

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 09:10 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 9**

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

*Ann L. Graham*  
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 4

THURSDAY, AUGUST 26, 2010

APPEARANCES:

FOR THE PLAINTIFF:

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Assistant District Attorney

STEPHANIE GRAHAM, ESQ.  
Deputy District Attorney

FOR THE DEFENDANT:

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COURT RECORDER:

MICHELLE RAMSEY  
District Court

TRANSCRIPTION BY:

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Littleton, CO 80120  
(303) 798-0890

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

001259

1 LAS VEGAS, NEVADA, THURSDAY, AUGUST 26, 2010, 10:04 A.M.

2 (Outside the presence of the jury)

3 THE COURT: Is Cliff in the hallway?

4 MR. LALLI: Are you ready for the jury judge?

5 THE COURT: I think we have some --

6 THE COURT RECORDER: (Indiscernible) outside the  
7 presence?

8 THE COURT: We're on the record, Michelle?

9 THE COURT RECORDER: Oh, we are?

10 THE COURT: Are we? I'm asking you.

11 THE COURT RECORDER: Yes, we are.

12 THE COURT: Okay.

13 THE COURT RECORDER: Outside the (indiscernible).

14 THE COURT: Tape recorder turned on?

15 THE COURT RECORDER: Yes.

16 THE COURT: All right. Ms. Palm, I had an  
17 opportunity to review the requested sections of the DVD you  
18 provided me yesterday, which we'll have this marked for the  
19 record next in line for defense exhibit.

20 MS. PALM: I --

21 THE COURT: Yes.

22 MS. PALM: -- didn't have it marked yet but yes.

23 THE COURT: All right. Well --

24 MS. PALM: I would like it --

25 MS. GRAHAM: Court defense --

ROUGH DRAFT TRANSCRIPT

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1 THE COURT: -- the Clerk will mark it right now.

2 MS. PALM: Thank you.

3 THE COURT: All right. And Mr. Lalli had an  
4 objection to the admission of those sections.

5 MR. LALLI: Well, I have -- I had an objection Your  
6 Honor to the admission of the portion after the point in time  
7 when the detectives leave the room. And my objection is on  
8 hearsay. Anything that anybody said is hearsay and the  
9 defendant is not allowed to enter his own statement because is  
10 -- it's not an admission of party opponent, so that's the basis  
11 of our objection.

12 THE COURT: All right, Ms. Palm.

13 MS. PALM: My response to that is under the rule of  
14 completeness if they admit a portion of a statement I get to  
15 admit other portions of it. And they are seeking to admit  
16 his -- almost his entire statement so I'm allowed to do that to  
17 counter what is in that part of the statement.

18 THE COURT: Okay.

19 MR. LALLI: Your Honor what --

20 MS. PALM: And it's relevant to his defense and it's  
21 relevant to what happened in the room when they were collecting  
22 his DNA.

23 THE COURT: Okay. Well, let's -- let's address that.  
24 You said it's relevant to his defense, let's address that  
25 issue. How is it --

1 MS. PALM: Well --

2 THE COURT: relevant to his defense?

3 MS. PALM: Cause I think they've made the claim that  
4 he's not saying what happened. And as drunk as he is, he is  
5 saying what happened when he's saying, "I tried to grab the  
6 knife, I tried to grab the knife." He's saying what happened.  
7 That's part of his defense is he was telling them the best that  
8 he could tell them what happened.

9 THE COURT: Isn't that --

10 MS. PALM: And --

11 THE COURT: -- a self-serving statement, it's not a  
12 statement against interest?

13 MS. PALM: Well, regardless if -- if it's self  
14 serving, they're making the claim in the interview he didn't  
15 tell them what happened. That's part of what happened and he  
16 is telling them, so it counters what they're saying happened.  
17 And it's part of the contact with law enforcement; if they want  
18 to admit part of it I get to admit what I want to admit.

19 THE COURT: Well, not necessarily. I mean --

20 MS. PALM: Well, I'm -- I -- I -- would say under the  
21 law I would get to.

22 MR. LALLI: Your Honor --

23 THE COURT: Well, under the completeness doctrine,  
24 that doesn't mean everything comes in. It's -- I mean if that  
25 means you don't take things out of context. You make sure it's

ROUGH DRAFT TRANSCRIPT

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1 in the proper context so the jury can understand the situation.  
2 There -- there isn't any claim being presented that is part of  
3 it at the end of the tape, or in the recording. It shows it  
4 was officer Ford or -- or CSI Ford taking various photographs  
5 and hand swabs of the defendant. There -- there isn't any  
6 claim here that the swabs were taken in an inappropriate  
7 manner, that DNA was contaminated. Is there -- I mean there  
8 isn't any claim in that regard is there?

9 MS. PALM: With the later swabs, yes. As far as that  
10 part goes there is a claim about them steadying him to balance  
11 him while they're taking the photographs of him. Them -- the  
12 interaction with him in the room at that time when he was off  
13 balance and appeared to intoxicated so there is a claim with  
14 that.

15 MR. LALLI: Your Honor, detective Wildemann is going  
16 to testify. He can certainly describe the defendants gait when  
17 they are in the room. Mr. Ford can do the same.

18 The problem is they're not allowed to enter  
19 self-serving statements of the defendant that are not being  
20 offered as part of a statement that was taken by the police.  
21 This is completely outside of that.

22 And as far as completeness is concerned, I've been  
23 complete as possible. I start when detectives enter the room  
24 and I end when they ultimately leave and the interview is  
25 concluded. They don't have any completeness argument at all.

1 The issue with what they want to do is they want to admit  
2 hearsay. And yeah, it's nice that maybe in -- in some little  
3 respect it might show some other things. But what they're  
4 really trying to do is get in this hearsay and it's  
5 inadmissible. Those people are going to be present. I fully  
6 expect the defendant is going to testify and all of that  
7 evidence can come in, but they don't get to admit hearsay.

8 THE COURT: Ms. Palm if -- I mean what I'm hearing  
9 from you is your fallback argument is, also shows his condition  
10 as far as his intoxicated condition.

11 MS. PALM: That's correct.

12 THE COURT: Okay.

13 MS. PALM: And it's the first time that he stood up  
14 and that you could see him standing up and how he was  
15 balancing. And in addition to that, in his state of mind how  
16 is he to know that is interview is over. They walked out of  
17 the room once for an hour and came back and kept interviewing,  
18 they walked back again and started talking to him. So I don't  
19 know how he's supposed to know the interview is over once it's  
20 began.

21 THE COURT: Well, there wasn't any interrogation  
22 during that time. They asked him to stand up face -- turn  
23 left, turn right, face backwards, take the photographs, put  
24 your hands out. I mean they're not interrogating or  
25 interviewing him at that time.



1           If you feel that the -- his condition goes to the  
2 issue of voluntariness of his confession I don't have a prompt  
3 showing the -- his gate with the sound turned off if that's  
4 what you -- if -- if you -- if your intent is to show that he  
5 was so drunk he didn't know what he was saying, that he was  
6 very unsteady on his feet. In that regard if that's what you  
7 want to do I would allow that but we'd have to turn the sound  
8 off.

9           MS. PALM: Okay, so he can't say you know, I -- I was  
10 trying to grab the knife, look at my hand, I got cut, how --

11          THE COURT: No.

12          MS. PALM: -- would I get cut.

13          THE COURT: If he takes the --

14          MS. PALM: Okay.

15          THE COURT: -- stand you can say that.

16          MS. PALM: But he can't show it, that he told them  
17 that all the time.

18          THE COURT: Now, if --

19          MS. PALM: Okay.

20          THE COURT: -- no. But if --

21          MS. PALM: I understand.

22          THE COURT: -- you want to use it to show his  
23 unsteady gait --

24          MS. PALM: And then I do, I'll take it however I can  
25 get it.

ROUGH DRAFT TRANSCRIPT

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1 THE COURT: Okay, and so we would just need  
2 somehow -- I don't know if you can -- if we can mute it or  
3 probably Michelle can mute or something.

4 MR. LALLI: Well, here is the problem with that Your  
5 Honor, if it's evidence it'll go back to the jury room. And if  
6 there is sound on the video, then the jury would at some point  
7 during their deliberations be able to hear it. It's not just  
8 enough to turn it off here --

9 THE COURT: All right.

10 MR. LALLI: -- so they'd have to get --

11 THE COURT: Is there somebody to edit this?

12 MR. LALLI: -- they'd have to get a -- the sound  
13 tract removed.

14 MS. PALM: I don't know how you would remove the  
15 sound tract from it. I think the Court could order the jury,  
16 "You're not allowed to listen to the sound on that." If they  
17 needed to replay they could ask for a replay and we could make  
18 sure they won't turn the sound up. I -- I don't know how to  
19 edit sound out of a video.

20 THE COURT: Isn't there one of these like Kinkos --

21 MR. LALLI: There's software that does it.

22 THE COURT: Yeah. I mean there's --

23 MS. PALM: Well, I don't have it and I'm telling you  
24 this late in the trial I'm not going to be able to get it.

25 MR. LALLI: Well, I object to the exhibit in its

1 current condition.

2 THE COURT: If there is a way for us to provide it to  
3 the jury with the sound off, then I have no objection to that.  
4 We'll admit it -- I mean -- there's got to be some -- someone  
5 in town that can do that on very short notice, just take the  
6 sound off. I mean I -- I don't personally know how to do it  
7 but it seems to me -- maybe even like Kinkos or someplace like  
8 that copying this.

9 MS. PALM: I'll try. And the first part of the --  
10 the video we have a dispute as to the --

11 THE COURT: Right. And anything else --

12 MR. LALLI: Your Honor, did the Court get what I  
13 (indiscernible) as --

14 THE COURT: And --

15 MR. LALLI: (indiscernible.

16 THE COURT: -- we could not play it, you have some  
17 code on your disk. It says C-O-D-E-C and it won't play in our  
18 machines.

19 MR. LALLI: Oh, it's -- there's a codex issue?

20 THE COURT: Yeah.

21 MR. LALLI: I -- would the Court like me to play it  
22 on -- I can play it right now. There's -- there's really  
23 not --

24 THE COURT: Let's do it at the lunch hour so we can  
25 get the jury in.

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1 MR. LALLI: Very good.

2 THE COURT: But I could not play it.

3 MR. LALLI: Okay.

4 THE COURT: Does Ms. Palm have a copy of this?

5 MR. LALLI: She has it.

6 THE COURT: Okay.

7 MR. LALLI: She doesn't have the edited version but

8 she has --

9 THE COURT: Okay.

10 MR. LALLI: -- she has the defendant's --

11 THE COURT: But we --

12 MR. LALLI: -- statement.

13 THE COURT: It wouldn't play. Blank screen.

14 MR. LALLI: Hum.

15 THE COURT: I mean it just popped up said --

16 MR. LALLI: Coded.

17 THE COURT: -- the computer can't play --

18 MR. LALLI: Right.

19 THE COURT: -- or some (indiscernible) --

20 MR. LALLI: You need to upgrade your -- your computer

21 judge, there's an issue there.

22 THE COURT: Tell the county that. Anything else?

23 MR. LALLI: Your Honor, one -- one issue and it

24 pertains again to this character evidence issue. I think Mr.

25 DeSalvio is going to be testifying at some point today and he's

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1 -- at least at the prior trial he testified as to seeing the  
2 defendant or -- and the victim together and they -- the gist of  
3 it was they appeared to be a loving couple based upon what he  
4 saw. That of course is character evidence. And it is our  
5 position -- it is -- it is our position that is in an improper  
6 method by which to prove character under 48.055 --

7 THE COURT: Yes?

8 MR. LALLI: It talks about proving character and how  
9 that is done, and it says, "In all cases in which evidence of  
10 character or trait of character of a person is admissible,  
11 proof may be made by testimony as to reputation or in the form  
12 of an opinion."

13 And then were allowed to cross on specific incidents.  
14 So, for example if they want Mr. DeSalvio to testify that Mr.  
15 O'Keefe was a loving boyfriend, the way that they are required  
16 to do that is in the form of an opinion, not as they did in the  
17 last trial with specific incidents. Then were allowed to  
18 challenge that opinion with specific incidents.

19 So in other words Mr. DeSalvio takes the stand, he's  
20 asked does he have an opinion as to whether the defendant was a  
21 loving boyfriend, yes, what's your opinion, I believe he was a  
22 loving boyfriend.

23 Then we are allowed to ask would that -- would it  
24 change your opinion if you knew that the defendant had been  
25 sent to prison for a domestic battery charge. Would it change

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1 your opinion if you knew that a jury found him guilty of  
2 domestic battery. Would it change your -- were allowed to then  
3 challenge his opinion with specific incidents. And so rather  
4 that doing all of this at the bench when Mr. DeSalvio hits the  
5 stand I just wanted to put it on the courts radar that's our  
6 position on how that witness ought to go.

7 THE COURT: Ms. Palm.

8 MS. PALM: Your Honor, we did litigate all the bad  
9 act stuff at the first trial. The courts ruling was we could  
10 talk about the relationship as it was from the time he got out  
11 of prison, and what they would be able to do is admit the prior  
12 felony conviction and that was the balancing determination that  
13 was made.

14 Mr. DeSalvio is going to talk about how he sent Brian  
15 to alcohol counseling because Brian came to him with a problem.  
16 He is going to talk about that Brian was excited to introduce  
17 Victoria to him and that they worked together at the Union, and  
18 that she helped on the phones and he helped in the campaign.

19 He's not to get -- he's not giving an opinion other  
20 than what he saw. He's -- he's just saying that the time they  
21 met them they seemed like they were a couple and he seemed  
22 excited to introduce her.

23 MR. LALLI: Then it's irrelevant. What -- what --  
24 the reason they're offering it, Your Honor, is to show that he  
25 cared for her, he was happy to introduce her to his Union

1 friend's, that he loved her, that he cared for her and that  
2 feeling is inconsistent with him wanting to kill her. It's  
3 character evidence and they're using to show that he acted in  
4 conformity there with on the night of the murder. It's  
5 character.

6 MS. PALM: And -- and --

7 MR. LALLI: So if it's character there is specific  
8 ways that the evidence code allows that evidence to be  
9 introduced. And then --

10 THE COURT: Ms. Palm, under 48.045(1), evidence of a  
11 person's character or trait is not admissible for purpose of  
12 proving that he acted in conformity therewith. And that's what  
13 -- isn't that what your asking, is that he acted in conformity  
14 of a loving boyfriend?

15 MS. PALM: Well, then the State is introducing these  
16 threats from Cheryl Morris and that he wanted to kill her .  
17 And this is to -- this is evidence to rebut that, that he was  
18 sitting around wanting to kill her, and he hated her, and he  
19 wanted to kill the bitch and all the other evidence that they  
20 get to introduce.

21 That was the courts balancing determination that was  
22 made a long time ago. The State never brought a motion on  
23 this. They know that Mr. DeSalvio was going to testify, and  
24 here we are again doing everything at the last minute. I'd  
25 like a chance to brief it if the Court's not going to let have

1 him testify.

2 MR. LALLI: I'm not saying he can't testify, I'm just  
3 saying that the Rules of Evidence need to be followed.

4 THE COURT: Well, you --

5 MS. PALM: Well, then --

6 THE COURT: You can -- Mr. Lalli do you have an  
7 objection to him testifying that he saw them together, he saw  
8 them having dinner together, at a picnic together before this  
9 event? I don't know what the time frame was, I don't recall  
10 what the time frame was of the --

11 MS. PALM: It was --

12 THE COURT: -- community picnic.

13 MS. PALM: It was just before the election in  
14 November and just before the incident that they came in and  
15 Brian introduced her to Mr. DeSalvio. He seemed like he was  
16 excited to introduce her, and Mr. DeSalvio knew that they were  
17 both working on the campaign together, that she was helping out  
18 with the Union stuff too.

19 MR. LALLI: It's character evidence.

20 THE COURT: On the opinion issue --

21 MR. LALLI: You could ask him, do you have an opinion  
22 based upon they were a loving, forward-looking couple? Yeah, I  
23 think they were. But that's the extent of it. They can't  
24 specific incidents.

25 MS. PALM: We can't go into that he met them both, or

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1 they worked at the Union together and that's how he had an  
2 opinion? I mean, I think I could just say the basis of his  
3 opinion is that he saw them, and then you could ask him why  
4 else his opinion. But I think what he's asking to do is then  
5 admit other bad acts to -- to counter his opinion, that they  
6 were a loving couple, then he want's to say, and did you know  
7 about this and did you know about that.

8 MR. LALLI: Well, first of all the bad act issue, the  
9 Court's already ruled that's relevant to motive and it  
10 certainly is.

11 Even if the Court had ruled that it was relevant to  
12 motive, we can challenge a witnesses opinion based upon  
13 specific acts. Arguably, I would be able to -- and I don't  
14 want to create an appellate issue -- but arguably I'd be able  
15 to ask the witness about every time the defendant had battered  
16 her and every time the police -- did you know the police came  
17 on this date? Did you know the police came on that date?

18 And I'm not saying I'm going to do that. But what I  
19 certainly am going to challenge, or what we will challenge the  
20 opinion with are the bad acts that the Court has already  
21 admitted and were certainly allowed to challenge on opinion  
22 with bad acts.

23 THE COURT: What was that ruling before, Ms. Palm?  
24 Refresh my memory on -- that is -- something along the lines of  
25 anything subsequent to his prison release?

1 MS. PALM: That's correct.

2 THE COURT: When we discussed that issue --  
3 specifically what was the -- refresh my memory on that.

4 MS. PALM: That as long as we kept his relationship  
5 to talking about his relationship in the context of after  
6 prison, his relationship with Victoria, then we were not  
7 opening the door to any of his other bad acts besides the prior  
8 felony conviction that the Court said was going to be  
9 admissible for motive. And then the Court -- the -- the  
10 statements of Cheryl Morris the Court had also ordered were  
11 admissible.

12 THE COURT: Okay.

13 MR. LALLI: Your Honor, the -- I'm not saying that  
14 this -- and -- and maybe counsel is misunderstanding, I'm not  
15 saying this evidence is not admissible. I mean, and I'm not  
16 sure, I'd -- I'd -- I have not been able to find that portion  
17 of the -- of the transcript.

18 Leaving that aside, I'm not saying the evidence is  
19 not admissible, I'm just saying they've got to follow the  
20 statute in admitting it, that's all I'm saying. And the  
21 statute allows for the evidence to be admitted in the form of  
22 an opinion only, not in specific incidents. So sure, if they  
23 want to bring it in they can, but they have to follow the rules  
24 of evidence in so doing.

25 THE COURT: And then if he says, I have an opinion

1 that they had a loving boyfriend/girlfriend relationship --

2 MR. LALLI: He has to say that, that's the --

3 THE COURT: Okay.

4 MR. LALLI: -- only way it's admissible.

5 THE COURT: Right. Then you're seeking to admit his  
6 conduct prior to him going to prison?

7 MR. LALLI: Well, no. Well, prior to him -- well,  
8 the -- the incident was lead for the -- the -- the evidence  
9 that the Court's already said is admissible as to motive, so  
10 the -- the fact that he was convicted of battering her, that he  
11 -- that a judge sent him to prison, all of that's -- all of  
12 that's in the record, all of that's in the -- in the judgment  
13 of conviction that the Court indicated is admissible.

14 So we would be able to challenge with those specific  
15 incidents and the way it work is would say, would it change  
16 your opinion if you knew that the defendant had battered her?  
17 Would it change your opinion if -- if you knew that a jury had  
18 convicted him? Would it change your opinion if you knew that a  
19 judge had sent him to prison because of it? Would any of those  
20 things change your opinion as to whether he was a loving  
21 boyfriend? And the witness can say, yeah, that would change my  
22 opinion, or the opinion was a no, it wouldn't.

23 MS. PALM: And -- you know, I wasn't even -- I was  
24 just going to ask them, what did you see, and it was going to  
25 be that Brian was happy to introduce her, he seemed excited to

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1 introduce her. That's all he knows. He doesn't have a full  
2 context of the relationship. He knows that they spent time  
3 together doing Union stuff together and that Brian was happy to  
4 introduce her.

5 THE COURT: Well, there's two paths you can take, Ms.  
6 Palm. You can ask him his opinion, whether or not they had a  
7 living relationship, and under 045 the State will be allowed to  
8 go into specific conducts.

9 I'm going to allow you to -- if were talking about  
10 this picnic situation, did you see them there, what were they  
11 doing, but you can't give an opinion. If you -- if he gives an  
12 opinion it needs to open up to the specific acts, I saw them  
13 there, they were laughing, were not going to get into any  
14 conversations, because then were getting into hearsay. If your  
15 going to ask him the opinion then you -- you've opened the door  
16 to --

17 MS. PALM: Okay, so as long as I say, what did you  
18 see?

19 THE COURT: What did you see them do.

20 MR. LALLI: But -- but Your Honor those are -- those  
21 are the specific acts that 48.055 prohibits. All they can do  
22 is offer the opinion. They can not offer specific incidents on  
23 direct.

24 THE COURT: Well, it's not -- I don't know that it's  
25 going necessarily to character, to say that they were laughing

1 and joking and having lunch together.

2 MR. LALLI: Well, that is character evidence. It's  
3 not percipient evidence either immediately before or  
4 immediately after the crime.

5 If -- if for instance a witness had observed them  
6 walking into the apartment together and they were holding hands  
7 and kissy, kissy and -- and that sort of a thing, well, that's  
8 almost as if it were res gestae evidence and I think it -- it  
9 -- it certainly is admissible.

10 And -- and again I'm not saying that the evidence is  
11 not, they just have to offer it in the form as contemplated by  
12 48.055.

13 MS. PALM: But, you know, I mean were going to have  
14 this issue with every witness then because last time this was  
15 never an issue and it -- their -- their percipient witnesses  
16 that testify have said things like, they seemed like they were  
17 way in love, from what the people in the apartment heard.

18 Because they're talking about these noises and  
19 they're trying to make the implication that there must have  
20 been a beating going on, because of what goes on in the  
21 apartment. And the downstairs neighbors say they hear noises  
22 from time to time. And then other neighbors say, he seemed way  
23 in love, they seemed happy, they would be out on the porch  
24 drinking.

25 THE COURT: Well, they're -- they're giving an

1 opinion. If they're going to say, they seem to be in love,  
2 they're giving an opinion testimony.

3 MR. LALLI: Well, it's character evidence.

4 MS. PALM: So they're going to be able to admit  
5 noises on other dates then?

6 THE COURT: There's --

7 MS. PALM: I mean, if they're going to talk about  
8 noises going on in the apartment on other dates then I --

9 MR. LALLI: Were not going to elicit any other dates.

10 THE COURT: Just this date?

11 MR. LALLI: Right.

12 MS. PALM: So, I can ask their witnesses, what did  
13 you see these two doing?

14 MR. LALLI: Those are -- those are specific  
15 incidents.

16 MS. PALM: Well --

17 MR. LALLI: I didn't make up the rules in our  
18 evidence code, they're -- they're there --

19 MS. PALM: But you know what --

20 MR. LALLI: -- and --

21 THE COURT: (Indiscernible) --

22 MR. LALLI: -- they ought to be followed. And you  
23 know Ms. Palm has said now from time to time, on the last trial  
24 we did this and the last trial -- the last trial we didn't edit  
25 a statement the way we're editing it now, so to suggest were

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1 somehow bound by what happened last time, obviously that --  
2 that's not occurring.

3 MS. PALM: Well --

4 THE COURT: Well, I don't see this as character  
5 evidence. So Ms. Palm your witness can testify, for example, I  
6 saw them walking hand in hand, okay? Or I mean if that's the  
7 testimony, I have no idea. I saw them carrying groceries in  
8 together. I saw them having a barbeque together, okay? I mean  
9 if we were just talking a couple weeks beforehand --

10 MS. PALM: Okay.

11 THE COURT: -- or the day of. But be very careful on  
12 the questioning as far as -- because -- I saw them walking hand  
13 in hand, they looked they a loving couple, then the door is  
14 open.

15 MS. PALM: Okay.

16 THE COURT: So, I would admonish them very carefully  
17 because, you know, that could hurt your -- your client's case.

18 MS. PALM: True. Okay.

19 THE COURT: All right?

20 MS. PALM: Thank you.

21 THE COURT: All right. Lets bring the jury in.

22 MS. PALM: And -- and that witness is out there so  
23 I'm going to need to talk to him before we call him.

24 THE COURT: Okay. Who do have first up for the  
25 State?

1 MR. LALLI: Cheryl Morris.

2 THE COURT: All right.

3 (Pause in proceedings)

4 (In the presence of the jury)

5 THE MARSHAL: Officers, members of the Court,  
6 Department 17 jurors. You may be seated. Ladies and  
7 gentlemen, let's check and make sure our cell phones are all  
8 turned off, please.

9 THE COURT: Good morning ladies and gentlemen. I  
10 hope -- hope you had a good evening. Were going to call our  
11 first witness now.

12 MR. LALLI: Your Honor, do we stipulate to the  
13 presence of the jury in this department? I'm not sure.

14 THE COURT: No, the record will show that the jury is  
15 here.

16 MR. LALLI: Okay, thank you. Your Honor the State  
17 will call Cheryl Morris.

18 THE MARSHAL: And ma'am, if you could just remain  
19 standing. Please raise your right hand and face the Clerk.

20 CHERYL MORRIS, STATE'S WITNESS, SWORN

21 THE MARSHAL: Please have a seat and slide up to  
22 microphone. And if at anytime you need to stand just go ahead  
23 and stand, okay?

24 THE WITNESS: Thank you.

25 THE MARSHAL: I you need you to please state and



1 spell your name for the record.

2 THE WITNESS: Cheryl Morris, C-H-E-R-Y-L, last name  
3 is Morris, M-O-R-R-I-S.

4 MR. LALLI: Is it okay if I just set these down?

5 THE WITNESS: Um-h'm.

6 MR. LALLI: Okay.

7 DIRECT EXAMINATION

8 BY MR. LALLI:

9 Q Now, Ms. Morris I think the record should reflect  
10 that you hobbled to the stand on crutches and your leg is in a  
11 cast?

12 A Yes.

13 Q If you -- and sometimes you experience some  
14 discomfort if you sit for a while; is that true?

15 A Correct.

16 Q So if you -- if you need to stand up I'm sure it  
17 would acceptable to the Court just to stand up or change your  
18 position so that you're a little more comfortable okay.

19 A Okay. Thank you.

20 Q Okay, can you tell us what you do?

21 A Currently I'm just a student.

22 Q What are you studying?

23 A Criminal justice.

24 Q Okay, do you know an individual by the name of Brian  
25 O'Keefe?

1 A Yes I do.

2 Q Do you see Mr. O'Keefe in the courtroom?

3 A Yes I do.

4 MS. PALM: We'll stipulate to his identity Your  
5 Honor.

6 MR. LALLI: Thank you.

7 BY MR. LALLI:

8 Q Can you please point to him and tell us what he's  
9 wearing today?

10 A That's the gentlemen right there, he's wearing a blue  
11 shirt, dark suit and a tie.

12 MR. LALLI: Your Honor may the record reflect the  
13 witness has identified the defendant as well as the stipulation  
14 by defense?

15 THE COURT: Yes.

16 MR. LALLI: Thank you.

17 BY MR. LALLI:

18 Q When did you first meet the defendant?

19 A Back in -- it was actually December. I -- I met him  
20 in 2007.

21 Q Where?

22 A We were at Arizona Charlie's.

23 Q Arizona Charlie's, the kind of locals hotel casino  
24 here in Las Vegas?

25 A Correct.

1 Q How was it that met him there?

2 A I was actually there with a friend who was gambling  
3 and I don't usually gamble so I'll sit down and I'll -- I was  
4 eating at the Sourdough Cafe, when he and his friend came up to  
5 counter and sat down next to me.

6 Q Okay. Without telling me anything specifically that  
7 was said, did the two of you talk?

8 A Yes, we did.

9 Q Did you -- at some point did you leave the Arizona  
10 Charlie's?

11 A Actually I was still there, he was --

12 Q Well, eventually at some --

13 A Yes.

14 Q -- point --

15 A Yes.

16 Q -- later on did you?

17 A Yes.

18 Q And did both you and the defendant agree to stay in  
19 touch?

20 A Yes.

21 Q Did a friendship or a romantic relationship  
22 eventually develop based upon that initial contact and  
23 subsequent contacts?

24 A Yes.

25 Q Okay. At either that period of time or shortly

1   thereafter did you know where the defendant was living?

2           A     Yes, I did.

3           Q     Where did he live?

4           A     He was living in a trailer on a friend's property.

5           Q     Okay. While he was living in that trailer was your  
6 relationship ongoing?

7           A     Yes it was.

8           Q     And was yours the type of relationship where you  
9 would go to his trailer and spend time with him?

10          A     Yes.

11          Q     Okay. Would you sometimes spend the night there?

12          A     Yes.

13          Q     Okay. Now, I want to direct your attention to  
14 Father's Day, June of 2008?

15          A     Correct.

16          Q     On that particular day was there a phonecall that the  
17 defendant received?

18          A     Yes, he did.

19          Q     Was there a phone in the trailer?

20          A     No.

21          Q     Can you please explain to the jury if you would how  
22 it was that he would received phone calls?

23          A     He'd actually go into his friend's house and receive  
24 the phonecall there cause there was no way that he could a  
25 phone line out to the trailer.

1 Q So on this particular day did he go inside the house  
2 to receive a phonecall?

3 A Yes, he did.

4 Q And was he gone for a time?

5 A Maybe about 15 minutes or so.

6 Q And then he returned to his trailer?

7 A Yes, he did.

8 Q Did he tell you had called?

9 A Yes he did.

10 Q What did he tell you?

11 A He said that it was his daughter that was calling him  
12 to wish him happy Father's Day.

13 Q Okay.

14 A And then after awhile he came out and said, "I can't  
15 lie to you. It was Victoria that called."

16 Q Who is Victoria?

17 A Victoria is a woman that he has had an ongoing  
18 relationship with since 2001.

19 Q Do you know Victoria's last name?

20 A Whitmarsh.

21 Q Okay. Did he tell you what the conversation was  
22 about?

23 A He told me that the conversation was she was calling  
24 to tell him that he was -- she was sorry just to clear her  
25 conscience and the fact that she was dying.

1 Q So he made it pretty clear that it was she who had  
2 called him?

3 A Correct.

4 Q Did you have a conversation with him about his  
5 feelings toward Victoria?

6 A Yes I did.

7 Q Can you tell us about that?

8 A I told him that I felt that he was -- he still had  
9 unfinished business with Victoria as far as emotions, and so I  
10 told him that if he chose to go and be with her that was fine,  
11 I'd step aside. And if found out later on that he didn't want  
12 to be with her then, you know, if I was still around I'd be  
13 there with him.

14 Q At some point does the defendant move out of his  
15 trailer?

16 A Um, actually he got kicked out of the trailer.

17 Q Okay, he no longer lives there --

18 A Correct.

19 Q -- at some point? Where does he go?

20 A He comes to stay with me and my friend.

21 Q What's your friend's name?

22 A Her name is Dorothy.

23 Q Do you know her last name?

24 A Robe.

25 Q Can you spell Robe for the record?

1 A R-O-B-E.

2 Q Okay, thank you. So you at that time are living with  
3 Dorothy?

4 A Correct.

5 Q And who else is living there?

6 A My daughter.

7 Q And the defendant comes and stays with you?

8 A Correct.

9 Q And are you living together as boyfriend and  
10 girlfriend?

11 A I guess that's what you would call us, yes.

12 Q All right. And during that period of time would you  
13 observe the defendant afterhours when he wasn't working or --  
14 or would you spend a lot of time together?

15 A Yes.

16 Q Would the defendant talk about Victoria?

17 A Yes, he did.

18 Q When?

19 A Quite often.

20 Q Okay.

21 A Most of the time it was when he was drinking and he  
22 would start describing and reminiscing about events that  
23 happened prior to our meeting.

24 Q Were you aware that the defendant was sent to prison  
25 based upon a trial that was conducted involving Victoria?

1 A Yes.

2 Q Would he talk about that?

3 A Yes.

4 Q What would he say?

5 A He would become angry and would say that he was angry  
6 with her and that he -- how do I -- he'd say that he hated the  
7 bitch and that he wanted to kill her.

8 Q Would -- was that one incident or was that multiple  
9 incidents?

10 A Multiple incidents.

11 Q Okay. During those same conversations would the  
12 defendant tell you about his experience in the military and  
13 killing people?

14 A Yes -- excuse me. Yes.

15 Q What would he tell you?

16 A He would describe to me some of the events that --  
17 how he would go through and it would either be kill or be  
18 killed and the type of weapon he would use.

19 Q Did he describe how -- did he ever describe for you  
20 his ability to kill?

21 A Yes, he --

22 Q What would he say?

23 A He said that the military trained them to kill  
24 basically.

25 Q How?



1           A     He was very equipped with the -- hand to hand combat,  
2 basically using a knife.

3           Q     Would he describe how he would insert a knife into  
4 someone?

5           A     Yes, he would.

6           Q     What would he say?

7           A     He'd say that you -- he could take a knife and shove  
8 in towards -- it's -- it would be your sternum and then just  
9 pull up and that's how he would describe killing someone. Or  
10 perhaps coming from behind and -- and taking the knife from the  
11 left side of the neck to the right side.

12          Q     Okay. When he would -- would these conversations  
13 occur at the same that he would tell you that he was angry with  
14 Victoria and wanted to kill the bitch?

15          A     Not necessarily.

16          Q     Okay, would the conversations occur together at  
17 times?

18          A     At times, yes.

19          Q     Okay, would he ever talk about killing people with a  
20 gun?

21          A     No.

22          Q     Would he ever talk about killing people by  
23 strangulation or by beating them with a club?

24          A     No.

25          Q     It was only a knife?

1 A Yes.

2 Q Did the defendant ever tell you one of the reasons he  
3 was attracted to Victoria was because she was submissive?

4 A Yes.

5 Q What did he tell you about that?

6 A Basically the fact that anything that he would tell  
7 her she would basically do. He'd say that, if I yelled at her  
8 she would you know, kind of be very submissive and -- and do  
9 whatever it is that I ask.

10 Q Did he ever tell you, ever, since the entire time  
11 that you've known him that he was ever concerned that she might  
12 harm him?

13 A No.

14 Q Did he ever tell you that he was concerned that she  
15 might use a weapon against him?

16 A No.

17 Q How long did you and the defendant live with your  
18 friend Dorothy?

19 A About -- I would say maybe a little over a month and  
20 a half.

21 Q Sometime just prior to the both of you moving out was  
22 your relationship deteriorating?

23 A Yes.

24 Q Can you tell us about that?

25 A Shortly after June of that phonecall he didn't show

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1 up back to his friend's house, his trailer for about a week and  
2 there was no phonecall, there was nothing. Nobody knew where  
3 he was. I believe he called that Thursday of that - that week  
4 that he was gone and spoke to the -- a little girl, but no  
5 adults in the house. He was just -- said that tell everybody  
6 I'm fine.

7 Q Well I'm -- I'm -- is this the period of time just  
8 before you and he moved out of Dorothy's home?

9 A No, this is -- this is just before he was kicked out  
10 of the trailer.

11 Q Okay, I'm -- I'm asking you now about when the two of  
12 you move out of Dorothy's home. Okay?

13 A Okay.

14 Q Was your relationship in decline at that point?

15 A Yes, it was.

16 Q And can you describe for us the state of your  
17 relationship?

18 A It was to the point where I didn't want to be with  
19 him, but I also couldn't just leave without taking him out of  
20 the resident of my friend's house. I -- I didn't feel  
21 comfortable, so I actually agreed to move in with him in order  
22 for him to be out of my friend's house.

23 Q Where did you move to?

24 A 5001 El Parque Avenue.

25 MR. LALLI: May I approach the witness Your Honor?

1 THE COURT: Yes.

2 BY MR. LALLI:

3 Q Ms. Morris I'm going to show you what we've marked as  
4 State's Proposed 2 for identification purposes. Do you  
5 recognize that?

6 A Yes, I do.

7 Q What is it?

8 A It's the apartment complex where we moved in.

9 Q Is that a fair and accurate depiction of the  
10 apartment complex?

11 A Yes it is.

12 MR. LALLI: Your Honor, move for the admission of  
13 State's Proposed 2?

14 MS. PALM: No objection.

15 THE COURT: 2 will be admitted.

16 (Exhibit 2 admitted)

17 MR. LALLI: Okay, now that the -- the focus has kind  
18 of kicked in.

19 BY MR. LALLI:

20 Q In the -- in the top portion of -- of the State's  
21 Exhibit 2, there is a door that appears to be open?

22 A Correct.

23 Q Was that the unit in which the two of you resided?

24 A Yes.

25 Q Do you remember approximately when it was when the

1 two of you moved into this apartment?

2 A I think it was around the later part of August, or  
3 the maybe the beginning part of August.

4 Q Okay. Do you stay there for a long time?

5 A No, actually I was only there for about four days.

6 Q What happened?

7 A I received a phonecall after Ms. O'Keefe did not come  
8 home, but he stated that he was coming home basically, and he  
9 was bringing Victoria home.

10 Q And what was your -- he was bringing Victoria to your  
11 -- your apartment --

12 A To the apartment, correct.

13 Q For what purpose?

14 A I guess that the fact that they wanted to go to  
15 sleep.

16 Q Was it your impression from talking then that he  
17 wanted Victoria to move in?

18 A The way I felt was, yes.

19 Q How did that set with you?

20 A I was more hurt at the fact, because two days prior  
21 to that we already broke up and we had sat out there on that  
22 little balcony discussing parameters, or boundaries, you know,  
23 since our things were all together and I had no where else to  
24 move back into. I needed 30 days to be able to try to find a  
25 place to store my -- my belongings. And we had agreed that no

1 one was going to bring anyone over the house and we were going  
2 to, you know, just be mutually living there until I was able to  
3 get out.

4 Q When -- during this period of time when you and the  
5 defendant had moved into that apartment did you sleep together  
6 in the same bed?

7 A When we've -- when we first started moving things in  
8 we did, because our room that we were going to set up -- I  
9 think they had to clean the carpet, so we slept a day or two --  
10 a couple of days out in the living room. And then shortly  
11 after that I moved my things into the master bedroom, he slept  
12 out on the couch, and I had maintenance come in and put a lock  
13 on the bedroom door.

14 Q Okay, was -- was the -- was the couch then at that  
15 point made up as a bed?

16 A Yes.

17 Q All right. And so lets go back to this conversation  
18 that you had when the defendant wanted Victoria to come over to  
19 your apartment. Did you also -- did Victoria also get on the  
20 phone?

21 A Yes, she did.

22 Q And without telling us what she said, what was her  
23 demeanor; was she rude, was she mean, was she yelling, just --  
24 just describe her affect on the phone if you would?

25 A She was a little loud in her statement, but other

1 than that -- and she was a little rude, but other than that  
2 that was it.

3 Q Okay. Was her affect, her demeanor on the phone  
4 threatening in any way?

5 A No. No.

6 Q After the phonecall, do you call a friend?

7 A Yes.

8 Q And what was the purpose of that?

9 A To get out of the apartment, because I was not sure  
10 whether or not they were going to actually come back there  
11 anyway.

12 Q Okay. So, at that point your friend comes and picks  
13 you up?

14 A Correct.

15 Q And you -- is --

16 A I leave, and I'm not back there for about a week, I  
17 believe. And then I make arraignments to come in and start  
18 moving everything out.

19 Q But essentially when you left that day after that  
20 phonecall that was the last time that you lived with the  
21 defendant?

22 A Correct.

23 Q Okay. Now, were you aware that the defendant was  
24 arrested for murder in this case on November 6th of 2008?

25 A Yes.

1 Q I want to talk about the week before that, okay?  
2 During that -- sometime in that week before did you receive a  
3 telephone call from him while you were at a Wal-Mart?

4 A Yes, I did.

5 Q And did he want something?

6 A He wanted me to come over.

7 Q What did he say?

8 A He just wanted -- he wanted to see me, he wanted me  
9 to come over. I asked him questions, you know, where's  
10 Victoria, what's going on, is everything all right. And --

11 Q Well, let me ask you this --

12 MS. PALM: Your Honor -- Your Honor, can we approach?

13 THE COURT: Okay.

14 (Off-record bench conference)

15 BY MR. LALLI:

16 Q Ms. Morris, he had called you and asked you to come  
17 over?

18 A Correct.

19 Q Did -- did you tell him -- did you tell him you would  
20 not come over?

21 A Correct.

22 Q And this was a week before he was arrested for  
23 murder?

24 A Yes.

25 Q Did the defendant when talking about Victoria ever



1     accuse her of taking years from him?

2             A     Yes.

3             Q     What did he say?

4             A     He would that he was mad at her because he took --  
5     she took three years of his life, because he was sent to  
6     prison.

7             Q     Based -- based upon the --

8             A     Based --

9             Q     -- domestic violence conviction?

10            A     Correct.

11            Q     Thank you.

12                     MR. LALLI:  Nothing further.

13                     THE COURT:  Cross examination?

14                     MS. PALM:  Thank you.

15                                     CROSS-EXAMINATION

16     BY MS. PALM:

17             Q     Good morning Ms. Morris.

18             A     Good morning.

19             Q     So you started dating Brian in January of 2008?

20             A     Correct.

21             Q     And when did your relationship become serious?

22             A     I don't really think it actually became serious.

23             Q     Okay.

24             A     I mean, define serious for -- for this particular  
25     purpose.

1 Q Committed relationship, in your mind.

2 A I barely was dating him, I was only with him for

3 about eight months.

4 Q Okay, so when -- when he was living in the trailer

5 that was up through what month?

6 A June. Later part of June.

7 Q June, 2008?

8 A Correct, yes.

9 Q Okay, and so during that time your relationship was

10 not very serious?

11 A No, we were -- we -- I mean, we talked a bit. We

12 didn't talk about any future plans or anything else.

13 Q Okay.

14 A We were just --

15 Q Okay. Just kind of casual dating?

16 A -- getting to know each other.

17 Q Did you -- did you get a bank account with Brian?

18 A Yes, I did.

19 Q And what month was that?

20 A I don't recall.

21 Q Would it have been February of 2008?

22 A I don't recall.

23 Q Is it possible?

24 A Probably.

25 Q If I show you bank records would it help you

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1 remember?

2 A Sure.

3 MS. PALM: May I approach the witness Your Honor?

4 THE COURT: Yes.

5 MS. PALM: I'm showing her defense proposed exhibit K  
6 and these are records from (indiscernible).

7 THE WITNESS: Okay. Um-h'm.

8 BY MS. PALM:

9 Q Does that appear to be dated February --

10 A Yes.

11 Q -- of 2008?

12 A Yes it does.

13 Q And -- and you signed for that bank account with him?

14 A Yes, I did.

15 Q And how did you indicate your relationship to Brian  
16 on that bank account?

17 A I didn't put that spouse there.

18 Q You didn't write that spouse?

19 A No, ma'am.

20 Q Somebody else wrote that --

21 A Correct.

22 Q -- next to your signature?

23 A Yes, it's not my handwriting.

24 Q Is this your signature next to where it --

25 A This --

1 Q -- says spouse?

2 A -- is my signature, correct.

3 Q So in February of 2008, he put you on his joint bank  
4 account, but you were dating casually?

5 A Yes.

6 Q When did you buy the car together?

7 A I don't recall.

8 Q You don't remember the month at all?

9 A No, I do not.

10 Q You bought a car together that was on your credit?

11 A Yes, it was. The reason for that was because Mr.  
12 O'Keefe's car was stolen, it was -- I guess it was impounded.  
13 His father and step-mother went down to try to retrieve the  
14 car, it cost too much, so he asked, let's go see if we can look  
15 at cars.

16 Well, of course we ended up getting one, he was in  
17 construction. Being that I was in a relationship with him we  
18 decided okay, well, we'll see what we can do, ended up having  
19 to purchase a car for him to get back and forth. I was the one  
20 who put the money down for it.

21 Q Okay, and is that during the time of your casual  
22 dating still?

23 A Yes.

24 Q Okay. And then that car was registered to you both  
25 jointly?

1 A Yes.

2 Q And when -- you were testifying about how he would  
3 cry -- or how he would talk about being in the service?

4 A Yes.

5 Q And when he did that he cried, didn't he?

6 A No, not all the time.

7 Q If you said in your statement that he would cry many  
8 nights about it because it conflicted in his belief in God,  
9 would that be incorrect?

10 A No, that would be correct.

11 Q Do you recall ever saying anytime before testifying  
12 today about the slicing of a -- of a throat?

13 A Yes.

14 Q Where did you say that?

15 A I was in the Marshal's office, I believe.

16 Q So you think that's in your statement?

17 A Yes.

18 Q Have you looked at your statement lately?

19 A No, not lately.

20 Q Did you meet with the DA's before you came to testify  
21 today?

22 A I went in on Monday, I believe, or two weeks ago.

23 Q Did they give you a copy of your statement?

24 A Yes.

25 Q Did they give a copy of prior testimony?

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1 A I believe so.

2 Q Did you read it before you came here today?

3 A No.

4 Q They gave it to you and you didn't read it at all?

5 A I glanced through it. This is something that I  
6 prefer not to remember.

7 Q So the whole slicing with a knife in the sternum  
8 area, could you demonstrate where the sternum area is?

9 A I just --

10 Q For the jury.

11 A -- Know that it's right here.

12 Q Okay, and then what you're --

13 THE COURT: Ma'am, can you stand up?

14 THE WITNESS: Oh.

15 THE COURT: I don't know if the jurors can see.

16 THE WITNESS: That'd be right here.

17 MS. PALM: And she's pointing to her sternum area.

18 And then what he said is --

19 MR. LALLI: Well, Your Honor could -- if I could just  
20 clarify, she's pointing to the area in the center of her chest  
21 it looks like.

22 THE WITNESS: Yeah.

23 MR. LALLI: I think that's the sternum --

24 THE WITNESS: This is --

25 MR. LALLI: -- but just for purposes of our records

1 she's pointing at the center of her chest.

2 MS. PALM: And then he was --

3 THE COURT: The record will reflect that, because we  
4 don't want the attorneys to testify where the sternum is.

5 BY MS. PALM:

6 Q And he was talking about slicing upward?

7 A Yes, he was talking about pulling the knife upward.

8 Q Now, after Victoria initiated the contact with Brian  
9 and he was gone for that week, and he came back home, you tried  
10 to resume a relationship with him?

11 A Yes, I did. I tried to figure out what was going on,  
12 what was the reason. He was the one that actually contacted  
13 me, because I was over at my friend's house and he called me.

14 Q Okay, ma'am if you could just yes or no, and if it's  
15 a yes or no, and then if I want an explanation I'll ask you for  
16 one, okay?

17 A Yes.

18 Q Thank you. And Victoria was persistent in calling  
19 you after that, wasn't she?

20 A Yes.

21 Q And she called you many times through the summer?

22 A I'd say only maybe three or four times.

23 Q And during the summer Brian was still seeing her?

24 A Brian was not seeing her that I knew of.

25 Q Did you -- did you think he was seeing her?

1 A Yes.

2 Q And she was calling you?

3 A Yes, she'd called me, she wanted to meet me.

4 MR. LALLI: I'm going to object as to hearsay Your  
5 Honor.

6 THE COURT: Sustained.

7 BY MS. PALM:

8 Q Was it your understanding that she wanted --

9 MR. LALLI: I'm going to object as to what her  
10 understanding was, that's going to call for the context of the  
11 -- the content of the conversations. It's hearsay.

12 THE COURT: Sustain the objection.

13 BY MS. PALM:

14 Q So when you get the apartment on El Parque and the  
15 two of you are going to live there it's your testimony your  
16 were going -- going to just live there as roommates?

17 A No, we were originally were going to move in together  
18 and set up a room for his two daughters.

19 Q Okay, and then within a couple of days you decided to  
20 just be roommates?

21 A I did, because he --

22 Q If you could just yes or no.

23 A Yes.

24 Q And Brian was honest with you about telling you he  
25 loved Victoria, wasn't he?



1 A Yes.

2 Q And -- and he told you he didn't love you the same  
3 way; is that true?

4 A Correct.

5 Q And was your relationship with him a sexual one?

6 A Well, if your asking if we had sex, yes.

7 Q Okay. And you that Victoria had Hepatitis C, didn't  
8 you?

9 A Not until after he told me.

10 Q And -- and on Father's Day when she called?

11 A He didn't even tell me that on Father's Day that I  
12 recall.

13 Q When did you find out that she had Hepatitis C?

14 A I don't recall, I think it was once when he was -- he  
15 had come home after awhile, that's all I can remember.

16 Q Okay, but you continued to have a sexual  
17 relationship?

18 A Once, with a condom.

19 Q And was it just the one time that she called you up  
20 yelling at you? Victoria?

21 A Yes.

22 Q And that's when -- when she basically wanted to come  
23 back to the apartment?

24 MR. LALLI: I'm going to object as to the content of  
25 the conversation, it's hearsay.

1 THE COURT: Sustained.

2 BY MS. PALM:

3 Q She called you up yelling at you at the time that  
4 Brian wanted to come back to apartment with her?

5 A Yes.

6 Q And how many times did she call you that day?

7 A I think the phone probably rang a couple more times.

8 Q If you previously testified four or five calls would  
9 that be about accurate?

10 A Yes.

11 Q And was she hanging up on you?

12 A No, I hung up on her a couple of times.

13 Q If you previously stated that she hung up on you,  
14 would that be incorrect?

15 A No.

16 Q Were you aware that she wasn't welcome at home with  
17 her husband?

18 A I'm sorry?

19 Q Were you aware --

20 MR. LALLI: Objection, foundation as to how she would  
21 know.

22 THE COURT: Let me hear the -- I couldn't hear the  
23 question.

24 MS. PALM: Whether she was aware that Victoria was  
25 not welcome at home with her husband.

1 MR. LALLI: I'm going to object to hearsay, calls for  
2 speculation, foundation, how she would know.

3 MS. PALM: I'm asking if she knew.

4 THE COURT: Well, I'm going to sustain the objection,  
5 if you would try -- try to rephrase it.

6 BY MS. PALM:

7 Q Did Brian ever tell you she wasn't welcome at home  
8 with her husband?

9 MR. LALLI: Objection, hearsay.

10 THE COURT: I'm going to overrule that objection.

11 BY MS. PALM:

12 Q You can answer.

13 A Both Brian and Victoria told me.

14 THE COURT: Okay, were just -- what Brian told you.

15 MS. PALM: Thank you.

16 BY MS. PALM:

17 Q So, you -- you knew Brian had a conviction with  
18 Victoria?

19 A Yes.

20 Q He told you that? And you were sort of living  
21 transient with him; is that a fair assessment, until you get  
22 the apartment?

23 A Can you word it a different way? I -- I don't  
24 understand the question?

25 Q Well, you -- you sort of had a unstable living

1 situation with him until you get the apartment.

2 A I -- we didn't actually live together. I'd go and  
3 spend the night there or spend the weekend there, sure.

4 Q Okay, but didn't you say you spent a couple of months  
5 with Dorothy Robe?

6 A That's where I lived, yes.

7 Q Okay, that's not your house right?

8 A No.

9 Q That's Dorothy's house?

10 A Correct.

11 Q And she let you live there?

12 A Correct.

13 Q And then she let Brian move in there?

14 A Correct.

15 Q Okay, and you were there a couple of months and then  
16 you get this apartment together?

17 A Correct.

18 Q And you know he's got a drinking problem?

19 A Yes.

20 Q And you put your name on a joint account with him in  
21 February?

22 A Correct.

23 Q And you know he's cheating on you?

24 A Correct.

25 Q And he's cheating on you at -- at some you know with

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1 somebody who has Hepatitis C?

2 A Correct.

3 Q And you say he talks about wanting to kill her?

4 A Correct.

5 Q And you put up with all these things?

6 A Correct.

7 Q And he told you he still loved her?

8 A Correct.

9 Q And you put up with that?

10 A Correct.

11 Q And weren't you upset when he wanted her in the end?

12 A No.

13 Q You weren't angry with him for that?

14 A No.

15 Q Do you remember telling Jimmy Hatchcox that you were

16 angry?

17 A Who's Jimmy?

18 Q The guy who lived next door to you and Brain in the

19 El Parque apartment.

20 A No.

21 Q You never told him that?

22 A I don't recall it.

23 Q Do you remember telling people in the office that she

24 had AIDS and Hepatitis C?

25 A I don't recall that.

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1 Q Might you have?

2 A I don't recall that.

3 Q You had to go there and fill out papers when you got  
4 your name off the lease, right?

5 A No, I did not have to, that I recall.

6 Q If you talked before about meeting with Ron Brady  
7 (phonetic), you don't recall that?

8 A I actually just went to talk to him about getting the  
9 lease, anything that was -- that was in my name, anything that  
10 had information about me, I wanted that removed.

11 Q Okay, so in that conversation you didn't tell anybody  
12 that she had AIDS and Hepatitis C?

13 A Not that I recall.

14 Q Did Brian ever take you to his Union, his Union  
15 offices?

16 A To make payments, look for jobs, yes.

17 Q Okay, did he ever take you to the Union social  
18 events?

19 A No.

20 Q Did you ever go to alcohol counseling with him?

21 A We may have gone once. I remember telling him that  
22 he needed to follow through.

23 Q But you didn't go into a long term counseling  
24 situation with him?

25 A No.

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1 Q And after you found out Brian was arrested you went  
2 to the police on your own, didn't you?

3 A I -- before going to the police --

4 Q I'm -- yes or no --

5 A Yes.

6 Q -- will do. So you contacted the police on your own?

7 A Yes.

8 Q And then you meet with them to give them a statement  
9 about Brian?

10 A Yes.

11 Q And that was in November of 2008?

12 A I don't recall, but I'm sure that's what it is.

13 Q Okay, they didn't contact you?

14 A No.

15 MS. PALM: Court's indulgence.

16 BY MS. PALM:

17 Q After Brian -- after Brian took off in June when  
18 Victoria called him, did you go down to his Union looking for  
19 him?

20 A Yes.

21 Q And were you crying because you wanted to be back  
22 with him?

23 A Yes.

24 MS. PALM: Thank you. No more questions.

25 THE COURT: Any redirect?

1 MR. LALLI: Briefly.

2 REDIRECT EXAMINATION

3 BY MR. LALLI:

4 Q Ms. Morris, Ms. Palm asked about your description of  
5 the stabbing's, do you remember that? When he was indicating  
6 for you how he would stab somebody, do --

7 A Yeah.

8 Q -- you remember her questions about that?

9 A Yes.

10 Q And she asked whether that was something you had said  
11 before today, whether you had indicated that to the police back  
12 in November of 2008, do --

13 A Yes.

14 Q -- you remember that question?

15 A Yes.

16 Q Do you remember whether you told the police that?

17 A I believe I did. I actually remember demonstrating  
18 it I believe to the marshal.

19 Q Okay, would you be more certain in that recollection,  
20 whether you said if I showed you a copy of that statement?

21 A Yes.

22 MR. LALLI: May I approach the witness?

23 THE COURT: Yes.

24 MR. LALLI: Page 11 and 12.

25 MS. PALM: Thank you.



1 BY MR. LALLI:

2 Q If you want to just look down here at the bottom.

3 A Um-h'm. Yes sir, I remember that.

4 Q So you -- you in fact did tell the police about his  
5 boasting about stabbing back at that time; is that correct?

6 A Yes.

7 Q During that conversation you told the police that  
8 Brian told you that --

9 MS. PALM: Leading, Your Honor, objection.

10 THE COURT: Sustained.

11 BY MR. LALLI:

12 Q Did you -- did you tell the police that --

13 MS. PALM: Objection, Your Honor, leading.

14 MR. LALLI: Well, I'm asking if she did; that's not  
15 leading.

16 THE COURT: Why don't you ask her, What else did you  
17 tell the police, and we'll go from there.

18 MR. LALLI: Okay.

19 BY MR. LALLI:

20 Q What else did you tell the police?

21 A Just the fact that he knew how to use his hands --

22 Q Okay.

23 A -- as weapons.

24 Q Did you tell the police the -- what you've told the  
25 jury today?

1 A Everything.

2 Q Thank you.

3 MR. LALLI: Nothing else.

4 THE COURT: Any recross?

5 MS. PALM: Thank you.

6 BY MS. PALM:

7 Q That -- 11 -- page 11, 12 of your statement, what you  
8 were just referencing doesn't say anything about a throat, does  
9 it?

10 A I didn't recall reading all of it, no.

11 Q If I could show you what he just showed you.

12 MS. PALM: May I approach?

13 THE COURT: Yes.

14 BY MS. PALM:

15 Q You look at that and tell me it's just talking about  
16 the whole allegation about the sternum's upward slicing; is  
17 that correct?

18 A That's correct.

19 Q Thank you.

20 MS. PALM: No further questions, Your Honor.

21 THE COURT: Anything else by the State?

22 MR. LALLI: Well, I could keep leading this horse but  
23 I won't.

24 THE COURT: Okay, any questions by any of the jurors?

25 No questions. All right, thank you Ms. Morris for your

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1 testimony you are excused.

2 THE WITNESS: Thank you.

3 THE COURT: Thank you. Do you need some help getting  
4 down from?

5 THE WITNESS: No, I'm okay.

6 THE COURT: Just -- where's our Marshal?

7 MS. PALM: Your Honor, I'm just going to go out and  
8 speak to the --

9 THE COURT: All right.

10 MS. PALM: -- the next witness briefly.

11 THE COURT: Thank you, officer.

12 MS. PALM: Thank you, Your Honor. And we had sort of  
13 agreed I could call a witness out of order because he has to  
14 leave the State.

15 MR. LALLI: That's correct, Your Honor.

16 MS. PALM: And that would --

17 THE COURT: Ladies and gentleman the trial starts  
18 with the State presenting their evidentiary portion, and then  
19 the defense does the same. Because of scheduling issues the --  
20 the parties have agreed that Ms. Palm can call one of her  
21 witnesses out of order at this time, so this is part of the  
22 defendant's case. And your witness?

23 MS. PALM: Lou DeSalvio.

24 THE COURT: Officer, if you don't mind you can help  
25 us out.

ROUGH DRAFT TRANSCRIPT

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1 THE MARSHAL: What's the name?

2 THE COURT: DeSalvio.

3 THE MARSHAL: Okay.

4 THE COURT: Sir, if you can come on up to the witness  
5 stand here.

6 LOUIS DeSALVIO, DEFENDANT'S WITNESS, SWORN

7 THE CLERK: Please be seated. Pull yourself up to  
8 the mic and state and spell your name for the record.

9 THE WITNESS: It's Louis DeSalvio, L-O-U-I-S,  
10 D-E-L-S-A-L-V-I-O.

11 THE COURT: Go ahead, Ms. Palm.

12 MS. PALM: Thank you. Good morning, Mr. DeSalvio.

13 THE WITNESS: Good morning.

14 BY MS. PALM:

15 Q Can you tell the jury how your employed?

16 A I'm with Labors Local 872 as the Assistant Political  
17 Director.

18 Q Okay, and back in November of 2008, how were you  
19 employed with the Union?

20 A I was the assistant -- excuse me, apprentice  
21 coordinator.

22 Q Okay, and is that a local Union?

23 A Correct.

24 Q Here in Las Vegas?

25 A Correct.

1           Q     And what does the apprentice coordinator do for the  
2 Union?

3           A     Oversees the apprenticeship program, as well as the  
4 journeyman upgrades for that local Union.

5           Q     Okay, and -- and can you explain what the  
6 apprenticeship program and journeyman are because --

7           A     Okay --

8           Q     -- not all the jurors know that?

9           A     -- apprenticeship program is a group of individuals  
10 that apply for a program for a career path. We basically -- we  
11 teach them our trade. Our trade consists of working with other  
12 trades. Once they go through that apprenticeship program then  
13 they will journey out and become a journey person within that  
14 trade.

15                     So my job at that training center was to oversee the  
16 daily operations as well as bringing new apprentices into the  
17 program, give them -- and then hopefully provide them with a  
18 career path at the end of it.

19           Q     And -- and through your job as the apprenticeship  
20 coordinator, did you come to know Brian O'Keefe?

21           A     Yes, I did.

22           Q     And is he the gentleman sitting at the table to my  
23 right?

24           A     Yes, he is.

25           Q     How did you come to know him?

1           A     He applied just like anybody else in the program,  
2     which consists of an application, a test, an interview, and  
3     should you score high enough, which you need to score 70 or  
4     above to get into the program.  BI elieve he scored an -- a 74,  
5     so he was invited into the program.

6           Q     Okay, and was he actively participating in that  
7     program?

8           A     Yes, he was.

9           Q     And that's working on his way towards a journeyman?

10          A     That's correct.

11          Q     And is it a big pay difference when hit journeyman?

12          A     It -- it goes in pay scale, you start out at a 50  
13     percent apprentice and work your way up to 100, so each jump is  
14     a few more dollars an hour on the check.

15          Q     Was he getting close?

16          A     If I recall, yes, he was working his way towards  
17     journeyman status.

18          Q     Okay.  And was there a point that he came to you for  
19     help?

20          A     Yes, there was.

21          Q     And what was that about?

22          A     Alcohol.

23          Q     Okay, and why did he come to you?

24          A     Because as the apprentice coordinator I'm kind of  
25     like their glorified babysitter, I mean, is what it really is.

1 I kind of mentor these men and women and make sure they stay on  
2 a, you know, a good path to a career. A lot of people that  
3 come to us normally don't have the opportunity to have a career  
4 path, so we provide them -- that career path. So, I'm kind of  
5 like a mentor to them. And he came to me with a problem one  
6 day at my office.

7 Q Okay, and what -- and what did you do after him  
8 coming to you?

9 A The minute he came to me we sat down, we talked, we  
10 -- to find -- get down to the nuts and bolts of what the issue  
11 was which seemed to be alcohol. If I remember correctly he did  
12 show up to my office smelling like alcohol and think that's  
13 when he realized he needed help.

14 Immediately I called our patient advocate, which is  
15 our -- our end within our own organization and asked for a  
16 recommendation of who I could send this gentleman to to get the  
17 best treatment he could get.

18 They then Doug Twellegar (phonetic) was his name.  
19 And then he turned me on to guy named Mike Thompson with MINE &  
20 Associates, which is an organization that we use to help our  
21 members should they be in trouble. And I then sent him -- I  
22 believe that day he actually left my office and then went home  
23 and showered and meet with Mike Thompson on that day.

24 So, I mean he started his -- immediately, it's not  
25 like he waited a few a days not -- I mean he went home,

1 showered if I remember correctly and went right -- right to  
2 MINE & Associates.

3 Q And do you remember what day that was?

4 A I -- no. No.

5 Q If I told you September 11th, would that refresh  
6 your --

7 A Yeah.

8 Q Does that sound right?

9 A Yep --

10 Q Okay.

11 A -- that's about what time it was.

12 Q Now, did you follow whether he was finishing his  
13 treatment there at -- with MINE's?

14 A Yes, I would -- I would make sure that Mike Thompson  
15 touched base with me, because again, once he admitted that he  
16 had a problem I was not going to put him back to work or do  
17 anything that might put anybody else in danger as far you know,  
18 I don't want him being drunk on the job and hurting somebody or  
19 himself.

20 So, in order to him to go back to work Mike Thompson  
21 and MINE & Associates would have to keep me posted on how he's  
22 doing, what's going on with the program, and once they notified  
23 me and told me he was eligible for release from the program  
24 then I would consider maybe putting him back in the field.

25 Q Okay, so when you -- when he goes to go in the



1 program is there some kind of formal procedure that he's put on  
2 a list where he can't work?

3 A Will you reask me that question, please?

4 Q Is there a procedure that you do with respect to his  
5 classification or something so that he's put on some sort of  
6 list that he can't go back to work until you say so?

7 A We keep a folder on each apprentice, pretty much  
8 everything that goes down with them. And in that folder I had  
9 wrote that until I was able to talk to the people from MINE &  
10 Associates he would not be eligible to go back to work. So --  
11 and nobody was allowed to dispatch that apprentice out without  
12 me being involved.

13 Q Okay. Is there -- are -- are there things that he  
14 could do with the Union while he was attending the Mines  
15 counsel?

16 A I believe at that point in time he was. He -- we  
17 were helping some candidates that were running for office and  
18 stuff, you know, putting up signs and stuff like that.

19 And he -- I -- if I remember correctly, I think he  
20 came up to me and asked say, "Hey, is there something I can do  
21 instead of just kind of sitting on the couch, I know I can't go  
22 back to work and I am still in treatment," and I do believe he  
23 was out doing some political stuff, you know, driving some  
24 signs, kind of keeping himself in shape you know, getting --  
25 staying used to the heat and stuff like that. So, I believe

1 that's what he was doing at that time until I -- I heard back  
2 from his people.

3 Q Thank you.

4 MS. PALM: Court's indulgence.

5 BY MS. PALM:

6 Q Was -- was there a time that he introduced to you a  
7 woman named Victoria Whitmarsh?

8 A Yes, there was.

9 Q Okay. And how did that introjection go?

10 A I happened to be at our local hall itself and I  
11 believe she was phone banking, and just come across the two of  
12 them as I was going to conduct business there, and Brian just  
13 wanted to make sure he introduced her to me.

14 Q Okay, and then were you aware whether the two of them  
15 participated in Union activities together?

16 A No, that was actually the first time I had actually  
17 met his significant other there. So no, I was not aware that  
18 they were --

19 Q Okay.

20 A -- doing stuff together there.

21 Q How about after that, do you know if they did Union  
22 activities together?

23 A I don't.

24 Q If you had previously testified that they did phone  
25 banking together, does that sound right?

ROUGH DRAFT TRANSCRIPT

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1 A No, she phone banked, he was in the field.

2 Q Okay, so they both participated in the Union  
3 activities just --

4 A Correct.

5 Q -- just separately?

6 A Just -- and now I only knew of it that day --

7 Q Okay.

8 A -- when he introduced. I had no idea she was  
9 actually working at the phone bank.

10 Q Okay. Did you know if she worked at the phone bank  
11 after that?

12 A I don't.

13 MS. PALM: Court's indulgence. I have no more  
14 questions. Thank you.

15 THE COURT: Any cross examination?

16 MS. GRAHAM: Yes judge, just briefly.

17 CROSS-EXAMINATION

18 BY MS. GRAHAM:

19 Q Good morning, sir.

20 A Good morning.

21 Q So you basically mentored the defendant?

22 A I would say -- in -- in a way, I mean --

23 Q Did you supervise him?

24 A During the apprenticeship program.

25 Q During the apprenticeship program. And he came to

1 you during the apprenticeship program?

2 A That's correct.

3 Q To talk to you about his alcohol problem --

4 A That's correct.

5 Q -- is that correct? And you indicated on direct  
6 examination that he wanted to get down to the nuts and bolts of  
7 the issue; is that correct?

8 A Correct.

9 Q And isn't -- isn't it true sir that the nuts and  
10 bolts of the issue is that he was actually fired from the  
11 apprenticeship program because he was three out of five days?

12 A That's not true.

13 Q That's not true?

14 A No.

15 Q So it wouldn't be correct in -- if Brian had  
16 indicated to the admissions director at Mines that that was why  
17 he was there?

18 A That I don't know about.

19 Q Okay, but you -- he didn't tell you that  
20 specifically?

21 A That's correct. Nor did his foreman that supposedly  
22 fired him.

23 Q Okay, so it's your testimony that he just voluntarily  
24 came to you out of the blue, told you that he had an alcohol  
25 problem, and that you --

ROUGH DRAFT TRANSCRIPT

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1 A Pretty much what happened.

2 Q -- did as much as you could to get him into Mines  
3 immediately?

4 A The minute -- look, our guys are like family, and so  
5 are --

6 Q Is --

7 A -- our women --

8 Q -- that's a --

9 A -- and the minute --

10 Q -- that's a --

11 A -- he came to me.

12 Q Excuse me, sir, that's a yes or no question.

13 A Why don't you repeat your question.

14 THE COURT: Repeat your question.

15 BY MS. GRAHAM:

16 Q Okay. The question is, you did whatever you could at  
17 that moment to get him into Mines?

18 A Absolutely.

19 Q And from what I understand that you were trying to  
20 tell me is that -- that the Unions are like family's, is that  
21 correct?

22 A That's correct.

23 Q And so as another brother to a brother, you wanted to  
24 make sure he got the help that he needed?

25 A Absolutely.

ROUGH DRAFT TRANSCRIPT

001325

1           Q     In fact he couldn't go back to work unless he  
2 completed that program; is that correct?

3           A     Not once he admitted to me he had an alcohol problem,  
4 absolutely. I knew --

5           Q     Okay.

6           A     -- nothing about one prior to that.

7           Q     And you supervised him?

8           A     That's correct.

9           Q     Okay, and you indicated that he smelled of alcohol  
10 when he entered your office?

11          A     That's correct.

12          Q     Okay. Do you know if he ever completed that program?

13          A     Which one?

14          Q     That Mines program.

15          A     From what I was told, and I believe --

16          Q     Well, do you know, that's the question.

17          A     I only know what they told me.

18          Q     Is --

19          A     And that he was good to go to go back to work.

20          Q     Okay, and do you have any idea what that date was?

21          A     I know it was only 20 something days after I put him  
22 in and it kind of floored me in a way.

23          Q     Okay, would that have been -- your aware of -- of why  
24 you're here today; is that correct?

25          A     Absolutely.

ROUGH DRAFT TRANSCRIPT

001326

1 Q And would you agree with me if I told that that was  
2 the day before the incident that occurred here?

3 A I'm not sure of the date, so I don't know.

4 Q Okay, would it surprise you to know that once he  
5 graduated from this Mines program, did you to -- to go back to  
6 work?

7 A Once. I believe it was Mike Thompson called me and  
8 said that, you know, he's been going to every appointment,  
9 always on time you know, hasn't missed one. It -- Lou, I give  
10 him the okay to, based on his professional opinion, that he's  
11 good to go to go back to work. At that point in time I tried  
12 to actually call him to go back to work --

13 Q Okay.

14 A -- and couldn't get a hold of him.

15 Q You could not get a hold of him?

16 A Correct.

17 Q Okay. So you actually tried to get ahold of him to  
18 let him know that he was eligible to go back to work?

19 A Yes.

20 Q Do you know if anybody else got ahold of him to let  
21 him know that he got back to work?

22 A Again, I'm in charge of that, I'm the one calling.

23 Q Okay. So, if you wouldn't of called him to let him  
24 know that he was cleared to go back to work, then he would of  
25 never gotten that phonecall; is that what your saying?

ROUGH DRAFT TRANSCRIPT

001327

1 A Unless he would have called me.

2 Q Okay. Would it surprise you to know that upon  
3 completing his alcohol counseling that he was sent to, that he  
4 celebrated by drinking?

5 A I was not aware of that.

6 Q Okay.

7 MS. GRAHAM: Pass.

8 THE COURT: Ms. Palm, any redirect?

9 MS. PALM: Just briefly.

10 REDIRECT EXAMINATION

11 BY MS. PALM:

12 Q Sir, would it help refresh your recollection if you  
13 looked at a transcript of your prior testimony as far as the  
14 date Brian was eligible to go to back to work?

15 A Sure.

16 MS. PALM: May I approach Your Honor?

17 THE COURT: Yes.

18 THE WITNESS: It's been some time.

19 BY MS. PALM:

20 Q Showing you page 26, the top of the page.

21 A Like I said, it was 20 something days, yeah.

22 THE COURT: Sir, read it to yourself and then Ms.  
23 Palm will ask you a question.

24 THE WITNESS: Okay.

25 BY MS. PALM:

ROUGH DRAFT TRANSCRIPT

001328



1 Q Does that help you remember?

2 A Yes.

3 Q And what date was he eligible to go back to work?

4 A According to that testimony it looks by the 29th.

5 Q And that -- this prior testimony happened closer in  
6 time to the event?

7 A Correct.

8 Q And it's probably more accurate than your memory  
9 today?

10 A Absolutely.

11 Q Okay. And so the -- the very day that this tragedy  
12 occurred is the day you were trying to contact Brian to let him  
13 know about a job?

14 A And if I remember correctly, when I was asked that  
15 question before, I wasn't exactly sure on the date. I know it  
16 happened somewhere October, November'ish, maybe the end October  
17 or the beginning of November, and I found out through the  
18 internet actually --

19 Q Okay.

20 A -- that this was even going down.

21 Q Okay. So around the same time as the event, in your  
22 memory?

23 A That would be fair to say.

24 Q Okay, and apprentices are actually also encouraged to  
25 seek employment on there own and then contact you?

ROUGH DRAFT TRANSCRIPT

001329

1 A Correct.

2 Q So you wouldn't know if Mr. O'Keefe had found his own  
3 job prospect if he hadn't contacted you yet?

4 A That's correct.

5 MS. PALM: Thank you. No more questions.

6 THE COURT: Any recross?

7 MS. GRAHAM: Nothing further judge.

8 THE COURT: Any questions by any of the jurors? We  
9 have a couple questions, marshal will pick up the questions and  
10 counsel please approach.

11 (Off-record bench conference)

12 THE COURT: Mr. DeSalvio we have a question from one  
13 of the jurors, we did receive did two, there is only question  
14 I'm legally available to ask (indiscernible) appropriate.

15 "When did the defendant come to you for alcohol  
16 help?"

17 THE WITNESS: If -- If I remember correctly it was  
18 first thing early in the morning,. I usually open up the  
19 training center about 5:30 in the morning. I want to say it  
20 that it was maybe around 7:00, 8:00 in the morning, somewhere  
21 around there that he came by.

22 THE COURT: All right. Any follow up questions by  
23 Ms. Palm?

24 MS. PALM: None, Your Honor, thank you.

25 THE COURT: By the State?

ROUGH DRAFT TRANSCRIPT

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1 MS. GRAHAM: No Your Honor.

2 THE COURT: Any -- any other questions by any of the  
3 jurors? No other questions. Thank you Mr. DeSalvio, I thank  
4 you for your testimony, you are excused.

5 State please call your next witness.

6 MS. GRAHAM: State calls Joyce Toliver.

7 THE MARSHAL: What was that name again?

8 MR. LALLI: Joyce Toliver.

9 UNKNOWN FEMALE SPEAKER: Toliver.

10 THE MARSHAL: Ms. Toliver, if you'll remain standing,  
11 please raise your right hand and face the Clerk.

12 JOYCE TOLIVER, STATE'S WITNESS, SWORN

13 THE MARSHAL: If you'll have a seat please, slide up  
14 to the microphone. Please state and spell your name for the  
15 record.

16 THE WITNESS: Joyce Toliver, J-O-Y-C-E, Toliver,  
17 T-O-L-I-V-E-R.

18 THE COURT: Go ahead, counsel.

19 MS. GRAHAM: Thank you, Judge.

20 DIRECT EXAMINATION

21 BY MS. GRAHAM:

22 Q Good morning, Ms. Toliver.

23 A Good morning.

24 Q Where did you live on November 5th, 2008?

25 A 5001 El Parque, Apartment 29, Las Vegas, Nevada,

ROUGH DRAFT TRANSCRIPT

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1 89146.

2 Q And that's in Clark County?

3 A Yes, it is.

4 Q Okay, and prior to November 5th how long had you  
5 lived in that apartment?

6 A About -- it was going on 11 years, it would have been  
7 11 years --

8 Q Okay --

9 A -- July.

10 Q And you said Apartment 29, I'm going to show what's  
11 been marked and -- or entered as States Exhibit 2. If you  
12 could just take a look at your screen here, let me see if I  
13 can --

14 THE COURT: Ms. Graham, you need to raise the lights  
15 on this side, (indiscernible) pushed down.

16 THE WITNESS: Yeah.

17 THE COURT: There you are.

18 BY MS. GRAHAM:

19 Q Can you see that?

20 A Yes, I can.

21 Q Okay. Can you point to the screen and show -- can  
22 you see Apartment 29 in that, the -- the door?

23 A Yes, because I've been there for 100 years, but it's  
24 right here, right by the rail of the stairs, or as your going  
25 up.

ROUGH DRAFT TRANSCRIPT

001332

1 THE COURT: Ma'am you can --

2 MS. GRAHAM: Can you --

3 THE COURT: -- press on the screen.

4 THE WITNESS: Oh, okay. Thank you, right here.

5 BY MS. GRAHAM:

6 Q Okay, so that was your apartment?

7 A That is our apartment.

8 Q Now, who lived with you in the apartment?

9 A Husband.

10 Q Husband?

11 A Yes.

12 Q Does --

13 A Husband?

14 Q -- your husband have a name?

15 A Yes, Charles Toliver. Cookie.

16 Q Cookie, he's got a nickname?

17 A Yeah, ever since he was a baby.

18 Q All right. And did you know any of your neighbors,  
19 having lived there 11 years?

20 A Yes.

21 Q Did you know who lived in the apartment directly  
22 above yours?

23 A Yes.

24 Q And who was that, on November 5th 2008?

25 A Brian.

ROUGH DRAFT TRANSCRIPT

001333

1 Q Okay, can you --

2 A (Indiscernible).

3 Q -- point to the screen and circle where Brian lived?

4 Okay, do you know how long Brian lived there?

5 A I think about maybe two or three months, he had just  
6 been there. It wasn't long.

7 Q Couple months?

8 A Yeah.

9 Q And do you know if anybody lived with him?

10 A In the couple of months that he was there, or the  
11 three months he was there I noticed it was like the first girl  
12 that came in there with, and then there was another one --

13 Q Oh.

14 A -- and then the last one so I say about two to three.

15 Q Okay. The first girl, can you -- can you describe  
16 the first girl?

17 A She about five, three or four, I think about that  
18 height. Kind of not stocky and heavy, she was kind of slim --  
19 medium build. Okay.

20 Q Did you know her name?

21 A No, didn't.

22 Q Okay, and -- and what ethnic background?

23 A I do believe the first one was white.

24 Q Okay, so there was a second woman that moved in?

25 A Yes.

ROUGH DRAFT TRANSCRIPT

001334

1 Q And can you describe that woman?

2 A She's about the same height, they were not tall, they  
3 were all medium build. She was a little bit thinner. And I'm  
4 not for sure if she was Japanese or Asian mixed -- mixed with  
5 Caucasian.

6 Q Okay, and did you know that girl's name?

7 A It could have been Carol or --

8 Q Okay.

9 A -- Lisa. I'm not good with names, I'm old.

10 Q I understand. Okay, what about the third girl?

11 A The third girl I spoke to one time and I used to wave  
12 to her.

13 Q Can you describe her?

14 A She was really, really, really thin.

15 Q I'm sorry, she was what?

16 A Really thin, she was thin build. Maybe about five or  
17 five foot one, she could've of been four nine. Long hair, she  
18 was Caucasian, that's about as much I could tell about her.

19 Q Did you know her name?

20 A Vicky.

21 Q Okay.

22 A Victoria.

23 Q And you said that you had this third girl that you  
24 had seen her one time?

25 A Yes.

1 Q And when did you see her?

2 A I seen her on the back porch -- I mean like the  
3 patio, we have --

4 Q Is there a back patio to that?

5 A Yeah.

6 Q Okay.

7 A And like because we would walk around to go to our  
8 cars, go to work, their patio would be facing that way and  
9 sometimes I see it standing in the window I believe,  
10 (indiscernible) and I saw her one time on the balcony and I  
11 spoke to her. That was about the first time I think I had  
12 really spoke to her because I didn't see her, I work. When I  
13 get off from work nobody would be out, or when I went to work a  
14 4:00 in the morning nobody would be out.

15 Q All right, so you leave for work about 4:00 in the  
16 morning?

17 A Yes.

18 Q And what time do you generally get home?

19 A If I do the morning shift that's like 5:00 o'clock,  
20 I'd get off at 2:30 but I wouldn't directly come home, I'd go  
21 to my moms and dad because they were elderly and I'd take care  
22 of them and even fix dinner and stuff. By the time I get back  
23 to my house it'd be like about 8:00 or -- about 8:00.

24 Q Okay. Did you ever have any -- or -- interaction  
25 with defendant?

ROUGH DRAFT TRANSCRIPT

001336



1 A No.

2 Q Okay --

3 A I suppose a couple times.

4 Q Incidentally, do you see who -- who -- who you  
5 described as Brian in the courtroom today?

6 A Yes I do.

7 Q Can you point to him and describe something that he's  
8 wearing?

9 A He's right here, looks older, looks a little bit  
10 slimmer, but that's Brian right there.

11 Q Okay --

12 THE COURT: What's he wearing ma'am?

13 THE WITNESS: He's wearing I guess a black suit, blue  
14 shirt and a pretty, yellow polk a dot tie.

15 THE COURT: Record reflect identification of the  
16 defendant.

17 MS. GRAHAM: Thank you, Judge.

18 BY MS. GRAHAM:

19 Q Did you have any interaction with the defendant  
20 during the time that he lived there?

21 A I think the first time that I interacted with and the  
22 only time was when I think he had one of the girls that was  
23 moving in, and she had boxes on her back and then she was  
24 moving, he was standing on the steps with me. I said, what are  
25 doing, this picture looks backwards, your supposed to -----

1 -- he say you want to help. I said well, you want to talk to  
2 my husband about that, I don't be moving nothing, and it was  
3 like a joke in that --

4 Q Oh.

5 A -- there was like the first and the only time that we  
6 had any kind of interaction.

7 Q Okay, and you indicated that he had a beer in his  
8 hand?

9 A Yeah.

10 Q Okay. Did you often see him around the complex?

11 A Yeah.

12 Q Okay. And where was that?

13 A I'd seen him a couple of times in the parking lot.

14 Q Okay.

15 A You know, on my going and coming, just wave, you  
16 know.

17 Q All right, but -- you were in the parking lot or --  
18 or he was in the parking lot?

19 A He probably was in the parking lot either coming out  
20 as I was going in.

21 Q Okay, so no significant interaction?

22 A No.

23 Q All right. Did you ever have the opportunity to  
24 observe the defendant and the last girlfriend, Victoria,  
25 together?

1 A No, I didn't.

2 Q Okay. Do you recall seeing them at all together on  
3 November 5th 2008?

4 A No.

5 Q I want to direct your attention to the night of  
6 November 5th specifically, 2008.

7 A Okay.

8 Q Do you remember that night?

9 A Plain as day, it'll never go away.

10 Q Okay, were you at home --

11 A Yes --

12 Q -- the night of November 5th?

13 A Yes, I was.

14 Q Specifically around 9:00 pm, can you tell the jury  
15 what you were doing?

16 A I was just getting relaxed to watch my stories. If I  
17 be working during the day, I watch them at night which is when  
18 I like (indiscernible) General Hospital it comes on at 9:00  
19 o'clock.

20 Q Okay.

21 A So I had just had my shower and was getting ready to  
22 watch it.

23 Q And you just had your shower and -- where do you  
24 watch --

25 A My bedroom.

1 Q -- your soap operas? In your bedroom?

2 A In my bedroom.

3 Q Okay, so you have a TV in your bedroom?

4 A Yes, I do.

5 Q All right.

6 MS. GRAHAM: Judge, may I approach the witness?

7 THE COURT: Yes.

8 MS. GRAHAM: I'm showing -- showing defense attorney  
9 what's been marked as States Proposed 1.

10 BY MS. GRAHAM:

11 Q Showing Ms. Toliver what's been marked as States  
12 Proposed 1; do you recognize that?

13 A It looks like a floor layout plan of our apartment.

14 Q Okay, does that fairly and accurately depict the  
15 layout of your apartment?

16 A Yes, we're right above and here's where  
17 (indiscernible).

18 Q Okay, does that --

19 A -- upstairs (indiscernible).

20 Q -- particular diagram reflect the --

21 A Yes, it does.

22 Q -- layout of your apartment?

23 A Yes, it does.

24 Q Okay. Do you know if the apartment directly above  
25 yours, meaning the defendant's, have the same layout?

1 A Yes.

2 Q Okay.

3 MS. GRAHAM: May I publish?

4 THE COURT: I -- it hasn't been admitted yet. Are  
5 you offering it?

6 A Yes.

7 THE COURT: Okay.

8 MS. GRAHAM: Yes, State would move to.

9 MS. PALM: No objection.

10 THE COURT: All right. Yes, you may publish, it'll  
11 be admitted.

12 (Exhibit 1 admitted)

13 BY MS. GRAHAM:

14 Q Can you point on the screen and show where your --  
15 your bedroom was?

16 A (Indiscernible).

17 Q Thank you.

18 A Right in here. Bedroom.

19 Q Thank you. And you indicated before that you -- the  
20 -- the layout of the apartment above you was the exact same  
21 layout?

22 A Yes, it is. But you know what, I'm just noticing the  
23 way it's turned now, seem like my bed -- my other bedroom would  
24 be on this side.

25 Q Okay, well maybe we need to fix the diagram. We'll

ROUGH DRAFT TRANSCRIPT

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1 get back to that.

2 A Okay. (Indiscernible) the bathroom (indiscernible) --

3 Q So about --

4 A -- (indiscernible).

5 Q -- about 9:00 p.m., that evening you were in bed?

6 A Yes.

7 Q And was your husband, Cookie, home with you that  
8 evening?

9 A Snoring like a baby.

10 Q Okay, snoring like -- where was he snoring at?

11 A In the bedroom.

12 Q Okay, and I assume that he doesn't snore unless he's  
13 sleeping?

14 A Right.

15 Q Okay. So he was sleeping in the bed next to you?

16 A Yes, he was.

17 Q At some point did you hear something that -- from the  
18 apartment above that caused you some concern?

19 A Yes, a lot of rumbling.

20 Q A lot of rumbling?

21 A Yeah.

22 Q Okay, and at this point when the rumbling began can  
23 you kind of estimate or what -- what soap opera were you  
24 watching at that point?

25 A Well, I was trying to watch One Life to Live.

1 Q Okay, you were trying to watch --

2 A And it was just -- and I was like, oh, okay. Because  
3 there never been no noise from him up there.

4 Q Okay.

5 A Good tenant. And then it just got -- got louder and  
6 louder.

7 Q Let me stop you right there. So you -- you heard the  
8 rumbling and it was about -- during One Life to Live?

9 A Something like that, say about ten after 9:00.

10 Q Okay. In response to the rumbling -- you seem a  
11 little irritated by that, what -- what did you do at first?

12 A I just turned the TV up louder.

13 Q Okay.

14 A Between the snoring and the room I'm like, okay, this  
15 is not going to work tonight.

16 Q Okay.

17 A I turned the television up.

18 Q All right. So initially you indicated that you heard  
19 just some mumbling?

20 A Yeah.

21 Q At some point in time did the noises get louder?

22 A Yes, it did, it got --

23 Q Okay.

24 A -- it got really loud.

25 Q Okay, and can you describe what you heard to the

1 jury?

2 A (Beats with fists on witness stand). But it was  
3 coming from up.

4 Q Okay --

5 A I thought for awhile they were going to fall down on  
6 me.

7 Q Okay, and when you say up are you referring to the  
8 apartment above?

9 A The apartment above us.

10 Q Okay. And do know how long that went on?

11 A It went on for the next 25 minutes or so.

12 Q Okay. When you heard the rumbling getting louder  
13 were you able to hear One Life to Live?

14 A Nope.

15 Q Okay, so what did you do?

16 A I got a broom and started beating it up in the  
17 ceiling but the stucco was falling me.

18 Q Okay.

19 A And it just got louder and louder then my husband  
20 woke. He said what is that?

21 Q Okay. Let me stop you right there.

22 A Okay.

23 Q All right. So after you've -- you've hit the broom  
24 on the ceiling, that didn't stop the noises?

25 A Nope.



1 Q Okay, and in fact, I think you just testified that  
2 your husband woke up?

3 A Yep.

4 Q Okay, did you wake him up?

5 A Nope.

6 Q Okay, he woke up --

7 A He woke up.

8 Q -- and what was his reaction?

9 A He just sat up in the bed, he was like, what's going  
10 on.

11 Q Okay, and what was your response?

12 A I said, I guess they going to fall down on us.

13 (indiscernible) --

14 Q Okay.

15 A -- they been having it going on for a while.

16 Q All right. And at this time it had been going on for  
17 a while?

18 A Thirty minutes probably about the -- when he woke up.

19 Q Okay. Once Charles woke up what did -- did you do?

20 A I just looked at him, he got the broom and he banged  
21 up --

22 Q Okay.

23 A -- and it still continued.

24 Q Okay, so he got the broom this time?

25 A Yep.

1 Q And I assume he pounded on it maybe a little harder  
2 that you would of?

3 A Yep, more stucco.

4 Q Okay. And did that stop the noises?

5 A No.

6 Q Okay, after Charles took the broom to the -- or  
7 Cookie took the broom to the ceiling what happened then?

8 A I could hear crying.

9 Q Okay. When you say you hear crying --

10 A Um-h'm.

11 Q -- could you discern whether it was a male or female  
12 crying?

13 A It was a female because it was like high pitch.

14 Q Okay. And you could hear this directly -- and you  
15 were still in your bedroom --

16 A Still in my bedroom.

17 Q -- at this point? How long did the crying go on?

18 A For a good little while.

19 Q Okay, when you say a little while --

20 A About --

21 Q -- perhaps it's better to associate it to -- was One  
22 Life to Live over?

23 A One Life to Live was still on.

24 Q Okay.

25 A Still on so, I'd say about a good five or ten minutes

1 maybe, probably -- might of been longer than that.

2 Q Okay.

3 A Because the crying turned into moaning.

4 Q Okay, and the crying turned into moaning?

5 A Yes.

6 Q What was Charles doing at this point, did he -- had  
7 he gone back to sleep?

8 A No.

9 Q Okay.

10 A He went upstairs.

11 Q Before I get there Joyce can you describe the  
12 moaning?

13 A Then crying, and moaning again. Crying. You know,  
14 like -- like that.

15 Q Okay.

16 A And --

17 Q Did you -- could you determine whether the moaning  
18 and the crying was from a male or a female?

19 A Definitely from a female.

20 Q Okay. After you heard the moaning start what  
21 happened?

22 A My husband was breaking his neck going back down the  
23 steps and --

24 Q Sorry?

25 A My husband was coming back down the steps.

1 Q Okay, wait a minute. Was -- did he leave the  
2 apartment?

3 A Yes, he did.

4 Q Okay, let -- let's start there. So after Cookie  
5 takes the broom --

6 A Um'hm.

7 Q Okay. What does he do then?

8 A He says he's got to go up there and stop it, it don't  
9 make no sense.

10 Q Okay, so what did he do?

11 A He got his house shoes, now he started going out the  
12 door and went out the door and went up the steps.

13 Q Okay, but where were you when Cookie went up the  
14 steps?

15 A Stayed right there in the bed.

16 Q Okay, so you just stayed in the bed --

17 A Um'hm.

18 Q -- at this time? Okay, so while he was gone you  
19 heard the moaning, is that --

20 A Right.

21 Q -- what your saying? Okay.

22 A About as soon as he got out the door the moaning --  
23 because she was already crying, there was already crying coming  
24 up there.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

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1           A     And I think that time might of -- would  
2     (indiscernible) want to go see what was going on because of the  
3     crying. Like I said they were very quiet, we had never heard  
4     no kind of nothing until that night.

5           Q     Okay. And Cookie leaves, what do you hear from the  
6     apartment above after he leaves?

7           A     The moaning, and then it just got fainter and then it  
8     stopped and I --

9           Q     Okay.

10          A     -- I had a real eerie felling that we might --  
11     something ain't definitely right like that.

12          Q     Okay. So after Cookie leaves does he eventually come  
13     back to the apartment?

14          A     Oh, yes.

15          Q     Oh, yes?

16          A     Oh, yes.

17          Q     Okay, and what happened when he came back? Without  
18     telling me what he said --

19          A     Okay.

20          Q     -- what happened when he came back?

21          A     He ran in without my house shoes.

22          Q     He had --

23          A     And he --

24          Q     -- your house shoes on?

25          A     Yeah, he ran upstairs with my house shoe and he came

1 back with them not -- not on his feet and --

2 Q Okay.

3 A -- he was out of breath and he go -- he was just

4 really, really enthused about what happened.

5 Q Okay, did he describe to you --

6 A Yes he did.

7 Q -- what he had just seen?

8 A Yep.

9 Q Okay, and did that cause him concern?

10 A Yes, it did.

11 Q Did it cause you concern?

12 A Oh, yes.

13 Q Okay, and at -- at that point do you know based on

14 that concern what Cookie did next?

15 A I do believe he went back outside.

16 Q Okay.

17 A And I don't follow him up and I don't -- I don't care

18 whatever's going on I'm not addicted to going and looking for

19 trouble, I stay put.

20 Q Okay, so --

21 A But he --

22 Q -- you remain in the apartment?

23 A I remains in the apartment.

24 Q Despite what cookie had told you?

25 A Yep.

1 Q Do you if -- did you ever -- did he ever tell you to  
2 call 911?

3 A He might of.

4 Q Okay.

5 A I don't -- can't really remember if he had me --  
6 asked me to call but I -- I know I heard him hollering outside  
7 to dial 911.

8 Q Okay, so before he came back into the apartment you  
9 heard him hollering outside?

10 A Yep.

11 Q Okay, how long was he gone from your apartment before  
12 he came back the first time?

13 A Maybe five minutes or so.

14 Q Okay.

15 A Long enough to run up and run back.

16 Q All right. And then you indicated that once Cookie  
17 came back to the apartment he eventually left again, was that  
18 to just go get your house shoes?

19 A No, because the house shoes didn't come back.

20 Q Okay.

21 A Just went out.

22 Q And you remained in your apartment?

23 A I remained in the apartment.

24 Q And eventually did officers arrive at --

25 A Yes they did.

ROUGH DRAFT TRANSCRIPT

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1 Q -- the address?

2 A Yes.

3 Q Okay. And at some point that night were you asked to  
4 speak to police and tell them what you remember happening that  
5 night --

6 A Yes.

7 Q -- what you heard? Okay, and did you do that?

8 A I sure did.

9 Q Okay.

10 MS. GRAHAM: I'll pass the witness at this time.

11 THE COURT: All right, thank you. Cross examination.

12 MS. PALM: Thank you.

13 MS. PALM: Good morning Ms. Toliver.

14 THE WITNESS: Good morning.

15 CROSS-EXAMINATION

16 BY MS. PALM:

17 Q You said you started hearing the noise right before  
18 your show, the one you -- you generally watch the, the One Life  
19 to Live?

20 A No, it was like right when the show was starting.

21 Q Okay, so and -- and you watch those shows regularly  
22 right?

23 A That's right.

24 Q So -- so you know that time for sure --

25 A I --

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1 Q -- is 9:00?

2 A Right, 9:00.

3 Q Okay, and so that's when the noise starts and it's  
4 kind of the -- the thumping around and on and off with the  
5 female crying?

6 A Yes.

7 Q And then that goes for a while and then your husband  
8 finally wakes up because of the noise?

9 A Yes.

10 Q Okay, and -- and what time did you think he woke up  
11 at?

12 A It had to be like about maybe 9:25, maybe 9:30.

13 Q Okay, then how long is he listening to noises before  
14 he goes up?

15 A Oh, maybe four minutes.

16 Q Okay, so about 9:30 but definitely before 10:00 he  
17 would be going up stairs?

18 A Oh yeah, definitely before 10:00, yeah.

19 Q Okay, and then if you testified previously that he  
20 was only up there for ten seconds, does that sound right?

21 A More than -- is wasn't like ten seconds, maybe five  
22 minutes.

23 Q Okay.

24 A Because I don't know how long it takes to go up and  
25 back down the stairs --

1 Q Right.

2 A -- and then he was in the -- the -- on the -- in his  
3 apartment so, it wasn't long.

4 Q Okay. So, your previous testimony of ten minutes was  
5 just kind of a guess?

6 A Sort of.

7 Q Just -- kind of --

8 A Yep.

9 Q -- it's a short amount of time and you didn't know?

10 A It's a short amount of time, ten minutes seemed like  
11 a short time --

12 Q Okay.

13 A -- but ten minutes could also seem long, so.

14 Q Okay, and then right after your husband goes up and  
15 comes down, that would still be about 9:30, 9:40 right?

16 A About that time.

17 Q Okay, and --

18 A Maybe 9:45.

19 Q -- then are the police coming right away pretty much?

20 A No.

21 Q How long does it take the police to come?

22 A Awhile. It was a good while, I'd say about maybe  
23 minutes to an hour when they arrived.

24 Q Okay but didn't -- didn't your husband call for  
25 somebody to call the police?

ROUGH DRAFT TRANSCRIPT

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1 A Yes, he did.

2 Q And they didn't call the police?

3 A Yes, they did.

4 Q Okay, and then the police just took a long time to  
5 get there?

6 A Yeah.

7 Q 45 minutes to an hour. But you're sure -- you're  
8 sure because your sure of your show is that this starts --

9 A Right.

10 Q -- at 9:00?

11 A Right.

12 Q Okay, if -- if you learned that the police weren't  
13 actually called until 11:00, does that change anything?

14 A No, because they were called -- they were called as  
15 soon as -- because I heard my husband outside hollering telling  
16 Robin (phonetic) to call the police and that --

17 Q Okay.

18 A -- was like as soon as he ran upstairs, ran back out  
19 and went back out again.

20 Q Okay. So, if the police were called right when --  
21 when Mr. Toliver came down and if that time was 11:00 o'clock  
22 could it have been two hours you were listening to noises for?

23 A No.

24 Q Okay, your -- your sure it was --

25 A I'm positive, my story One Life to Live is only an

1 hour long.

2 Q Okay, so your sure it was a half an hour noise  
3 period?

4 A Yes, about a half an hour.

5 Q Okay.

6 A Or a little bit more.

7 Q And during that -- that time period the only thing  
8 that you hear is the female?

9 A Correct.

10 Q Okay. And I just want to talk about that  
11 (indiscernible). I am showing you the States Exhibit 1, it's  
12 that the bedroom layout?

13 A Um'hm.

14 Q Now, did I understand your testimony right, your  
15 apartments actually flipped, than this one?

16 A Well, this is like my setup, but this bedroom is over  
17 on this side but this is the master bedroom just like his.

18 Q Can you touch the screen where your master bedroom  
19 is?

20 A Same place.

21 Q Okay, so what's split?

22 A Because the bathroom. Because right here would be my  
23 other bedroom and I guess they have it on this side.

24 Q I'm sorry, could you touch where your other bedroom  
25 is?

1 A Right here, on the other side of the other bathroom.

2 Q Okay, so you're the same as theirs or different?

3 A A little different out on the -- when it got up here  
4 I'm like, okay, because I see this.

5 Q Is -- are the -- is the master bedroom in your  
6 apartment actually on the other side that this one?

7 A No, the master bedroom is exactly where ours is --

8 Q Okay.

9 A -- where his is, it's just a bed -- the other bedroom  
10 is on the other side.

11 Q Can you show me where your other bedroom is?

12 A Right here.

13 Q Okay.

14 A On the other side of the other bathroom.

15 Q Okay. I just had to clarify that because I wasn't  
16 sure what you were saying. Were you watching any other shows  
17 that night besides the One Life to Live?

18 A No, and I missed that one.

19 Q But you normally watch General Hospital after that?

20 A General Hospital --

21 Q Okay.

22 A -- Which comes on at 10:00.

23 Q Okay, so by the time General Hospital came on were  
24 the police already there?

25 A No.

1 Q Okay, so the General Hospital is this long waiting  
2 period when they don't come for an hour?

3 A General Hospital had been playing about maybe 25 or  
4 minutes.

5 Q When -- when the police get there?

6 A When the police -- right.

7 Q And General Hospital starts at 10:00?

8 A Correct.

9 Q And -- did the -- did you meet with the DA's before  
10 you got ready to testify?

11 A When?

12 Q Last week. Did you come down here last week and meet  
13 with the DA's?

14 A Yes, I did.

15 Q Okay, did they give you a copy of your statement?

16 A Already had one, yep.

17 Q Okay, and -- and your previous testimony?

18 A Um-h'm, I had --

19 Q Okay.

20 A -- I had it already. They gave me --

21 Q Do you remember in your statement that you only  
22 mentioned Charles hitting the broom with the ceiling, did you  
23 look at it?

24 A I read through it.

25 Q Okay. Do you remember that you didn't mention that

ROUGH DRAFT TRANSCRIPT

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1 you hit the broom with the ceiling [sic]?

2 A I'm old and forgetful, but I know I hit the ceiling  
3 first.

4 Q Okay, I'm not -- I'm not saying you didn't, I'm just  
5 -- I'm trying to clarify because sometimes would you agree that  
6 if you give a statement close to the time, sometimes that  
7 statement is the better memory than later when you're trying to  
8 remember?

9 A That's something I'm not going to forget.

10 Q Yeah. Okay. But if it -- if it's not mentioned in  
11 your statement is that just an oversight you forgot to tell  
12 them --

13 A I forgot to say it.

14 Q -- that you did it to? Okay. And if you said in  
15 your statement that the noise -- the constant noise went on for  
16 at least an hour, would that not be accurate?

17 A That would be accurate.

18 Q Okay, so -- so the noise went on for an hour before  
19 Charles went up there?

20 A No, not for an hour, it was like 35 minutes when he  
21 -- when it woke him up.

22 Q Okay. If you -- if you said in your statement the  
23 noise went on for an hour and then Charles got up, would that  
24 not be correct?

25 MR. LALLI: I'm sorry, Your Honor, can we just ask

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1 what page counsel's --

2 THE COURT: Yeah.

3 MR. LALLI: -- referring to?

4 THE WITNESS: Let me --

5 MS. PALM: Seven.

6 THE WITNESS: -- go get mine outside.

7 THE COURT: Seven. Page seven.

8 THE WITNESS: Now --

9 MR. LALLI: Thank you.

10 THE WITNESS: -- say that again please.

11 BY MS. PALM:

12 Q All right, if you -- if you had said in your  
13 statement that the noise went -- went on for an hour and then  
14 Charles woke up, would that not be correct?

15 A It wasn't an hour, if I said in the statement at that  
16 particular time maybe the time span from a hour to 40 to  
17 minutes.

18 Q Okay.

19 A It's lapsing in my memory.

20 Q Were going to help you look at your statement and see  
21 what you said?

22 A No, you can go on (indiscernible).

23 Q Okay.

24 A Like I said, it's burned in my memory.

25 Q Okay, so if you said --

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1           A     The time sequence might be off a little but what  
2 happened is there as clear as a bell.

3           Q     All right, so if you told the police at the time of  
4 your statement it went on for at least an hour because he got  
5 up at 10:00, does that sound like what you said?

6           A     I can't really remember.

7           Q     Okay.

8           A     I know I said it went on for -- for a while, I don't  
9 if I said an hour, I might of said hour --

10          Q     Well, okay. If you can't remember I -- I can show  
11 you and see if that -- if you recall saying that. If that's  
12 what you said, I -- I'm not trying to put words in your mouth.

13          A     No, that all right.

14                MS. PALM: Can I approach Your Honor?

15                THE COURT: Yes.

16 BY MS. PALM:

17          Q     Do you mind looking at the last little bit of that  
18 page ma'am? I (indiscernible).

19          A     Um'hm, I see it. So, if I said that, they wrote it.  
20 I said that.

21          Q     Okay, and -- and so when they asked how long it went  
22 on before Cookie woke up and you said at least an hour, is that  
23 right?

24          A     Okay.

25          Q     Okay. And -- and that -- you gave that statement

1 that night, right?

2 A That night.

3 Q The night that it happened?

4 A The night that it happened.

5 Q You think you remember a little bit better than  
6 later on now?

7 A Probably, yeah, because it had just happened.

8 Q Okay. Right.

9 A You're talking about a year ago.

10 Q Right.

11 A I went the ten minutes.

12 Q And then so the only time you heard the moaning is  
13 while Cookie is outside and upstairs --

14 A When he was --

15 Q -- in that apartment?

16 A -- when he was going out she was already crying.

17 Q Okay.

18 A And when she -- when he was going out she had started  
19 moaning and he was -- left so quick, he wasn't even paying  
20 attention to the way nothing except for the noise and while he  
21 was walking up.

22 Q Okay, so was the moaning going on the whole time that  
23 Cookie went upstairs and came back down?

24 A Not the whole time just --

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

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1           A     -- when -- time he was getting ready to leave to go  
2 out and before he even got back down it just died, it just  
3 stopped.

4           Q     Okay, when he -- do you remember saying that when he  
5 came back in you told him, come back in and listen to the  
6 moaning, but he couldn't hear it cause he's deaf?

7           A     What?

8           Q     Do you remember saying that?

9           A     I don't remember saying that he was deaf and listen  
10 to the moaning.

11          Q     Maybe I misinterpreted that, I don't want to --

12          A     I think so.

13          Q     Okay.

14          A     Because he's a man and he's not thorough like that.

15          Q     Okay -- well, would it help you remember what you  
16 said exactly if I showed you your statement?

17          A     (Indiscernible).

18                MS. PALM: May I --

19                THE COURT: Which page?

20                MS. PALM: -- approach Your Honor? Page ten. Of  
21 voluntary statement.

22 BY MS. PALM:

23          Q     Ma'am if you could just look at where you say -- do  
24 you recall saying that?

25                THE COURT: First, ma'am, read -- read the

1 statement --

2 THE WITNESS: Oh.

3 THE COURT: -- and then ask the next question.

4 THE WITNESS: Okay.

5 THE COURT: Ma'am, read -- no, read it to yourself.

6 THE WITNESS: Oh, I read it.

7 THE COURT: Okay, now the next question, Ms. Palm.

8 BY MS. PALM:

9 Q So did you say you told him come in -- come in and  
10 listen, but he can't hear he's deaf?

11 A I don't remember. I don't remember saying that.

12 Q Okay, and at the time it was still a little faint but  
13 then it stopped?

14 A Yes.

15 Q Okay. So, you gave that statement right at the time  
16 of the incident right, right afterwards?

17 A Right, I could've --

18 Q Okay.

19 A -- said that. Like I --

20 Q Okay.

21 A -- said, I don't really remember exactly --

22 Q Okay.

23 A -- word for word what I said.

24 Q But at least then you thought that the noise was  
25 still going on when Charles had come back in?

ROUGH DRAFT TRANSCRIPT

001364

1 A Yes, it was.

2 Q Okay --

3 A It wasn't going on when he come back in.

4 Q Okay, but in your --

5 A When he left going out.

6 Q Right, but in your statement you said that you told  
7 Charles, come in listen to the noise, it was still at little  
8 faint.

9 A I don't remember saying that.

10 Q Right, but -- do you want to see your statement  
11 again?

12 A I still don't remember -- no, I just said I don't  
13 remember saying that.

14 Q Okay, but you don't dispute that you said that?

15 A No, I could of but like I said --

16 Q Okay.

17 A -- I don't remember saying that.

18 Q Okay. And do you recall telling the police that when  
19 Charles came back down, right after that you went to the door  
20 and the police and stuff were coming?

21 A I think I went outside the door.

22 Q Okay.

23 A Where everybody was standing out on the grass  
24 looking.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

001365

1           A     And then I came back in cause the police asked  
2 everybody to go back into their apartments.

3           Q     Okay, was that -- was that -- though -- right when  
4 Charles came back downstairs, pretty much the police were  
5 there?

6           A     No. Because they didn't show up in like five  
7 seconds, it was like I'd say 35 to 45 minutes. Because by that  
8 time all the tenants was gathering outside.

9           MS. PALM: Court's indulgence, I lost my place.

10 BY MS. PALM:

11          Q     Okay. Do you recall saying that Charles went out  
12 there, about ten seconds later he comes running in, and after  
13 that you went to the door and you saw everybody looking,  
14 policemen and all?

15          A     Yeah.

16          Q     Okay. So there was -- some -- some -- you're saying  
17 today that there was a lapse in time before --

18          A     Yes.

19          Q     -- the police came?

20          A     Yes.

21          Q     All right. But your sure this -- all of this noise  
22 stuff started at 9:00?

23          A     Yep. Positive about that.

24          MS. PALM: Court's indulgence.

25 BY MS. PALM:

ROUGH DRAFT TRANSCRIPT

001366

1 Q Ma'am, you didn't call the police yourself, did you?

2 A No, I didn't.

3 Q Do you recall saying in your statement that you  
4 called the police?

5 A I don't remember.

6 Q If I show you your statement will it help you  
7 remember?

8 A No, because I still wouldn't remember.

9 Q Okay, you don't dispute that you said in your  
10 statement, "and I called the police?"

11 A No, I don't dispute it, I said I couldn't -- I don't  
12 remember.

13 Q Right, you just don't remember, okay. Thank you, Ms.  
14 Toliver.

15 A You're quite welcome.

16 THE COURT: Any redirect by the State?

17 MS. GRAHAM: Yes, just briefly judge.

18 REDIRECT EXAMINATION

19 BY MS. GRAHAM:

20 Q Okay, so Ms. Toliver I understand it's been a year  
21 or --

22 A Um'hm.

23 Q -- SO ago that this happened. Understanding that you  
24 indicated that your time frame might not be accurate --

25 A Accurate. Right.

1 Q -- after that long and that's certainly  
2 understandable. Would you -- from the time that -- now, you  
3 indicated Cookie went upstairs twice.

4 A Okay.

5 Q Okay, is that right?

6 A He did.

7 Q Okay, and -- is it -- is it correct in saying that  
8 the disturbance upstairs went on for more than an hour?

9 A Maybe a hour and five or ten, 15 minutes.

10 Q Okay, and would you have any reason to disagree that  
11 if -- if dispatch police got a 911 call, once they were called  
12 their response time would have been quicker than 35 minutes?  
13 Would you have any reason to disagree with that?

14 A I disagree. It was slow, because our apartment  
15 building we stayed in, they used to like set up camp over there  
16 because there was always so much stuff going on.

17 Q Um-hm.

18 A And then after like a couple of months they just --  
19 they didn't respond real quickly like they would normally do  
20 when it first started having bad stuff going on over there.

21 Q Okay, but -- but you really know what time 911 --

22 A Nope.

23 Q -- was called, do you?

24 A Um'hm.

25 Q Okay, so you really wouldn't know how quick the



1 response time was if --

2 A No.

3 Q -- if you didn't know what time and who called 911?

4 A Right.

5 Q Was -- would that be fair to say?

6 A That'd be fair to say.

7 Q Okay. But with regard to the disturbance upstairs,

8 you did indicate in your voluntary statement that -- if I could

9 refresh your recollection. And you would that if you -- if you

10 said this in your voluntary statement that the -- the

11 disturbance lasted over an hour, would that have been correct?

12 A That'd have been correct.

13 Q Okay. So the disturbance could then very well have

14 gone on through One Life to Live and into General Hospital?

15 A A little bit into General Hospital, not that far on.

16 I say if it -- if it went for a hour, it went for a hour, maybe

17 ten, fifteen minutes.

18 Q Okay.

19 A It didn't go for two.

20 Q But --

21 A Or even 30 minutes.

22 Q But --

23 A (indiscernible).

24 Q -- what your sure of is that you couldn't watch One

25 Life to Live that night --

ROUGH DRAFT TRANSCRIPT

001369

1 A At all, right.

2 Q Okay, and you're sure that you couldn't watch General  
3 Hospital that night?

4 A Correct.

5 Q Okay. And again you didn't call 911?

6 A Nope.

7 Q So you don't know what time 911 was --

8 A No.

9 Q -- called? So --

10 A Nope.

11 Q -- you don't know how long it would have taken the  
12 police to respond once they received that call?

13 A That's correct.

14 Q Okay.

15 MS. GRAHAM: Court's indulgence. Pass the witness.

16 THE COURT: Any recross?

17 MS. PALM: Just briefly.

18 RE CROSS-EXAMINATION

19 BY MS. PALM:

20 Q Ma'am, you started out, I guess, thinking that was  
21 like a half an hour that the thumping was going on before  
22 Charles woke up and now the DA just got you to agree it was  
23 over an hour --

24 A Because --

25 Q -- but you just don't really remember, do you?

ROUGH DRAFT TRANSCRIPT

001370

1 A I -- I was just going to say that.

2 Q Yeah.

3 A I don't remember. I know --

4 Q Yeah, it was a long time ago.

5 A -- it had to along for a whole hour because of One  
6 Life to Live, and what time exactly that my husband woke up in  
7 between that, I said maybe 25 minutes to 10 minutes after the  
8 story was on.

9 Q Okay, and -- and you really don't remember today the  
10 sequence of anything?

11 A Not the time.

12 Q Okay.

13 A But I remember the sequence of what happened.

14 Q Okay, and if you previously testified that Charles  
15 went up 10 to 15 minutes after he woke up --

16 A I'd --

17 Q -- does that sound about right?

18 A No, as soon as he got up and hit the broom on the  
19 thing he went upstairs.

20 Q Okay, if --

21 A So I don't know if it took him ten or 15 minutes to  
22 do the broom and then go upstairs.

23 Q Okay, but if you testified before it was 10 to 15  
24 minutes, does that sound accurate?

25 A Okay.

ROUGH DRAFT TRANSCRIPT

001371

1 Q Doesn't sound wrong, does it?

2 A Nope.

3 Q Okay.

4 A It could have been any time frame?

5 Q Okay, and you never heard arguing or nothing just  
6 the --

7 A No arguing.

8 Q -- stomping around, bamming or whatever you --

9 A Just the crying and the thumping.

10 Q Okay.

11 A And the moaning.

12 MS. PALM: Nothing further. Thank you ma'am.

13 THE WITNESS: You're welcome.

14 THE COURT: Any questions from any of our jurors? We  
15 have no questions. Thank you Ms. Toliver for your testimony,  
16 you are excused.

17 THE WITNESS: Thank you.

18 THE COURT: Ladies and gentlemen we'll take out lunch  
19 break at this time, we'll come back at 1:15.

20 During this recess it is your duty not to converse  
21 among yourselves, or with anyone else on any subject connected  
22 with this case or to read, watch or listen to any report of or  
23 commentary on the trial by any person connected with trial, or  
24 any medium of information, including without limitation  
25 newspaper, television, radio or the internet. You're not to

1 form or express an opinion on any subject connected with this  
2 case until the matter is submitted to you. We'll see you back  
3 at 1:15.

4 MR. LALLI: Your Honor? Could we just  
5 (indiscernible) real quickly?

6 THE COURT: All right.

7 (Off-record bench conference)

8 (Court recessed at 12:12 p.m. until 1:17 p.m.)

9 (Outside the presence of the jury)

10 THE COURT: Michelle?

11 THE COURT RECORDER: I am.

12 THE COURT: Michelle Ramsey?

13 THE COURT RECORDER: Yes. All set.

14 THE COURT: All right. Mr. Lalli?

15 MR. LALLI: Your Honor, we -- over the lunch break we  
16 were able to show for the Court, I guess, a disputed portion of  
17 a video of the defendant's interview.

18 It's our contention that we ought to be allowed to  
19 show the video from the point in time that detectives enter the  
20 interrogation room, until they leave. And Ms. Palm is now  
21 indicating that the very beginning portion of that video ought  
22 to be released.

23 First of all, it's our position the statement is not  
24 barred by any Miranda violation, or the Fifth Amendment. As  
25 the Court saw from that video when the police entered the first

ROUGH DRAFT TRANSCRIPT

001373

1 thing that happens is the detective gives him some bandages for  
2 his finger, and he immediately starts making statements, did  
3 you do this, did you do that, did you do the other thing.

4 Later on he begins to make comments about whether he  
5 will receive a fair trial, things of that nature. And we  
6 believe it's relevant to the issue of consciousness of guilt.

7 Over the lunch hour I was able to do some research on  
8 the issue and I'd like to bring to the courts attention Florez  
9 versus State (phonetic), which is sighted at 121 Nevada, 708.  
10 It is a 2005 case from the Nevada supreme Court, and their was  
11 an issue involving consciousness of guilt based upon a  
12 defendants affect in that case as well.

13 And what our supreme Court said was, "Evidence  
14 regarding Florez' lack of remorse was prohibitive to her  
15 conscience of guilt." That's what our Supreme Court said. And  
16 in -- in that case the homicide detective was allowed to  
17 testify regarding her affect, how she reacted, her emotional  
18 responses during the course of that interview. And it was over  
19 objection. And the -- the trial judge thought it was relevant  
20 to consciousness of guilt.

21 On review our Supreme Court agreed. So certainly the  
22 evidence is relevant, our Supreme Court says so, we ought to be  
23 allowed to admit it and -- I think it ought to come in.

24 THE COURT: All right, Ms. Palm.

25 MS. PALM: Your Honor, Mr. O'Keefe was not Mirandized

1 during that portion of the interaction with detectives, he was  
2 in custody, they were having a type of interaction that was  
3 likely illicit statements from.

4           It starts off at the part that they want to introduce  
5 with the detective asking question, she was still unconscious,  
6 wasn't she. That's part of an interrogation, it was non-  
7 Mirandized and I'm objecting to anything before the Miranda at  
8 this point if they're not going to agree to start where I would  
9 like it to start.

10           THE COURT: Mr. Lalli, didn't the detectives say,  
11 "She was unconscious, wasn't she?" Did he ask that question?

12           MR. LALLI: Not at the beginning of the interview,  
13 no. That is later on. He does ask that, and the defendant  
14 looks at him and doesn't say anything. And then the resume to  
15 a discussion about his hand and the bandages.

16           And -- and that is the only time that a detective  
17 asks a question, the defendant doesn't answer it, and then just  
18 like he did at the beginning of the interview, the defendant  
19 starts controlling the interview again.

20           He starts talking about he wants the investigation to  
21 go right, he doesn't think he's going to get a fair trial this  
22 time, all of those things, just like in Florez, are probative  
23 to his consciousness of guilt.

24           That sort of conduct is inconsistent with someone who  
25 just lost somebody that they loved.

ROUGH DRAFT TRANSCRIPT

001375

1           THE COURT: May I see the case? Do you have the  
2 section highlighted?

3           MR. LALLI: Yes, I do.

4           MS. PALM: And I didn't hear if Florez was un-  
5 mirandized statements during an interrogation.

6           MR. LALLI: Well, there are two ways --

7           MS. PALM: Because I'm not -- my -- my -- it is two  
8 separate issues, and I think -- I'm not saying that you could  
9 not say relevant things during an un-Mirandized interrogation,  
10 they -- most people -- people most certainly do do that.  
11 However, they're not admissible because they're unwarned.

12           THE COURT: On Florez there's no Miranda issue, it's  
13 not mentioned one way or the other so that's not really in --  
14 in play or in Florez. Surprisingly, the witnesses or  
15 detectives were allowed to testify that the defendant did not  
16 attend the victim's funeral. And that was allowed in.

17           MR. LALLI: The victim in that case was the  
18 defendant's child.

19           THE COURT: Okay. That's a little different, but you  
20 would think --

21           MR. LALLI: Right, you could see how it could be  
22 relevant in that -- in that case. But I guess the point of  
23 this, consciousness of guilt is certainly -- there are many  
24 iterations of it, and certainly a person's emotional response  
25 is one of them.



1 MS. PALM: And I absolutely agree with that except  
2 for when it's an unwarranted interrogation it's completely  
3 different.

4 THE COURT: I think we have the issue of -- what was  
5 it -- there was a possible question in there and there's some  
6 evidence that the defendant was intoxicated, and so I'm going  
7 to re preclude testimony.

8 MS. PALM: Thank you Your Honor.

9 THE COURT: All right.

10 MR. LALLI: So then the only part that's admissible  
11 is once Miranda begins on?

12 THE COURT: Well, at one point he somewhat asks a  
13 question, "was she unconscious," and I don't recall after that  
14 question if there was further questions by the detective, I  
15 don't recall on the disc.

16 MR. LALLI: There aren't, but I guess the -- the --  
17 if -- if -- if the Court is excluding statement because of a  
18 Miranda violation now they can't get in parts that occurred  
19 before Miranda, we start at Miranda and go from there.

20 MS. PALM: And I think that's as it should be then.

21 THE COURT: All right, so if the door's open then  
22 it's -- everyone's going to walk through it, okay?

23 MS. PALM: Thank you, Your Honor.

24 MR. LALLI: Here you go judge.

25 THE COURT: I think I coined that phrase now. So

1 just don't open the door.

2 MS. PALM: So, and --

3 THE COURT: Anything else?

4 MS. PALM: No, just so the Court knows our -- our  
5 schedule, it's my understanding were going to do Cookie  
6 Toliver, the State's witness, and then I'm going to call Dr.  
7 Grey out of order because he's here from Utah.

8 THE COURT: All right. All right, let's bring the  
9 jury in and have Cookie Toliver.

10 THE MARSHAL: All righty, Cookie.

11 (In the presence of the jury)

12 THE MARSHAL: Officers and members of the Court,  
13 Department 17 jurors. You may be seated ladies and gentlemen.  
14 Let's make sure our cell phones are turned off please.

15 THE COURT: All right, the State's next witness is  
16 Charles Toliver.

17 MS. GRAHAM: Charles Cookie Toliver, State calls  
18 Charles Cookie Toliver.

19 THE MARSHAL: And Mr. Toliver, if you'll remain  
20 standing and please raise your right hand and face the Clerk.

21 CHARLES TOLIVER, STATE'S WITNESS, SWORN

22 THE MARSHAL: Just have a seat. Slide up to the mic.  
23 Mr. Toliver, if you'll please state your name and spell it for  
24 the record.

25 THE WITNESS: Charles Elwood Toliver, T-O-L-I-V-E-R.

ROUGH DRAFT TRANSCRIPT

001378

## DIRECT EXAMINATION

1  
2 BY MS. GRAHAM:

3 Q Good morning Mr. Toliver -- afternoon Mr. Toliver.

4 Do you have a nickname?

5 A Cookie.

6 Q Cookie. Mr. Toliver, did you live at 5001 El Parque  
7 on November 5th, 2008?

8 A Yes.

9 Q And how long did you live there prior to November  
10 5th, 2008?

11 A About 12 or 13 years.

12 Q Who did you live with?

13 A My wife, Lea (phonetic), Joyce Toliver.

14 Q Joyce Toliver. And I'm showing you what's been  
15 marked as States Exhibit 2. Does that look like the exterior  
16 of your apartment?

17 A Yes ma'am.

18 Q Can you point on the screen what apartment you lived  
19 in?

20 A Where the (indiscernible) door's at.

21 Q Okay, can you circle it? Touch the screen and circle  
22 that. Okay, there you go. And what apartment number was that?

23 A 29.

24 Q And did you know most of your neighbors having lived  
25 there that many years?

ROUGH DRAFT TRANSCRIPT

001379

1 A Yes.

2 Q Did you know who lived in the apartment above you?

3 A Not personally.

4 Q Okay, had you seen him around?

5 A Yes, from me doing my mechanic work in the parking  
6 lot. Yeah.

7 Q Okay, do you see the person that lived above you in  
8 the courtroom today?

9 A Yes.

10 Q Can you point to him and describe something that he's  
11 wearing?

12 A The -- the blue shirt, tie.

13 MS. GRAHAM: Record reflect identity of defendant?

14 THE COURT: Yes, it will.

15 MS. GRAHAM: Thank you.

16 BY MS. GRAHAM:

17 Q So you indicated that you didn't personally know the  
18 defendant?

19 A No, I didn't.

20 Q Okay, but you had seen him around?

21 A Yes, spoke to him. He speaks to me when I be -- when  
22 he come up. I'd be in the back working, he'd --

23 Q Okay.

24 A -- come up and I would speak, he speak.

25 Q Okay, now explain to me, there's -- there's a back

1 side of that apartment?

2 A Yes.

3 Q And can you explain the -- the --

4 A The back part?

5 Q The back part.

6 A It's a parking lot, where we park out vehicles.

7 Q Okay.

8 A The owner had given me a place to work back there

9 doing my --

10 Q Okay.

11 A -- little mechanic because I do mobile mechanic.

12 Q So you're a mechanic?

13 A Yes.

14 Q Okay, and you had authorization to work on-site?

15 A Yes.

16 Q So, you were out there most days?

17 A Yes.

18 Q Okay.

19 A In and out.

20 Q In and out. Did you have a balcony on the back -- or

21 a porch on the back of your apartment?

22 A No, because I was just downstairs, no balcony.

23 Q Okay. Did the apartment above have a balcony?

24 A Yes.

25 Q Okay, and during the time that you lived there did

ROUGH DRAFT TRANSCRIPT

001381

1 you ever observe the defendant out on his balcony?

2 A Nope.

3 Q Okay. So other than just casual cross paths you had  
4 no contact with the defendant?

5 A No contact, just hello Cookie, you know, that's it.

6 Q And he knew your name?

7 A Yes.

8 Q Okay.

9 A Everybody in the apartment did.

10 Q Okay. All right. Did you know if anybody lived with  
11 the defendant in that apartment?

12 A I don't know if -- she lived there but I knew she was  
13 there.

14 Q Okay.

15 A The lady.

16 Q Okay, so you recall a lady being there?

17 A Yes.

18 Q But you were unsure if she lived there?

19 A When they be coming up I see them together.

20 Q Okay, can you describe that woman?

21 A Really, it's been a minute. You know --

22 Q Can you describe --

23 A Short, little, small lady.

24 Q Okay. Did you see him with more than one woman?

25 A Just that one.

ROUGH DRAFT TRANSCRIPT

001382

1 Q Okay, and do you know what ethnic background she --

2 A Huh?

3 Q Do you know her ethnic background, did you -- did you  
4 observe what -- what race she was?

5 A She was like a Chinese, Korean, Chinese or something,  
6 I don't know. I don't (indiscernible).

7 Q Okay. So you never had the opportunity to interact  
8 with him socially?

9 A If you speaking of visiting, no. No -- no sociable  
10 thing. No.

11 Q Okay. And you never observed the defendant and this  
12 woman together prior to this day?

13 A Just when they be coming home, you know.

14 Q Okay.

15 A If they come through the parking lot, it'd be like I  
16 say, I'd be back there working. I speaks to everybody and  
17 everybody speaks to me. Yeah.

18 Q Okay. Do you recall ever seeing the defendant  
19 drinking alcohol?

20 A No.

21 Q Okay. I want to draw your attention to the night of  
22 November 5th 2008; do you remember that night?

23 A Yes.

24 Q Were you at home that evening?

25 A Yes, very tired.

ROUGH DRAFT TRANSCRIPT

001383

1 Q Okay. Were you home around 9:00 p.m.?  
2 A Yes, I was.  
3 Q And --  
4 A I was asleep.  
5 Q You were sleeping?  
6 A I just -- just fell off to sleep.  
7 Q Okay, and where were you sleeping at the time?  
8 A Above their bedroom -- I mean below their bedroom.  
9 Q Okay, were you --  
10 A In my -- in --  
11 Q -- in your apartment?  
12 A I was in my apartment, in my bedroom.  
13 Q Okay. I'm going to show you what's been marked as  
14 State's Exhibit 1. Do you recognize the layout of that  
15 particular apartment Cookie?  
16 A Not really.  
17 Q Does that appear to be the same layout as your  
18 apartment?  
19 A Oh. Yes. Okay.  
20 Q Point to the screen and show me where your bedroom  
21 that you were sleeping in was that -- that night.  
22 A Right above this bedroom.  
23 Q Okay, can you point to the screen and show me?  
24 A Yeah.  
25 Q Yeah. Okay --

ROUGH DRAFT TRANSCRIPT

001384



1           A     Uh-huh.

2           Q     -- so your -- would it be fair to say that's your

3 master bedroom --

4           A     Yes.

5           Q     -- and you --

6           A     Oh, yeah.

7           Q     -- were sleeping in the master --

8           A     In the master bathroom -- it's a master bedroom and

9 it's -- right next to it is another bedroom, just a place where

10 I kept my tools and other clothes, you know.

11          Q     Okay, and I think you indicated that you were aware

12 that the apartment above had the same layout?

13          A     Yes, it's the same.

14          Q     Okay, and you were sleeping in your bedroom?

15          A     Yes.

16          Q     And where was your wife at this time?

17          A     Next to me.

18          Q     Okay.

19          A     She was watching soap operas.

20          Q     Okay, and while you were sleeping, at some point did

21 you become awakened by something?

22          A     A noise.

23          Q     A noise?

24          A     A noise.

25          Q     What type of noise?

ROUGH DRAFT TRANSCRIPT

001385

1 A Like a (witness bangs hand on witness stand) --

2 Q Just one?

3 A No, it's -- you know (witness bangs hand on witness  
4 stand). And then I woke up -- excuse my language, I asked my  
5 wife, what the hell was that, she says --

6 Q Okay, let me stop you right there. Okay, so you --  
7 the noise woke you up?

8 A Yes.

9 Q Did you know where the noise was coming from?

10 A Upstairs.

11 Q Okay. So, describe the noise again.

12 A It was banging like, you know.

13 Q Okay. And it was enough to wake you up?

14 A Yes.

15 Q Okay, and --

16 A Yes.

17 Q -- and when you woke up what did you do?

18 A I asked her, how long this been going on, and she  
19 said for a minute.

20 Q Okay, then what did you do?

21 A So I just laid there for a little while longer then I  
22 heard it again, I said let me go up there, because I am tired  
23 and it -- and I'm trying to get me some sleep. So I got up --  
24 you want me to keep going?

25 Q Well -- well, prior to going up there did you do

1 anything to try to get the attention of the apartment above  
2 you?

3 A Yeah, I took my broom -- my broom --

4 Q Where was your broom?

5 A It was in the -- it was in my kitchen.

6 Q Okay.

7 A I went into the kitchen and got my broom, I came back  
8 and I hit the top of the ceiling.

9 Q Okay, and what was the purpose of doing that?

10 A Make them be quite, let them know I hear them. I --

11 Q Okay.

12 A -- (indiscernible) making too much noise.

13 Q All right.

14 A You know.

15 Q And when you did that did the noise stop?

16 A I heard it again so I said well, I'm figuring to go  
17 up there.

18 Q Okay, prior to going up there, what kind of noises  
19 were you hearing?

20 A Just a battering sound, you know like -- you know a  
21 noise.

22 Q Okay.

23 A You know, like they about to come through the  
24 ceiling.

25 Q Okay. So, based on your -- of your observation of

1 the noise of what you heard --

2 A Um-h'm.

3 Q -- what did you think was going on up there?

4 MS. PALM: Objection, speculation.

5 THE COURT: Sustained.

6 BY MS. GRAHAM:

7 Q You described the noise as so loud you thought it was  
8 going to come -- they were going to come through the ceiling?

9 A Yes.

10 Q Okay, did you --

11 A It was pretty loud.

12 Q -- hear any voices?

13 A Nope.

14 Q Okay. All right. So, you decide to go upstairs?

15 A Yes.

16 Q What was the purpose of that decision?

17 A To much noise.

18 Q Okay, and what were you -- what was your intent on  
19 going up there?

20 A To say, "Hey man, would you please keep it down, you  
21 know, I'm trying to get me some rest." I've been running all  
22 day and I had -- just had a heavy meal, too. You know how you  
23 eat when you get lazy, sleepy, you know, and that's the way I  
24 felt.

25 Q Okay.

1 A You know.

2 Q So, prior to going up there, were you angry?

3 A No, I wasn't really angry, I just -- you know,  
4 because I know -- I -- I -- I know, you know -- I knowed him  
5 and I didn't want to you know, just -- you know start a  
6 confusion or nothing with nobody, I just wanted the noise to  
7 stop, that was all.

8 Q Okay. So what did you do then?

9 A Went upstairs.

10 Q Okay, and before you left were you -- do you have  
11 pajamas on?

12 A Yes, I grabbed my wife's house shoes.

13 Q All right.

14 A And I slid them on and then I started up the steps.  
15 But when I got halfway up the steps I seen that the door was  
16 open.

17 Q Okay --

18 A So.

19 Q -- and when you say the door was open -- I'm going to  
20 show you what's been marked as States Exhibit 2. Show me how  
21 you went up the stairs, just --

22 A Okay, I -- I went up --

23 Q Um'hm.

24 A -- then I stopped.

25 Q Okay, you stoped there and then what did you see?

ROUGH DRAFT TRANSCRIPT

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1 A I looked and seen the door was open.

2 Q Okay, did that strike you as unusual?

3 A Well, not really, you know -- I mean -- I thinking  
4 I'm just going on up there to keep this -- try to get this  
5 noise down.

6 Q Okay, so --

7 A So --

8 Q -- you see the door open and then what do you do?

9 A I -- I continue on up the steps. So when I got to  
10 the door --

11 Q Uh-huh.

12 A -- I'm like, brace myself in the doorway, I'm  
13 hollering, "Hey man, can you please keep the noise down."

14 Q Okay.

15 MS. GRAHAM: Showing defense what's been marked as  
16 State's proposed 3. Judge may I approach the witness?

17 THE COURT: Yes.

18 BY MS. GRAHAM:

19 Q Cookie, I'm showing you what's been marked as State's  
20 proposed 3, can you just take a look at that and see if you  
21 recognize that?

22 A The living room.

23 Q Okay, does that -- and -- and when you say the living  
24 room, who's living room would that be?

25 A His living room.

ROUGH DRAFT TRANSCRIPT

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1 Q The defendant's living room?

2 A Yes.

3 Q Okay, does that fairly and accurately depict the way  
4 the living room looked when you had your hands on either side  
5 of the door?

6 A Well, you know I was -- I -- you know, I couldn't say  
7 it would look this way, I don't know, I can't remember.

8 Q Okay --

9 A I --

10 Q Fair enough.

11 A -- I can't remember.

12 Q Fair enough, but you could see inside the living  
13 room?

14 A I could see inside the living room.

15 Q Okay, did you see anybody inside the living room?

16 A Not when I first got to the door I didn't.

17 Q Okay, so you call out and what do you say?

18 A "Hey man, can you please keep the noise down."

19 Q And did you get any response?

20 A Not right then, he -- he came to the bedroom door.

21 Q Okay, and who -- who -- when you say he, who do you  
22 mean?

23 A This guy.

24 Q The defendant?

25 A Yes.

1 Q He came to the bedroom door?

2 A The bedroom door.

3 Q And which bedroom was -- would that be?

4 A The bedroom where they was at, the -- the master  
5 bedroom.

6 Q Okay, and again, I'm showing what's been marked as  
7 State's exhibit 2, can you just point on the screen to where  
8 you were standing in that apartment?

9 A Right here.

10 Q Okay.

11 A After I came in.

12 Q All right, and -- and then where the defendant came  
13 when you said, "Hey man?"

14 A Oh, well first I was standing at the door and then  
15 when he came to the bedroom door --

16 Q Okay.

17 A -- he told me, "Come get her."

18 Q Okay.

19 A You know --

20 Q Did you know what he --

21 A Come -- come --

22 Q -- go ahead.

23 A He said, "Come -- come -- come get her man, come get  
24 her." So when --

25 Q And what was his demeanor when he said that?



1 A Something was wrong with her, you know.

2 Q Okay, so what did you do then?

3 A So, by then I just eased on in and when I got to the  
4 door I seen her legs on the -- you know, on the foot of the --  
5 bed.

6 Q Okay, so when he said come get her you decide to --  
7 to follow him into the bedroom?

8 A Follow him into the bedroom, then he reached down and  
9 grabbed her, was --

10 Q Okay, let -- let me stop you right there --

11 A Oh, okay. All right.

12 Q I'm showing you what's been marked as State's  
13 proposed 20 -- I'm just showing the defense attorney what's  
14 been marked as State's Proposed 22.

15 MS. GRAHAM: Judge may I approach the witness?

16 THE COURT: Yes.

17 BY MS. GRAHAM:

18 Q Cookie I'm showing you what's been marked as State's  
19 Proposed Exhibit 22 --

20 A Uh-huh.

21 Q -- is that what you saw --

22 A That's what I saw --

23 Q -- do you recognize that from --

24 A Yes --

25 Q Is that what --

1 A I --

2 Q Does that --

3 A I -- I -- it's just like today, you know.

4 Q Okay, does that not fairly and accurately depict what  
5 you saw that evening when you went to that bedroom?

6 A When I went to the bedroom door right here, that's  
7 what I seen.

8 Q Okay.

9 MS. GRAHAM: Judge I move for the admission at this  
10 time of State's Exhibit 22.

11 MS. PALM: No objection.

12 THE COURT: 22 will be admitted, you can publish.

13 MS. GRAHAM: Thank you.

14 (Exhibit 22 admitted)

15 BY MS. GRAHAM:

16 Q So you walked through the bedroom door?

17 A Yes.

18 Q Do you follow the defendant?

19 A Yes.

20 Q And that's what you see?

21 A That's what I seen.

22 Q What's your reaction when you see that?

23 A You really want me to -- you want me to tell you?

24 Q Yes, I want to know what --

25 A All right.

1 Q -- your reaction was when you see that?  
2 A "Man, what the hell have you did," that's exactly  
3 what I asked him.  
4 Q And what was his response?  
5 A "Baby, wake up, baby wake up, don't --  
6 Q So he's not talk --  
7 A -- do me like this."  
8 Q Okay, he's not talking to you?  
9 A Nope.  
10 Q Okay --  
11 A And then by then I --  
12 Q Let me stop you right there Mr. Toliver, we need to  
13 get -- go a little bit --  
14 A Oh, okay.  
15 Q -- slow here --  
16 A All right, all right.  
17 Q Okay, he didn't respond to you when you asked him  
18 what he did?  
19 A Well -- no.  
20 Q Okay, what did he do then?  
21 A Picked her up.  
22 Q Okay, when --  
23 A (Indiscernible).  
24 Q -- you say picked her up --  
25 A You know, not -- you know, I seen him pick her up but

ROUGH DRAFT TRANSCRIPT

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1 you know, he was holding her.

2 Q Okay.

3 A Telling her to, "Wake up baby, don't do me like  
4 this."

5 Q Okay.

6 A That's what he was saying.

7 Q All right, then what did you do?

8 A I got the hell out of there.

9 Q Okay, and why is that?

10 A Because I was scared, when I looked over on the bed  
11 and seen what I seen, I --

12 Q What did you see?

13 A Blood on the bed and -- like a handle of something up  
14 under the -- sticking out from under the cover and --

15 Q Can you tell what that handle was?

16 A I couldn't -- well, it looked like a knife to me.

17 Q Okay.

18 A So when I looked at him he -- it was like look I  
19 ain't never seen on a person before. And me, I'm  
20 (indiscernible) go, and that's what I did, I left. I ran --

21 Q Okay --

22 A -- oh --

23 Q -- let me stop you right there, you say he looked at  
24 you?

25 A Yeah, like a weird look, you know.

1 Q What kind of a look was it?

2 A Like, you know, a look.

3 Q Can you describe that for the jury?

4 A Well, it was a scary look, I'll put it that way.

5 Q Okay, it scared you?

6 A And it was scary -- it scared me.

7 Q Okay.

8 A I had to go.

9 Q Okay. So when you entered the bedroom and he saw you

10 there and looked at you did he ever ask you to call 911?

11 A Nope.

12 Q Did he ever ask you to call fire and rescue?

13 A No.

14 Q Paramedics?

15 A No.

16 Q Okay, so you left the apartment immediately because

17 you were frightened?

18 A I was frightened.

19 Q What did you do then?

20 A I ran to the steps, to the porch.

21 Q Okay --

22 A And --

23 Q -- and let me just --

24 A Okay.

25 Q -- State's Exhibit Number 2. You come out of his

ROUGH DRAFT TRANSCRIPT

001397

1 apartment?

2 A I came out the apartment and then I got to the top of  
3 the steps --

4 Q Uh-huh.

5 A -- and I was hollering so loud that everybody -- a  
6 lot of people started coming out of the apartment. I'm all,  
7 "Somebody call the police, call --

8 Q Okay.

9 A -- the ambulance, call somebody because something --  
10 something ain't right up in here."

11 Q All right --

12 A So I ran on down the steps and I was running to the  
13 -- apartment 2.

14 Q Okay, and who lives in Apartment 2?

15 A Todd.

16 Q Todd who?

17 A Todd, I can't think of his last name anyways he stays  
18 in the apartment, he was staying in the apartment.

19 Q Okay, did this person named Todd come out of  
20 apartment two?

21 A Yes.

22 Q Okay, why did you go to Todd?

23 A Because he -- he worked for me.

24 Q Okay.

25 A And -- and he was about the closest one, you know,

ROUGH DRAFT TRANSCRIPT

001398

1 that I could go to and get. And I went and got him and I said,  
2 "Man, come upstairs, something don't look right here."

3 Q Okay, so -- why didn't you immediately call 911 at  
4 that point?

5 A I was scared. I'm going to tell you why I didn't.

6 Q Okay.

7 A I was to frightened.

8 Q Okay, so ran and got Todd?

9 A Yeah, I was running to get some help, that's what I  
10 was doing.

11 Q Okay. So, once you make contact with Todd do you --  
12 do you tell him what you saw?

13 A I said, man -- yes.

14 Q Okay, what then do you and Todd do?

15 A We go back up the steps.

16 Q Show me on the monitor.

17 A Okay, we go back up the steps, and we go into the  
18 door, I said, "Man come here, this lady don't look right."

19 Q Okay, and you say that to Todd --

20 A Todd --

21 Q -- is that right?

22 A -- yeah.

23 Q Okay.

24 A So when we go in the room he told Todd to, "Get the  
25 hell out of my house."

1 Q Okay, so where -- how far into the apartment did you  
2 and Todd and go?

3 A Back to the bedroom door, you know --

4 Q Back to the bedroom door?

5 A -- you know where the door's -- where the two  
6 bedrooms separates? You know, that door.

7 Q Okay, so I'm showing you -- did -- were you able to  
8 point out to Todd what you saw in the bedroom?

9 A Well, when he -- when we both went to the doorway he  
10 seen what was going on.

11 Q Okay, so I'm showing again what's been --

12 A Yes.

13 Q -- marked as --

14 A Yep, that's what we seen.

15 Q Okay, and -- so once you get to the door with Todd,  
16 what if anything does defendant do?

17 A We came up. We -- he stood there for a minute and  
18 came out and we was going back down the steps and that's when  
19 the other -- the other lady, she I think -- maybe she might be  
20 the one that called the police but when we --

21 Q Okay, let me -- let me stop you right there, I need  
22 to go back to the point where you and Todd entered the  
23 apartment --

24 A Okay.

25 Q -- okay. Did defendant know you came back to the

ROUGH DRAFT TRANSCRIPT



1 apartment?

2 A Yeah.

3 Q Okay, how do you know he knew that?

4 A Because he was still -- he was still on the floor and  
5 he's looking up at us.

6 Q He's looking up at you?

7 A Yeah, and he told us -- told Todd to, "Get the hell  
8 out -- you get the hell out of my apartment," that's what he  
9 told him.

10 Q Okay, and do you recall what if anything happened  
11 after that?

12 A No, we left.

13 Q Okay.

14 A When we got downstairs into the -- like the little  
15 (indiscernible) that's when the police came up.

16 Q Okay, now when he saw -- when you indicated that he  
17 told you to get the hell out of the apartment --

18 A Yeah.

19 Q -- at that time do you recall him trying to confront  
20 Todd in any way physically?

21 A Not -- I can't remember that, I -- I can't remember.

22 Q Okay, what were you thinking this whole time, what --  
23 what -- what -- what were --

24 MS. PALM: Objection, Your Honor.

25 MS. GRAHAM: It's as to what he did next, Your Honor.

1 THE COURT: Well, ask him, what did you do next.

2 MS. GRAHAM: Okay.

3 BY MS. GRAHAM:

4 Q When defendant saw you and Todd, and he told him to  
5 get the hell out did -- did he ever say anything else to you?  
6 The defendant.

7 A I'd -- no, and I can't remember him saying anything.

8 Q Did he ever say --

9 MS. PALM: Objection --

10 Q -- help?

11 MS. PALM: -- leading.

12 A No, he just told us to leave --

13 THE COURT: Hang on a second.

14 A -- told him to leave --

15 THE COURT: Hang on a second.

16 A -- and I --

17 THE COURT: Hang on, sir.

18 THE WITNESS: Oh, okay.

19 THE COURT: So you had an objection, leading  
20 question?

21 MS. PALM: My objection was leading, she already  
22 asked if he said anything else and he said no, so no.

23 THE COURT: Sustain the objection.

24 MS. PALM: Thank you.

25 BY MS. GRAHAM:

1 Q Based on the defendants demeanor did it appear to you  
2 that he wanted help for this woman?

3 MS. PALM: Objection, leading.

4 MS. GRAHAM: Judge, this is an observation, he can  
5 certainly answer.

6 THE COURT: I'm sustaining the objection, also calls  
7 for speculation.

8 MS. GRAHAM: Thank you.

9 BY MS. GRAHAM:

10 Q Did he -- so he never said anything else but get the  
11 hell out?

12 A That's it. That's all I -- that's all I -- that's  
13 all I heard him saying. Well see, when you see something like  
14 that you be kind of like in a state of shock, you -- you got to  
15 go and that's what I did.

16 Q Okay, understood.

17 MS. GRAHAM: I'll pass the witness at this time.

18 THE COURT: All right.

19 CROSS-EXAMINATION

20 BY MS. PALM:

21 Q Good afternoon Mr. Toliver.

22 A Good afternoon ma'am.

23 Q Do you remember meeting me about a year ago out at  
24 the apartment complex?

25 A I think so, yeah.

ROUGH DRAFT TRANSCRIPT

001403

1 Q Okay, that's closed down now, isn't it?

2 A No, a new one -- doctor -- a doctor bought it, next  
3 door, the apartments next door and the owner of the apartments  
4 next door, he bought it.

5 Q Okay, are you still living there?

6 A No ma'am.

7 Q Okay, no --

8 A He want -- he want -- he wanted me to move because I  
9 had been there too long and he was trying to go up real high on  
10 the rent and he --

11 Q Oh.

12 A -- couldn't do it so, in order to do it he -- I had  
13 to move.

14 Q Did you meet with the DA before your testimony today,  
15 did you meet with them last week?

16 A Yes.

17 Q Did they give a copy of your prior -- your prior  
18 statement?

19 A Yes, they did.

20 Q Did they give you a copy of the transcript of your  
21 prior testimony?

22 A Yes.

23 Q Did they review with you the -- the scary look on my  
24 client's face, did they talk about that with you?

25 A No.

ROUGH DRAFT TRANSCRIPT

001404

1 Q They just handed you the stuff?

2 A Yeah, they gave me my paperwork.

3 Q Okay. And when you get nervous your memory's not to  
4 good, right?

5 A When I get nervous my memory's not to good. It ain't  
6 good enough to remember, I'll put it that way.

7 Q Yeah. Do you remember what time it is that the noise  
8 woke you up?

9 A It was between 9:00 and 10:00.

10 Q Okay, if you previously testified it was at 10:00  
11 o'clock, does that sound accurate?

12 A Somewhere right in there, yeah.

13 Q Okay. You'd never been inside my client's apartment  
14 before, had you?

15 A Before he moved I was -- I -- (indiscernible) there.

16 Q Well, when he was living there you hadn't been  
17 inside?

18 A I -- no.

19 Q Okay --

20 A I had no cause to go up there.

21 Q Okay. Had you seen my client outside before?

22 A Yes, several times.

23 Q And had you seen him with Victoria Whitmarsh outside  
24 before?

25 A Coming up, like I said, back there working.

1 Q Okay, were --

2 A Hello and good-bye.

3 Q -- were they up there drinking sometimes?

4 A I don't know. Like I say, I don't go in their  
5 apartment, I don't know what they was doing.

6 Q No, up on the balcony?

7 A I ain't -- I don't -- I don't think -- I don't know.  
8 I don't know.

9 Q If you had previously testified that they were  
10 drinking together on the balcony, does that sound accurate?

11 A No.

12 Q Would it help you remember if you look at your  
13 testimony? Would that help you remember to see what you  
14 testified to?

15 A All right.

16 MS. PALM: May I approach?

17 THE COURT: Yes.

18 MS. GRAHAM: Can you --

19 MS. PALM: Page 223.

20 MS. GRAHAM: Thank you.

21 BY MS. PALM:

22 Q Here you go sir, if you could just look at this part  
23 of the question. See (indiscernible)?

24 A Yeah, I see it.

25 Q Okay, so when you were asked, had you seen him

ROUGH DRAFT TRANSCRIPT

001406

1 outside -- outside --

2 A Well --

3 Q -- their apartment drinking?

4 A -- if -- if they was drinking -- I don't if it was --  
5 what -- what they was drinking. If I said they was drinking,  
6 yeah, I don't know if it was beer or what, I don't -- I don't  
7 know.

8 Q Okay, but you saw them sitting outside drinking  
9 before?

10 A I seen them sitting outside. I don't know what they  
11 were doing.

12 Q Okay. So a noise wakes you up about 10:00 o'clock,  
13 and then I believe your testimony was that you got a broom?

14 A Yeah.

15 Q You testified that you got the broom?

16 A Well see, let me tell you something. They're not the  
17 only one that I had to do this to to -- lots of people stayed  
18 above me, I have to, you know, getting my little broom handle  
19 and making them kind of quiet it up.

20 Q Okay, cause those walls are pretty thin there, aren't  
21 they?

22 A Yes.

23 Q And the floors are pretty thin?

24 A Yes.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

001407

1           A     And -- and seemed like the landlord put all the  
2 parties above me.

3           Q     If you -- if you had testified before that you went  
4 up about 15 minutes after you woke up, does that sound right?

5           A     Yes --

6           Q     You were --

7           A     -- the time, it is -- I don't know about what time it  
8 -- you know, how long it took me (indiscernible) but I went up  
9 there after -- after a little while, you know.

10          Q     And when you decided to go up there was it because  
11 the noise that had been kind of a little steady all the sudden  
12 got real loud?

13          A     It was a steady noise, it -- it was -- you know, it  
14 was just continuous noise --

15          Q     Okay.

16          A     -- off and on.

17          Q     But was there like a louder burst of noise right  
18 before you go out that made you go, I'm going up there?

19          A     Could have been.

20          Q     Okay. Do you know once you got up there how long do  
21 you think you were inside my client's apartment?

22          A     Not long, because I'm going to stand around no --  
23 when I see violence I ain't going to stand there to long.

24          Q     Okay, can you say a minute, less?

25          A     A couple of minutes maybe --

ROUGH DRAFT TRANSCRIPT

001408



1 Q Okay.

2 A -- three, four minutes, I don't know. Might not have  
3 been that long.

4 Q And you never heard voices or yelling just the --

5 A No, just the noise.

6 Q Okay, just the stompy noise? If you testified before  
7 that your wife used the broom and you didn't do anything, is  
8 that wrong?

9 A She might have while I was asleep, I don't know what  
10 she did when I was asleep --

11 Q Okay, but --

12 A -- because -- because when I woke up she told it was  
13 -- it's -- it's been going on -- she -- you know, for a minute.

14 Q Okay, but if you testified that you didn't use the  
15 broom, is that wrong?

16 A I did.

17 Q Okay. Do you recall testifying you didn't use the  
18 broom?

19 A No, didn't tell you anything about, I didn't use it,  
20 I told you I did.

21 Q Okay, if I show you a copy of the transcript of your  
22 testimony --

23 A Yeah, show it to me.

24 Q -- and would you like to see it?

25 A Yeah.

ROUGH DRAFT TRANSCRIPT

001409

1 MS. PALM: May I approach?

2 THE COURT: Yes.

3 MS. GRAHAM: Can you --

4 MS. PALM: It's on page 207.

5 MS. GRAHAM: I'm sorry, what -- what transcript? I

6 -- I --

7 MS. PALM: The previous preceding transcript.

8 MS. GRAHAM: And I don't see a page 207 --

9 MR. LALLI: Can we see it?

10 MS. GRAHAM: You need to -- can we see that?

11 (Off-record bench conference)

12 MR. LALLI: Thanks, Trish.

13 MS. PALM: Um'hm.

14 BY MS. PALM:

15 Q Sir, if you would look at your transcript, these  
16 lines?

17 A Um-hum.

18 Q Talking about the (indiscernible). Can you see what  
19 that says?

20 A Yes, I see what it said.

21 Q Okay, so did you say that?

22 A I did not say that.

23 Q Okay, so the transcript's wrong?

24 A It's got to be, because I was the one that took my  
25 broom -- that's what made me go up there, when I hit the

ROUGH DRAFT TRANSCRIPT

001410

1 ceiling with my broom he would -- noise continued so I went --  
2 I went on upstairs, that's what I did.

3 Q So if the transcript says that you said, I didn't do  
4 anything, your wife did it, the transcript's wrong?

5 A I guess it is, because I took my broom handle and hit  
6 the ceiling myself and that what I said when I was in here two  
7 years ago.

8 Q Okay. So when you got upstairs it would have been  
9 about probably 10:15?

10 A Probably so. Like I said I -- I'm at a loss with  
11 time.

12 Q Okay, I'm just trying to narrow it down.

13 A Yeah.

14 Q And then you're up there for just maybe a minute,  
15 two --

16 A A few minutes.

17 Q -- minutes. Okay, and then you come downstairs and  
18 you're yelling across the courtyard?

19 A Somebody call the police or something --

20 Q Okay, and -- and you -- you run over to Todd  
21 Armbruster's apartment at that point?

22 A I was headed over there.

23 Q Okay.

24 A And then he came out.

25 Q He comes out because he hears you yelling?

ROUGH DRAFT TRANSCRIPT

001411

1 A Yeah.

2 Q All right, and then do you immediately go back  
3 upstairs, back into Brian's apartment?

4 A Well, after I told him what was going on then we went  
5 back up there.

6 Q Okay, how long do you think it took you to tell him  
7 what was going on?

8 A A few minutes. As we walking towards the  
9 apartments --

10 Q Okay.

11 A -- I'm telling him --

12 Q Okay.

13 A -- what's going on.

14 Q And it's not very far from my client's apartment  
15 to --

16 A No, we was right about the swimming pool.

17 Q Okay.

18 MS. PALM: Court's indulgence.

19 BY MS. PALM:

20 Q Those apartments are laid out -- it's like a little  
21 -- a little --

22 A Square, little section.

23 Q -- square with a courtyard in the middle?

24 A Yes.

25 Q Okay, so it's just a run across a short little

1 courtyard to --

2 A Yes, it is.

3 Q -- Todd's apartment?

4 A Yes.

5 Q Okay, so you're -- you meet with and you -- you talk  
6 and a couple minutes and you're walking back upstairs?

7 A Yes.

8 Q Okay, and you weren't going back upstairs to do  
9 anything other than just show Todd what was going on?

10 A Wasn't nothing to do, just -- I'm just  
11 (indiscernible) show him what I see.

12 Q Okay.

13 A Was -- what had happened up here.

14 Q Okay, so you're not going in there trying to give --  
15 give aide to the woman, you're just trying to show Todd what's  
16 going on?

17 A What's going on.

18 Q Okay. And you never saw that apparent knife in my  
19 client's hands, right?

20 A No.

21 Q And --

22 A There was --

23 Q -- you never saw him with a weapon, right?

24 A No.

25 Q And the whole time you see him -- the first time you

ROUGH DRAFT TRANSCRIPT

001413

1 go up he's basically trying to pick her up off the floor?

2 A Holding her.

3 Q Okay, has he got -- is he standing over her and  
4 grabbing her around the waist, or?

5 A He's on the floor with her --

6 Q Okay.

7 A -- you know, holding her.

8 Q Trying to pick her up?

9 A I guess.

10 Q Okay, from what part of her body is --?

11 A Her legs, like -- well, a body like, you know, just  
12 holding her.

13 Q Okay, holding her in his arms?

14 A Yes.

15 Q And he's on the floor --

16 A Saying -- rocking like, baby don't do this, wake up,  
17 don't do it -- do this to me.

18 Q Okay.

19 A When you see stuff like that you can't --

20 THE COURT: Excuse me, sir, hang on --

21 THE WITNESS: Oh, I'm sorry.

22 THE COURT: -- wait for the next question.

23 THE WITNESS: All right.

24 BY MS. PALM:

25 Q That's pretty stressful to see something like that,

1 right?

2 A Yes, that was I was trying to tell you.

3 Q Yeah. You -- you yourself never heard a female voice  
4 during the entire incident, right?

5 A No, I didn't.

6 Q Okay, and when you come up stairs and my client's  
7 holding Victoria and saying that to her, does she appear to be  
8 unconscious?

9 A Yes.

10 Q Okay --

11 A She wouldn't say nothing.

12 Q Okay, is -- is her -- is her body kind of flopping  
13 back or is she --?

14 A Yeah, you know, she just --

15 Q Okay.

16 A - loose.

17 Q So she's not moaning?

18 A No, she ain't saying nothing.

19 Q Okay. And you were kind of in shock when you ran  
20 out, right?

21 A Yes, I was. Because I have never seen nothing like  
22 before in my life.

23 Q Okay. And when you're previously -- previously asked  
24 to describe the look on my client's face would you agree when  
25 you said it was shocked look?

1 A Yes.

2 Q Yeah. Okay. And my client didn't try and fight you  
3 while you were up there, did he?

4 A No, no, he was cool.

5 Q And he didn't try and keep you out of there, right?

6 A He was cool.

7 Q Okay, in fact he's trying to get you to come in  
8 right, come get her?

9 A Yeah, it was like he didn't know what was -- he  
10 didn't know what was going on or something, I don't know.

11 Q Okay, did he seem like he was pretty intoxicated to  
12 you or you're -- you were you there long enough to tell?

13 A I wasn't there long enough to tell.

14 Q Okay, and you didn't remember if the lights were on  
15 or off, did you?

16 A No.

17 Q Okay, in the -- in that bedroom I'm talking about,  
18 you couldn't remember?

19 A Can't remember.

20 Q Okay.

21 A I don't -- I don't -- I don't know.

22 Q And how long do you think that you and Todd were in  
23 the room with him?

24 A Just a few minutes.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

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1           A     Just so he could see what was going on and then he  
2 told him, you get out, so we left.

3           Q     Okay. So, you and Todd went directly there from when  
4 you met up with him, you went straight up the Brian's  
5 apartment?

6           A     Yes.

7           Q     And then you were in the apartment maybe --

8           A     A few minutes.

9           Q     -- a couple minutes?

10          A     A couple of minutes, yeah.

11          Q     Okay, and then by the time that you come back outside  
12 the apartment the police are already arriving?

13          A     No, when we came back down we were down there for a  
14 minute and then the police come and tell everybody to go back  
15 to their apartments.

16          Q     Okay, how long do you think you were down there  
17 before the police started coming?

18          A     I don't know.

19          Q     Do you think it was five minutes or ten minutes or?

20          A     Like I say, I don't know.

21                MS. PALM: Court's indulgence. Thank you, Mr.  
22 Toliver.

23                THE WITNESS: Thank you.

24                MS. PALM: No more questions.

25                THE COURT: Any redirect?

ROUGH DRAFT TRANSCRIPT

001417

1 MS. GRAHAM: Just briefly.

2 REDIRECT EXAMINATION

3 BY MS. GRAHAM:

4 Q When you indicated he was kind of -- he wasn't too  
5 shocked to tell you to get the hell out of there was he?

6 A (Indiscernible).

7 Q He was aware of your presence in the room?

8 A He was aware of my?

9 Q He was aware of your presence in the room?

10 A Yeah, he told me -- he invited me in.

11 Q Okay. And do you recall in a previous testimony that  
12 you indicated that he had a mad look?

13 A Yes.

14 Q And you were asked if it was shocked, and you said  
15 no, it was a crazy look, scary?

16 A Yeah, a scary look, yeah.

17 Q Okay.

18 MS. GRAHAM: Court's indulgence. Pass the witness.

19 THE COURT: Any recross?

20 RECROSS-EXAMINATION

21 BY MS. PALM:

22 Q Mr. Toliver do you -- do you recall being asked to  
23 describe the look and saying it was a shocked look?

24 A Yes.

25 Q Thank you.

1 THE COURT: Any questions from any of the jurors? We  
2 have no questions. Thank you Mr. Toliver for your testimony,  
3 you are excused.

4 THE WITNESS: Thank you very much, sir.

5 THE COURT: Next witness or -- we're going to call a  
6 witness out of order; is that correct?

7 MR. LALLI: Yes Your Honor.

8 MS. GRAHAM: That's correct.

9 THE COURT: All right. This would be a witness for  
10 the defense then.

11 MS. PALM: And that would be Dr. Grey.

12 THE MARSHAL: And doctor, if you'll remain standing,  
13 please raise your right hand and face the clerk. If you'll  
14 remain standing please, and (indiscernible).

15 DR. TODD CAMERON GREY, DEFENDANT'S WITNESS, SWORN

16 THE MARSHAL: Have a seat, please.

17 THE WITNESS: Pardon me?

18 THE MARSHAL: State and spell your name for the  
19 record.

20 THE WITNESS: Okay. Todd Cameron Grey, G-R-E-Y.

21 THE COURT: Go ahead counsel, I'm sorry.

22 MS. PALM: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MS. PALM:

25 Q Good afternoon --

ROUGH DRAFT TRANSCRIPT

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1 A Good afternoon.

2 Q -- Dr. Grey. Could you please tell the jury how  
3 you're employed?

4 A I'm the Chief Medical Examiner for the State of Utah.

5 Q And how long have you been so employed?

6 A I've been the Chief Medical Examiner since 1988. I  
7 came to Utah in 1986 as an Assistant Medical Examiner.

8 Q And it -- for the State of Utah that's means you're  
9 the government medical examiner?

10 A Uh-huh.

11 Q Okay. And what's your role as the Chief Medical  
12 Examiner?

13 A I'm the Chief Administrative Officer for the death  
14 investigation system in Utah, and I'm a forensic pathologist  
15 and perform autopsies and examinations and make rulings about  
16 how people came to their death.

17 Q What's your medical education?

18 A I received my medical degree from Dartmouth Medical  
19 School in 1980. I did training in anatomic pathology at the  
20 University of California in San Diego, and was trained as a  
21 forensic pathologist at the Dade County Medical Examiners  
22 Office in Miami, Florida. And I am board certified in both  
23 anatomic and forensic pathology.

24 Q And have then had training specific to the cause and  
25 manner of death?

ROUGH DRAFT TRANSCRIPT

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1 A Yes, that would be a part -- both part of training as  
2 a -- general pathologist and as a forensic pathologist.

3 Q Are you the member of any professional groups?

4 A Yes.

5 Q Which groups?

6 A I am a member of the National Association of Medical  
7 Examiners and a member of the American Academy of Forensic  
8 Sciences. I'm also a member of Intermountain Pathology  
9 Society.

10 Q And your work experience before the medical examiners  
11 office?

12 A Before I went to the Utah medical examiners office?

13 Q Yes.

14 A I came to Utah directly out of my fellowship in  
15 Florida.

16 Q Okay.

17 A I had worked between by residency and my training as  
18 a forensic pathologist as a general hospital pathologist in a  
19 small hospital in Gallup, New Mexico.

20 Q As -- aside from your work experience as a  
21 pathologist, do you also teach?

22 A Yes.

23 Q What do you teach?

24 A I'm a associate clinical professor of pathology at  
25 the University of Utah Medical School and so I teach the

ROUGH DRAFT TRANSCRIPT

001421

1 medical students about pathology. I also teach doctors in  
2 training in pathology about forensics and the investigation of  
3 sudden and unexpected death.

4 Q Have you had any publications in the area?

5 A Yes.

6 Q Do you recall how many?

7 A No. A few.

8 Q And did you talk about your licensure here already?

9 A No, I am licensed to practice medicine in Utah. I  
10 had previously been licensed in New Mexico and California.

11 Q And have you testified in a Court of Law before?

12 A Yes, I have.

13 Q Do know -- know how many times?

14 A Several hundred.

15 Q Okay, in what jurisdictions?

16 A Mostly in Utah, but I've also testified in -- let's  
17 see, Wyoming, Idaho, California, Nevada, New Mexico and  
18 Florida, both in state and federal Court.

19 Q And -- have you testified as an expert in forensic  
20 pathology?

21 A Yes.

22 Q In all of those places?

23 A Yes.

24 Q Do you know how many times you've testified or --

25 A No just --

ROUGH DRAFT TRANSCRIPT

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1 Q -- did I ask you that?

2 A -- several hundred probably.

3 Q Okay. Well, you've testified for the government?

4 A Most of my testify -- most of the times I'm called as  
5 a witness, I'm called by the prosecution.

6 Q Okay, occasionally you're retained by the defense in  
7 a case?

8 A Yes.

9 Q And did I retain you in this case?

10 A Yes, you did.

11 Q I forgot to ask you how many autopsies you've  
12 actually performed?

13 A I think I'm up around 6,900 autopsies, and about  
14 3,000 non autopsy examinations so were getting close to about  
15 10,000 post mortem exams.

16 Q Did I ask you review records and photographs of the  
17 autopsy conducted on -- of the body of Victoria Whitmarsh?

18 A Yes.

19 Q And did you review those?

20 A Yes, I did.

21 MS. PALM: Your Honor, may I approach the witness?

22 THE COURT: Yes.

23 MS. PALM: And I'm showing the doctor had a series of  
24 photographs.

25 BY MS. PALM:

ROUGH DRAFT TRANSCRIPT

001423

1 Q Doctor, did you recognize those photographs?

2 A Yes, I did.

3 Q Were those part of the photographs that you reviewed?

4 A Those appear to be copyies of photographs which were  
5 provided to me as part of my review of what happened in this  
6 case.

7 MS. PALM: Your Honor, I would move to admit the  
8 photographs and these are the Defendant's O through X.

9 THE COURT: Any objection?

10 MR. LALLI: Can just have one more look at them?  
11 Okay. Thank you.

12 MS. PALM: Um'hm.

13 THE COURT: Any objection by the State?

14 MR. LALLI: No, Your Honor, no objection.

15 THE COURT: All right, they'll be admitted.

16 (Defendant's Exhibits O through F)

17 MS. PALM: Thank you.

18 BY MS. PALM:

19 Q And did you review the autopsy report of Dr.  
20 Benjamin in this case?

21 A Yes.

22 Q And did you review the toxicology report attached to  
23 that?

24 A Yes.

25 Q And are there -- are the results of the toxicology

ROUGH DRAFT TRANSCRIPT

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1 tests part of the information that used to determine cause and  
2 manner of death in any case?

3 A That would be one thing that I and any other forensic  
4 pathologist would use when trying to understand how somebody  
5 came to their death, yes.

6 Q And did I ask you to specifically consider the wound  
7 to Ms. Whitmarsh's side, the -- the stab wound?

8 A Yes.

9 Q Were you able to form an opinion on how quickly Ms.  
10 Whitmarsh would have died when she sustained that wound?

11 A Not with any certitude, other than an opinion that  
12 this would not be a very rapid or immediately incapacitating  
13 wound.

14 Q Would -- would -- would Ms. Whitmarsh of been able to  
15 have performed purposeful activity?

16 A Certainly, after the -- the stab wound in her side  
17 she had still most likely be conscious and able to engage in  
18 purposeful activity.

19 Q Would that -- would the time that she could do that  
20 vary depending on how active she was?

21 A Yes.

22 Q And the more active she was then what?

23 A It would probably make that period shorter because it  
24 would enhance blood loss.

25 Q Did I ask you to consider as to the manner of death

ROUGH DRAFT TRANSCRIPT

001425

1 whether an accidental injury could be ruled out?

2 A Yes.

3 Q And giving you the hypothetical of a struggle over a  
4 knife where she's holding the knife in her right hand and there  
5 a struggle, and a fall onto the bed, under those circumstances  
6 could you rule out accidental injury just from looking at the  
7 injuries to the body?

8 A In the hypothetical proposed, the physical findings  
9 would be consistent with that hypothetical situation.

10 Q And what factors do you consider in that?

11 A A couple of things. First, the location of the wound  
12 in that if Ms. Whitmarsh was holding the knife and was  
13 struggling with another individual, that could result in a  
14 wound in that location.

15 The second factor is that in addition to the stab  
16 wound itself where the knife punctured the skin and went  
17 inside, there was below that a small puncture wound which would  
18 -- could be consistent with the tip of the knife striking the  
19 skin but without actually perforating the skin, again  
20 consistent with a struggle over the weapon.

21 Q And showing you defense exhibit Q --

22 A Um'h'm.

23 Q -- could you show the jury where that puncture wound  
24 is?

25 A If I touch it or -- is it going to be visible?

ROUGH DRAFT TRANSCRIPT

001426

1 Q If you -- if you touch the screen it should.

2 A Okay.

3 Q You could draw a circle around it if -- if that's  
4 convenient.

5 A So, this is the stab wound itself. And then below  
6 the stab wound you can see a roughly triangular-shaped defect  
7 in the skin, which would be consistent with what's called a  
8 hesitation mark, or a incomplete perforation of the skin.

9 Q Okay, and you sometimes could see that with a  
10 struggle with a knife?

11 A You can see that in -- in situations where a person  
12 is fighting over the -- the opponent, yes.

13 Q Did I ask you to consider the injury to Ms.  
14 Whitmarsh's right knuckle?

15 A Yes.

16 Q What kind of injury is that?

17 A The autopsy report describes and the photographs show  
18 that there was bruising over the two proximal or the knuckles  
19 closest to the back of the hand, those were contusions or blunt  
20 force injuries.

21 Q And would those injuries be consistent with somebody  
22 grabbing onto her knuckle during a struggle?

23 A That would be one possible way those injuries could  
24 be sustained, yes.

25 Q And did the depth of the injury factor at all into

1 your -- your answer to my question?

2 A We're now going back to the stab wound?

3 Q Yes, whether -- whether it could have been  
4 accidental.

5 A It was one thing that I considered, and I'd be happy  
6 to explain that if you want me to.

7 Q Could you please?

8 A The -- Dr. Benjamin's report describes that the wound  
9 went in about four and a half inches into the victim's liver. As  
10 part of the information I was given to review I also got a copy  
11 of the police report, and that's described, the knife was used,  
12 as being eight and a half inches. So that -- it would mean  
13 that the knife was only partially inserted, not fully inserted  
14 into the victim's body, and that again could be consistent with  
15 a, say, unintentional insertion of the blade.

16 Q And why is that?

17 A Because of -- well, I would think that given the  
18 location of the wound and what it went through, that if a  
19 person was really intending to stab the individual and use  
20 significant force that knife would have gone all the way in.

21 Q And -- and is that because there was nothing bony or  
22 hard to stop the knife from going in?

23 A There was nothing other than skin and muscle and  
24 liver.

25 Q Okay, and does the absence of any hilt mark indicate

1 anything?

2 A That would also confirm that, or support the idea  
3 that this knife was not inserted to its full depth with a  
4 significant amount of force.

5 Q And did I ask you to consider whether the injury  
6 could have been self-inflicted?

7 A Yes.

8 Q And were you able to make a determination as to that  
9 issue?

10 A I came to an opinion, yes.

11 Q And what was your opinion?

12 A It's not likely, but it's not impossible and I'd be  
13 happy to explain that answer.

14 Q Could you please explain it?

15 A Okay, the reason I say it's not likely is when people  
16 are trying to harm themselves or kill themselves with a knife,  
17 they usually will insert it in a location where they think it's  
18 going to do lethal damage and -- usually fairly quick lethal  
19 damage. People don't want to usually suffer, even if they do  
20 intend to die.

21 So they will go for neck, they will go for where they  
22 think their heart is, they may try to cut vessels in their  
23 extremities.

24 A self-inflicted stab wound of the right side isn't a  
25 typical location for a suicidal stab wound. Is it possible?

ROUGH DRAFT TRANSCRIPT

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1 Certainly. This is an area which would be accessible to the  
2 victim. It is not physically impossible that she could do  
3 that. And again, the presence of that small hesitation mark  
4 underneath the main stab wound may indicate that she was seeing  
5 what it felt like before the final lethal thrust. Those are  
6 possibilities.

7 Q Now, as a medical examiner when you're determining  
8 what happened to somebody you don't just confine your -- your  
9 analysis of the evidence to the body, do you?

10 A I couldn't make a determination just limiting myself  
11 to the body.

12 Q Okay. And so medical examiners usually look at  
13 things like police reports and other -- other information that  
14 comes to them about the circumstances?

15 A Yes, we try to weigh all of the information available  
16 to come to an accurate conclusion about how that person came to  
17 their death.

18 Q And if somebody had a history of suicide attempts,  
19 would that factor into your determination if you knew about it?

20 A Certainly, it would be one of the pieces of evidence  
21 that I would want to weigh and think about in coming to an  
22 ultimate conclusion.

23 Q And would you want to also know a history of self  
24 mutilation with knives?

25 A That would be another piece of useful information.

ROUGH DRAFT TRANSCRIPT

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1 Q And were -- were there marks on Ms. Whitmarsh's body  
2 that were consistent with self-mutilation?

3 A If I recall correctly she did have a number of linear  
4 scars, particularly I saw them on her right hand that could be  
5 consistent with that.

6 Q And showing you defense exhibit F, did I ask you to  
7 consider whether the injury to her left hand appeared to be  
8 fresh?

9 A Yes, you did.

10 Q And what was your determination --

11 MR. LALLI: I'm sorry counsel, I apologize. I didn't  
12 hear the question.

13 MS. PALM: Did -- I'm asking him about the injury to  
14 her left hand, showing him a photograph and asking if it  
15 appeared to be a fresh injury.

16 MR. LALLI: Thank you.

17 BY MS. PALM:

18 A And I -- my opinion was, no, that looks to be more of  
19 healing injury.

20 Q And can you explain why?

21 A This is a abrasion where the superficial layer of the  
22 skin has been scraped away. Usually, a fresh abrasion will  
23 have a relatively moist red brown color and appearance. In  
24 this case you see it's a duller red brown. And if you look  
25 very closely at the edges of the defect, you can see that there

1 are somewhat heaped and irregular tan gray margins, which  
2 indicates that's where the skin is beginning to try to grow  
3 over that area of daynudation.

4 Q Thank you. Can you explain to the jury how bruises  
5 develop?

6 A How do bruises form?

7 Q How do bruises form?

8 A Okay, a bruise or a contusion results when there is  
9 force applied to the body in a fashion or in -- which does not  
10 actually disrupt the skin. So usually it means that whether  
11 something has hit the body or the body has hit something else,  
12 it's not sharp and rough, it doesn't break the skin, but what  
13 it does is it crushes the underlying tissues. And so what  
14 happens is blood then leaks out and eventually you see the  
15 color of that blood underneath the intact skin, which gives it  
16 a -- the usual sort red-purple color that first appears with a  
17 bruise.

18 Q And how does the cirrhosis affect the bruising?

19 A Cirrhosis of the liver would affect a persons ability  
20 to clot blood, because some of the factors that -- or compounds  
21 that are involved in clotting blood are made in the liver. And  
22 if your liver is damaged, which is what cirrhosis is,  
23 essentially scaring of the liver, you would have a lower level  
24 of some of those clotting factors, and so you would tend to  
25 bleed both more expensively and more easily to damage.

ROUGH DRAFT TRANSCRIPT

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1 Q So, it -- it would take less pressure to cause a  
2 bruise?

3 A It might take less pressure, you might get a bigger  
4 bruise from a lesser impact than a person who does not have  
5 cirrhosis.

6 Q Does it -- does cirrhosis affect the way a bruise  
7 ages?

8 A Probably not per se, because the aging of bruises,  
9 the healing of bruises is much more a factor of local reactions  
10 by the cells, both at the area of injury and carried into the  
11 area of injury by the blood.

12 Q Does cirrhosis affect how quickly somebody might  
13 bleed from an injury or how much somebody might bleed from an  
14 injury?

15 A Yes, in that because the person doesn't have the  
16 clotting factors they would tend to bleed more extensively.

17 Q And does alcohol also affect how easily somebody  
18 might bruise?

19 A To a very minor degree, yes.

20 Q Okay, does it affect how quickly somebody might bleed  
21 or how much they might bleed?

22 A Again, to a minor degree. Acute alcohol intoxication  
23 could have some effect on that.

24 Q Did I ask you to assess the seriousness of the injury  
25 on the back of Ms. Whitmarsh's head?

ROUGH DRAFT TRANSCRIPT

001433

1 A Yes, you did.

2 Q And did you have an opinion on that injury?

3 A The injury was a bruise or a contusion of the back of  
4 the head. It was relatively small, I believe it was on the --  
5 about one and a quarter inches. It was not what I would  
6 consider a very severe injury.

7 Q Could that injury be consistent with falling backward  
8 and hitting your head on something?

9 A Yes.

10 Q Could it be consistent with falling on the floor and  
11 hitting your head on something?

12 A Yes.

13 Q Did I ask you to assess the injury on Ms.  
14 Whitmarsh's forehead?

15 A Yes.

16 Q And what was your opinion on that injury?

17 A Again, this was another area of bruising, or a  
18 contusion in the upper-central forehead region. It was not,  
19 again, in and of itself a severe or significant injury.

20 Q And showing you defense Exhibit C. Is that the  
21 bruise we're talking about?

22 A Yes.

23 Q Do you see that? Would that bruising be consistent  
24 with bumping your forehead against somebody else's?

25 A Like a head-butt? Yes.

1 Q Did I ask you to determine whether there was any  
2 physical -- any evidence of physical restraint on Ms.  
3 Whitmarsh's body?

4 A Yes.

5 Q Was there?

6 A Not specifically that I could say, oh, that's clearly  
7 a restraint injury.

8 Q Okay. And what injury are you talking about?

9 A Things that we would look for in restraint injuries  
10 are binding marks. So if the person has had their wrists or  
11 hands tied together, you can sometimes see marks that would be  
12 consistent with that. If I saw a mark that looked like the  
13 outlines of fingers and a thumb on the person's arm or wrist,  
14 that would be something I would point to and say, well that  
15 certainly would be consistent with restraint. And I did not  
16 see anything like that on -- in the photos that I examined.

17 Q Did I ask you to consider whether any of the injuries  
18 on Ms. Whitmarsh's bodies (sic) could have been caused by  
19 ordinary daily activities?

20 A Yes.

21 Q And which injuries were you able to form an opinion  
22 about?

23 A Well injuries on parts of the body that we normally  
24 can't expose and bang into things with are what I'm -- we're  
25 talking about. So if you have a bruise on your shin or your

1 knee, or a bruise on your foot, those are certainly the kinds  
2 of injuries that we all can get in normal daily activity.

3 Potential for those kinds of injuries, if you bang  
4 your elbow, you might see something on your elbow or lower arm.  
5 Areas which are more commonly exposed to impacts with our  
6 environment certainly could be considered accidental, as  
7 opposed to inflicted.

8 Q And is there a part of the body those injuries are  
9 more likely to be on?

10 A As I say, usually lower extremities are the most  
11 common location. You may sometimes see them on the upper  
12 extremities.

13 Q Doctor, can you rule out whether any of the bruises  
14 were sustained after a stabbing, but before succumbing to  
15 death?

16 A No.

17 Q Could any of the bruises -- can you rule out that any  
18 of the bruises were caused by bumping into the body after she  
19 had received the stab wound?

20 A No. Until she has lost blood pressure, no longer has  
21 a beating heart, she still could bruise if there is an impact.

22 Q So if somebody bumped into her, she could have  
23 sustained a bruise?

24 A After the stabbing? Yes, that's possible.

25 Q Okay. Or if somebody were grabbing her to lift her

1 up, that could have bruised her?

2 A If it was done forcefully enough, yes.

3 Q And did I ask you to assess the condition of Ms.  
4 Whitmarsh's liver?

5 A Yes.

6 Q And did you have an opinion of how healthy or  
7 unhealthy her liver was?

8 A Yes, I did.

9 Q And what is it?

10 A The photographs, as well as the autopsy report,  
11 documents that Ms. Whitmarsh had cirrhosis of the liver. That  
12 is a condition in which you have lost liver cells, and they are  
13 replaced by scar tissue. And usually it will produce a pattern  
14 or appearance to the liver that looks like the outside of a  
15 basketball, a very fine, nodular pattern. And she clearly had  
16 that condition.

17 Q How severe was her condition?

18 A From the pictures I saw, I would describe it as  
19 moderate to severe cirrhosis.

20 Q Okay. Could you determine how long she might have  
21 lived a natural life?

22 A No. Clearly with that liver, she is at risk for  
23 death. And unless she got a liver transplant, I would be  
24 surprised if she'd lived more than a number of years.

25 Q And would alcohol use lessen her life span?

ROUGH DRAFT TRANSCRIPT

001437

1           A     Alcohol abuse or misuse certainly is a factor that  
2 can cause cirrhosis. And so if she continued to drink  
3 chronically, that would make her liver disease even worse.

4           Q     Doctor, is there any medical certainty with which  
5 bruises could be aged?

6           A     No, not really. I don't think so.

7           Q     Okay. Is that an area that's kind of fraught with  
8 air?

9           A     Yes.

10          Q     Can you explain why?

11          A     The -- we've all had the experience of suddenly  
12 noticing on our bodies, hey, I got a bruise, I don't even  
13 remember doing that. So first-off, how long it takes for a  
14 bruise to show up is variable. Sometimes they will show up  
15 very quickly, sometimes it may take some time before they show  
16 up.

17                 The general schema is bruises will first appear as a  
18 light red color, maybe even blue. They tend to darken over  
19 some period of time. And then as the body begins to break down  
20 the blood that's loose in the tissues, you'll start seeing  
21 color changes. They may go green, they may go brown, you may  
22 see a yellow tinge to them.

23                 All of those steps and changes can proceed at varying  
24 rates, depending on the health of the individual, where on the  
25 body the bruise is, how extensive the bruising is. So,

1 essentially what you're left with is you can say, yeah, we may  
2 have a hint that this is a bruise that looks like it's healing,  
3 or it's one that looks like it's still fresh.

4 But beyond that most general classification or  
5 categorization, it's really difficult to say, oh, I know this  
6 bruise has to be 15 hours, versus that bruise has to be 24  
7 hours-old. I can't do it, and I would be very suspect of  
8 somebody who claims they can.

9 Q Does bilirubin levels have anything to do with the  
10 aging of bruising?

11 A Bilirubin levels -- if you are a person who is  
12 jaundiced and has high bilirubin levels, you may see that  
13 change in red-purple to green, or yellow-brown more fast --  
14 more quickly. That's possible. But again, it would be another  
15 factor that confuses and brings into question, how long has  
16 that bruise been there.

17 Q And does cirrhosis affect that whole determination  
18 also?

19 A In terms of the development of the bruise, the  
20 possibility of re-bleeding into the area, making the color  
21 changes more confusing, yes, cirrhosis could play a role.

22 Q And Doctor, have you performed autopsies on people  
23 who had beating deaths -- or beatings that ended in death?

24 A That have been beaten to death, yes.

25 Q Yes. What kind of condition would you expect to see

1 when that happens?

2 A In those kinds of cases, those kinds of situations  
3 where blunt force trauma, basically bruises, lacerations,  
4 abrasions are the main type of injury, they usually are very  
5 extensive. So you'll see extensive bruising of the face,  
6 extensive bruising of the body, swelling. You may see  
7 lacerations of the lips because they've been jammed against the  
8 teeth. They're very ugly kinds of deaths.

9 Q And was Ms. Whitmarsh's body consistent with that  
10 kind of beating?

11 A No.

12 Q And were the injuries on Ms. Whitmarsh's body  
13 consistent with a beating that was fairly constant for an hour?

14 A No.

15 Q Would -- can you determine whether any of the  
16 injuries she had would have caused her to lose consciousness,  
17 aside from the stabbing injury?

18 A Well first-off, the stabbing injury in and of itself  
19 immediately would not cause a loss of consciousness. The loss  
20 of blood, shock, hemorrhage, that's what would ultimately lead  
21 to a loss of consciousness.

22 I've -- in the autopsy report, there was certainly  
23 nothing, other than the two small bruises of the forehead and  
24 the back of the head, that would indicate she'd sustained  
25 significant head trauma. There's certainly nothing described



1 internally, like damage to the brain, or bleeding inside of the  
2 skull that would make me think that she'd sustained an injury  
3 that would make her lose consciousness.

4 Q Thank you, Doctor.

5 MS. PALM: Pass the witness.

6 CROSS-EXAMINATION

7 BY MR. LALLI:

8 Q Dr. Grey, I've got a number of questions. And  
9 unfortunately, I'm not sure that I'm going to go in any  
10 particular order. But you spoke somewhat about attempting to  
11 date bruising?

12 A Um-hum.

13 Q Is that correct? Is that yes, for the record?

14 A Yes.

15 Q Okay. And if Dr. Benjamin had said there's really no  
16 fool-proof way to discern the age of a bruise by looking at  
17 it's color, you would agree with that?

18 A Yes.

19 Q If Dr. Benjamin said that bruising manifests itself  
20 in a change of colors in a discernible order, you would agree  
21 with that?

22 A Generally, yes.

23 Q So we can look at the color of a bruise, and you  
24 might be able to tell where in the healing process it is,  
25 whether it is green, or red, or yellow. But you can't tell if

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1 that healing process has been for a day, or for a week, or how  
2 long it's been with any certainty; you would agree with that?

3 A I would agree with that statement.

4 Q Okay.

5 A Yes.

6 Q Okay. So if Dr. Benjamin -- and let me predicate  
7 that question. Do you believe -- you've done a number of  
8 autopsies. Do you believe that opinions based upon reviewing  
9 secondary information are every bit as good as a person who  
10 actually saw the body, felt the body, examined the body?

11 A That's way too broad of a question to answer. So if  
12 you have a specific issue, I'd be happy to address that. I  
13 mean, obviously --

14 Q Do you not understand the question?

15 A No, I understood the question.

16 Q Okay.

17 A But it is such an incredibly broad question, I don't  
18 think I can answer that as a yes or no.

19 Q Okay. As a general proposition, let's talk about  
20 bruising, for instance.

21 A Um-hum.

22 Q For a medical examiner to reach some opinions about  
23 the age of a bruise based upon color --

24 A Um-hum.

25 Q -- for example, is it better to actually see it,

1 versus reviewing photographs?

2 A Yes.

3 Q Okay. And in this case, obviously you weren't  
4 present at the autopsy. You reviewed photographs of it, I take  
5 it?

6 A I am dependent upon the written exam -- the written  
7 descriptions, and the photographic documentation.

8 Q So in terms of just using this very narrow example as  
9 one, to discern the age of a bruise -- and I don't mean how  
10 long it's been there, but in what process of healing it was in,  
11 Dr. Benjamin would have been in a better position having  
12 actually seen it, than you for instance looking at photographs  
13 of it; would you agree with that?

14 A Yes.

15 Q Okay.

16 A I would.

17 Q And I'm not saying you're not in a position to render  
18 any opinion. Certainly you would be, correct? About cause,  
19 manner of death, things of that nature from reviewing photos  
20 and autopsy reports?

21 A Yes.

22 Q You have something to offer?

23 A I hope so.

24 Q Okay. Are you familiar with -- well let me ask you  
25 this. When you autopsy a patient, and you see bruising, do you

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1 sever the bruise to look at whether there is evidence of  
2 hemorrhage in the subcutaneous tissue?

3 A Will I make an incision and look at the deep tissues,  
4 yes.

5 Q Why do you do that?

6 A Why?

7 Q Yes.

8 A To see how extensive that injury is.

9 Q Can you get some sense of whether -- how old the  
10 injury is from that?

11 A Yes.

12 Q All right. So it's good to tell the extent of the  
13 injury, and the age of the injury?

14 A It may help you in, again, putting that bruise  
15 somewhere in the continuum, whether you know exactly how old it  
16 is or not.

17 Q All right. So does hemorrhage in the subcutaneous  
18 tissue generally suggest that a bruise is fresh or newer?

19 A No, not in and of itself.

20 Q Okay. But is it one factor that leads -- points in  
21 that direction?

22 A Well, the presence or absence of deeper hemorrhage  
23 probably isn't that germane to the question of how old is the  
24 bruise. But it certainly does tell you how severe the injury  
25 was, and how that hemorrhage looks may help you in assessing

1 where on the healing continuum it might be.

2 Q Okay. Dr. Benjamin used terminology -- the  
3 terminology of acute versus chronic.

4 A Um-hum.

5 Q What do -- let's start with acute. What does that  
6 mean to you?

7 A When I describe an injury as acute, it means that  
8 it's appearance suggests that it has happened within a short  
9 enough period of time before death that there is no evidence  
10 that the body has been able to amount a healing response.  
11 That's what I -- that's how I will use the term acute when I'm  
12 describing injuries.

13 Q So acute to you means short?

14 A Short, recent --

15 Q In terms of time of death? Close to time of death?

16 A Relative to the time of death, yes.

17 Q Okay. And then, what does chronic mean?

18 A Chronic means that there is now -- there are now  
19 findings that suggest this injury has been there long enough so  
20 that the body has had a chance to begin to try to heal the  
21 damage.

22 Q Okay. Does hemorrhage in the subcutaneous tissue  
23 suggest that a bruise is acute, or is it one of the factors  
24 that would suggest that?

25 A No. Just in and of itself, the presence of

1 subcutaneous hemorrhage doesn't tell me acute versus chronic.

2 It's how that subcutaneous hemorrhage would look.

3 Q Okay. Well let me ask you this. What specifically  
4 did you review as part of the process in reviewing this case?

5 A Okay. The autopsy report prepared by Dr. Benjamin.  
6 The toxicology report that was part of that. The Clark County  
7 Coroner's Officer investigative report. A Las Vegas  
8 Metropolitan Police Department investigative report.

9 Transcripts of prior testimony. The photographs of both the  
10 victim and the suspect, and the scene of death.

11 Q Okay. Transcripts of testimony?

12 A Yes.

13 Q Whose?

14 A Pardon me?

15 Q Whose testimony?

16 A I read transcripts of Dr. Benjamin's testimony, of  
17 Mr. O'Keefe's prior testimony. Of a -- oh, I can't remember  
18 her name off the top of my head. Another physician who was  
19 testifying, I believe relating to the toxicology findings.

20 Q Okay. Did you ever review the testimony of a police  
21 officer by the name of Christopher Hutcherson?

22 A No.

23 Q Did you ever review the testimony of an individual by  
24 the name of Cheryl Morris?

25 A No.

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1 Q Okay. Who provided those materials to you?

2 A Ms. Palm.

3 Q The photos that you actually examined, were they  
4 photos that were taken by the actual coroner's office?

5 A I believe so, yes.

6 Q Let me ask you this. Did they have an identification  
7 tag on them?

8 A Yes.

9 MR. LALLI: If I could approach the witness, Your  
10 Honor.

11 THE COURT: Yes.

12 BY MR. LALLI:

13 Q So Doctor, if I showed you State's Exhibit number 81  
14 for example --

15 A Um-hum.

16 Q -- there appears to be an identification tag at the  
17 bottom of it?

18 A Yes.

19 Q You viewed photos bearing that tag?

20 A Yes.

21 Q Okay. Thank you. So you viewed the photos, as well  
22 as Dr. Benjamin's report, and those other items that you've  
23 described?

24 A Yes.

25 Q If Dr. Benjamin described the injury to the front of

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1 Victoria Whitmarsh's head as acute, would you agree with that?

2 A If she characterized it as acute, yes.

3 Q Okay. If she described the injury to the back of  
4 Victoria's head as acute, would you agree with that?

5 A Again, that characterization would be correct, yes.

6 Q Okay. In the middle of the back, there was bruising  
7 that she described as acute, would you agree with that?

8 A Again, that would be consistent with what I saw.  
9 Yes.

10 Q Okay. On the right side of the back, she described  
11 bruising as acute, would you agree with that?

12 A I believe there were two injuries there, one which  
13 had the description in the autopsy report as having some green  
14 color to it.

15 Q I'm not talking about that one.

16 A Oh, okay. There was one below --

17 Q I'm talking about the other one.

18 A -- that, which was described as red-purple in the  
19 report. And if she characterized that as acute, yes.

20 Q And above the left and right buttocks, she described  
21 a bruise as acute. Would you agree with that?

22 A I'm going to have -- if she characterized them as  
23 that, that would be probably consistent. I just can't quite  
24 remember those two individual injuries.

25 Q Let me show you a photo of it.



1 MR. LALLI: May I approach the witness, Your Honor?

2 THE COURT: Yes.

3 BY MR. LALLI:

4 Q Doctor, she was referring to the bruising just above  
5 the buttocks.

6 A Okay.

7 Q If she categorized those as acute, would you agree  
8 with that?

9 A It would be consistent with that, yes.

10 Q Okay. And your meaning of acute, like Dr.  
11 Benjamin's, means closer to time of death?

12 A Closer, yes.

13 Q If she described that as minutes or hours, would you  
14 agree with that?

15 A I would not quibble with that, no.

16 Q So you would agree with it?

17 A Yes.

18 Q All right. You testified about location of bruising  
19 for someone who suffers, for instance, from alcoholism. Do you  
20 remember those questions?

21 A Yes.

22 Q So --

23 A There were a series of questions about injuries, and  
24 whether alcoholics could experience injuries in certain  
25 locations, yes.

1 Q And I take it you have performed autopsies on folks  
2 who were chronic alcoholics?

3 A Yes.

4 Q And I would imagine it is your opinion that it would  
5 not be uncommon for those people to have bruising on, for  
6 example, the front of their legs, their knees, their shins,  
7 true?

8 A That's a fairly common finding, yes.

9 Q And that's from being so intoxicated that you run  
10 into things, and suffer bruising?

11 A It could be that you are intoxicated and stumbling,  
12 or unaware of your environment and running into things, yes.

13 Q Okay. Would you say that an injury or a bruise in  
14 the back of the head is one of those types of injuries?

15 A Not a more common type of injury, no.

16 Q So that is inconsistent with being a bruise as a  
17 result of being an alcoholic, and stumbling over something?

18 A No, I wouldn't say it's inconsistent. It's not a  
19 common -- a more common location.

20 Q Unusual?

21 A Can alcoholics fall down and hit the backs of their  
22 head? Certainly.

23 Q Okay. Would you say it would be unusual to attribute  
24 that injury to someone having stumbled over an object as a  
25 result of being intoxicated?

1 A Yes.

2 Q What about injuries to the back, bruising in the  
3 back? Is that something that you would --

4 A Again --

5 Q -- normally see on an alcoholic?

6 A Again, less common.

7 Q Okay. What about injuries to the back of the  
8 shoulder?

9 A Again, less common.

10 Q Injuries to the back of the arms?

11 A Possible, but less common.

12 Q Injuries to the buttocks?

13 A Again, possible, but less common.

14 Q Less common. And you could only really tell us about  
15 probabilities unless you actually see the injury itself, right?  
16 Or common or less common --

17 A Well actually, see the person sustaining the injury.

18 Q Right. Thank you. And you would agree that once  
19 someone is dead, their body doesn't bruise anymore?

20 A It's very hard to inflict a postmortem bruise. You  
21 can do it, but they generally tend to be smaller and less  
22 apparent, and take a lot more force to lead to bruising. So  
23 it's not impossible, but it's uncommon.

24 Q Very unlikely?

25 A Uncommon.

1           Q     And did I understand you to say that blood pressure  
2 was a factor in whether a person could bruise?

3           A     It certainly is a factor in that if their blood is  
4 under pressure, it will be pushed out into the tissues more  
5 readily than if there is no blood pressure.

6           Q     Let me ask you this question.  If someone were to --  
7 do you have a vein right under your chin here that is often  
8 checked to see if there is a pulse?

9           A     That would be an artery that you're checking.  But  
10 yes, the --

11          Q     Artery?

12          A     -- carotid artery.

13          Q     Thank you.  But it's not uncommon for somebody to  
14 feel here for an artery to see if there is a pulse?

15          A     That's one place to look.

16          Q     And is that pulse that they're feeling blood  
17 pressure?

18          A     Yes.

19          Q     Okay.  So if someone were to reach down and touch a  
20 person to ascertain whether they're alive or dead, and they  
21 feel this artery and there's absolutely nothing there, do you  
22 think it's unlikely that that person would be able to bruise at  
23 that point?

24          A     Much less likely.

25          Q     Okay.  You can't say impossible, but certainly you

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1 wouldn't expect for someone to suffer a bruise when they're in  
2 that condition?

3 A If a person is pulse-less without blood pressure, it  
4 would be less -- very unlikely that they would suffer a bruise.

5 Q Okay. You talked about Ms. Whitmarsh's cirrhotic  
6 liver?

7 A Um-hum.

8 Q And I guess you would agree with Dr. Benjamin that it  
9 affects the bruising on the body?

10 A Yes.

11 Q Would you also agree with Dr. Benjamin if she said  
12 that a cirrhotic liver does not in and of itself cause  
13 bruising?

14 A No. You --

15 Q So if I have a cirrhotic --

16 A Okay.

17 Q -- liver, I'm just not going to start bruising, am I?

18 A No. You're not spontaneously going to start bleeding  
19 into your tissues.

20 Q Okay.

21 A No.

22 Q If someone suffers a bruise, it's a result probably  
23 of some sort of blunt force trauma?

24 A Yes, some sort of force applied to the body.

25 Q And if a person is cirrhotic, we're going to see that

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1 better perhaps than in someone who's not, would you agree with  
2 that?

3 A Not specifically as asked, but I think I know what  
4 you're trying to ask. And if you want me to explain, I will.

5 Q Well, please do.

6 A Okay.

7 Q Help me out.

8 A Whether you see a bruise or not is a factor of a  
9 number of different things, how much force was (indiscernible),  
10 how deep the injury is, et cetera. A person who is cirrhotic  
11 though will tend to bruise more easily, and an area of damage  
12 may be more apparent or significant looking than in a  
13 non-cirrhotic.

14 Q Okay. So when we look at the photographs of  
15 Victoria's body at autopsy, and we see bruising throughout her  
16 body --

17 A Um-hum.

18 Q -- would you agree that each one of those bruises  
19 represents some form of blunt force trauma, or force upon her  
20 body?

21 A Yes.

22 Q Okay. Would you agree with Dr. Benjamin that the  
23 condition of Victoria's liver is not what killed her, or not  
24 what caused her death?

25 A No. It was a factor, but it was certainly not the

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1 cause of death.

2 Q She didn't die as a result of cirrhosis?

3 A No.

4 Q Would you agree with Dr. Benjamin that she died as a  
5 result of the stab wound?

6 A Yes.

7 Q And more particularly, exsanguination?

8 A A combination and external bleeding.

9 Q Okay.

10 A Exsanguination would mean external bleeding.

11 Q All right. You would agree she bled out, which was  
12 the cause of --

13 A She -- the mechanism of her death was hemorrhage and  
14 shock.

15 Q Dr. Benjamin found that there were no major blood  
16 vessels that were severed. And you would agree that that being  
17 the case, her death would not have been instantaneous?

18 A That is correct.

19 Q She was probably conscious before the stab wound, and  
20 probably conscious for a time after it?

21 A Yes.

22 Q All right. So if there was a woman who was in the  
23 downstairs apartment that said over the course of ten -- five  
24 or ten minutes, she heard crying, which eventually went into  
25 moaning, and then she did not hear anything, would that be one

1 accurate account of how long it took for Victoria Whitmarsh to  
2 die?

3 A Yes, it might be.

4 Q Okay. That's certainly consistent with this type of  
5 an injury?

6 A Yes.

7 Q All right. I think you were asked to look at an  
8 injury on a hand; is that correct?

9 A The right hand, or the left hand?

10 Q Well --

11 A There were two sets of hands injuries.

12 Q I'll show it to you, because I'm not good at that.

13 MR. LALLI: May I approach, Your Honor?

14 THE COURT: Yes.

15 BY MR. LALLI:

16 Q This hand.

17 A Okay.

18 Q All right, let me publish it so the jury can see it.  
19 And Doctor, I think you described that as a healing injury?

20 A I see features in there which makes me think this has  
21 been there for a bit of -- a little while, not -- that the body  
22 is trying to heal it.

23 Q Okay. Can you tell us how long?

24 A Probably at least a day. Because of, again, the fact  
25 that you have that heefing (phonetic) up at the edges of the

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1 wound, and the drying of the base. At least a day. Could it  
2 be older? Yes.

3 Q Now I'm going to show you something you probably  
4 haven't seen before.

5 MR. LALLI: May I approach?

6 THE COURT: Yes.

7 BY MR. LALLI:

8 Q Or perhaps you have. State's proposed Exhibit --  
9 what is that, 61?

10 A Um-hum.

11 Q What sort of an injury is that?

12 A This appears to be both a combination of abrasion and  
13 contusion.

14 Q Okay. What do you mean by abrasion?

15 A Abrasion means that you can see that the surface of  
16 the skin has been scraped and disrupted to some degree, fairly  
17 irregularly, more to the center and right, maybe more  
18 confluent in the injury on the left side.

19 Q Okay. Would -- have you ever heard the terminology a  
20 carpet burn?

21 A Yes.

22 Q Or rug burn? Is that injury consistent with a rug  
23 burn?

24 A Yes.

25 Q Okay. Did it appear fresh to you?

1 A Relatively fresh, yes.

2 Q Okay. Now Ms. Palm asked you some questions about  
3 whether suicide was possible in this case.

4 A Yes.

5 Q Do you recall those?

6 A I do.

7 Q And you acknowledged that for a medical examiner to  
8 make an opinion about -- well, let me back up. Suicide would  
9 be a manner of death versus a cause of death?

10 A Yes.

11 Q And suicide means, death inflicted by self?

12 A A self -- an intentionally -- self intentionally  
13 inflicted injury, yes.

14 Q Okay. And for medical examiners such as yourself,  
15 you need to look beyond the body to make that sort of a  
16 determination in some cases?

17 A Certainly.

18 Q So if for example you were to receive a decedent in  
19 your autopsy lab with a gunshot wound to the chest, and you  
20 knew nothing else about it.

21 A Um-hum.

22 Q Let's assume it was a close-range shot, either a  
23 contact wound or a close-range gunshot wound, that could be  
24 homicide, it could be suicide?

25 A It could be, certainly.

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1 Q And you would want to know things outside of the body  
2 to make that determination?

3 A Yes. We'd have to put that injury in some sort of  
4 context to understand what happened.

5 Q If -- in my example, the gunshot wound to the chest,  
6 if investigators had told you, we found a suicide note at the  
7 scene, and a handgun about a foot away from the decedent, would  
8 have any problem calling that a suicide?

9 A No.

10 Q Totally consistent with that?

11 A Certainly.

12 Q Would you in fact call that factual scenario a  
13 suicide?

14 A Yes.

15 Q Okay. And if you had that same scenario, the same  
16 facts of a decedent with a gunshot wound to the chest, and  
17 investigators told you that, we have an individual who was  
18 apprehended at the scene who admitted to us that he had killed  
19 that person, okay, would you have any problem calling that case  
20 a homicide?

21 A Probably not, on the facts presented.

22 Q All right. So you need to look outside?

23 A Of course.

24 Q Would a motive by suspect to kill the decedent be one  
25 of those factors you would look at in assessing whether

1 something were suicide or homicide?

2 A Yes.

3 Q If there was a motive to kill, would that make a  
4 death more likely a homicide? If someone -- if the suspect, or  
5 someone had a motive to kill that person, and was in proximity  
6 of that person when they were found deceased, does that make it  
7 sound more like a homicide?

8 A In the absence of any other evidence, certainly.

9 Q Yes, yes. Okay.

10 A In the absence of other evidence, certainly.

11 Q Absolutely. Okay. So for instance, if the  
12 defendant, Mr. O'Keefe, had said that he, wanted to kill the  
13 bitch, referring to Victoria Whitmarsh, would that help you  
14 rule out homicide?

15 A Rule it out? No.

16 Q Would that make a suicide less likely if you knew  
17 that and nothing else?

18 A That fact alone, with no other evidence?

19 Q Yes.

20 A Then you would begin to think, well, possibly  
21 homicide here.

22 Q Okay. Less likely suicide?

23 A Yes. In the absence of any other evidence.

24 Q Okay. But you weren't provided -- in coming to Court  
25 today, you weren't provided with any witness statements where

1 witnesses actually indicated that the defendant said those  
2 things?

3 A No, I don't recall that.

4 Q Okay. If immediately after Victoria's body was  
5 discovered, the defendant said, I didn't mean to hurt you, does  
6 that make this look less like a suicide, and more like a  
7 homicide?

8 A It raises that possibility, certainly.

9 Q Does it make it look more like homicide, and less  
10 like suicide?

11 A Again, in the absence of other evidence, certainly.

12 Q Okay. And if the defendant said, let's go do the ten  
13 years, an obvious reference to doing --

14 MS. PALM: Objection, Your Honor. Can we approach?

15 THE COURT: Yes.

16 (Off-record bench conference)

17 THE COURT: We need to take a mid-afternoon break.

18 Doctor, I'll give you a short break, because I know you have  
19 traveled (indiscernible).

20 THE WITNESS: I'm here until late.

21 THE COURT: Oh, okay. All right, good. Ladies and  
22 gentlemen, during this recess, it is your duty not to converse  
23 among yourselves, or with anyone else on any subject connected  
24 with this case. Or to read, watch or listen to any report of  
25 or commentary on the trial by any person connected with the

1 trial, or by any medium of information, including without  
2 limitation, newspaper, television, radio, or the internet. You  
3 are not to form or express an opinion on any subject connected  
4 with this case until this matter is submitted to you.

5 We'll see you back in approximately ten minutes.

6 (Outside the presence of the jury)

7 THE COURT: We're outside the presence of the jury  
8 panel. Actually Doctor, you can take your break as well. If  
9 you're going to use the facilities, we just ask you to go one  
10 floor up, one floor down, because the jury's using the restroom  
11 on this floor.

12 THE WITNESS: Okay. I'm okay.

13 THE COURT: There's an anteroom here. If you just  
14 want to sit there, that's fine. Like I said, if you need to  
15 use the restroom, one floor up, or one floor down.

16 THE WITNESS: Thanks.

17 THE COURT: Now let's deal with that issue. Okay.  
18 You had an objection Ms. Palm? Let's --

19 MS. PALM: My objection is my concern was he was  
20 going to say, it's an obvious reference to a sentence for  
21 murder, or something like that. And since the jury's not  
22 allowed to consider sentencing, and they're -- you know,  
23 they're not going to be told about the various sentences for  
24 different crimes, that would be my objection. And It's  
25 irrelevant and inappropriate.

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1 MR. LALLI: Well I wasn't going to do that. What I  
2 was going to say is it's just a reference to going to prison.

3 THE COURT: Why don't you rephrase your question,  
4 just a reference to going to prison.

5 MR. LALLI: That's what I intended to ask.

6 THE COURT: Okay.

7 MR. LALLI: So --

8 THE COURT: But I think you asked, ten years. I  
9 think you mentioned the word --

10 MS. PALM: Well, (indiscernible) --

11 MR. LALLI: That's -- well the evidence is going to  
12 be that he said, let's go do the ten years. That's what the  
13 defendant said.

14 MS. GRAHAM: It's right here. It's right here. It's  
15 Hutcherson.

16 THE COURT: Well I think at this point, let's hear  
17 that from the officer referring to the defendant's statement.  
18 But I think for the doctor, (indiscernible) to say that you  
19 know, the defendant referenced going to prison.

20 MR. LALLI: So you'd like me to ask --

21 MS. PALM: Well I --

22 MR. LALLI: -- in terms of -- in --

23 THE COURT: Well let's -- (indiscernible) --

24 MS. PALM: I would object to that too, because our  
25 take on that statement is that he was trying to say that he

1 wanted ten more years with her, and the officer misunderstood  
2 it. So it's not a reference to prison.

3 MS. GRAHAM: Right.

4 MS. PALM: So I think that that -- what it's a  
5 reference to is a fact determination for the jury to make, and  
6 it's inappropriate to be saying it's an obvious reference to  
7 prison time.

8 THE COURT: Do you have the exact statement there,  
9 Mr. Lalli?

10 MS. GRAHAM: I do, Judge. It's a note.

11 MR. LALLI: Well I --

12 MS. PALM: If he just said -- if he said, let's go do  
13 the ten years, does that make a --

14 MR. LALLI: Yeah.

15 MS. PALM: -- difference to you?

16 MR. LALLI: Let's go do the ten years.

17 THE COURT: So Ms. Palm, you're saying that means,  
18 let's stay together for ten years?

19 MS. PALM: Well, we believe that the officer misheard  
20 him.

21 MS. GRAHAM: It's --

22 MS. PALM: And he wasn't referring to prison time at  
23 all. But the fact that it's ten years -- let's go do the ten  
24 years is for the jury to determine what that means, if they  
25 believe it. For Mr. Lalli to characterize it as his opinion on

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1 that evidence, and that's improper, and it's improper to base  
2 the question on Mr. Lalli's opinion.

3 THE COURT: If that statement's --

4 MR. LALLI: It goes to weight, Your Honor --

5 THE COURT: Okay.

6 MR. LALLI: -- not to admissibility.

7 THE COURT: I'm just about to agree with you to a  
8 certain extent.

9 MR. LALLI: Okay.

10 THE COURT: If that statement is attributed to the  
11 defendant, you can confront that -- I mean, you can -- the  
12 doctor can -- you can use that statement to question the  
13 doctor. But don't refer to it -- I mean, you're not going to  
14 give your interpretation of what that means.

15 MR. LALLI: That's fine.

16 THE COURT: Okay? All right?

17 MS. PALM: Thank you.

18 MR. LALLI: Thank you, Your Honor.

19 THE COURT: Apparently the doctor's going can here  
20 until 8:00 o'clock at night, so (indiscernible).

21 MR. LALLI: Oh, good.

22 THE COURT: So --

23 (Court recessed at 3:10 p.m. until 3:28 p.m.)

24 (In the presence of the jury)

25 THE MARSHAL: You may be seated, ladies and

1 gentlemen.

2 (Pause in proceedings)

3 THE MARSHAL: Oh. You can go ahead and have a seat,  
4 Doctor.

5 (Pause in proceedings)

6 THE MARSHAL: Please remain seated and come to order.  
7 Department 17 of the 8th Judicial District is again in session.  
8 The Honorable Judge Michael Villani presiding. Let's make sure  
9 that our cell phones are turned off, please.

10 THE COURT: Doctor, do you understand you're still  
11 under oath?

12 THE WITNESS: Yes.

13 THE COURT: All right. Go ahead, Mr. Lalli.

14 MR. LALLI: Thank you.

15 BY MR. LALLI:

16 Q Doctor, I think we were talking about categorizing  
17 killings in terms of manner in death (sic), and then the real  
18 need to look to factors external of the body when making those  
19 calls.

20 A That's what I recall.

21 Q Okay. And we had talked about information that would  
22 be helpful in making that decision, such as a suicide note in  
23 the case of a suicide, versus evidence of motive to kill in the  
24 case of a homicide, correct?

25 A Again, that's what I recall.

1 Q And I think we were talking about, for instance, if  
2 the slayer had indicated, or said the words, I want to kill the  
3 bitch, that makes a case look more like a homicide?

4 A In and of itself, yes.

5 Q Okay. And if immediately after the killing, the  
6 suspect were to say, I didn't mean to hurt you, that makes it  
7 look more like a homicide, less like a suicide?

8 A Again --

9 Q In and of itself?

10 A In and of itself, yes.

11 Q Okay. And if a suspect were to say in that same  
12 time, I didn't mean to hurt you, let's go do the ten years,  
13 that makes it look more like homicide, less like suicide?

14 A With the implication meaning, let's do the ten years,  
15 and that I will be punished for doing this?

16 Q Yes.

17 A Yes.

18 Q Okay. Let me ask you this. What about if you --  
19 well strike that. Any of the information that we just talked  
20 about, any of those facts making this look more like homicide,  
21 were any of those things provided to you by Ms. Palm?

22 A The information about the, I didn't mean to hurt you,  
23 I believe I remember seeing in the Las Vegas Police Department  
24 report. The ten years, I do not recall seeing that statement.  
25 The, I want to kill the bitch, I do not remember seeing.

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1 Q Okay. What about prior aggression by the slayer  
2 against the deceased? Is that something that would factor into  
3 your determination of whether this was a suicide versus a  
4 homicide, or an accidental death?

5 A Certainly.

6 Q Prior aggression by the slayer against the decedent,  
7 does that weigh more heavily in favor of homicide?

8 A It certainly would suggest the possibility, yes.

9 Q Okay. What about putting all these things together  
10 that we've discussed?

11 A In and of themselves, with no other evidence,  
12 certainly they would point towards homicide.

13 Q What about -- I'm talking aggregately, putting them  
14 all together?

15 A That's what I mean.

16 Q Okay.

17 A In and of themselves without any other evidence, all  
18 of the things we've talked about would point to homicide.

19 Q Now I want to talk about what I think you referred to  
20 as hesitation marks?

21 A A hesitation -- possible hesitation wound, yes.

22 Q Okay. Now I'm going to show you what's already been  
23 admitted as 102. And hopefully I will be able to zoom in, and  
24 you'll be able to get a pretty sharp image of that. Okay. Now  
25 you're looking at your monitor?

1 A Yes.

2 MR. LALLI: Your Honor, can I just approach this  
3 (indiscernible)?

4 THE COURT: Sure.

5 MR. LALLI: Or is it okay if I ask the doctor to --

6 THE COURT: Yeah.

7 MR. LALLI: -- come down?

8 THE COURT: Doctor, can you go down to the --

9 THE WITNESS: Sure.

10 THE COURT: -- bigger screen there? It might be  
11 clearer for you.

12 BY MR. LALLI:

13 Q Can you indicate for us, Doctor -- just be mindful of  
14 the folks down here, where is the hesitation -- did you call it  
15 a hesitation wound or a mark, or what did you call it?

16 A What I described, it's not very well shown in this  
17 blow-up, there are better pictures. But this is the main stab  
18 wound. And then below it is a roughly triangular shaped  
19 superficial puncture wound of the skin.

20 Q Okay. The mark -- the dark mark that we're seeing on  
21 the left?

22 A That?

23 Q That's nothing, right? Well it's something, but  
24 it's --

25 A It's something, but I don't think it's a puncture

1 wound. Whether it's a bruise versus a mole, I couldn't quite  
2 tell.

3 Q Okay. It certainly could be a bruise, or it  
4 certainly could be a mole?

5 A I can't tell the difference from just looking at it.  
6 And neither it or the puncture wound were described in the  
7 autopsy report.

8 Q Certainly the mark on the left of the wound as we're  
9 looking at it, you wouldn't call that a hesitation mark?

10 A If it was a bruise, it's possible that it is from a  
11 point.

12 Q Okay.

13 A But I can't say with certainty.

14 Q Okay. That's all I wanted you to do.

15 A Okay.

16 Q Thank you. And I think you indicated that sometimes,  
17 a hesitation mark on the body might be suggestive of suicide?

18 A Yes.

19 Q A person testing -- kind of testing, how much is this  
20 going to hurt before I do this?

21 A Yes.

22 Q All right. Would you agree however with Dr.  
23 Benjamin that this is an oddly placed wound for suicide to have  
24 been what caused the death of this woman?

25 A Yes. As I discussed earlier, this would be an

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1 atypical location for a suicidal, self-inflicted stab wound.

2 Q Okay. Would you also agree that if Victoria  
3 Whitmarsh died in the context of a struggle, she probably  
4 wasn't taking a knife and testing to see how much it hurt, and  
5 then stabbed herself?

6 A That is correct.

7 Q Okay. So the fact that she died during the course of  
8 a conflict, a struggle, if that were a fact, that certainly  
9 would help you rule out suicide?

10 A Yes.

11 Q Okay. Now you indicate that a hesitation mark is  
12 suggestive of struggle, however?

13 A Could also occur in that scenario, yes.

14 Q Right. And if neighbors below this apartment complex  
15 heard what they described, noise like the ceiling coming down,  
16 thumping, loud thumping, banging, that certainly would be  
17 consistent with a struggle?

18 A Yes.

19 Q Okay. A hesitation mark in and of itself does not  
20 suggest the motivation of the slayer or the deceased, does it?  
21 So in other words, there was a struggle, but you can't tell us  
22 if it was Victoria Whitmarsh struggling to die, or Victoria  
23 Whitmarsh struggling to live, can you?

24 A To prevent the knife going in, versus trying to get  
25 the knife in, no.

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1 Q Exactly. You can't tell us?

2 A Not from the wound, no.

3 Q So you can't tell us who's intention it was to bring  
4 about the stab, and who's intention it was to stay alive, if  
5 that were the case?

6 A I guess I understand the question, and the answer  
7 would be no.

8 Q And that's kind of the case with all of these  
9 injuries; isn't that true? You don't know what motivated them?

10 A Which injuries are we talking about?

11 Q Well the knife wound, as well as the bruising on the  
12 body? For instance, on --

13 A Okay.

14 Q -- direct examination, you were asked whether the  
15 bruise on the back, the contusion on the back of her head could  
16 have been caused by falling down.

17 A Okay.

18 Q And you indicated that it could?

19 A That's correct. All I can say is injuries are  
20 consistent with certain scenarios or stories.

21 Q Okay.

22 A There's nothing about an individual injury that's --  
23 I can say proves it was from impact, where the person fell and  
24 hit something, versus a blow, where somebody hit the person. I  
25 can not make that distinction from the wound itself.



1 Q So talking again about the injury to the back of the  
2 head, it's consistent with falling down backwards and hitting  
3 your head on the ground?

4 A Yes.

5 Q It's also consistent with somebody punching her in  
6 the back of the head?

7 A I can not exclude that.

8 Q It's consistent with somebody taking her, and  
9 throwing her down on the ground?

10 A Again, I can not exclude that.

11 Q Same thing with the bruise on the front of her head?

12 A Again, I do not know how that injury occurred. I did  
13 not witness it's infliction.

14 Q But certainly, the bruise on the front of her head is  
15 consistent with someone purposefully striking her in the front  
16 of her head?

17 A Certainly could be caused that way.

18 Q As well as all the bruising on her body?

19 A Certainly.

20 Q Thank you.

21 MR. LALLI: That concludes cross-examination.

22 THE COURT: Redirect.

23 MS. PALM: Thank you.

24 REDIRECT EXAMINATION

25 BY MS. PALM:

1 Q Doctor, the bruising on Ms. Whitmarsh is -- is it  
2 consistent also with -- on her body with being picked up, and  
3 dropped on the floor?

4 A That could cause those injuries, certainly.

5 Q And again as we said, the head injury on the  
6 forehead, consistent with hitting heads with another person?

7 A Yes.

8 Q And the bruising on the arm, consistent with being  
9 lifted up forcefully off a bed, or off a floor?

10 A Yes.

11 Q And Mr. Lalli asked you some questions about not  
12 being the actual doctor that performed the autopsy. In the I  
13 guess ME business, or line of work, do you often rely on each  
14 other's reports?

15 A Yes.

16 Q And that's because other ME's often will testify for  
17 each other?

18 A Sometimes it will be because a doctor isn't available  
19 to testify on a case that they did. And so one of their  
20 colleagues needs to be able to step in, and testify in that  
21 case. It's not uncommon to rely upon the report and  
22 documentation provided by another physician to render an  
23 opinion.

24 Q And so when physicians are making their reports, and  
25 documenting injuries with photographs, and their description of

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1    them, they are trained to be complete in that because somebody  
2    else is possibly going to rely on it?

3           A     Yes.

4           Q     And Dr. Benjamin was complete enough here for you to  
5    be able to rely on what she did?

6           A     Pretty much, yes.

7           Q     Mr. Lalli talked to you about acute injuries.

8           A     Um-hum.

9           Q     The fact that injuries are acute does not mean that  
10   they necessarily came from a purposeful blow, does it?

11          A     No.

12          Q     Could have been accidental?

13          A     How they are inflicted does not relate to their age.

14          Q     So the word "acute" has no connection with --

15          A     No etiologic --

16          Q     -- how it's inflicted?

17          A     -- specificity, no.

18          Q     The photograph that Mr. Lalli showed you of Mr.  
19   O'Keefe's face --

20               MS. PALM:  Mr. Lalli, is that (indiscernible)?

21               MR. LALLI:  Yes.

22               MS. PALM:  It's been --

23               MR. LALLI:  Yes.

24                               (Pause in proceedings)

25   BY MS. PALM:

1 Q Showing you the State's proposed 61 --  
2 MR. LALLI: Well it's never been admitted.  
3 MS. PALM: Oh.  
4 THE COURT: It has not been admitted.  
5 MS. PALM: Didn't you put it up?  
6 MR. LALLI: No.  
7 THE COURT: No, he --  
8 MS. PALM: Oh, I'm sorry.  
9 MR. LALLI: I didn't. But I'll certainly --  
10 MS. PALM: You want to stipulate to admit?  
11 MR. LALLI: -- stipulate to it's admissibility --  
12 MS. PALM: All right.  
13 MR. LALLI: -- for your purposes.  
14 MS. PALM: We stipulate.  
15 THE COURT: Ms. Palm, do you stipulate?  
16 MS. PALM: I do stipulate.  
17 THE COURT: Okay. It will be admitted then.  
18 MR. LALLI: Thank you.  
19 MS. PALM: Thank you.  
20 (Exhibit 61 admitted)  
21 BY MS. PALM:  
22 Q Looking at that photograph, which you described as an  
23 abrasion?  
24 A Yes.  
25 Q And possibly a contusion?

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1 A And possibly some contusion associated with that.

2 Q Okay. And I believe that your testimony was it's  
3 consistent with carpet burn?

4 A Yeah, that could cause that.

5 Q Can you rule out that there was some other injury  
6 besides carpet burn?

7 A Like a blow? No.

8 Q Okay. So could it have been sustained by bumping  
9 foreheads, and then having a carpet burn after that?

10 A Yes.

11 Q Thank you. And so if he had bumped foreheads, and  
12 then was dropped on his head by police on the carpet, would  
13 that be consistent with that photograph?

14 A Yes.

15 Q Ms. -- do you recall what Ms. Whitmarsh's blood-  
16 alcohol level was?

17 A Yes.

18 Q What was it?

19 A 0.24 grams per deciliter.

20 Q Would that have affected her ability to engage in  
21 purposeful activity after --

22 MR. LALLI: Objection, this is -- I'm sorry. This is  
23 beyond the scope, Your Honor.

24 THE COURT: I'm going to sustain the objection.

25 MS. PALM: I think we got into her intoxicated state.

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1 THE COURT: Not on cross. On direct.

2 BY MS. PALM:

3 Q When medical examiners are making diagnoses, I  
4 believe Mr. Lalli was establishing that they have to rely on  
5 outside information? Or when they're determining --

6 A Yes.

7 Q -- the manner of death?

8 A Yes.

9 Q And if the outside information they are relying on is  
10 false, might that cause an incorrect determination?

11 A That is one of the problems and difficulties in  
12 coming to a conclusion, is assessing accuracy of information.

13 Q So for instance, if a person made an allegation that  
14 a suspect had said they wanted to kill somebody, and the person  
15 that made that allegation had a motive to lie, would you want  
16 to know that?

17 A Yes.

18 Q And talking about the puncture wound near the  
19 stabbing wound, is that puncture wound also still consistent  
20 with a struggle?

21 A Yes.

22 Q So if Ms. Whitmarsh were holding the knife and there  
23 was a struggle, the stab wound could have been sustained during  
24 that --

25 A That -- that --

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1 Q -- struggle? The puncture wound?

2 A That puncture mark could have been sustained in that  
3 scenario, along with the actual lethal stab wound.

4 Q And back to outside information again. As a medical  
5 examiner, you would want to know about a victim's previous  
6 suicidal ideation?

7 A Yes. Certainly.

8 Q And if she had a history of attempting suicides, you  
9 would want to know that?

10 A Absolutely.

11 Q And does the use of Effexor affect somebody's  
12 suicidal behavior?

13 A It may.

14 Q In which way?

15 A There is some evidence that, particularly in the  
16 initial phases of taking certain antidepressants, there may be  
17 an increased risk of suicidal thoughts and actual attempts. So  
18 yes, it would play an issue -- it would be a piece of  
19 information that would be relevant.

20 Q Would you want to know if the victim had anger  
21 issues?

22 A Yes.

23 Q Mood swings?

24 A Pardon me?

25 Q Mood swings?

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1 A Certainly.

2 Q If the victim had a history of impulsive behavior?

3 A Yes.

4 Q And does the use of alcohol disinhibit somebody as  
5 far as suicidal behavior goes?

6 A Yes, it may.

7 Q So you would want to know how intoxicated somebody  
8 was?

9 A That would be a piece of information that would be  
10 part of that decision making process, yes.

11 Q Thank you, Doctor.

12 MS. PALM: That's all I have.

13 THE COURT: Any recross?

14 MR. LALLI: No. No, Your Honor.

15 THE COURT: Any questions from any of the jurors? We  
16 do have a question from a juror. Marshal will pick it up.  
17 Doctor, in our jurisdiction, we allow jurors to ask questions  
18 of witnesses.

19 THE WITNESS: I've had that experience before.

20 (Off-record bench conference)

21 MR. LALLI: Your Honor, I guess (indiscernible) --

22 THE COURT: You can put it on the monitor.

23 MR. LALLI: All right.

24 THE COURT: Doctor, if you need a closer view of the  
25 photograph and -- the monitor's showing you --

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1 THE WITNESS: Um-hum.

2 THE COURT: -- more than happy to hand the photograph  
3 to you.

4 THE WITNESS: I think I'm comfortable with that.

5 THE COURT: All right. And we're putting that  
6 somewhat related to some of the questions here.

7 THE WITNESS: Okay.

8 THE COURT: First question from one of the jurors is,  
9 "How many inches is the stab wound from the armpit?"

10 THE WITNESS: The autopsy report did not specifically  
11 describe that. The landmarks that were given were the top of  
12 the head, and the midline of the body. So she -- and Dr.  
13 Benjamin describes it as being about 15 and-a-half inches from  
14 the top of the head. In terms of where that is from the  
15 axilla, or armpit, I don't have a ruler picture, but it's  
16 probably on the order of about five inches or so below the  
17 armpit.

18 THE COURT: Next question is, "Would the amount of  
19 blood shown on the sheets come from one stab wound?"

20 THE WITNESS: Certainly could, yes.

21 THE COURT: Is there any follow up questions by the  
22 defense on these questions here from the juror?

23 MS. PALM: No, Your Honor.

24 THE COURT: Any follow up by the State?

25 MR. LALLI: No, Your Honor.

1 THE COURT: Any other questions by any of the jurors?  
2 No other questions. Doctor, thank you for your testimony. You  
3 are --

4 THE WITNESS: May I be excused?

5 THE COURT: -- excused. Yes, you may.

6 THE WITNESS: Thank you.

7 THE COURT: Next witness for the State?

8 MR. LALLI: Your Honor, State calls Jimmy Hatchcox.

9 (Pause in proceedings)

10 MR. LALLI: Todd Armbruster.

11 THE MARSHAL: Okay.

12 (Pause in proceedings)

13 THE MARSHAL: Mr. Armbruster, if you will remain  
14 standing. Please raise your right hand, and face the clerk.

15 TODD ARMBRUSTER, STATE'S WITNESS, SWORN

16 THE MARSHAL: Have a seat, please. Slide up. If you  
17 will please state and spell your name for the record.

18 THE WITNESS: Todd Armbruster. A-R-M-B-R-U-S-T-E-R.

19 DIRECT EXAMINATION

20 BY MR. LALLI:

21 Q Sir, how are you employed?

22 A Now -- at the time, or now?

23 Q Now.

24 A Now I'm a mechanic.

25 Q Okay. And back in October of -- I'm sorry, November

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1 of 2008, how were you employed?

2 A The maintenance man.

3 Q Where?

4 A 5001 El Parque.

5 Q Did you live in a particular unit back then?

6 A Apartment number 2?

7 Q Did you live alone, or with someone else?

8 A Robin Kolacz was there also.

9 Q Does Robin spell her last name, K-O-L-A-C-Z?

10 A Yes.

11 Q Did she have a position or a job at the complex?

12 A On-site manager, or part-time thing.

13 Q Okay. So you both lived in the same unit?

14 A Um-hum.

15 Q Is that yes, for the record?

16 A Yes.

17 Q Okay. Did you -- how long did you live there?

18 A About four years.

19 Q And during the course of that four-year period, did

20 you know many of the residents in the --

21 A I knew all of them.

22 Q You knew all of them? Okay. You knew an individual

23 by the name of Charles Toliver?

24 A Yes.

25 Q He was --

1 A Cookie.

2 Q Cookie? Okay. And did you know an individual by the  
3 name of Brian O'Keefe?

4 A Yes.

5 Q Do you know what unit he lived in?

6 A Apartment 35.

7 Q Okay. Did he live there -- and I'm talking  
8 specifically about November of 2008. Did he live there alone,  
9 or with someone else?

10 A There was somebody there with him most the time. I  
11 mean, as far as I knew, there was two people living there.

12 Q Okay. Was the other person, other than Brian O'Keefe  
13 who lived there, was that a male or a female?

14 A Female.

15 Q Can you describe the female for us?

16 A Filipino. A little short, slender, petite Filipino.

17 Q Okay. Okay. Now do you see Mr. O'Keefe in the  
18 courtroom?

19 A Yes.

20 Q Can you please point to him, and identify something  
21 he's wearing today?

22 A Right there, (indiscernible).

23 Q Thank you.

24 MR. LALLI: Your Honor, may the record reflect that  
25 the witness has identified the defendant?

1 THE COURT: Yes, it will.

2 BY MR. LALLI:

3 Q Now I want to direct your attention to November 5th  
4 of 2008 at approximately 11:00 in the evening. Was there a  
5 commotion or a disturbance that you became aware of?

6 A Cookie came running from his apartment down to mine,  
7 yelling about needing to call 9-11, that there was a problem  
8 upstairs.

9 Q Okay. Okay.

10 MS. PALM: Objection.

11 BY MR. LALLI:

12 Q Just don't tell us what Cookie told you. But he  
13 was --

14 A All right.

15 Q Was he pretty excited?

16 A Yes.

17 Q And do you know what time that was?

18 A Around 11 p.m. 11:05, something like that.

19 Q Okay. And you gave an interview to the police?

20 A Yes.

21 Q That same night?

22 A Yes.

23 Q Is that true?

24 A Yes.

25 Q And in the interview, you actually told the police

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1 that he had come over to your apartment around 11:00 at night?

2 A Yes.

3 Q All right. Did he say some things to you? Cookie?

4 A He said, call 9-11.

5 Q Okay. Well -- and based upon other things that he  
6 said, did you go somewhere?

7 A I went up to apartment 35.

8 Q All right. Who went with you?

9 A Nobody.

10 Q Did --

11 A Well there was two people behind me, but they didn't  
12 go into the apartment.

13 Q All right. Did Cookie go with you?

14 A No.

15 Q Okay. So tell us what you did after your  
16 conversation with Cookie. You ran back to the apartment?

17 A I went up to apartment 35. The door was open. I  
18 went into the living room, there was nothing -- there wasn't  
19 anything going on in there. I went into the bedroom, and  
20 that's where I saw what I saw.

21 Q Okay. I'm going to show you State's Exhibit number  
22 1. Does this appear to be a diagram of that apartment?

23 A Yes.

24 Q So down here at the bottom where it says, front door,  
25 is that the front door that you came through?

1 A Yes.

2 Q And you walked -- there appears to be a dotted line  
3 kind of going through the living room area?

4 A Correct.

5 Q Is that kind of the path you took toward the back?

6 A Yes.

7 Q All right. So what happened as you walked into the  
8 apartment?

9 A Brian was at the foot of the bed, laying over  
10 Victoria. Or standing over Victoria.

11 Q And tell us, what was her condition?

12 A She wasn't moving.

13 Q Was she clothed?

14 A Half-clothed. She had a sweater on, halfway down.

15 Q Did you see her breathing in any way?

16 A No, I didn't.

17 Q Did you see her moaning?

18 A No.

19 Q Or hear her moaning, I should say?

20 A No.

21 Q Any movement at all?

22 A None.

23 Q All right. What was he doing?

24 A He was standing over her, talking to her, asking her  
25 to get up. You know, don't do this to me, get up.

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1 Q Okay. Did you try to get closer to her to try to  
2 help or assess her condition?

3 A Well Brian -- after (indiscernible) I don't know, 30  
4 seconds or so, Brian saw me, and he stood up. Told me to get  
5 the hell out of his apartment.

6 Q Okay. Did you ever ask Brian, hey, let me take a  
7 look at her, or something like that?

8 A No, he was adamant about getting me out of his  
9 apartment.

10 Q Okay. It's been quite a while since this occurred,  
11 hasn't it?

12 A Yes.

13 Q All right.

14 MS. PALM: And Your Honor, he doesn't -- he hasn't  
15 said he doesn't remember.

16 MR. LALLI: I didn't -- okay.

17 THE COURT: We haven't had another question yet.

18 MR. LALLI: Court's indulgence. Okay.

19 BY MR. LALLI:

20 Q In your interview to the police, did you ever say,  
21 quote, hey --

22 MS. PALM: Objection, Your Honor. Leading.

23 MR. LALLI: It's a yes or no question.

24 THE COURT: I'm going to overrule the objection.

25 BY MR. LALLI:



1 Q Did you ever say, hey, let me take a look at her?

2 A I don't remember.

3 Q Okay.

4 A To be honest with you.

5 Q Would it help you --

6 A Yeah.

7 Q -- if you looked at the statement that you gave to  
8 the police?

9 A Sure. Yeah, I don't remember. That was a long time  
10 ago.

11 Q Sure.

12 MR. LALLI: May I approach?

13 THE COURT: Yes. Which page?

14 MR. LALLI: Page 5.

15 THE COURT: All right.

16 THE WITNESS: Oh, (indiscernible).

17 BY MR. LALLI:

18 Q Okay. Does that refresh your recollection?

19 A Yes.

20 Q So tell us what happened. What do you remember  
21 saying?

22 A About -- yeah, if I could take a look at her. He --  
23 that's when he stood up, and he started to take a swing at me.

24 Q Okay. What did you do?

25 A I don't remember exactly what I said. But he --

ROUGH DRAFT TRANSCRIPT

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1 that's when he started yelling. Directly after that is when he  
2 started yelling about getting the hell out of his apartment.

3 Q Okay. Did he ever ask you to call the police?

4 A No.

5 Q Did he ever ask you to call for paramedics?

6 A No.

7 Q Did he ever tell you that this woman had pulled a  
8 knife on him?

9 A No.

10 Q Did he ever indicate that he was afraid of this  
11 woman?

12 A No.

13 Q He just told you to get out of there?

14 A Get the hell out of his apartment.

15 Q Okay. What did you do?

16 A I went over -- I left his apartment and went two  
17 doors down to apartment 37, and called 9-11.

18 Q Okay.

19 MR. LALLI: Your Honor, at this point --

20 MS. PALM: (Indiscernible).

21 MR. LALLI: -- I'm going to move for the admission of  
22 State's proposed Exhibit number 2. I believe it's going to be  
23 admitted pursuant to stipulation.

24 MS. PALM: And for the record, it's my understanding  
25 that that's the 9-11 dispatch from Mr. Armbruster.

1 MR. LALLI: It is.

2 MS. PALM: And I have no objection to that.

3 THE COURT: All right. Number 2 will be admitted.

4 MR. LALLI: Okay.

5 BY MR. LALLI:

6 Q Now you indicated that you called the police?

7 A Yes.

8 Q All right. Was it on a 9-11 line?

9 A Yes.

10 Q All right. Your Honor, if I could ask that this be  
11 transferred over so that we can play the call.

12 THE COURT: Michelle, can you do that?

13 THE COURT RECORDER: No. I just did. He just needs  
14 to --

15 THE COURT: Okay.

16 MR. LALLI: She did what she needs to do.

17 THE COURT: Right. Ball's in your Court.

18 MR. LALLI: Thank you. It is.

19 THE CLERK: Did you say 2, Mr. Lalli?

20 MR. LALLI: Yes. I'm sorry. My apologies. It's  
21 proposed 129.

22 THE CLERK: Okay, that's what I thought.

23 THE COURT: That's what we had marked.

24 MR. LALLI: Yeah. Thank you.

25 THE COURT: 129 will be admitted.

1 (Exhibit 129 admitted)

2 (9-11 tape played, not transcribed)

3 BY MR. LALLI:

4 Q Mr. Armbruster -- excuse me. There was some  
5 indication that the police had already been called. Do you  
6 know who called them?

7 A Robin.

8 Q Did you tell Robin to call the police?

9 A Before I went up to his apartment.

10 Q Was that at about the same time that Cookie had come  
11 over?

12 A Yes.

13 Q So as soon as Cookie arrives at your apartment, you  
14 asked Robin to call the police?

15 A Yes.

16 Q Do you see her start to do that?

17 A No, I didn't see her do it. I was running upstairs.

18 Q But you told her that?

19 A Yeah.

20 Q All right. Immediately after Cookie comes to your  
21 apartment, do you leave and go to the defendant's apartment?

22 A Yes.

23 Q And then you described what happened there.  
24 Immediately after that, do you then go and call 9-11?

25 A Yes.

1 Q From the time Cookie came over to your apartment  
2 until your call was placed to 9-11, are we talking --

3 A Two or three minutes.

4 Q Okay, two or three minutes. And then while you're on  
5 the phone, we hear you say something of the effect, I can hear  
6 the sirens?

7 A Um-hum.

8 Q Is that yes, for the record?

9 A Yes, yes.

10 Q Was that in fact -- were those in fact the sirens  
11 from the police?

12 A Yes.

13 Q So the police came in fairly short proximity from the  
14 call to --

15 A They got there quick.

16 Q Okay. Great, thank you.

17 MR. LALLI: Your Honor, that concludes direct  
18 examination.

19 THE COURT: All right. Cross-examination.

20 MS. PALM: Thank you.

21 CROSS-EXAMINATION

22 BY MS. PALM:

23 Q Good afternoon, Mr. Armbruster. Do you remember  
24 talking to me about a year ago? Vaguely?

25 A About a year ago?

1 Q Yeah.

2 A Not --

3 Q No?

4 A Not really.

5 Q At the time, you were living with Robin Kolacz, and

6 she was kind of running the apartment? Or were you both

7 running the apartment?

8 A I was doing the maintenance, she was running it.

9 Q Okay. Was she your girlfriend at the time?

10 A No, no.

11 Q Just friend's? Okay. And is Robin the one that

12 warned the police about Ms. Whitmarsh having aids and Hepatitis

13 C?

14 A I don't know anything about that.

15 Q Okay. She's -- she called though, as far as you

16 know?

17 A Yes.

18 Q Prior to November 5th, had you seen Brian before at

19 the apartment complex?

20 A Yes.

21 Q Had you seen him with Victoria there before?

22 A Yes.

23 Q Had you seen them outside the apartment?

24 A Yes.

25 Q What did you see them doing?

ROUGH DRAFT TRANSCRIPT

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1           A     Normally it was just to and from the parking lot, to  
2 his apartment, is when I saw him. Occasionally they were up on  
3 the balcony, (indiscernible) the walkway there in front. He  
4 was drinking. I don't think she ever drank, but.

5           Q     Okay.

6           A     He was drinking a few beers.

7           Q     You see them hanging out together?

8           A     Yeah.

9           Q     And so if the 9-11 call went out at 11:01, does that  
10 sound accurate to you? 11:01 p.m.?

11          A     Yes.

12          Q     Sound right time-wise?

13          A     Yes.

14          Q     So that would have been 2, 3 minutes after Cookie  
15 came running --

16          A     Right, yes.

17          Q     -- to you, hey, there's something going on?

18          A     Yes.

19          Q     Okay. And when you walked into the room by yourself,  
20 what was Brian doing physically when he was saying -- talking  
21 to Victoria?

22          A     Well he was bent over, grabbing her knees or her  
23 legs, trying -- talking to her.

24          Q     Okay. Was he grabbing her just by the waist, or the  
25 knees, or what? What did you see?

1 A Well, he was right by the knees.

2 Q Okay. Trying to do what? Lift her up?

3 A Just talking to her.

4 Q Okay.

5 A I mean (indiscernible) trying to lift her up. He --

6 Q Okay.

7 A Talking to her.

8 Q Do you recall what he was saying to her?

9 A Yeah, (indiscernible). Yeah, come on, baby, don't do

10 this to me. Get up, get up.

11 Q Okay. And she didn't appear to be moving to you at

12 all?

13 A No.

14 Q And at the time she -- did she have -- was she

15 dressed?

16 A Half. She had a shirt on, that was it.

17 Q From the waist down, she was naked?

18 A Um-hum.

19 Q Do you recall the lighting in the room.

20 A The bedroom was fully lit.

21 Q The bedroom was what?

22 A Lit, fully lit.

23 Q Okay. If you said before that the bathroom door was

24 open and that was the light for the room, does that sound

25 right?

ROUGH DRAFT TRANSCRIPT

001496



1           A     Well there's a light in his room, and then bathroom  
2 also, yeah.

3           Q     Okay. Was the light in his room on?

4           A     Yes. There was a light on in his room, yeah.

5           Q     If you testified at a prior hearing that you don't  
6 remember if the light was on, would that be accurate?

7           A     Well, probably. Yeah, I mean -- I'm just thinking  
8 back. I mean, it was well-lit in there. So I'm assuming that  
9 it was -- that was on, yeah.

10          Q     Okay.

11          A     But she was right next to the bedroom door -- or the  
12 bathroom door anyway, so.

13          Q     Okay. You remember light coming from the bathroom?

14          A     Um-hum.

15          Q     Okay. But not --

16                THE COURT: Is that a yes?

17                THE WITNESS: Yes.

18                THE COURT: Okay.

19                THE WITNESS: I'm sorry.

20 BY MS. PALM:

21          Q     But not necessarily from the bedroom area itself?

22          A     Right, okay.

23          Q     Okay. And you never saw Mr. O'Keefe with a weapon,  
24 did you?

25          A     No.

1 Q Okay. And you never heard any screaming or fighting,  
2 did you?

3 A No.

4 Q And when Mr. O'Keefe stood up to take a swing at you,  
5 he was stumbling, wasn't he?

6 A Well I -- yes, somewhat. Well I'm not saying he was  
7 stumbling, but his eyes were bloodshot, and he looked like he  
8 had been --

9 Q If you previously testified that he was stumbling  
10 when he stood up, would that be inaccurate?

11 A That -- no. If that's what I said, yeah.

12 Q You think that that's probably correct?

13 A It's been a while, you know.

14 Q Okay. Do you -- would it help you remember if I  
15 showed you the prior testimony?

16 A No, I -- no, I believe you.

17 Q You accept that you said he was stumbling?

18 A I believe you. If that's what I said, I believe you.

19 Q Okay. When you walked into the bedroom and he was  
20 standing over her saying, baby, get up, get up, what you had  
21 told him was, hey, let me take a look at her, correct?

22 A Yes.

23 Q Okay. It wasn't, hey, let me help her, right?

24 A Right.

25 Q It was, hey, let me take a look at her?

ROUGH DRAFT TRANSCRIPT

001498

1 A Right.

2 Q And that's when he stood up --

3 A Right.

4 Q -- and said, get the hell out of here?

5 A Right.

6 Q Okay. And he was pretty intoxicated, wasn't he?

7 A Oh, I can't say -- I couldn't smell alcohol, so.

8 Q Well you -- we just heard in your 9-11 call, you  
9 said, very much so, when they asked if he was intoxicated.

10 A He was intoxicated. But you can be intoxicated by  
11 other things other than alcohol, so I don't --

12 Q Okay. But you first said, he's drunk, he's drunk.  
13 And then you said, very much so, he's intoxicated.

14 A Well I never smelt alcohol. And I even said that in  
15 my first part, I never said -- I never once smelled alcohol.

16 Q Okay. So you didn't smell alcohol, but your  
17 perception of him was that he was drunk?

18 A Right. Right.

19 Q And so when you previously stated, he was pretty  
20 intoxicated, you just meant that he appeared to be either drunk  
21 or high?

22 A Yeah. Well I figured he was -- because I knew he  
23 drank a lot of beer, so I figured that's what it was.

24 Q Okay.

25 A I assumed it, yeah.

ROUGH DRAFT TRANSCRIPT

001499

1 Q Okay. And he seemed disoriented?

2 A I'm sorry?

3 Q He seemed disoriented?

4 A At first, yes.

5 Q Okay. Unsteady on his feet?

6 A Yes.

7 Q Okay. And then after he said, get up, get up, he  
8 turned around and went back to Victoria?

9 A Right.

10 Q And you don't dispute that you had described him as,  
11 he looked tore up?

12 A As what?

13 Q Tore up?

14 A Yes.

15 Q And then you told him to calm down, and he did?

16 A I -- yes.

17 MS. PALM: Court's indulgence.

18 THE COURT: Sure.

19 MS. PALM: I have no further questions. Thank you.

20 THE COURT: Any redirect?

21 MR. LALLI: Yes.

22 REDIRECT EXAMINATION

23 BY MR. LALLI:

24 Q Mr. Armbruster, what was your purpose in telling the  
25 defendant that you wanted to take a look at her, meaning

1 Victoria on the ground?

2 A Well --

3 MS. PALM: Objection, Your Honor. It's irrelevant  
4 what his purpose is. I think it's being offered for --

5 MR. LALLI: Well she --

6 MS. PALM: -- the response to it.

7 MR. LALLI: She just tried to suggest that it was  
8 just because he wanted to see her. I'm just trying to ask if  
9 that's what it was, or if he was interested in rendering  
10 assistance.

11 THE COURT: I don't know if that was suggested. I'm  
12 going to sustain the objection.

13 MS. PALM: Thank you.

14 MR. LALLI: Okay.

15 BY MR. LALLI:

16 Q What did you say to her?

17 A To who?

18 Q To -- I'm sorry. What did you say to the defendant  
19 when you saw him standing over her?

20 A Can I take a look at her.

21 Q Okay. And his response was, no?

22 A No.

23 Q At one point, do you remember telling the defendant  
24 to calm down?

25 A Yes.

ROUGH DRAFT TRANSCRIPT

001501

1 Q Do you remember that? Is that in response to him  
2 taking a swing at you?

3 A Yes.

4 Q Did you actually say those words, calm down? Or did  
5 you say something else?

6 A I don't remember exactly what it was that I said, but  
7 it was to that effect.

8 Q Okay. And in response to him taking a swing at you?

9 A Um-hum.

10 Q Is that yes?

11 A Yes.

12 Q Okay. Thank you, sir.

13 MR. LALLI: Nothing further.

14 THE COURT: Any recross?

15 MS. PALM: No, Your Honor.

16 THE COURT: All right. Any questions from any of the  
17 jurors? No questions. Thank you, sir, for your testimony.

18 You are excused. Next witness for the State?

19 MR. LALLI: Yes. Jimmy Hatchcox.

20 THE MARSHAL: Sir, if you will remain standing.

21 Please raise your right hand, and face the clerk.

22 JIMMY HATCHCOX, STATE'S WITNESS, SWORN

23 THE MARSHAL: Please have a seat. Slide up to the  
24 microphone. Would you please state and spell your name for the  
25 record?

1 THE WITNESS: Jimmy Hathcox. J-I-M-M-Y,  
2 H-A-T-H-C-O-X.

3 DIRECT EXAMINATION

4 BY MR. LALLI:

5 Q Would you like some water, Mr. Hathcox? Or are you  
6 okay?

7 A No, I'm fine. I'm fine.

8 Q Okay. I want to direct your attention to November of  
9 2008. Were you living at an apartment complex located at 5001  
10 El Parque?

11 A Yes.

12 Q What unit were you living in?

13 A 36.

14 Q I'm going to show you what's been admitted as State's  
15 Exhibit number 2. Do you see the apartment at which you lived  
16 in this photograph?

17 A Yes.

18 Q Can you just take your finger and place it on the  
19 monitor, and circle your unit? And have you complied with my  
20 request, for the record?

21 A Yes.

22 Q Okay. And that unit is right next-door to another  
23 unit that has a door opened to it?

24 A Yes.

25 Q Did you know the individual who lived next-door to

ROUGH DRAFT TRANSCRIPT

001503

1 you?

2 A Yes.

3 Q What was his name?

4 A Brian O'Keefe.

5 Q Do you see Mr. O'Keefe in the courtroom?

6 A Yes.

7 Q Can you -- you just pointed to somebody. Can you  
8 please tell us what the individual you pointed to is wearing?

9 A Yeah.

10 Q What is he wearing?

11 A Suit.

12 Q Sorry?

13 A Suit.

14 Q Okay.

15 MS. PALM: We'll stipulate to the identification.

16 THE COURT: All right.

17 MR. LALLI: Thank you.

18 BY MR. LALLI:

19 Q Now I want to specifically direct your attention to  
20 November 5th of 2008. Were you living in that unit right  
21 next-door on that date?

22 A Yes.

23 Q In the evening hours, do you remember hearing a noise  
24 outside?

25 A Yes.



1 Q What did you hear?

2 A A bang, like on a rail. A banging noise.

3 Q You indicated, like on a rail?

4 A That rail right there, the metal rail.

5 Q Okay. So the rail that we're seeing on the  
6 photograph, it sounded like somebody was banging on that?

7 A It just sounded like somebody just hit it, like one  
8 good hard time or something.

9 Q Okay. What were you doing at home?

10 A Watching TV. I just had surgery on my foot, and I  
11 was just sitting there watching TV.

12 Q As part of having surgery on your foot, were you  
13 taking any medications at all?

14 A Yes, sir.

15 Q What kind of medication?

16 A Lortab.

17 Q And were you feeling the effects of the Lortab that  
18 night?

19 A Yeah, I was kind of out of it. It had only been like  
20 three days since I had the surgery, and I was --

21 Q All right. Okay.

22 A -- in pain, and kind of --

23 Q Okay. Was there any doubt in your mind in spite of  
24 the Lortab that you heard a loud bang on that railing outside?

25 A No, sir.

ROUGH DRAFT TRANSCRIPT

001505

1 Q What did you do as a result of hearing that?

2 A When I heard the bang, I just got up and opened the  
3 door, and looked out. And I saw Brian going in his apartment.  
4 And he looked at me, and I looked at him. And I went back in.  
5 He had kind of a -- I don't know, just a look I hadn't normally  
6 seen on his face before.

7 Q A look that you don't normally -- had not normally  
8 seen?

9 A Right.

10 Q Can you describe it for us?

11 A Just maybe mad, or just disturbed or something. It  
12 just -- it was a look I hadn't seen before.

13 Q Would you describe it as scary?

14 A It was different, and it was --

15 Q Do you remember describing it to the police as a  
16 scary, funky look on his face?

17 A Yes. Yes, sir. Yes, sir. Yes, sir.

18 Q What did you do after you saw this look on his face?

19 A I just closed my door, like ain't (sic) none of my  
20 business or whatever. I didn't -- you know. I thought  
21 something might have been wrong, but I didn't --

22 Q Okay. Now starting about 10:00 that evening, did you  
23 begin hearing noise in the apartment next-door?

24 A Yes, sir.

25 Q And what -- now when you saw the defendant, was it

1 before or after you were --

2 A No, it was after.

3 Q -- hearing the noise?

4 A I heard noises.

5 Q Oh, it was after the noises?

6 A Yes, sir. I'm pretty sure.

7 Q Okay.

8 A I had heard the noises throughout the evening. And

9 I'm pretty sure the bang was like one of the -- was like maybe

10 a half-an-hour before the police showed up, or 45 minutes.

11 Q Okay.

12 A I think. I mean --

13 Q Okay. You indicated in -- well about what time was

14 it that you started hearing the noise in the apartment

15 next-door?

16 A 9:30, 10. Somewhere around there.

17 Q All right. Do you remember writing a written report,

18 or a written statement for the police?

19 A Yes, sir. I do.

20 Q And did you write in that statement that it was

21 around 10:00 that you had been hearing the noise in the

22 apartment?

23 A Yes, sir. It sounds --

24 Q Okay.

25 A -- correct.

ROUGH DRAFT TRANSCRIPT

001507

1 Q What did it sound like to you?

2 A I heard thumping noises. I heard voices, you know,  
3 like a repetitive voice. Just a ruckus, you know.

4 Q Okay. Did you -- at some point after you saw the  
5 defendant's face, did you continue to hear that noise?

6 A Yes, I did.

7 Q And what did you think was going on next-door, based  
8 upon his facial features, and what you heard?

9 MS. PALM: Objection, Your Honor. Speculation.

10 MR. LALLI: Lay witness opinion, Your Honor.

11 THE COURT: I'm going to sustain the objection.

12 MR. LALLI: Okay.

13 THE COURT: He can testify what it sounded like to  
14 him.

15 MR. LALLI: Okay.

16 BY MR. LALLI:

17 Q What did it sound like to you?

18 A It just sounded like there was a -- you know, maybe a  
19 little small disturbance, maybe a little bit of a ruckus going  
20 on over there. But I didn't think it was any of my business or  
21 nothing (sic). You know, I didn't want to --

22 Q You didn't want to get involved if you --

23 A Right.

24 Q -- didn't have to?

25 A I didn't think anything was major (sic) going on over

1 there like that, you know.

2 Q But you thought there was a disturbance?

3 A Well I mean, those walls in these apartments are like  
4 paper-thin. I mean, it's like if you're in your house in your  
5 bedroom, hearing to the next bedroom type of thing. I mean,  
6 it's that thin. And so what noise I heard, I mean, it wasn't  
7 nothing (sic) really out of the ordinary. I mean, I'd heard  
8 these --

9 Q Well don't tell me about anything else you might have  
10 heard. I'm just talking about that specific --

11 A Okay.

12 Q -- evening, okay? But you thought it was a  
13 disturbance?

14 A Yeah, I did. I mean, I wouldn't -- trying not to pay  
15 that much attention to it, to tell you the truth. I mean --

16 Q Understood. You at some point -- do you open the  
17 door and go outside again?

18 A After -- probably a half-an-hour or so after I heard  
19 the bang, the guy below, Cookie, apparently he --

20 Q Well don't -- just don't tell me apparently. Just  
21 you -- at some point, you're saying about 30 minutes after you  
22 saw the defendant with that look on his face, you heard Cookie?

23 A Yelling, yeah.

24 Q Where was he?

25 A He was right outside my door.

ROUGH DRAFT TRANSCRIPT

001509

1 Q And you heard him yelling?

2 A Yes.

3 Q Was he -- without telling me what he said, did he  
4 describe something that he had seen?

5 A Yes, sir.

6 Q Okay.

7 MR. LALLI: Your Honor, that concludes direct  
8 examination.

9 THE COURT: All right. Cross-examination.

10 MS. PALM: Thank you.

11 CROSS-EXAMINATION

12 BY MS. PALM:

13 Q Good afternoon, Mr. Hathcox.

14 A How you doing?

15 Q You were kind enough to come and talk to us last week  
16 after you met with the DA, weren't you?

17 A Yes ma'am, I was.

18 Q Do you remember testifying at trial that you started  
19 hearing the noises about 10:00 --

20 A Yes, ma'am.

21 Q -- over at the apartment? And then later, you heard  
22 the loud rang (sic) on the (indiscernible) -- on the rail --  
23 the loud bang on the rail? Sorry.

24 A Yes, ma'am.

25 Q And then about 15 minutes after that, you heard

ROUGH DRAFT TRANSCRIPT

001510

1 Cookie yelling?

2 A Yeah, somewhere in that time frame. (Indiscernible)  
3 necessarily the exact amount of minutes, but yeah.

4 Q Okay. So if at 10:00 you're hearing noises, and then  
5 about 15 minutes -- and then later, there's a bang on the rail.  
6 And then 15 minutes after that, you hear Cookie yelling, if the  
7 cops --

8 A I heard the noises, I heard the bang, I heard Cookie  
9 yelling.

10 Q Okay. And then Cookie would have been yelling about  
11 10:45, 11:00?

12 A Somewhere in that area, yes.

13 Q Okay. So when you hear the bang on the rail, it's  
14 pretty close to the time Cookie's yelling?

15 A No, it's before, probably 15, 20 minutes I'm  
16 thinking.

17 Q Okay. If you testified 15 minutes, that would be  
18 accurate? Okay. And that's when you open your door, and you  
19 see Brian going into his apartment?

20 A Correct.

21 Q Had you ever seen Brian where he's just completely  
22 intoxicated before that?

23 A I had before, yeah.

24 Q You have?

25 A Yeah.

ROUGH DRAFT TRANSCRIPT

001511

1 Q When you were hearing the noises, were they just kind  
2 of weird, little noises?

3 A Just muffled sounds, really. I mean, like I said, I  
4 was not really like sitting there, trying to listen to what was  
5 going on. I mean --

6 Q Okay. You never heard crying?

7 A No.

8 Q You never heard yelling?

9 A No.

10 Q You never heard a man's voice?

11 A No. I heard voices, I don't know if it was -- whose  
12 they were.

13 Q Well now, do you remember saying that you heard a  
14 kind of repetitive voice, but you couldn't tell if it was a man  
15 or a woman?

16 A I do remember saying that.

17 Q Like kind of somebody saying the same thing over and  
18 over again?

19 A Yeah.

20 Q Could the noises have been consistent with somebody  
21 having a temper tantrum over there? Banging doors, or --

22 A It could have been, yeah.

23 Q -- slamming things around?

24 A It could have been.

25 Q And Brian didn't have anything in his hands going in,



1 right?

2 A No, not that I saw.

3 Q And you didn't see any blood on his clothes?

4 A No.

5 Q And when you went -- when you heard Cookie yelling

6 downstairs, you go to your door, and Cookie's out there with

7 Todd?

8 A Yes.

9 Q Okay. So they had already come upstairs by the time

10 you get to your door?

11 A Yes.

12 Q If you thought Mr. O'Keefe was hurting Ms.

13 Whitmarsh, you would have done something, right?

14 A If I thought that was what was happening, I probably

15 would have, yes.

16 Q Okay. And had you seen Mr. O'Keefe and -- with Ms.

17 Whitmarsh at the apartment complex outside before?

18 A Yes.

19 Q What were they doing?

20 A Sitting, talking. Walking in and out.

21 Q Did you see them hanging out on their balcony at all?

22 A Yeah, a few times.

23 Q Okay. Did you ever hang out with them?

24 A Yeah.

25 Q Did you ever go over and eat with them?

ROUGH DRAFT TRANSCRIPT

001513

1 A Yes, I did. Once, I believe.

2 MS. PALM: Court's indulgence. No more questions.

3 Thank you, Mr. Hathcox.

4 THE COURT: Any redirect?

5 MR. LALLI: Just a little bit.

6 REDIRECT EXAMINATION

7 BY MR. LALLI:

8 Q Do you remember describing the noises next-door to  
9 the police as slamming doors, rough-housing kind of noises?

10 A Like I said, a ruckus. Like -- you know.

11 Q Okay. Would it help you to look at your statement to  
12 remember exactly how you described those noises to the police?

13 A It possibly would.

14 Q Okay.

15 A I don't remember exactly what I wrote.

16 MR. LALLI: Page 6.

17 MS. PALM: Voluntary?

18 MR. LALLI: Yes.

19 BY MR. LALLI:

20 Q Just read this part to yourself. Does that refresh  
21 your memory?

22 A Yeah.

23 Q Okay. How did you describe it for them?

24 A Slamming doors, you know. Rough-housing.

25 Q Okay. Ms. Palm just asked you the question, if you

1 thought something was happening to that woman, you would have  
2 called the police?

3 A Yeah.

4 Q Well you did think something was happening, didn't  
5 you?

6 A Well I mean, I didn't -- you know.

7 Q Didn't you tell the police, quote, "I was wondering  
8 if he was over there beating the shit out of her or something?"

9 A That did go through my mind. That did go --

10 Q I'm sorry?

11 A That did go through my mind, yes.

12 Q You actually were concerned, based upon what you were  
13 hearing and what you saw, that this defendant was beating the  
14 shit out of that girl?

15 A Well, that did go through my mind. Yeah, yeah.

16 Q Okay. Thank you.

17 MR. LALLI: Nothing further.

18 THE COURT: Any recross?

19 RECROSS-EXAMINATION

20 BY MS. PALM:

21 Q So the noises you described it to the police was like  
22 kind of rough-housing sort of sounds?

23 A I'm sure the way I described it that night was pretty  
24 accurate. I mean --

25 Q Rough-housing?

1 A Right.

2 Q Okay. But you also told them you never thought he  
3 was hurting her, that correct?

4 A I do remember thinking though, I wonder if he is over  
5 there beating her up or something. I mean, that just went  
6 through my head. I didn't really put a lot of (indiscernible)  
7 to it, but it just, you know --

8 Q You were just speculating though?

9 A Right.

10 Q Could have been anything, right?

11 A Right.

12 Q And with those paper-thin walls, you would have heard  
13 pretty much anything, right?

14 A But I had my TV up loud. And like I said, I was  
15 taking medication, I was kind of out of it. I was really not  
16 trying to pay attention, trying to mind my own business, and --

17 Q Okay. But again, you never heard yelling?

18 A I didn't.

19 Q You never heard, you know, screaming or crying?

20 MR. LALLI: Objection, Your Honor.

21 MS. PALM: Nothing?

22 MR. LALLI: This is all beyond the scope.

23 THE COURT: I'm going to overrule the objection.

24 BY MR. LALLI:

25 Q Nothing but just kind of rough-housing sounds? And

1 that started before you saw my client going into the apartment?

2 A Yes, ma'am.

3 Q Thank you.

4 MS. PALM: Nothing further.

5 THE COURT: Any questions from any of the jurors? No  
6 questions. Thank you, sir, for your testimony. You are  
7 excused.

8 THE WITNESS: Thank you.

9 THE COURT: Next witness for the State?

10 MS. GRAHAM: State calls --

11 (Pause in proceedings)

12 MS. GRAHAM: State calls Officer Brian Santarossa.

13 THE MARSHAL: Officer Santarossa, if you will remain  
14 standing. Please sir, raise your right hand, and face the  
15 clerk.

16 BRIAN SANTAROSSA, STATE'S WITNESS, SWORN

17 MS. MORTON: Please sir, have a seat. Slide up to  
18 the microphone. Please state and spell your name for the  
19 record.

20 THE WITNESS: Brian Santarossa. B-R-I-A-N,  
21 S-A-N-T-A-R-O-S-S-A.

22 DIRECT EXAMINATION

23 BY MS. GRAHAM:

24 Q Afternoon, Officer.

25 A Good afternoon.

ROUGH DRAFT TRANSCRIPT

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1 Q And you work for the Metropolitan Police Department?

2 A Yes, ma'am.

3 Q Were you working as a Metro officer on November 5th  
4 of 2008?

5 A Yes, ma'am.

6 Q And what was your assignment that evening?

7 A Patrol.

8 Q Patrol? And were you riding solo?

9 A Yes.

10 Q Were you in a marked car?

11 A Yes.

12 Q Full uniform?

13 A Yes.

14 Q Okay. At approximately 11 p.m. that evening, did you  
15 become aware of a situation that was occurring at the location  
16 of 5001 El Parque?

17 A Yes, I did.

18 Q And how did you become aware of the situation?

19 A The call popped up on the screen as a priority call.

20 Q Okay. And when you say -- let's just explain to the  
21 jury, popped up on the screen as a priority call. What does  
22 that mean exactly?

23 A When a call is called into 9-11 as a in progress type  
24 of call, it's (indiscernible) as what's called a priority zero  
25 call. And when that happens, when the dispatcher signs up to

ROUGH DRAFT TRANSCRIPT

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1 the computer, it pops up on every officer's computer that's  
2 assigned to that area of command.

3 Q And so you were assigned to that area of command?

4 A Yes.

5 Q And it popped up on your --

6 A Yes.

7 Q Okay. And what were the details of that call?

8 A The only details initially was that there was a  
9 female in a room, and there was blood everywhere.

10 Q All right. And what did you do after receiving that  
11 information?

12 A Due to the fact I was close to the call, I assigned  
13 myself to it.

14 Q Okay. So you can assign yourself to certain calls?

15 A Yes.

16 Q And did you in fact respond to the scene?

17 A I did.

18 Q Okay. And I'm going to show you what's been marked  
19 as -- what's been entered as State's Exhibit 2. Do you  
20 recognize that photo, Officer?

21 A Yes, I do.

22 Q And what is that a photo of?

23 A The photo of the front of the apartment.

24 Q Okay. And is that the location that you responded  
25 to?

1 A Yes.

2 Q When you arrived on the scene there, can you describe  
3 for the jury what was going on at the scene at that point when  
4 you arrived?

5 A When we walked up to that location, we saw -- it was  
6 just -- there were some neighbors outside by the stairs  
7 downstairs, and some neighbors on the patio area.

8 Q Okay. Can you -- do you know how many neighbors were  
9 there?

10 A I can't recall, no.

11 Q Okay. So neighbors downstairs, and neighbors  
12 upstairs?

13 A Yes.

14 Q Were there any other officers there at that time?

15 A Yes, Officer Fonbuena.

16 Q Okay. And Officer Fonbuena, did he arrive  
17 separately --

18 A Yes, he did.

19 Q -- from you? But about the same time?

20 A He arrived like maybe 30 seconds before I did.

21 Q Is he what was called a first responder?

22 A Yes.

23 Q Okay. And what does first responder mean?

24 A You're the first officer there.

25 Q Okay. When you arrived there and Officer Fonbuena

ROUGH DRAFT TRANSCRIPT

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1 was there -- now incidentally, was Officer Fonbuena, was he  
2 also in a marked car?

3 A Yes.

4 Q In full uniform?

5 A Yes.

6 Q Did you receive any more details from the neighbors  
7 as to what was going on at the scene?

8 A Yes. As we walked up to the apartment, one neighbor,  
9 I don't know who, just pointed at the --

10 MS. PALM: Objection, Your Honor. Hearsay.

11 THE COURT: Sustained.

12 MS. GRAHAM: Judge, it's not for the truth of the  
13 matter. It's for what the officers did next.

14 MS. PALM: Did you receive information that made you  
15 do something next.

16 THE COURT: Right. I'm going to sustain the  
17 objection. Just ask it a different way.

18 BY MS. GRAHAM:

19 Q You received information --

20 A Yes.

21 Q -- from neighbors?

22 A Yes.

23 Q What did you do then?

24 A We immediately went up to the open door.

25 Q Can you just point on the screen? If you touch that

1 screen it will make a mark, so you can describe for the jury  
2 exactly where you and Officer Fonbuena were.

3 A Okay. We initially basically walked up to the  
4 apartment, and stood -- there we go, right there. And then do  
5 the details. We basically pause maybe like a second, and then  
6 we made entry into the apartment.

7 Q Okay. Now the details that you heard from not only  
8 dispatch, but the neighbors --

9 A Um-hum.

10 Q -- did you feel the need to get a search warrant  
11 before you entered that apartment?

12 A No.

13 Q Why not?

14 A Because the details stated that there was a female  
15 inside bleeding, which my first thought was, okay, somebody  
16 probably needs medical help, extenuating circumstances. And  
17 the other detail we were given was that there was a male still  
18 inside.

19 Q Okay. When you arrived at the top of the stairs --  
20 and incidentally, do you know what apartment number it was?

21 A I believe it was C.

22 Q Okay.

23 A From my memory.

24 Q If I said C35, would that be --

25 A Yes.

ROUGH DRAFT TRANSCRIPT

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1 Q -- accurate?

2 A Yes.

3 Q Was the door to the apartment open or closed?

4 A It was open.

5 Q And did you immediately make entry into the open  
6 door?

7 A Yes.

8 Q Okay. And what did you observe when you went in the  
9 apartment?

10 A We -- excuse me. We went into the living room. All  
11 we saw was an empty living room, that nothing seemed disturbed.  
12 There wasn't any signs of violence.

13 Q Okay. Let me stop you right there.

14 MS. GRAHAM: I'm showing what's -- defense counsel  
15 what's been marked as State's proposed 3, and State's proposed  
16 4. May I approach the witness?

17 THE COURT: Yes.

18 MS. GRAHAM: As well as State's proposed 5, 6, and 7.  
19 In order. May I approach?

20 THE COURT: Yes.

21 BY MS. GRAHAM:

22 Q Officer, can you just take a look at these photos for  
23 a minute, flip through them and see if you recognize those?

24 A Yes, I do.

25 Q And what are they?

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1 A That's the inside of the apartment.

2 Q Okay. And do those fairly and accurately depict the  
3 way that apartment, the living room -- specifically the living  
4 room area looked that evening?

5 A Yes.

6 MS. GRAHAM: Move to admit State's 5, 6, 7 -- 4, 5,  
7 6, and 7.

8 MS. PALM: No objection.

9 THE COURT: They will be admitted.

10 (Exhibits 4, 5, 6, and 7 admitted)

11 MS. GRAHAM: Thank you.

12 BY MS. GRAHAM:

13 Q I'm showing you what's been admitted as State's 3,  
14 Exhibit 3 --

15 THE CLERK: (Indiscernible).

16 THE COURT: Pardon?

17 THE CLERK: (Indiscernible).

18 UNKNOWN MALE SPEAKER: She hasn't asked for  
19 admission.

20 THE COURT: It should be 4. You asked for 4 through  
21 7.

22 MS. GRAHAM: Oh, I'm sorry.

23 THE COURT: Is this 3?

24 MS. GRAHAM: 3, 4, 5, 6, and 7.

25 THE CLERK: Okay. (Indiscernible).

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1 MS. PALM: And I have no objection to those.

2 THE COURT: Okay.

3 (Exhibit 3 admitted)

4 MS. GRAHAM: Apologize for that.

5 BY MS. GRAHAM:

6 Q What's been admitted into evidence now as State's 3.

7 What is that a photo of?

8 A That's the -- just outside the front door, looking  
9 in.

10 Q Okay. And that's where you entered with --

11 A Yes.

12 Q -- Officer Fonbuena?

13 A Yes.

14 Q Okay. So you entered the living room?

15 A Yes.

16 Q And what did you observe in the living room?

17 A Just -- it was just (indiscernible). There wasn't  
18 anything disturbed, no signs of violence of anything.

19 Q Okay. What did you do then?

20 A At that point, we then called out, and identified  
21 ourselves as police officers.

22 Q And did anybody respond to you?

23 A Yes, we heard a voice say -- a male voice say, get in  
24 here.

25 Q Okay. And what was your response to the male voice

ROUGH DRAFT TRANSCRIPT

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1 saying, get in here?

2 A We immediately asked him to step out into the living  
3 room, because we couldn't tell which room it was coming from.

4 Q And where were you at this time?

5 A When we first entered, we basically kind of -- in the  
6 middle of the living room.

7 Q Showing you what's been marked as -- or entered into  
8 evidence as State's 4, does that depict the area that you and  
9 Officer Fonbuena were?

10 A Yes.

11 Q Can you just point to where you were when you heard  
12 the male voice shouting out?

13 A We were basically in this area here, me and -- he and  
14 I.

15 Q Okay.

16 A In the middle of the living room.

17 Q So he says, get in here. And in response, you tell  
18 him what?

19 A We ask him to step out into the living room.

20 Q Okay. And did he comply with that?

21 A No.

22 Q Okay. What did he say?

23 A At first -- I can't recall the order in which these  
24 things were said. But I can say that when we asked -- we asked  
25 him to come out into the living room, because we couldn't tell

1 which room he was in. In fact, we initially thought it was the  
2 room -- I'll depict, it's just on the other side of this wall  
3 right here. So we took a position by the kitchen so we can see  
4 into that room.

5 Q Okay.

6 A Which was --

7 Q Can you point in the screen where you and Fonbuena  
8 took a position?

9 A Right -- that area right there.

10 Q Okay. So as you're standing there, are you giving  
11 him verbal commands?

12 A Yes.

13 Q Okay. And did you get a view inside what would be  
14 known now as the second bedroom?

15 A Yes, we did. A partial view.

16 Q And were there any signs of anybody in that --

17 A No.

18 Q -- particular bedroom? Okay. And once you noticed  
19 that the male voice was not coming from the second bedroom,  
20 what did you do then?

21 A We just stayed where we were, and continued to -- we  
22 basically tried to ask his name, and kept asking him to come  
23 out into the living room.

24 Q Okay. And do you recall how many times you asked him  
25 to come out?

ROUGH DRAFT TRANSCRIPT

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1           A     I don't. There was a -- it was a lot, but I can't  
2 recall a number.

3           Q     Okay. Do you recall -- was it repeatedly?

4           A     Yes.

5           Q     Okay. And did you explain to him why you needed him  
6 to come out?

7           A     During our back-an-forth, he said that -- something  
8 to the effect like, she's bleeding, or she's still breathing,  
9 or something -- that somebody in there was injured. So we  
10 asked him to step out in the living room so we can get her  
11 help.

12          Q     Okay. And when you asked him to step out so you  
13 could get her help, what was his response?

14          A     To that exact answer (sic), I don't know what his  
15 exact response was. But I know one of his responses when we  
16 were trying to get him out in the living room was, fuck you.

17          Q     So he wasn't cooperating?

18          A     No.

19          Q     Okay. Even though you indicated you needed to get  
20 her medical?

21          A     Yes.

22          Q     Okay. At that -- at some point while you're talking,  
23 did you know the identity of the people inside the apartment at  
24 this point?

25          A     No.

ROUGH DRAFT TRANSCRIPT

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1 Q Okay. Neither the male?

2 A No.

3 Q Or the female?

4 A No.

5 Q And at this point, you had not made visual with  
6 anybody inside the apartment?

7 A Correct.

8 Q Okay. At some point, did other officers arrive?

9 A Yes.

10 Q And do you recall what officers those were?

11 A It was Officer Conn, was the third to arrive.

12 Q Officer Conn was the --

13 A Todd Conn, correct.

14 Q Todd Conn was the third to arrive? And once -- did  
15 he enter the apartment?

16 A Yes.

17 Q And did you relay the information that you had thus  
18 far --

19 A Yes.

20 Q -- to him?

21 A I briefly told him what was going on.

22 Q Okay. And once he joined you, where did he join you  
23 in the apartment?

24 A He stood by the -- oh, not there. But by this wall,  
25 right behind this wall. That wall right there.

ROUGH DRAFT TRANSCRIPT

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1 Q Okay. And do you know what Officer Conn's assignment  
2 was at that time at Metro?

3 A He was also patrol.

4 Q Okay. And do you know if he had any special training  
5 with de-escalating situations?

6 A Yes. He was trained -- he was trained as a crisis  
7 intervention team officer.

8 Q Okay. And upon entering into the apartment, and  
9 after you let him know what was going on, did he attempt to  
10 make contact with the people inside?

11 A Yes.

12 Q And do you recall, if anything, what he did?

13 A He basically -- I can't recall exactly what he said.  
14 But it was basically the same as we were saying. We were just  
15 trying to get whoever was in that apartment talking to us out  
16 so we can see them.

17 Q Okay. And you were there when he was issuing verbal  
18 commands?

19 A Yes.

20 Q And do you know how long between the time you and  
21 Fonbuena arrived and Officer Conn arrived?

22 A I don't recall exactly.

23 Q Okay. Once Officer Conn started issuing the verbal  
24 commands, what if anything did defendant do?

25 A Nothing. He just kept saying, get in here. He said

ROUGH DRAFT TRANSCRIPT

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1 at one point, she's breathing. Then at one point said, she's  
2 dead. He just -- he kept -- it just kept going back and forth.  
3 We kept saying, come out in the living room so we can get her  
4 help.

5 Q Okay.

6 A But he wouldn't.

7 Q And why didn't you go in there?

8 A Well once he -- once we were trying to get him out in  
9 the living room, and once his response was, fuck you, that  
10 changed my mind to, why is he so intent on getting us in that  
11 bedroom.

12 Q Okay. So you had no idea at that time what the  
13 situation was in the bedroom?

14 A Correct.

15 Q Other than the initial details of the call?

16 A Correct.

17 Q Okay. Did Officer Conn ever make visual into that  
18 room at that point?

19 A I believe is when he peeked, and he saw blood on the  
20 bed area, is I think is -- if I remember correctly  
21 (indiscernible) relate to us.

22 Q Okay. At some point, did other officers arrive on  
23 the scene?

24 A Yes.

25 Q And do you recall who those officers were?

**ROUGH DRAFT TRANSCRIPT**

1           A     Sergeant Dan Newberry.  Officer -- I can't remember  
2 his first name, but his last name is Ballejos.  And Officer  
3 Sean Taylor.

4           Q     Okay.  And did they arrive together?

5           A     I don't recall.

6           Q     Okay.  And in -- was this a dynamic situation at that  
7 point?

8           A     Yes.

9           Q     Can you explain to the jury what a dynamic situation  
10 is?

11          A     A dynamic situation is basically, things are still  
12 going on.  There's still a chance for someone to get hurt.  The  
13 scene isn't safe, we're still trying to get it under control.  
14 That's the best I can describe as dynamic.

15          Q     Okay.  So at that point -- now Officer Newberry,  
16 Ballejos, and Taylor, did they also enter the apartment with  
17 you?

18          A     Yes.

19          Q     Okay.  Were they in full uniform that evening?

20          A     I believe they were in plain clothes.

21          Q     Okay.  So at that point, that's five officers; is  
22 that correct?

23          A     Correct.  Six.

24          Q     Including -- six?

25          A     Counting -- sorry, I'm losing count.  I believe it's

ROUGH DRAFT TRANSCRIPT

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1 six with myself and Officer Fonbuena. No, I'm sorry. Correct,  
2 you're right. Five officers, not counting me and Officer  
3 Fonbuena.

4 Q Actually, I think you're right. I think it was --

5 A Was it six?

6 Q -- six at that point.

7 A Okay. Okay.

8 Q My addition skills are a little -- all right. So  
9 once they arrived, nobody had made entry into that bedroom at  
10 that point?

11 A Correct.

12 Q Did you relay the information to Sergeant Newberry,  
13 Ballejos, and Officer Taylor once they arrived?

14 A I didn't. I believe Officer Conn did.

15 Q Okay. And what happened then?

16 A At that point -- or the three officers that came in  
17 aligned up along this wall behind Officer Conn --

18 Q Okay.

19 A -- in what we call a stack position.

20 Q A stack position?

21 A Correct.

22 Q Okay. Did somebody formulate a plan for that, or how  
23 does that work? They just immediately started --

24 A That's -- that -- the stacking up like that behind  
25 each other is kind of a standard thing that we use. We don't

**ROUGH DRAFT TRANSCRIPT**

1 have to plan for it. We just do it automatically when we know  
2 it's a situation like that.

3 Q Okay. Now at that point, you don't know if -- you  
4 don't have visual of inside the master bedroom --

5 A No.

6 Q -- at that point?

7 A No.

8 Q And after those officers arrived, Newberry, Ballejos,  
9 and Taylor, do you have any information of the male that's in  
10 the apartment, or the female at that point?

11 A No.

12 Q You still don't have that information?

13 A Correct.

14 Q Are there five -- six officers at the scene then, and  
15 at some point, the male voice was indicating that the female  
16 was alive, she's dead, she's alive, she's dead; why didn't you  
17 guys just go in there?

18 A Like I said, once -- when -- we were basically trying  
19 to get him out because he was saying someone needs help. We  
20 were trying to -- well, come out into the living room first.  
21 And he responded with, fuck you. That was not indicative of  
22 somebody who was trying to get help from the police.

23 Q Okay. All right. So you indicated that officers  
24 stacked up?

25 A Correct.

ROUGH DRAFT TRANSCRIPT

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1 Q Okay. And you said that that was a term that you  
2 use. Can you describe stacking up to the jury?

3 A It simply is lining up behind each other. Like say  
4 at a doorway, we just line up behind each other. That's the  
5 term we use, called stacking up.

6 Q Okay. And what's the purpose of stacking?

7 A It's just for efficient movement when we make entry  
8 into a room. It's just for efficient entry through the door.

9 Q So was it determined that you were going to make  
10 entry into that room?

11 A At some point, yes.

12 Q Do you know who made that determination?

13 A Sergeant Newberry was --

14 Q Okay. Are you aware if Sergeant Newberry did a quick  
15 peek?

16 A He did.

17 Q Okay. And what is a quick peek?

18 A It's basically you peek your head around the wall --  
19 around the corner real quick to get a glimpse of what's in that  
20 room.

21 Q Okay. And he did a quick peek of the master bedroom?

22 A Correct.

23 Q And what's the purpose of a quick glance?

24 A Because if there is somebody armed inside, doing a  
25 quick peek doesn't give them the chance to find a target and

1 start shooting.

2 Q Okay. After Officer -- or Sergeant Newberry did a  
3 quick peek, did he relay what he had observed inside the  
4 bedroom to --

5 MS. PALM: You know, Your Honor, I'm going to object.  
6 She's leading an awful lot. If she could just say, what  
7 happened next, it might go a little faster.

8 THE COURT: I'm going to sustain the objection.

9 BY MS. GRAHAM:

10 Q Did Officer Newberry indicate to you what he had  
11 observed in the bedroom?

12 A Yes.

13 Q And what was that?

14 A He said that he can see blood on the ground. He saw  
15 the male laying down on top of another subject. He just saw  
16 the bottom half of her legs though.

17 Q Okay. At this point, did you know the condition of  
18 the female?

19 A No.

20 Q Did you know the condition of the male?

21 A No.

22 Q Okay. Did he indicate to you at all whether he saw a  
23 weapon?

24 A I can't -- I don't remember if he's the one that said  
25 it. But I did remember hearing that there was a knife on the

ROUGH DRAFT TRANSCRIPT

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1 bed.

2 Q Okay. And at some point, did Newberry, Ballejos, and  
3 Taylor enter the bedroom?

4 A Yes, they did.

5 Q Did you ever enter the bedroom --

6 A No.

7 Q -- with the other officers?

8 A No, I did not.

9 Q Why not?

10 A Because myself and Officer Fonbuena, once they made  
11 entry into the master bedroom, we made entry into the second  
12 bedroom to clear that to make sure there wasn't anybody in  
13 there.

14 Q And who directed you to do that?

15 A That's also common practice. We already knew that  
16 that was going to happen, because they were passing that room.  
17 Once they passed that, I was going to go into that room, make  
18 sure nobody else was in there. So you can (indiscernible)  
19 clear the apartment.

20 Q Okay. So basically your role then was to clear the  
21 apartment?

22 A Correct.

23 Q And you never made entry into the room?

24 A Correct.

25 Q Did you ever have an personal interaction with the

ROUGH DRAFT TRANSCRIPT

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1 defendant?

2 A After he was taken into custody, I assisted with  
3 carrying him out onto the balcony.

4 Q Okay. So he was ultimately taken into custody?

5 A Yes.

6 Q But as far as personal interaction with him --

7 A No.

8 Q -- did you have any?

9 A No.

10 Q Okay.

11 MS. GRAHAM: I'll pass the witness.

12 BY MS. GRAHAM:

13 Q Do you know who --

14 MS. GRAHAM: I'm sorry, one more question.

15 BY MS. GRAHAM:

16 Q Do you know who maintained custody of him?

17 A I believe it was Officer Ballejos, stood outside with  
18 him.

19 Q Okay. Thank you.

20 CROSS-EXAMINATION

21 BY MS. PALM:

22 Q Good afternoon, Officer Santarossa.

23 A Good afternoon.

24 Q At the time on November 5th, 2008, how long have you  
25 been with Metro?

1 A For probably about -- I believe it was about a year.

2 Q Were you working with anybody else? Were you working  
3 with a field training officer still? Or --

4 A No.

5 Q -- were you on your own?

6 A I was by myself.

7 Q Okay. So when you first get there, and you enter the  
8 apartment, Brian O'Keefe is saying, get in here, get in here?

9 A Correct.

10 Q And you're afraid to go in because it's a possible  
11 baiting situation?

12 A Correct.

13 Q And when you do go in though, he doesn't have a  
14 weapon, right?

15 MS. GRAHAM: Objection, misstates the facts. He  
16 never went in. He never went into the bedroom.

17 THE COURT: Sustained.

18 MS. PALM: All right.

19 BY MS. PALM:

20 Q When you looked into the room, he didn't have a  
21 weapon, right?

22 MS. GRAHAM: Objection, facts not in evidence. He  
23 never went into that bedroom.

24 THE COURT: Officer, did you ever go into that master  
25 bedroom?

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1 THE WITNESS: No, I did not.

2 THE COURT: Sustained.

3 BY MS. PALM:

4 Q When Sergeant Newberry looked into the room, he told  
5 you he didn't see him with a weapon, right?

6 A No. Well (indiscernible) I can't recall. I guess --  
7 I heard that there was a knife in there. I can't recall who  
8 relayed that information.

9 Q Okay. You heard there was a knife on the bed?

10 A Correct.

11 Q Not in my client's hand?

12 A No.

13 Q Okay. Did you watch them when they went in the room?

14 A I watched them pass me. I just -- I -- because I  
15 went into the second bedroom, so I didn't see much of what  
16 happened. I knew when they initially made entry.

17 Q Okay. So you weren't watching the arrest happen?

18 A No.

19 Q A crisis intervention officer is somebody who's  
20 trained to deal with people with mental illnesses, or suicidal  
21 people?

22 A Correct.

23 Q A lot of what Mr. O'Keefe was saying while you were  
24 waiting for other officers to arrive was kind of  
25 unintelligible, correct?

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1 A I understood what he was saying.

2 Q If you previously testified it was unintelligible,  
3 would that be incorrect? Do you remember testifying to that?

4 A I don't.

5 Q Would it help you remember if I showed you a copy of  
6 your transcript?

7 A Absolutely.

8 MS. PALM: Page 56 of the previous proceeding. May I  
9 approach, Your Honor?

10 THE COURT: Yes.

11 MS. PALM: Thank you.

12 BY MS. PALM:

13 Q Look at the highlighted.

14 A Okay.

15 Q Did you previously testify that --

16 MS. GRAHAM: Judge, objection. We need to approach,  
17 please.

18 THE COURT: All right.

19 (Off-record bench conference)

20 THE COURT: We need to take a break at this time.

21 Ladies and gentlemen, during this recess, it is your duty not  
22 to converse among yourselves, or with anyone else on any  
23 subject connected with this case. Or to read, watch or listen  
24 to any report of or commentary on the trial by any person  
25 connected with the trial, or by any medium of information,

1 including without limitation, newspaper, television, radio, or  
2 the internet. You are not to form or express an opinion on any  
3 subject connected with this case until this matter is submitted  
4 to you.

5 We'll see you back in approximately five to ten  
6 minutes.

7 (Pause in proceedings)

8 THE COURT: When the jury leaves, you can just go  
9 outside, or go to the anteroom here if you like.

10 THE WITNESS: Okay, thank you.

11 (Outside the presence of the jury)

12 THE COURT: Yes?

13 MS. GRAHAM: Actually Judge --

14 THE COURT: Officer (indiscernible) --

15 MS. GRAHAM: -- I withdraw my objection.

16 THE COURT: -- (indiscernible).

17 THE WITNESS: Oh, yeah.

18 THE COURT: Okay. All right. As soon as the jury's  
19 done with their break, can you call me, Cliff?

20 THE MARSHAL: I will.

21 THE COURT: All right.

22 (Court recessed at 5:01 p.m. until 5:11 p.m.)

23 (In the presence of the jury)

24 THE MARSHAL: Officers and members of the Court,  
25 Department 17 jurors. You may be seated, ladies and gentlemen.

1 Let's check to make sure all cell phones are turned off.

2 THE COURT: Officer, do you understand you're still  
3 under oath?

4 THE WITNESS: Yes.

5 THE COURT: All right. Go ahead, Ms. Palm.

6 MS. PALM: Thank you, Your Honor.

7 BY MS. PALM:

8 Q Officer, do you recall now that you had testified  
9 that a lot of what my client said was unintelligible?

10 A Yes.

11 Q And it was kind of mumbled?

12 A Correct.

13 Q One of those statements was that she stabbed herself  
14 though?

15 A Correct.

16 Q And do you recall what time the dispatch call went  
17 out?

18 A I believe it was at 11:00.

19 Q Okay.

20 A (Indiscernible).

21 Q If I show you a copy of the 9-11 -- or the dispatch  
22 log, would it help you recall the times?

23 A Yes, it will.

24 MS. PALM: May I approach, Your Honor?

25 THE COURT: Yes.

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1 BY MS. PALM:

2 Q If you want to just keep referring to that  
3 (indiscernible). Do you recall what time the call was  
4 dispatched?

5 A 11:02.

6 Q Okay. And do you recall what time you personally  
7 arrived? It might help you out -- if you previously testified  
8 11:06, does that sound right?

9 A Correct. 11:06.

10 Q Okay. And then do you recall what time my client was  
11 in custody? Is it -- would it be at 11:13?

12 A Correct.

13 Q Okay. So basically, it was about 6, 7 minutes that  
14 you were there total?

15 A Correct.

16 Q Okay. And is -- was anybody there before you, or  
17 were you the first ones there?

18 A Myself and Officer Fonbuena were the first ones to  
19 arrive.

20 Q Okay. So the entire situation took about six minutes  
21 to resolve?

22 A Right.

23 Q And was it a matter of seconds once the officers went  
24 into the bedroom?

25 A I can't recall the exact time frame, no.

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1 Q And when you entered the apartment area in the living  
2 room, you didn't notice any kind of disarray or signs of  
3 violence in there, did you?

4 A No, I did not.

5 Q And do you recall whether the bedroom was lit, the  
6 bedroom that my client was in?

7 A I only recall one light being on, but I can't  
8 remember which room had that light on.

9 Q Okay. Do you recall my client being dropped on his  
10 face in the living room?

11 A No.

12 Q Did you recall putting him on his stomach in the  
13 living room?

14 A Yes, we did.

15 Q Was he dropped in a way that he would have been  
16 injured?

17 A No, he wasn't.

18 Q Did you see whether he was dropped in the bedroom?

19 A No.

20 Q If you previously testified if you didn't recall if  
21 his face actually hit the ground or not, would that be  
22 accurate?

23 A It would.

24 MS. PALM: Court's indulgence.

25 BY MS. PALM:

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1 Q So you yourself never looked into the bedroom and saw  
2 my client, did you?

3 A No.

4 Q And I'm sorry. His first statements were, get in  
5 here, get in here?

6 A Correct.

7 MS. PALM: No further questions. Thank you.

8 THE COURT: All right. Any redirect?

9 MS. GRAHAM: Just very briefly, Judge.

10 REDIRECT EXAMINATION

11 BY MS. GRAHAM:

12 Q Ms. Palm mentioned the word, baiting.

13 MS. PALM: Objection, Your Honor. I don't think I  
14 mentioned the word, baiting.

15 MS. GRAHAM: She -- in cross she did, Judge.

16 MS. PALM: Oh.

17 THE COURT: I'll overrule the objection. If not,  
18 I'll let you go into that area at this point.

19 BY MS. GRAHAM:

20 Q Officer Santarossa, can you describe for the jury  
21 what the term baiting means to police officers?

22 A It's when somebody wants us to get into -- basically  
23 get into their turf. Get us into their situation, so whatever  
24 they have planned, they can execute.

25 Q Okay. And does that -- generally, is that a concern

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1 for officers --

2 A Yes.

3 Q -- when you say baiting?

4 A Yes.

5 Q And are precautionary measures taken when officers  
6 feel as if they're being baited?

7 A Yes.

8 Q Okay. The only other question that I have for you  
9 today is, did you ever witness the circumstances under which  
10 the defendant was eventually restrained and taken into custody  
11 in the bedroom?

12 A I couldn't see it.

13 Q Okay.

14 A I heard it though.

15 Q Okay. But you --

16 A I couldn't see it.

17 Q -- visually saw nothing?

18 A No.

19 Q Okay. Thank you.

20 A Thank you.

21 THE COURT: Ms. Palm, anything further?

22 RECROSS-EXAMINATION

23 BY MS. PALM:

24 Q Officer Santarossa, when my client -- when officers  
25 entered into the bedroom, it didn't turn out my client was

1 baiting anyone, was he, under the term you use it when  
2 somebody's preparing to ambush officers?

3 A No, correct.

4 Q Thank you.

5 MS. PALM: That's all.

6 THE COURT: Any questions by any of the jurors? No  
7 questions. All right. Thank you, Officer, for your testimony.  
8 You are excused.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Ladies and gentlemen, I understand that  
11 the jury needs to leave at 5:30 or before 5:30 today. And so  
12 with your request, we'll adjourn today. I have a very late and  
13 long calendar tomorrow morning. We're going to resume tomorrow  
14 at 11 in the morning. Also, I understand the jury can stay  
15 until 6:30 tomorrow. And so I don't know if you want to take a  
16 late breakfast or an early lunch, but we'll start up at 11  
17 tomorrow morning.

18 During this evening recess, it is your duty not to  
19 converse among yourselves, or with anyone else on any subject  
20 connected with this case. Or to read, watch or listen to any  
21 report of or commentary on the trial by any person connected  
22 with the trial, or by any medium of information, including  
23 without limitation, newspaper, television, radio, or the  
24 internet. You are not to form or express an opinion on any  
25 subject connected with this case until this matter is submitted

1 to you.

2 Please have a good evening, and we'll see you  
3 tomorrow at 11.

4 (Outside the presence of the jury)

5 THE COURT: All right, we're outside the presence.  
6 Anything for the State?

7 MR. LALLI: Not on behalf of the State, Your Honor.  
8 Thank you.

9 THE COURT: Anything on defense?

10 MS. PALM: No thank you, Your Honor.

11 THE COURT: All right. Are the attorneys able to  
12 stay to 6:30?

13 MS. PALM: I have no life. I can stay --

14 THE COURT: I mean, are we getting caught up?

15 MS. PALM: -- whenever.

16 THE COURT: Are we behind schedule, or?

17 MS. GRAHAM: Well I think we're getting caught up.

18 MR. LALLI: I think we're -- I personally believe  
19 we're on schedule to finish up with the evidence Monday  
20 probably. At the latest, Tuesday, at this point. But I think  
21 -- I don't know. My sense is that it will be maybe a full day  
22 on Monday, but on Monday the evidence would conclude.

23 THE COURT: All right.

24 MS. PALM: Yeah. I'm thinking we'll probably finish  
25 Tuesday though when you count argument too.

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1 MR. LALLI: Yeah. Yeah. I'm not talking about  
2 argument, but I'm talking about the conclusion of the evidence.

3 THE COURT: Okay.

4 MR. LALLI: I would see it concluding --

5 THE COURT: Good.

6 MR. LALLI: -- on Monday.

7 THE COURT: See everybody tomorrow. Have a good  
8 evening.

9 MS. PALM: You too.

10 (Court proceeding concluded at 5:20 p.m., until Friday,  
11 August 27, 2010)

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Joyce Toliver	73	94	109	112
Charles Toliver	120	145	160	160
Todd Armbruster	224	235	242	
Jimmy Hatchcox	245	252	256	257
O. Brian Santarossu	259	280	288	289

DEFENDANT'S WITNESS:

Louis DeSalvio	58	65	70	
Dr. Todd Cameron Grey	161	183	216	

\* \* \*

EXHIBITS

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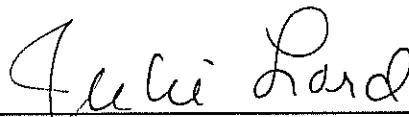
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ACKNOWLEDGMENT

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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