

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

[illegible]

Supreme Court No. _____
District Court Case No. C250630

)

)
)
)
)
)
)
)
)
)
)

)

)

)

)

15
16
17
18
19
20
21
22
23
24
25
26
27
28

15
16
17
18
19
20
21
22
23
24
25
26
27
28

18
19
20
21
22
23
24
25
26
27
28

20
21
22
23
24
25
26
27
28

DAVID ROGER
BAR NO. 0477
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
200 LEWIS AVE., 3RD FLOOR
LAS VEGAS, NV 89155
(702) 671-2500

CATHERINE CORTEZ-MASTO
ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701-4717
(702) 486-3420
Counsel for Real Party in Interest

Attorney for Petitioner

INDEX

<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
1	AMENDED INFORMATION (2/10/09)	35-37
5	APPELLANT'S FAST TRACK STATEMENT DOCKET NO. 53859 (8/19/09)	721-736
4	DEFENDANT'S BRIEF ON ADMISSIBILITY OF EVIDENCE OF ALLEGED VICTIM'S HISTORY OF SUICIDE ATTEMPTS, ANGER OUTBURSTS, ANGER MANAGEMENT THERAPY, SELF-MUTILATION (WITH KNIVES AND SCISSORS) AND ERRATIC BEHAVIOR (3/20/09)	598-606
5	DEFENDANT'S MOTION TO SETTLE THE RECORD (3/24/09)	694-699
1	DEFENDANT'S OPPOSITION TO STATE'S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES (2/6/09)	25-29
14	DEFENDANT'S OPPOSITION TO MOTION IN LIMINE TO ADMIT EVIDENCE OF OTHER BAD ACTS PURSUANT TO NRS 48.045 AND EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061 (1/18/11)	2449-2480
5	DEFENDANT'S PROPOSED EXHIBIT B (MONTE VISTA HOSPITAL RECORDS)	607-49
7	DEFENDANT'S PROPOSED JURY INSTRUCTIONS (8/23/10)	1038-1096
1	INFORMATION (12/19/08)	1-3
5	INSTRUCTIONS TO THE JURY (3/20/09)	650-692

	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
1			
2			
3	12	INSTRUCTIONS TO THE JURY (9/2/10)	2191-2218
4	5	JUDGMENT OF CONVICTION	
5		(5/8/09)	709-710
6	5	MINUTES (1/6/09 - 5/5/09)	713-720
7			
8	6	MINUTES (4/29/10, 5/20/10, 6/6/10)	746-748
9	12	MINUTES (9/1/10 – 9/2/10)	2221-2224
10	12	MINUTES (9/16/10)	2235
11			
12	12	MINUTES (9/14/10)	2239
13			
14	5	NOTICE OF APPEAL	
15		(5/21/09)	711-712
16			
17	1	NOTICE OF DEFENDANT'S EXPERT	
18		WITNESSES (3/5/09)	40-45
19	1	NOTICE OF DEFENDANT'S WITNESSES	
20		(3/6/09)	58-61
21	1	NOTICE OF MOTION AND MOTION TO	
22		ADMIT EVIDENCE OF OTHER CRIMES	
23		(BY STATE) (2/2/09)	7-22
24	6	NOTICE OF MOTION AND MOTION BY	
25		DEFENDANT O'KEEFE TO PRECLUDE THE	
26		STATE FROM INTRODUCING AT TRIAL	
27		OTHER ACT OR CHARACTER EVIDENCE	
28		AND OTHER EVIDENCE WHICH IS UNFAIRLY	
		PREJUDICIAL OR WOULD VIOLATE HIS	
		CONSTITUTIONAL RIGHTS (7/21/10)	749-765

1	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
2			
3	6	NOTICE OF MOTION AND MOTION BY	
4		DEFENDANT O'KEEFE TO ADMIT EVIDENCE	
5		PERTAINING TO THE ALLEGED VICTIM'S	
6		MENTAL HEALTH CONDITION AND HISTORY,	
7		INCLUDEING PRIOR SUICIDE ATTEMPTS,	
8		ANGER OUTBURSTS, ANGER MANAGEMENT	
9		THERAPY, SELF-MUTILATION AND ERRATIC	
10		BEHAVIOR (7/21/10)	765-784
11			
12	6	NOTICE OF MOTION AND MOTION BY	
13		DEFENDANT FOR DISCOVERY	
14		(8/2/10)	817-825
15			
16	6	NOTICE OF MOTION AND MOTION BY	
17		DEFENDANT TO SUPPRESS HIS	
18		STATEMENTS TO POLICE, OR,	
19		ALTERNATIVELY, TO PRECLUDE THE	
20		STATE FROM INTRODUCING PORTIONS	
21		OF HIS INTERROGATION	826-872
22			
23	6	NOTICE OF MOTION AND MOTION BY	
24		DEFENDANT TO PRECLUDE EXPERT	
25		TESTIMONY	880-887
26			
27	13	NOTICE OF MOTION AND MOTION BY	
28		DEFENDANT TO PRECLUDE THE STATE	
		FROM INTRODUCING AT TRIAL	
		IMPROPER EVIDENCE AND ARGUMENT	
		(1/3/11)	2246-2315
	13	NOTICE OF MOTION AND MOTION IN	
		LIMINE TO ADMIT EVIDENCE OF OTHER	
		BAD ACTS PURSUANT TO NRS 48.045 AND	
		EVIDENCE OF DOMESTIC VIOLENCE	
		PURSUANT TO 48.061 (BY STATE)	
		(1/6/11)	2321-2343

<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
13	NOTICE OF MOTION AND MOTION BY DEFENDANT TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY BAR AND SPEEDY TRIAL VIOLATION AND, ALTERNATIVELY, TO PRECLUDE STATE'S NEW EXPERT WITNESS, EVIDENCE AND ARGUMENT RELATING TO THE DYNAMICS OR EFFECTS OF DOMESTIC VIOLENCE AND ABUSE (1/7/11)	2344-2370
1	NOTICE OF WITNESSES AND/OR EXPERT WITNESSES (BY STATE) (2/3/09)	23-24
1	NOTICE OF WITNESSES AND/OR EXPERT WITNESSES (BY STATE) (2/17/09)	38-39
1	NOTICE OF EXPERT WITNESSES (BY STATE) (3/5/09)	56-57
14	<u>OHIO V. BETTS</u> , 2007 OHIO APP LEXIS, 4873 (2007)	2588-2596
5	ORDER OF REVERSAL AND REMAND, DOCKET NO. 53859 (4/7/10)	737-738
7	ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION BY DEFENDANT O'KEEFE FOR DISCOVERY (8/23/10)	1097-1098
12	ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION BY DEFENDANT O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT TRIAL OTHER ACT EVIDENCE AND OTHER EVIDENCE WHICH IS UNFAIRLY PREJUDICIAL OR WOULD VIOLATE HIS CONSTITUTIONAL RIGHTS (9/9/10)	2236-2238

<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
5	REMITTITUR, DOCKET NO. 53859 (5/7/10)	739-745
1	ROUGH DRAFT TRANSCRIPT JANUARY 20, 2009 (7/10/09)	4-6
1	ROUGH DRAFT TRANSCRIPT FEBRUARY 10, 2009 (7/10/09)	30-34
1	ROUGH DRAFT TRANSCRIPT MARCH 10, 2009 (7/10/09)	64-68
3	ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY TWO, MARCH 17, 2009 (7/10/09)	375-442
3	ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY THREE, MARCH 18, 2009 (7/10/09)	443-494
4	ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY FOUR, MARCH 19, 2009 (7/10/09)	495-548
4	ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY FIVE, MARCH 20, 2009 (7/10/09)	549-597
5	ROUGH DRAFT TRANSCRIPT APRIL 7, 2009 (7/10/09)	704-703
5	ROUGH DRAFT TRANSCRIPT (SENTENCING) MAY 5, 2009 (7/10/09)	704-708
6	ROUGH DRAFT TRANSCRIPT AUGUST 17, 2010 (11/23/10)	929-949

1	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
2			
3	7	ROUGH DRAFT TRANSCRIPT	
4		AUGUST 19, 2010	
5		(11/23/10)	956-992
6	7	ROUGH DRAFT TRANSCRIPT	
7		AUGUST 20, 2010	
8		(11/23/10)	996-1037
9	7	ROUGH DRAFT TRANSCRIPT	
10		(PARTIAL) JURY TRIAL (DAY ONE),	
11		AUGUST 23, 2010	
12		(11/23/10)	1099-1122
13	7	ROUGH DRAFT TRANSCRIPT	
14		(PARTIAL) JURY TRIAL (DAY TWO),	
15		AUGUST 24, 2010	
16		(11/23/10)	1123-1135
17	8	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
18		(DAY THREE), AUGUST 25, 2010	
19		(11/23/10)	1136-1258
20	9	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
21		(DAY FOUR), AUGUST 26, 2010	
22		(11/23/10)	1259-1552
23	10	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
24		(DAY FIVE), AUGUST 27, 2010	
25		(11/23/10)	1553-1790
26	11	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
27		(DAY SIX), AUGUST 30, 2010	
28		(11/23/10)	1791-2016
	12	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
		(DAY SEVEN), AUGUST 31, 2010	
		(11/23/10)	2017-2190

1	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
2			
3	12	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
4		(DAY EIGHT), SEPTEMBER 1, 2010	
5		(11/23/10)	2219-2220
6	12	ROUGH DRAFT TRANSCRIPT JURY TRIAL	
7		(DAY NINE), SEPTEMBER 2, 2010	
8		(11/23/10)	2225-2232
9	7	SECOND AMENDED INFORMATION	993-995
10	6	STATE'S OPPOSITION TO DEFENDANT'S	
11		MOTION TO ADMIT EVIDENCE PERTAINING	
12		TO THE ALLEGED VICTIM'S MENTAL	
13		HEALTH CONDITION AND HISTORY (8/16/10)	900-905
14	6	STATE'S OPPOSITION TO DEFENDANT'S	
15		MOTION TO SUPPRESS HIS STATEMENTS	
16		TO POLICE, OR ALTERNATIVELY, TO	
17		PRECLUDE THE STATE FROM INTRODUCING	
18		PORTIONS OF HIS INTERROGATION (8/17/09)	915-928
19	6	STATE'S OPPOSITION TO MOTION TO	
20		PRECLUDE EXPERT TESTIMONY (8/18/10)	950-955
21	14	STATE'S OPPOSITION TO DEFENDANT'S	
22		MOTION TO PRECLUDE THE STATE FROM	
23		INTRODUCING AT TRIAL IMPROPER	
24		EVIDENCE AND ARGUMENT (1/12/11)	2371-2428
25	6	STATE'S RESPONSE TO DEFENDANT'S	
26		MOTION TO PRECLUDE THE STATE FROM	
27		INTRODUCING AT TRIAL OTHER BAD ACTS	
28		OR CHARACTER EVIDENCE AND OTHER	
		EVIDENCE THAT IS UNFAIRLY PREJUDICIAL	
		OR WOULD VIOLATE HIS CONSTITUTIONAL	
		RIGHTS (8/16/10)	891-899

1	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
2			
3	14	STATE'S OPPOSITION TO MOTION TO	
4		DISMISS, AND, ALTERNATIVELY, TO	
5		PRECLUDE EXPERT AND ARGUMENT	
6		REGARDING DOMESTIC VIOLENCE	
7		(1/18/11)	2481-2538
8	1	SUPPLEMENTAL NOTICE OF WITNESSES	
9		(BY STATE) (3/10/09)	62-63
10	1	SUPPLEMENTAL NOTICE OF WITNESSES	
11		(BY STATE) (3/11/09)	69-70
12	6	SUPPLEMENTAL NOTICE OF WITNESSES	
13		(BY DEFENDANT) (8/16/10)	888-890
14	6	SUPPLEMENTAL NOTICE OF	
15		DEFENDANT'S EXPERT WITNESSES	
16		(7/21/10)	785-816
17	6	SUPPLEMENTAL NOTICE OF EXPERT	
18		WITNESSES (BY STATE) (8/13/10)	878-879
19	6	SUPPLEMENTAL NOTICE OF EXPERT	
20		WITNESSES (BY STATE) (8/16/10)	906-914
21	13	SUPPLEMENTAL NOTICE OF EXPERT	
22		WITNESSES (BY STATE) (1/3/11)	2316-2320
23	14	SUPPLEMENTAL NOTICE OF WITNESSES	
24		(BY STATE) (1/14/11)	2429-2432
25	2	TRANSCRIPT JURY TRIAL (DAY ONE)	
26		MARCH 16, 2009	
27		(10/14/09)	71-369
28	3	TRANSCRIPT (PARTIAL) JURY TRIAL	
		(DAY TWO) MARCH 17, 2009	
		(3/18/09)	370-374

1	<u>VOLUME</u>	<u>DOCUMENT NAME/FILE DATE</u>	<u>PAGE NO.</u>
2			
3	6	TRANSCRIPT AUGUST 12, 2010 (11/23/10)	873-877
4			
5	12	TRANSCRIPT SEPTEMBER 16, 2010 (2/4/11)	2240-2245
6			
7	14	TRANSCRIPT JANUARY 13, 2011 (2/4/11)	2433-2448
8			
9	14	TRANSCRIPT JANUARY 18, 2011 (2/4/11)	2539-2544
10			
11	14	TRANSCRIPT JANUARY 20, 2011 (2/4/11)	2545-2587
12			
13	5	VERDICT (3/20/09)	693
14	12	VERDICT SUBMITTED TO JURY BUT RETURNED UNSIGNED (9/2/10)	2233-2234
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

COPY

FILED

Nov 23 10 24 AM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

Ann Williams
CLERK OF THE COURT

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

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 7

TUESDAY, AUGUST 31, 2010

APPEARANCES:

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

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

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

002017

1 LAS VEGAS, NEVADA, TUESDAY, AUGUST 31, 2010, AT 10:15 A.M.

2 (Outside the presence of the jury).

3 THE MARSHAL: All right, let's come to order and make
4 sure our cell phones are turned off, please.

5 THE COURT: Where's our defendant? Okay. We're on
6 the record, Michelle?

7 THE COURT RECORDER: Yes, we are.

8 THE COURT: All right, we're outside the presence of
9 the jury panel. Mr. Lalli, during the conference with you and
10 Ms. Palm in chambers, you advised me of a situation on the
11 elevator. If you could put that on the record, please.

12 MR. LALLI: Yes. Your Honor, this morning I was
13 coming up to the 11th floor on the elevator and I entered a
14 crowded elevator, and there were a number of people on it, one
15 of whom was Debra Ratanapool (phonetic), Jury No. 6, I believe.

16 On the way up to the 11th floor two attorneys, Jeanie
17 Wa (phonetic) and Dan Winder were on the elevator having a
18 discussion between themselves. And at one point Mr. Winder,
19 and certainly am not suggesting was intentional or anything of
20 that nature, but Mr. Winder looked at me and he said words to
21 the effect, I understand you're in trial. And I said, yes.
22 And he said, I believe you're doing that with Trish, reference
23 to Ms. Palm, and I said, yes. And he -- he mentioned something
24 about he was supposed to come see part of it or watch part of
25 the trial. And then he said the defendant's name. He said

ROUGH DRAFT TRANSCRIPT

002018

1 O'Keefe, I think that's a retrial or I heard that's a retrial
2 or it is a retrial. Certainly he said something audible about
3 O'Keefe and retrial.

4 And as soon as he did that, I immediately placed my
5 finger to my lips in the be quiet sort of gesture without
6 saying anything to either confirm or deny it. And he
7 acknowledged that. And my concern is that Ms. Ratanapool might
8 have heard it. And if she did, you know, there's always the
9 possibility that she might have disclosed something to another
10 juror, so obviously I've got an ethical obligation to disclose
11 that to the court. And it would be our request that Ms.
12 Ratanapool just come in and perhaps be questioned by the court
13 on a, did she hear anything, what did she hear, and did she
14 disclose it to jurors.

15 THE COURT: Right.

16 MR. LALLI: And then depending on what she says, the
17 court at some point would have to make a determination to
18 whether she were still fit to be on the jury.

19 THE COURT: Anything to add, Ms. Palm, because I'm
20 going to bring her in?

21 MS. PALM: Not at this point. We'll wait until
22 after --

23 THE COURT: Yeah.

24 MS. PALM: -- because I still need to talk to Mr.
25 O'Keefe about it.

ROUGH DRAFT TRANSCRIPT

002019

1 THE COURT: Okay, well, can we -- I can bring -- I'm
2 going to bring her in right now.

3 MS. PALM: Yes, no --

4 THE COURT: All right.

5 MS. PALM: -- that's fine.

6 THE COURT: Miss, what is it, how do you pronounce
7 her name?

8 THE MARSHAL: No. 6, Ratanapool.

9 THE COURT: Ratanapool. Bring just her in. All
10 right, Cliff. Morning, Ms. Ratanapool.

11 JUROR NO. 6: Good morning.

12 THE COURT: We called you in here, you're not in
13 trouble, okay.

14 JUROR NO. 6: Okay.

15 THE COURT: All right, you look a little nervous.
16 This morning when you were coming up to the 11th floor Mr.
17 Lalli saw you in one of the elevators.

18 JUROR NO. 6: (Indiscernible).

19 THE COURT: And he mentioned to me and to Ms. Palm
20 that some attorneys, other attorneys were in the elevator and
21 they may have spoke to Mr. Lalli or may have made some comments
22 about this case. Did you overhear anything?

23 JUROR NO. 6: The only thing I know that happened,
24 which I thought of like after I said it, I was standing next to
25 a lady that probably worked in the court, I think, she had a

ROUGH DRAFT TRANSCRIPT

002020

1 newborn baby, four-week-old baby, and we were in the middle of
2 two ladies. Darling little baby next to me, like I said, very,
3 very young. She had her -- the baby had her necklace, her
4 chain necklace in her hand, and all I said was because I know
5 we're not supposed to say anything, but I said it, and then I
6 thought oh, I'm not supposed to talk to anybody, she's got your
7 necklace. And that's all I said. And that's all I heard.
8 (Indiscernible). I thought well (indiscernible) newborn baby
9 and she's got the necklace in her hand, and I just -- that's
10 all I said and that's all I heard and that's it.

11 THE COURT: Did you overhear any conversations with
12 anyone else in the elevator?

13 JUROR NO. 6: No, I did not.

14 THE COURT: Did you overhear any conversations
15 involving Mr. Lalli?

16 JUROR NO. 6: No.

17 THE COURT: Not directed at you, directed at anybody
18 else?

19 JUROR NO. 6: No.

20 THE COURT: Did you hear anyone --

21 JUROR NO. 6: I just -- I just thought to myself I
22 shouldn't talk, I'm not supposed to.

23 THE COURT: Okay. Did you hear anyone else direct a
24 conversation to Mr. Lalli?

25 JUROR NO. 6: I really wasn't listening to anybody

ROUGH DRAFT TRANSCRIPT

002021

1 else. I was thinking I wasn't supposed to talk, and I just
2 was --

3 THE COURT: Well, talking to someone with a baby,
4 that's okay, so you're not talking about the case. You're not
5 in trouble.

6 JUROR NO. 6: Oh, no, okay.

7 THE COURT: You're not in -- no, that's --

8 JUROR NO. 6: Okay.

9 THE COURT: You just can't talk about the case,
10 that's all.

11 JUROR NO. 6: No oh, all right.

12 THE COURT: No, if there's a cute baby in the
13 elevator, that's -- that's fine, okay. But you -- you didn't
14 hear anything regarding this case?

15 JUROR NO. 6: No.

16 THE COURT: Okay, Mr. Lalli, do you have any
17 questions?

18 MR. LALLI: No questions.

19 THE COURT: Ms. Palm?

20 MS. PALM: None, thanks.

21 THE COURT: Okay. And Ms. Ratanapool, this issue's
22 right here are -- you know, have nothing to do with the
23 evidence of this case, so I direct you not to discuss these
24 questions with the jurors.

25 JUROR NO. 6: Okay.

ROUGH DRAFT TRANSCRIPT

002022

1 THE COURT: All right. Why don't you have a seat
2 outside, and we'll call everybody in in just a minute.

3 JUROR NO. 6: All right.

4 THE COURT: Okay, thank you.

5 JUROR NO. 6: Thank you.

6 THE MARSHAL: Do we know probably how long the jury
7 instructions will be so --

8 THE COURT: We're not going to do them right now.

9 THE MARSHAL: -- (indiscernible) get coffee or --

10 THE COURT: No, we'll start with the testimony
11 because we're ready. Ms. Palm, do you have anything regarding
12 this juror?

13 MS. PALM: No, your Honor.

14 THE COURT: (Indiscernible)? Okay. And at this time
15 since the State has rested, I'm going to give your client the
16 Carter instruction. Mr. O'Keefe, can you please listen very
17 carefully.

18 Under the Constitution of the United States of
19 America and the Constitution of the State of Nevada, you cannot
20 be compelled to testify in this case. Do you understand that,
21 sir?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: All right. You may at your own request
24 give up that right and take the witness stand and testify. If
25 you do, you will be subject to cross-examination by one of the

1 deputy district attorneys, and anything that you may say, be it
2 on direct from -- question from Ms. Palm or on
3 cross-examination will be the subject of fair comment when you
4 deputy district attorney speaks to the jury in final argument.
5 Do you understand that, sir?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: If you choose not to testify, the court
8 will not permit the district attorneys to make any comment to
9 the jury because you have not testified. Do you understand
10 that, sir?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: If you elect not to testify, the court
13 will instruct the jury, but only if your attorney specifically
14 requests as follows: The law does not compel a defendant in a
15 criminal case to take the stand and testify and no presumption
16 may be raised and no inference of any kind may be drawn from a
17 failure of a defendant to testify. Do you understand that,
18 sir?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Okay. Do you have any questions
21 regarding these rights I've just advised you of?

22 THE DEFENDANT: No, your Honor.

23 THE COURT: Okay. If you have a felony conviction
24 within the last ten years, sir, the district attorney, if you
25 take the stand, can inquire or your attorney can as far as

ROUGH DRAFT TRANSCRIPT

002024

1 whether or not you've been convicted of a felony, what was the
2 felony and when did it happen. Do you understand that, sir?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Okay. Ms. Palm, does your client have
5 any prior felony convictions that you've advised him about?

6 MS. PALM: He does, your Honor, and I have advised
7 him.

8 THE COURT: Okay. All right, anything else before we
9 call the jury? By the defense?

10 MS. PALM: No.

11 THE COURT: By the State?

12 MR. LALLI: No, your Honor.

13 THE COURT: All right.

14 MR. LALLI: Thank you.

15 THE COURT: Bring the jury in and call Ms. Palm's
16 witness.

17 MS. PALM: Mr. Burger.

18 THE COURT: Ms. Palm, total witnesses time wise so I
19 can schedule lunch.

20 MS. PALM: Gosh, these witnesses are all really
21 short. But I can tell you the last one's not going to be here
22 until 11:00, so -- and he's probably going to be a 20 minute
23 witness.

24 THE COURT: Okay.

25 THE CLERK: (Indiscernible).

ROUGH DRAFT TRANSCRIPT

002025

1 MS. PALM: Paisano.

2 THE COURT: Ms. Palm, and I understand if for
3 tactical reasons you haven't made a decision yet or I don't
4 know if you're able to tell me whether or not your client's
5 going to take the stand. I'm just trying to schedule the lunch
6 for the jurors to order lunch.

7 MS. PALM: And your Honor, I'm just trying to talk to
8 him about it right now.

9 THE COURT: Okay, all right. And if you feel that
10 would effect your tact as a trial strategy, then feel free to
11 say you haven't decided yet, okay.

12 MS. PALM: Okay. I haven't decided at this exact
13 moment.

14 THE COURT: Okay. Officer, could you catch our
15 marshal and ask him to inquire from the jurors if there's
16 anyone vegetarian.

17 THE CORRECTIONS OFFICER: (Indiscernible).

18 THE COURT: Yeah.

19 (Pause in the proceedings).

20 THE COURT: Are we ready, Cliff?

21 THE MARSHAL: We're ready, but I know we're waiting
22 on something.

23 THE COURT: What? No, we're ready to go.

24 MS. PALM: Can we approach --

25 THE COURT: All right.

ROUGH DRAFT TRANSCRIPT

002026

1 MS. PALM: -- while we're waiting.

2 (Off-record bench conference).

3 (In the presence of the jury).

4 THE MARSHAL: Officers and members of the court,
5 Department 17 jurors.

6 (Off-record bench conference).

7 THE MARSHAL: Please be seated, ladies and gentlemen.
8 Let's make sure cell phones are turned off, please.

9 THE COURT: All right, Ms. Palm, your first witness,
10 please.

11 MS. PALM: Tracy Burger.

12 THE COURT: Actually, it's not your first witness.
13 We've called some witnesses already.

14 THE MARSHAL: Mr. Burger, if you'll remain standing,
15 please, sir. Raise your right hand and face the clerk.

16 TRACY BURGER, DEFENDANT'S WITNESS, SWORN

17 THE MARSHAL: Please have a seat. Slide up to the
18 microphone and place state and spell your name for the record.

19 THE WITNESS: My name is Tracy Burger, T-r-a-c-y
20 first name. Last name, Burger, B-u-r-g-e-r.

21 THE COURT: Go ahead, Ms. Palm.

22 MS. PALM: Thank you.

23 DIRECT EXAMINATION

24 BY MS. PALM:

25 Q Good morning, Mr. Burger.

ROUGH DRAFT TRANSCRIPT

002027

1 A Morning.

2 Q Can you tell the jury how you're employed, sir?

3 A Well, presently I'm unemployed.

4 Q Okay. How were you employed in November of 2008?

5 A I was the labor superintendent for MJ Dean
6 Construction (phonetic).

7 Q Okay. And where is that company located?

8 A Las Vegas, Nevada.

9 Q And do you know Brian O'Keefe?

10 A I do.

11 Q And could you tell the jury where he's seated and
12 what he's wearing, if he's in here today?

13 A Sitting at the table there with a black tie -- or
14 blue tie and black suit.

15 Q Thank you.

16 MS. PALM: May the court reflect the identification?

17 THE COURT: Yes, it will.

18 MS. PALM: Thank you.

19 BY MS. PALM:

20 Q And did Mr. O'Keefe ever work for you?

21 A Yes, he did.

22 Q How was it he -- he came to your employment?

23 A He was dispatched through the labor's union.

24 Q What labor's union is that?

25 A Local 872.

1 Q Okay. Was he an apprentice?

2 A At that time, he was, yes.

3 Q Okay. Are all your employees union members?

4 A Yes, yes.

5 Q And did he work for you from about November 2007 to
6 July 2008?

7 A Yes, he did.

8 Q Okay. Was it full time?

9 A Yes, it was.

10 Q Do you recall November 5th of 2008 speaking with Mr.
11 O'Keefe?

12 A I do.

13 Q Okay. Was -- what kind of -- was that a telephone
14 call, in person, what?

15 A Yeah, Brian it telephoned me.

16 Q Okay. Do you recall what time?

17 A It was in -- in the afternoon around 3:00 o'clock or
18 so, maybe a few minutes after. 3:00, 3:15, somewhere in that
19 area.

20 Q Okay. Do you know what he wanted?

21 A He was --

22 MS. GRAHAM: Objection. Hearsay.

23 THE COURT: Sustained.

24 BY MS. PALM:

25 Q Do you know what the purpose of his phone call was?

1 A Well, yeah, he inquired -- he had recently been laid

2 --

3 MS. GRAHAM: Objection. It calls for hearsay.

4 THE COURT: Sustained.

5 BY MS. PALM:

6 Q Did you know Mr. O'Keefe's employment situation?

7 A Yes, I -- yes, I did.

8 Q What was it?

9 A Well, he was unemployed as far as working for MJ
10 Dean.

11 Q Okay.

12 A Yeah, I assumed he was unemployed.

13 Q Okay. And how was work going with MJ Dean at the
14 time?

15 A It -- it was slow. It was very slowed compared to
16 normal.

17 Q Okay. So when you say he was unemployed, he had been
18 laid off or --

19 A Oh, yeah, Brian had been reduction in force.

20 Q Okay.

21 A Had been downsized.

22 Q Okay. As a result of the phone call, did Mr. O'Keefe
23 have any hope of going back to work for you?

24 A Yeah, yeah Brian was eligible for rehire.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

002030

1 MS. PALM: No further questions, thank you, sir.

2 THE WITNESS: Um-h'm.

3 THE COURT: Any cross-examination?

4 MS. GRAHAM: No, Judge.

5 THE COURT: Any questions from any of the jurors?

6 All right, thank you, Mr. Burger, for your testimony. You are
7 excused.

8 THE WITNESS: All right.

9 THE COURT: Thank you, sir. Next witness for the
10 defense.

11 MS. PALM: My next witness would be Chelsea Collins
12 (indiscernible).

13 THE COURT: All right.

14 MS. PALM: Your Honor, she's actually scheduled for
15 10:30.

16 THE COURT: Okay. All right, ladies and gentlemen,
17 what we'll do is we'll just take a quick -- I know you just sat
18 down, but we're just going to take a recess for ten minutes
19 until the next witness shows up.

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 the trial
24 or by any medium of information, including without limitation,
25 newspaper, television, radio or the Internet. You are not to

ROUGH DRAFT TRANSCRIPT

002031

1 form or express an opinion on any subject connected with the
2 case until this matter is submitted to you. We'll see you back
3 approximately 10:30.

4 (Outside the presence of the jury).

5 MR. LALLI: Do you want to work on jury instructions?

6 THE COURT: Yeah, let's do that. Let me go get my
7 package. Do you have -- everyone have their copy of
8 instructions? And the State was going to amend some of the
9 instructions.

10 MR. LALLI: Yes. And I did send those to the court.

11 THE COURT: You did?

12 MR. LALLI: Yeah, I --

13 MS. GRAHAM: They were e-mailed, Judge?

14 MR. LALLI: They were e-mailed both to you and your
15 secretary.

16 THE COURT: It you get a copy of those?

17 MS. PALM: No, I mean, I don't have --

18 THE COURT: What I'll do is I'll print out --

19 MS. PALM: A copy.

20 THE COURT: -- I'll print out a couple copies right
21 now.

22 MS. PALM: Okay, thank you.

23 THE COURT: Is that to my e-mail or to the law clerk?

24 (Court recessed at 10:21 a.m. to 10:32 a.m.).

25 (Outside the presence of the jury).

ROUGH DRAFT TRANSCRIPT

002032

1 THE COURT: All right, State had provided additional
2 instructions over the evening or this morning. Do you have a
3 copy of those Ms. Palm?

4 MS. PALM: I have the actual danger or the killing is
5 justified and the statements of the defendant.

6 MR. LALLI: Your Honor, the actual danger --

7 THE COURT: Yes.

8 MR. LALLI: Yes we've already offered that. So it
9 was just included in the -- in the small group that I sent, but
10 it's already -- it's already being offered. So the court can
11 disregard it.

12 THE COURT: Okay.

13 MS. PALM: Well, and, your Honor, I which with
14 respect to that one, he sent over two instructions, and it was
15 my understanding last night you were going to butt them on one
16 page because otherwise the killing is justified does not make
17 sense.

18 THE COURT: I thought we were going to put them on
19 the same page.

20 MR. LALLI: My impression was actually just the
21 opposite, your Honor.

22 THE COURT: Oh, maybe --

23 MR. LALLI: This was the -- the separate portion, and
24 just to recall the court, we were looking at the court's
25 version of Runion of that case, and the court had actually

1 written in his -- in his -- in his book and had them all as
2 separate instructions and -- and I commented that yeah, that's
3 how they ought to be given. So they were supposed to be
4 separate.

5 I indicated that I would put that instruction into my
6 format so that it matched the other instructions.

7 MS. PALM: And that's not my memory at all, your
8 Honor.

9 THE COURT: I'm sorry?

10 MS. PALM: That's not the way I remembered. It was
11 going to be one instruction.

12 THE COURT: Okay. But the actual language, you --
13 neither party has any objection; is that correct?

14 MS. PALM: No.

15 MR. LALLI: We do not, your Honor. It's taken
16 directly from Runion.

17 THE COURT: Actually, I think second thought it does
18 read better if it's in one instruction. So we'll just do that.
19 So do you have any objection to the giving of that instruction.
20 Ms. Palm?

21 MS. PALM: No, your Honor.

22 THE COURT: And there's another instruction,
23 statements by the defendant made to homicide detective.

24 MS. PALM: And I will point out to the court that my
25 alternative instruction's on Page 25 of my proposed

1 instructions. I object to State's instruction. It does not
2 include the language about voluntariness requires a act be a
3 product of rational intellect and free will. That's been the
4 case law for a long time in Nevada. That's under Passima
5 (phonetic), and it's -- I believe that's also cited in the
6 Rosky case, which I have on my instruction.

7 In addition, they don't mention intoxication at all.
8 And there's plenty of case law on intoxication effecting
9 somebody's ability to give a voluntary statement. And the
10 second paragraph of my proposed instruction talks about that a
11 defendant's intoxication will make a statement inadmissible
12 only if the accused is intoxicated to the extent of being
13 incapable of understanding of the meaning of his comments.
14 That is the case law in Nevada.

15 Their instruction doesn't mention intoxication and
16 for that reason, I don't believe it's a proper instruction.

17 THE COURT: All right.

18 MR. LALLI: Well, I -- first --

19 THE COURT: Hang -- actually, can you hang on one
20 second, Mr. Lalli.

21 (Pause in the proceedings).

22 THE COURT: Go ahead, Mr. Lalli, I'm sorry.

23 MR. LALLI: Your Honor, Ms. Palm cited two cases as
24 support for this instruction. And I can tell the court I've
25 never seen anything like this before. And when we were

1 discussing these last night, I indicated that I wanted to read
2 the cases. And these cases say nothing whatsoever of voluntary
3 intoxication, nothing. They're not voluntary intoxication
4 cases.

5 But they do talk about voluntariness. And the
6 instruction that we proposed in lieu of the original
7 voluntariness instruction that we proposed is taken verbatim
8 from the case that she cites to, which is the Rosky case,
9 R-o-s-k-y versus State. It's cited at 121 Nevada 184, a 2005
10 case.

11 And I'll just read verbatim from that case. The
12 prosecution has the burden of proving by preponderance of the
13 evidence that the statement was voluntary. A confession is
14 involuntary if it was coerced by physical intimidation or
15 psychological pressure. Several factors are relevant in
16 deciding whether a suspect statement -- statements are
17 voluntary. The youth of the accused, his lack of education or
18 his low intelligence, his lack of any advice of constitutional
19 rights, the length of detention, the repeated and prolonged
20 nature of questioning, and the use of psychological -- I'm
21 sorry, the use of physical punishment, such as the deprivation
22 of food or sleep. A suspect's prior experience with law
23 enforcement is also relevant -- is also a relevant
24 consideration.

25 So that is verbatim the instruction that we're

1 offering. What the defendant's instruction does is it blows
2 voluntary intoxication or intoxication way out of proportion to
3 anything else. And so I suppose if the court wanted to add in
4 this laundry list of things that -- that can be considered
5 intoxication or voluntary intoxication or -- or -- or however,
6 certainly that would be fine.

7 But we're entitled to instruct the jury that they can
8 consider things like whether he was advised of his
9 constitutional rights, his age, whether there was physical
10 force here, whether he has any experience in the criminal
11 justice system, which Rosky specifically says is relevant.

12 None of those factors that are listed in Rosky are
13 contained within the instruction that is purported to be
14 supported by Rosky. These two really don't mirror each other
15 at all. Nor do they mirror Laursen, L-a-u-r-s-e-n versus
16 State, 97 Nevada 568, a 1981 case, which are listed as support
17 for the instruction.

18 So certainly the defendant is entitled to have the
19 issue of voluntariness considered by the jury. The question is
20 how do we instruct on it? And I don't think you can go wrong
21 citing language that is specifically been approved or -- or the
22 -- a holding of the Nevada Supreme Court. Not some bastardized
23 version that overly emphasizes aspects of this case.

24 THE COURT: Anything further, Ms. Palm?

25 MS. PALM: I wouldn't object to adding in the lack of

1 advice of constitutional rights and prior experience with law
2 enforcement. In my instruction it does say experience with the
3 criminal justice system. But I did take that language being
4 incapable of understanding the meaning of his comments directly
5 from a case. I believed it was Rosky or Laursen, I'm trying to
6 get on Lexus right now to find -- verify that or not.

7 MR. LALLI: Here.

8 MS. PALM: No, I'm going to do a search for that
9 language. I'm having a little trouble hooking up with Lexus.
10 That is from a case in Nevada. I just can't get onto Lexus
11 right now.

12 THE COURT: Well, I -- I've pulled the cases, and the
13 cases don't provide -- about the defendant's intoxication as
14 you've set forth. That's not identified in Rosky, Ms. Palm.
15 (Indiscernible) paragraph two where the instruction lists
16 various factors for the jury to look at, if we added in there
17 intoxication.

18 MS. PALM: Well, I think the jury still needs to be
19 giving the test of how -- how to consider intoxication. And
20 I'm sorry, if I could get on Lexus, I'd do a search for just
21 that language from that test, but I cannot. I mean, I -- I
22 have no objection to adding intoxication in there. But I also
23 want product of rational intellect and free will.

24 THE COURT: Say it again which words are you
25 requesting. The product of --

1 MS. PALM: Voluntariness under the law requires that
2 the act be a product of rational intellect and free will.

3 MR. LALLI: I'm -- I'm not sure that -- free will
4 certainly is an issue related to voluntariness. Rational
5 intellect, I think is more an issue of whether there was a
6 valid waiver, which is a different issue. So I would certainly
7 like to see a case that stands for that proposition. And if --
8 if Counsel needs some time to find one --

9 MS. PALM: Well, I --

10 MR. LALLI: -- I --

11 MS. PALM: It's Passima. I believe it's cited in
12 just about every case. I will find it right now.

13 MR. LALLI: But -- but I have some obvious concerns
14 with the one that is proffered.

15 THE COURT: Tell us when you find it, Ms. Palm.

16 MS. PALM: All right. Well, it is -- it is cited in
17 just about every case. But I will give you Chambers versus
18 State cites to Passima. Passima is a 103 Nevada 212 at 213,
19 214.

20 THE COURT: Now, if you had a -- let Mr. -- do you
21 mind if Mr. Lalli looks on your screen so he can see the
22 specific language from the case?

23 MS. PALM: Sure. It's a little bit slow. A
24 confession is inadmissible unless freely and voluntary given.
25 In order to be voluntary confession must be the product of

1 rational and intellect and of free will.

2 MR. LALLI: That language is there, your Honor. I --
3 I don't oppose adding it to my proffered instruction and adding
4 in intoxication as something that a jury can consider.

5 THE COURT: So Ms. Palm, beyond just intoxication,
6 what are you requesting?

7 MS. PALM: Well, I'm -- I wanted the test incapable
8 of understanding. That might have -- okay, well, it is from
9 Rosky, all right.

10 THE COURT: Which page? I have the case in front of
11 me.

12 MS. PALM: Just a minute.

13 THE COURT: Or which head note?

14 MS. PALM: I'm trying to forward to the -- I have to
15 wait until the little tag comes up. Okay. It is footnote 29
16 and Page 697 of the Pacific Reporter.

17 THE COURT: Do you have that, Mr. Lalli? I do have
18 the case here.

19 MR. LALLI: I do.

20 THE COURT: It cites to Kirskey.

21 THE MARSHAL: (Indiscernible).

22 THE COURT: Okay. Mr. Lalli, your position.

23 MR. LALLI: Well, in my review of the case, your
24 Honor, I did not -- I did not see this footnote reference to
25 Kirskey. The court's legal discussion ended in the previous

ROUGH DRAFT TRANSCRIPT

002040

1 paragraph. So the -- in Ms. Palm's instruction, starting at
2 line 12, where it says a defendant's intoxication would make a
3 statement inadmissible only if the accused is intoxicated to
4 the extent of being incapable of understanding the meaning of
5 his comments.

6 I think under the -- under the Kirskey, K-i-r-s-k-e-y
7 case, I think she is entitled to that. However, the last
8 sentence is merely a restatement of the first sentence, which
9 overly emphasizes the -- the need of the -- of the jury to
10 consider this. So I don't oppose adding intoxication as one of
11 the things that the jury can consider, as well as free will
12 language and this first sentence.

13 So if -- if -- I know we're probably going to receive
14 some testimony. If the court wants me to work on that while
15 we're -- work on further modifications, I can do that.

16 THE COURT: Yeah, that's what I'm going to do, Ms.
17 Palm, because I -- I think the other language is not -- is not
18 really appropriate. The language from Kirskey and also where
19 it says a product of rational intellect and free will is going
20 to be included. Can we do that into one instruction, Ms. Palm?
21 The one that's already proposed?

22 MS. PALM: You're going to add in both rational
23 intellect and free will?

24 THE COURT: Yes.

25 MS. PALM: And -- and that language?

1 THE COURT: Yes.

2 MS. PALM: I mean, that does make the instruction
3 better. I guess, you know, it says before the jury may take
4 such statements into consideration, so I guess that fixes it.

5 THE COURT: See, it's on line 7 of the jury's -- of
6 the State, several factors and these two items will be listed
7 as -- as factors.

8 MS. PALM: Well, I -- I don't want it as a factor. I
9 want it as it must be --

10 MR. LALLI: Right.

11 MS. PALM: -- the way I have it, voluntariness
12 requires. I want that sentence in there.

13 THE COURT: Can we just add those as paragraphs three
14 and four, Mr. Lalli?

15 MR. LALLI: Well, what I -- what I -- what I would --
16 what I would suggest is starting on line 5 of my proposed
17 instruction, where it says a statement is involuntary if it was
18 coerced by physical intimidation or psychological pressure.
19 Voluntariness under the law requires that the act be the
20 product of rational intellect and free will added in that
21 paragraph. Several factors are relevant in deciding whether a
22 suspect's statements are involuntary, the youth of the accused,
23 I would add whether the accused was intoxicated and then --

24 THE COURT: To the extent of being incapable of
25 understanding, et cetera.

ROUGH DRAFT TRANSCRIPT

002042

1 MS. PALM: Well --

2 MR. LALLI: Well, then I would at -- at -- at the end
3 of it, the defendant's intoxication will make a statement
4 inadmissible only if the accused is intoxicated to the extent
5 of being incapable understanding the meaning the -- the meaning
6 of his comments. So I'd put that whole sentence that she
7 proffers in her instruction into this instruction.

8 THE COURT: And is it paragraph three?

9 MR. LALLI: It's -- yes.

10 THE COURT: All right, Ms. Palm, what I'm going to do
11 is I think -- I think it fits. So that first part where you
12 have voluntariness under the law requires --

13 MS. PALM: Yes.

14 THE COURT: -- okay, that will be inserted at line 6
15 of the State's proposed instruction. And the sentence starting
16 at line 12 and ending line 14 will be paragraph three of that
17 instruction.

18 MR. LALLI: Would the court like me --

19 MS. PALM: Yes.

20 MR. LALLI: -- to put that together?

21 THE COURT: Yeah, if you could do that.

22 MR. LALLI: Yes.

23 THE COURT: All right. I think you have your
24 witnesses here, so let's call them in. Where's Cliff?

25 (Pause in the proceedings).

ROUGH DRAFT TRANSCRIPT

002043

1 (In the presence of the jury).

2 THE MARSHAL: Officers and members of the court,
3 Department 17 jurors. You may be seated, ladies and gentlemen.
4 Let's make sure our cell phones are turned off, please.

5 THE COURT: The next witness is Chelsea Collins.

6 MS. PALM: Yes, your Honor.

7 THE MARSHAL: Chelsea. Step up here to the witness
8 stand, raise your right hand, remain standing and face the
9 clerk.

10 CHELSEA COLLINS, DEFENDANT'S WITNESS, SWORN

11 THE CLERK: Please be seated. State and spell your
12 name for the record.

13 THE WITNESS: Chelsea Collins, C-h-e-l-s-e-a,
14 C-o-l-l-i-n-s.

15 THE COURT: Go ahead, Ms. Palm.

16 MS. PALM: Thank you.

17 DIRECT EXAMINATION

18 BY MS. PALM:

19 Q Good morning, Ms. Collins.

20 A Good morning.

21 Q Can you please tell the jury how you're employed?

22 A I'm a crime scene analyst two with the Las Vegas
23 Metropolitan Police Department.

24 Q And how long have you had that position?

25 A Four and a half years.

ROUGH DRAFT TRANSCRIPT

002044

1 Q Were you working in that capacity in the early
2 morning hours of November 6th, 2008?

3 A I was.

4 Q Did you respond to 5001 El Parque?

5 A Yes.

6 Q And were you working with another crime scene analyst
7 at that location?

8 A Yes.

9 Q Who was that?

10 A Jocelyn Maldonado.

11 Q Can you explain your respective roles that morning.

12 A I was responsible for doing the photography of the
13 scene, and she was responsible for the collection of the
14 evidence and doing a diagram.

15 Q Okay. And how does it work when you're doing the
16 photography? Do you walk with her or separately or --

17 A No, not necessarily together. Initially the
18 photographer goes in and takes pictures of the entire scene the
19 way it's found. And then generally later we'll work together
20 when she's ready to collect the evidence and it will be
21 photographed before she picks it up.

22 Q Okay. And do the detectives direct you at all in
23 what they want photographed?

24 A They will sometimes have things that they want
25 photographed. We work together with them.

ROUGH DRAFT TRANSCRIPT

002045

1 Q Okay. Did they direct you to a vehicle at that
2 location?

3 A Yes, they did.

4 MS. PALM: May I approach the witness?

5 THE COURT: Yes.

6 MS. PALM: Have you seen this already?

7 MR. LALLI: I think so. (Indiscernible).

8 BY MS. PALM:

9 Q I'm showing you Defendant's Proposed Exhibit
10 quadruple X, quadruple Y, quadruple Z and five As. I -- I'm
11 not sure how you say that. Sin co As. Do you recognize what
12 those are?

13 A Yes, I do.

14 Q Is that the car that you photographed --

15 A Yes, it is.

16 Q -- that morning?

17 A Yes.

18 MS. PALM: Your Honor, I would move to admit those
19 exhibits.

20 MR. LALLI: No objection.

21 THE COURT: They'll be admitted.

22 (Exhibits XXXX, YYYY, ZZZZ, AAAAA admitted).

23 BY MS. PALM:

24 Q Okay. Showing you AAAAA. Can you tell the jury what
25 that depicts?

1 A That's a view of the front seat, the front area of
2 the vehicle.

3 Q Okay. And was that seat reclined when you went to
4 take the photographs of the car?

5 A Yes, it was.

6 Q Okay. Does that appear to be some glasses in the
7 center console, center area?

8 A Yes.

9 Q Did you check inside to see what was in those
10 glasses?

11 A I did not open the vehicle.

12 Q Okay. So you didn't move anything around when you
13 checked the photographs?

14 A That's correct.

15 Q Did you check them from outside the vehicle.

16 A Yes.

17 Q You didn't have to open the door?

18 A No, the windows were closed and they were taken
19 through the closed windows.

20 Q Okay. And quadruple Z, is that another view the in
21 -- interior of the vehicle?

22 A Yes, it is.

23 Q Okay. And quadruple Y, what is that photograph?

24 A The exterior of the vehicle.

25 Q Okay. And I believe I had one more.

ROUGH DRAFT TRANSCRIPT

002047

1 MS. PALM: Court's indulgence.

2 THE COURT: All right.

3 (Pause in the proceedings).

4 MS. PALM: I don't think I had her identify this. It
5 is EEEEE.

6 BY MS. PALM:

7 Q Do you recognize this?

8 A Yes, I do.

9 Q Is that a photograph of -- of the car -- the same car
10 also?

11 A Yes.

12 MS. PALM: I would move to admit this document,
13 EEEEE.

14 MR. LALLI: I think it's five e's or --

15 MS. PALM: Five Es.

16 THE COURT: All right.

17 MR. LALLI: No objection.

18 THE COURT: It will be admitted.

19 (Exhibit EEEEE admitted).

20 BY MS. PALM:

21 Q And that's the rear of the car?

22 A Yes.

23 Q Okay. Can you tell what's in that back window of the
24 car?

25 A No, I cannot.

ROUGH DRAFT TRANSCRIPT

002048

1 Q Okay. And -- and do you remember what time you
2 arrived at the scene?

3 A At 12:34 a.m.

4 Q Okay. And if detectives had wanted you to open up
5 the car and do anything, you would have done what?

6 A Well, we would have waited for a search warrant most
7 likely. And then after that you mean?

8 Q Yes.

9 A The -- the --

10 MR. LALLI: I'm going to object. This calls for
11 speculation.

12 THE COURT: Sustained.

13 BY MS. PALM:

14 Q Well, no -- no -- so you weren't ever directed to go
15 inside the interior of the vehicle, were you?

16 A That's correct, I was not.

17 Q Okay.

18 MS. PALM: Thank you. No further questions.

19 THE COURT: Cross-examination?

20 MR. LALLI: No, your Honor.

21 THE COURT: Any questions from any of the jurors? No
22 questions. Thank you, you are -- thank you for your testimony,
23 you excused.

24 THE WITNESS: Thank you.

25 THE COURT: Next witness for the defense.

ROUGH DRAFT TRANSCRIPT

002049

1 MS. PALM: That would be Bob Paisano.

2 (Pause in the proceedings).

3 THE MARSHAL: Step up here to the witness stand,
4 remain standing, raise your right hand and face the clerk.

5 ROBERT FRANCIS PAISANO, DEFENDANT'S WITNESS, SWORN

6 THE CLERK: Please be seated. State and spell your
7 name for the record.

8 THE WITNESS: Robert Francis Paisano, P-a-i-s-a-n-o.

9 MS. PALM: May I proceed, your Honor?

10 THE COURT: Yes.

11 DIRECT EXAMINATION

12 BY MS. PALM:

13 Q Good morning, Mr. Paisano.

14 A Good morning.

15 Q Can you please tell the jury how you're employed?

16 A I'm in private practice as a chemical dependency
17 therapist.

18 Q Okay. And does part of your practice involve
19 alcoholism treatment?

20 A Yes.

21 Q Okay. And in your work capacity did you have the
22 occasion to meet Brian O'Keefe?

23 A Yes, I did.

24 Q Is he in the courtroom today?

25 A Yes, he is.

ROUGH DRAFT TRANSCRIPT

002050

1 Q Could you please point to where he's seated and
2 describe something he's wearing.

3 A He's wearing a dark blazer with a blue tie, white
4 shirt, and he's sitting at the table to my left.

5 Q Thank you.

6 MS. PALM: Will the court reflect -- will the -- may
7 the record reflect identification?

8 THE COURT: Yes, it will.

9 MS. PALM: Thank you.

10 BY MS. PALM:

11 Q How did Brian end up coming to you?

12 A He was referred to me by his union, or actually, he
13 -- he was a self-referral from his union.

14 Q What does that mean self-referral?

15 A That mean he -- he talked to somebody at the union
16 about an issue that he was having, and they referred him to me.

17 Q Okay. And did you give him an assessment --

18 A Yes, I did --

19 Q -- at that time?

20 A Yes, I did.

21 Q What were the results of that?

22 A I gave him a diagnosis of alcohol dependency. The
23 level would be severe, and that he was in need of detox at that
24 time.

25 Q Okay. And did you send him to detox?

ROUGH DRAFT TRANSCRIPT

002051

1 A Yes, I did.

2 Q Okay. And where did he go?

3 A Went to the Las Vegas Recovery Center.

4 Q Okay. What happens after detox then?

5 A After detox he returns back to me, and then we go in
6 an outpatient basis.

7 Q Okay. And how does the outpatient basis work?

8 A What we looked at was he had no prior treatment, so
9 what we put him into was an intensive outpatient treatment
10 process, and that was three days a week at three hours per
11 session. And then I saw him at least once a week during at
12 that period of time of six weeks.

13 Q Okay. And -- and he's actually living out on his own
14 at that time?

15 A Yes.

16 Q All right. And tell -- can you tell the jury what
17 kind of background you need to be able to do the therapy that
18 you do?

19 A Well, you have to have extensive training and then
20 you have to have a graduate degree to be licensed.

21 Q And do you have those things?

22 A Yes.

23 Q And you're licensed?

24 A Yes, I am.

25 Q Okay. Now, when Brian was coming to you for the

ROUGH DRAFT TRANSCRIPT

002052

1 aftercare, did you encourage him to involve support members of
2 his family or friends or how does that work?

3 A Anybody who we can utilize as a -- as a support
4 network, we encourage the patient to have them involved.

5 Q Okay, and did Brian have somebody that he brought
6 with him?

7 A Yes, he did.

8 Q Who was that?

9 A I'm not sure the person's name, but it was a young
10 lady.

11 Q Would it be Victoria Whitmarsh?

12 A Yes.

13 Q Okay. And did you have a chance to meet with her?

14 A Briefly.

15 Q Okay. Did she attend with Brian?

16 A She attended the -- the IOP process and that was a
17 group education. She accompanied him at the individual therapy
18 sessions that we conducted, but she never participated in the
19 therapy session.

20 Q Okay. And did Brian attend his aftercare as he was
21 supposed to?

22 A Yes.

23 Q Now, did you have any information as to Victoria's
24 drinking pattern at that time?

25 A No, I did not.

ROUGH DRAFT TRANSCRIPT

002053

1 Q Okay. So you only knew her as a support person?

2 A Yes.

3 Q If -- do you have some experience in -- in how -- how
4 drug abuse might interact with alcohol?

5 A Yes.

6 Q Okay.

7 MS. GRAHAM: Objection. Relevance.

8 THE COURT: Overruled --

9 MS. PALM: All right, I'll -- I'll move --

10 THE COURT: -- at this point.

11 BY MS. PALM:

12 Q If a person's taking drugs, should they mix them with
13 alcohol?

14 A No, it's not recommended.

15 Q Okay. Does being an alcoholic tend to cause other
16 source of problems for an individual in their regular life?

17 A It generally interferes with the major areas of life.

18 Q Can you name those?

19 A Employment, social, family, economic, legal.

20 Q Okay. When Victoria and Brian were coming to Brian's
21 treatment sessions, did they appear to be a couple?

22 A Yes.

23 Q Did they make any attempt to hide the relationship?

24 A No.

25 Q Did you know whether they had any plans for the

ROUGH DRAFT TRANSCRIPT

002054

1 future?

2 MS. GRAHAM: Objection. Speculation.

3 THE COURT: Sustained.

4 BY MS. PALM:

5 Q Were they affectionate with each other?

6 A Yes.

7 Q Did Brian give you a history of when his problem with
8 alcohol first started?

9 A He did, but I don't have any documentation in front
10 of me to -- to cite any dates.

11 Q Okay. Did you know any events in his life that it
12 related to?

13 A There was some issues that came up during his
14 military service, and following that the -- the increase of --
15 of alcohol did start to take place.

16 Q Do you know whether he suffered from blackouts?

17 A I believe --

18 MR. LALLI: I'm going to object, your Honor. This is
19 hearsay.

20 THE COURT: Sustained. Unless this witness
21 personally observed the blackout.

22 MS. PALM: Court's indulgence.

23 BY MS. PALM:

24 Q Do you find that alcoholics often have relapse
25 issues?

ROUGH DRAFT TRANSCRIPT

002055

1 A Yes.

2 Q Do they often minimize their use of alcohol?

3 A Yes.

4 Q And why would people minimize their use of alcohol if
5 they're coming for help?

6 A A lot of times it's -- it's to decrease the severity
7 of the problem. It's part of the denial system.

8 Q Is denial part of being an alcoholic?

9 A Yes.

10 Q And is alcoholism a chronic disease?

11 A Yes, it is.

12 MS. PALM: No further questions. Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: Cross-examination.

15 MS. GRAHAM: Thank you, Judge.

16 CROSS-EXAMINATION

17 BY MS. GRAHAM:

18 Q Mr. Paisano, is -- is Brian O'Keefe an alcoholic?

19 A Yes, he is.

20 Q Okay. And you indicated that you had not read your
21 notes before coming here; is that correct?

22 A Yes.

23 Q So you don't -- do you recall when you treated Brian?

24 A I have no recollection of the date.

25 Q Okay. You indicated that he came to you as a

ROUGH DRAFT TRANSCRIPT

002056

1 self-referral; isn't that right?

2 A Yes.

3 Q But the truth is, sir, he was actually, he had to
4 come for treatment or else he would have lost his job as an
5 apprentice; isn't that correct?

6 A I'm not aware of that.

7 Q Okay. Do you recall testifying in a prior
8 proceeding?

9 A Yes.

10 Q Do you recall when asked whether or not Brian had
11 indicated that he had missed three days of work out of five,
12 and he had to seek alcohol treatment or he could not continue
13 working?

14 MS. PALM: Page number?

15 THE WITNESS: I'm -- I'm not clear on that.

16 BY MS. GRAHAM:

17 Q Okay. So you don't have your notes, sir?

18 A No, I do not.

19 Q Okay. So you don't -- you can't the say for sure
20 whether he was a self-referral?

21 A I can because that's how it was on his -- on his
22 assessment form.

23 Q Okay. And tell me about that assessment form. How
24 -- how does that work?

25 A It's done in two parts. First we have initial

ROUGH DRAFT TRANSCRIPT

002057

1 assessment to identify problems and then we go into a more
2 extensive psychosocial process.

3 Q And do you perform that assessment on -- on Brian
4 O'Keefe when he came to see you?

5 A Yes.

6 Q And I assume you ask a series of questions, true?

7 A Yes.

8 Q And the answers that are given to your questions come
9 directly from Brian O'Keefe; is that correct?

10 A Yes.

11 Q So everything that Brian O'Keefe tells you during
12 your assessment is basically self-reported; is that correct?

13 A Yes.

14 Q Okay. So essentially, what you're relying onto treat
15 him would be anything that he decides to tell you during that
16 assessment, is that correct?

17 A Yes.

18 Q And you indicated that he had a severe alcohol
19 problem, true?

20 A Um-h'm.

21 Q Okay, isn't it fact -- true, sir, that you did make a
22 diagnosis of him based on your experience of, I believe, it was
23 303.9?

24 A Um-h'm.

25 THE COURT: Is that a yes?

ROUGH DRAFT TRANSCRIPT

002058

1 THE WITNESS: Yes, I'm sorry.

2 BY MS. GRAHAM:

3 Q Okay. And isn't it true, sir that 303.9, that
4 diagnosis specifically indicates that the use of alcohol,
5 despite -- that he uses alcohol, despite adverse consequences
6 and distortions in thinking most notably denial is one of
7 those; is that correct?

8 A Yes.

9 Q Okay. You were just asked if you knew if Brian
10 O'Keefe had suffered any blackouts or is that what Ms. Palm
11 asked you?

12 A Yes.

13 Q Okay. And based on your recollection, again, if --
14 if Mr. O'Keefe would have told you he had never suffered from
15 blackouts, then that's where you would have gotten that
16 information; is that correct?

17 A Yes.

18 Q Do you recall if he ever told you he suffered from
19 blackouts?

20 A I believe he did.

21 Q Okay. And but you would agree with me, sir, that if
22 he told the therapist at the MINES that he denied ever having
23 blackouts, that that would have come from Brian as well?

24 A I was a therapist from the MINES facility.

25 Q I'm sorry?

ROUGH DRAFT TRANSCRIPT

002059

1 A I was a therapist from the MINES facility.

2 Q Okay. So the records from MINES, you generated
3 those?

4 A Yes.

5 Q Okay. If -- if I showed you those records, and I --
6 I showed you where you indicated that Brian self-reported he
7 never suffered from blackouts, would that be helpful to you?

8 A Yes.

9 MS. GRAHAM: May I approach the witness?

10 THE COURT: Yes.

11 MS. PALM: Can I see it?

12 MS. GRAHAM: Oh, sure.

13 (Pause in the proceedings).

14 MS. GRAHAM: May I approach, Judge?

15 THE COURT: Yes.

16 BY MS. GRAHAM:

17 Q I'm handing you a document, sir. What is that
18 document? What does it appear to be?

19 A Looks like a release form.

20 Q So that a copy of -- if you read it, sir, does it --
21 does it indicate that this is a copy from the custodian of
22 records of MINES & Associates (phonetic).

23 A Yes.

24 Q And that would include his medical records?

25 A No.

ROUGH DRAFT TRANSCRIPT

002060

1 Q Or his records from MINES.

2 A Right.

3 Q Okay.

4 A Yeah.

5 Q And so if it would have come from the custodian of
6 records, you're aware, sir, that a custodian of records
7 basically attests to the truth and the accuracy of what's
8 contained therein; is that right?

9 A Yes.

10 Q Okay.

11 MS. PALM: Your Honor, I don't think he recognizes
12 this document, and I don't think she's properly refreshing his
13 recollection. I think if they asked him does he recognize it.

14 THE COURT: Do you recognize the document, sir?

15 THE WITNESS: No, sir. It's the first time I've seen
16 it.

17 THE COURT: Did you generate that document?

18 THE WITNESS: I have no idea because again, it -- it
19 -- it's -- it's a release form to corporate office, and --

20 BY MS. GRAHAM:

21 Q If you could flip through that and see if that just
22 contains treatment notes pertaining to Brian O'Keefe.

23 MS. PALM: You know, your Honor, I'm happy if she
24 just wants to move the entire document in instead of doing it
25 this way. I don't think the witness compiled the documents in

ROUGH DRAFT TRANSCRIPT

002061

1 there. He's not the custodian of records.

2 THE COURT: Ms. Graham, are you seeking to admit the
3 active records into evidence?

4 MS. GRAHAM: Court's indulgence. Judge, if I may
5 just save some time and turn to one page and ask Mr. Paisano if
6 this -- this particular page in the records refreshes his
7 recollection.

8 BY MS. GRAHAM:

9 Q If you could just start reading that to yourself
10 right here.

11 A Okay.

12 Q Were those records from MINES?

13 A No, this is from the detox facility, I believe, which
14 is Las Vegas Recovery Center.

15 Q Okay. And what is MINES, then?

16 A MINES is the manage care company for the Labors Union
17 872, which Mr. O'Keefe belonged to.

18 Q Okay. I'm a little bit confused because you said you
19 were MINES.

20 A I'm a contractor with MINES.

21 Q Okay. But you would have had access to these
22 records.

23 A Not those, unless the facility gave me a copy of the
24 admit report and the discharge summary.

25 Q Is that typically something that they would do?

ROUGH DRAFT TRANSCRIPT

002062

1 A It depends upon whether or not they -- they feel it's
2 necessary for me to have. Usually it -- it's -- they send me a
3 discharge summary, but I don't see the discharge summary in
4 that document.

5 Q Okay, so essentially you treat somebody without
6 looking at the -- the records?

7 A Who -- who treats the person?

8 Q Didn't you testify that you treated Mr. O'Keefe?

9 A Yes.

10 Q So you wouldn't feel it was necessary to have records
11 from MINES for your treatment of Mr. --

12 A I have --

13 Q -- O'Keefe?

14 A I do the records from MINES. You're looking at the
15 -- the detox facility. I -- I don't have access to their
16 records.

17 Q Okay. And if -- if somebody were to enter detox,
18 would they do the same evaluation? You're familiar with the --

19 A Yes.

20 Q -- the evaluations?

21 A Right. But -- but their evaluation's more extensive
22 because they're going to be using medications where I don't.

23 Q Okay. Just then a quick question, sir. During their
24 evaluations when they interview somebody that's there for
25 treatment, who provides that information to those -- those

ROUGH DRAFT TRANSCRIPT

002063

1 persons?

2 A The -- the patient.

3 Q The patient?

4 A Um-h'm.

5 Q So that would be Brian O'Keefe?

6 A Right.

7 Q Okay, so if Brian O'Keefe had told the people at
8 inpatient --

9 MS. PALM: Your Honor, I'm going to object to this
10 because this witness doesn't have any knowledge of what Brian
11 O'Keefe told the people at treatment. And she's trying to
12 testify about the contents of records that she's not willing to
13 move in.

14 THE COURT: Ms. Graham.

15 MS. GRAHAM: Well, we can admit them.

16 THE COURT: Are you -- both sides agree to have those
17 documents admitted?

18 MS. GRAHAM: State does.

19 MS. PALM: I have no problem with admitting the
20 documents. I -- I have a problem with her continuing to
21 question him --

22 THE COURT: Okay.

23 MS. PALM: -- on the document.

24 THE COURT: All right, well, let's have them marked
25 and they'll be admitted in.

ROUGH DRAFT TRANSCRIPT

002064

1 MS. GRAHAM: Just for the record, Judge, this is a
2 marked copy. I have --

3 MS. PALM: Well --

4 MS. GRAHAM: -- (indiscernible).

5 THE COURT: Do we have a clean copy?

6 MS. PALM: I have a clean copy that I was going to
7 move in anyway. And it would be (indiscernible). Defense
8 Exhibit five Cs.

9 THE COURT: All right. It will be admitted.

10 (Exhibit CCCCC admitted).

11 MS. GRAHAM: No objection.

12 BY MS. GRAHAM:

13 Q You heard of the term tolerance, sir?

14 A Yes.

15 Q And -- and basically, is it true that -- that
16 tolerance is somebody that drinks a period of alcohol for many,
17 many years, they develop a tolerance to alcohol wherein they
18 can actually consume more alcohol and still function at a level
19 whereas somebody that doesn't drink all the time drink; is that
20 --

21 A Yes.

22 Q -- your -- is that -- is that a correct -- you're the
23 therapist, I'm not.

24 A Yes, that's (indiscernible).

25 Q All right. Do you -- are you aware as his therapist

ROUGH DRAFT TRANSCRIPT

002065

1 of the amount of alcohol and the amount of years that Mr.
2 O'Keefe drank?

3 A I'm not sure exactly of the amount and years because
4 I don't have that document in front of me. But yes, he did
5 express a length of time and -- and a -- and a high consumption
6 rate.

7 Q Okay. And do you recall testifying in a previous
8 hearing?

9 A Yes.

10 Q In this case? Do you recall when asked how much
11 Brian reported that he drank, it would be five to eight quarts
12 a beer on a daily basis?

13 MS. PALM: Page number?

14 MS. GRAHAM: That's on Page 41.

15 THE WITNESS: I don't have that in front of me.

16 BY MS. GRAHAM:

17 Q Did defendant O'Keefe indicate to you that he had
18 severe substance abuse problem?

19 A He -- he had mentioned that he had previous problems
20 associated to alcohol.

21 Q Okay.

22 A I'm not sure if he indicated a severity level.

23 Q All right, sir, so basically, everything -- when
24 you're treating defendant O'Keefe, when he comes to you,
25 everything that he tells you is self-reported; is that right?

ROUGH DRAFT TRANSCRIPT

002066

1 A Yes.

2 Q And you don't have those notes in front of you to
3 tell us how much he reported to you that he drank?

4 A No, I do not.

5 Q Okay. And the length of time that he drank?

6 A I do not have that either.

7 Q Okay. But yet, you were able to assess that he had a
8 severe alcohol problem?

9 A Yes. If I gave him a diagnosis of 303.9.

10 Q Okay. And would somebody that had that diagnosis be
11 able to tolerate alcohol pretty well?

12 A It depends upon the individual because each -- each
13 individual's metabolism is different.

14 Q Um-h'm.

15 A So you can't -- I mean, I can't lump everybody
16 together with that.

17 Q In a general sense you've heard the term hold your
18 own liquor, holds liquor well?

19 A Yes, I've heard of it.

20 Q Okay. So that basically, a kind of a slang for
21 tolerance?

22 A I've never heard it in those terms as a -- as a slang
23 for tolerance.

24 Q Okay. Thank you, sir.

25 THE COURT: Any redirect?

ROUGH DRAFT TRANSCRIPT

002067

REDIRECT EXAMINATION

1
2 BY MS. PALM:

3 Q Mr. Paisano, would it refresh your recollection to
4 look at a transcript of your prior testimony to see whether you
5 ever testified as to how much a day my client drank?

6 A I'm -- I'm sorry?

7 Q Would it help you to look at your prior testimony to
8 see if you ever testified, as Ms. Graham it just stated, as to
9 how much my client drank?

10 A Yes.

11 MS. PALM: May I approach the witness?

12 THE COURT: Yes.

13 MS. PALM: Same Page 41.

14 BY MS. PALM:

15 Q Here's the question and here's your answer.

16 A Yes.

17 Q Does that help you recall?

18 A Yes.

19 Q Did you ever testify as to how much my client drank a
20 day?

21 A According to that statement, yes.

22 Q You said -- did you testify you -- you can't answer
23 that truthfully because you didn't have the documentation in
24 front of you?

25 A Yes.

ROUGH DRAFT TRANSCRIPT

002068

1 Q So her -- the statement was just the DA's question?

2 A Yes.

3 Q Okay. And would it refresh your recollection to look
4 at a copy of the MINES report to see what the dates of
5 treatment were?

6 A Yes.

7 Q (Indiscernible) records?

8 MS. PALM: May I approach?

9 THE WITNESS: Okay. These are dates that I --

10 BY MS. PALM:

11 Q Okay.

12 A -- saw him.

13 Q So it would be from 9/11 of 2008 to early November
14 2008?

15 A Yes.

16 Q And he was seeing you several times a week?

17 A Yes.

18 Q And would it be unusual at all for somebody going
19 into detox to minimize how bad their problem is?

20 A Yes.

21 Q And is alcoholism considered a disease?

22 A Yes, it is.

23 Q Why?

24 A Because it has its own symptom characteristics,
25 manifestation period, and it was deemed so by the American

ROUGH DRAFT TRANSCRIPT

002069

1 Medical Association in 1954.

2 Q Okay. And is part of that because people have a hard
3 time stopping?

4 A Yes.

5 Q Okay. And even when they stop they have a hard time
6 staying dry?

7 A Yes.

8 MS. PALM: No further questions. Thank you.

9 THE COURT: Any recross?

10 MS. GRAHAM: No, Judge.

11 THE COURT: Any questions from any of the jurors? No
12 questions. Thank you, sir, for your testimony. You are
13 excused.

14 THE WITNESS: Thank you.

15 THE COURT: Next witness for the defense.

16 MS. PALM: Your Honor, that concludes the lay
17 witnesses.

18 THE COURT: All right.

19 MS. PALM: May we approach?

20 THE COURT: Yes.

21 (Off-record bench conference).

22 THE COURT: Ladies and gentlemen, we're just going to
23 take a -- just a five minute recess to resolve an issue. It is
24 -- during this recess, it is your duty not to converse among
25 yourselves or with anyone else on any subject connected with

ROUGH DRAFT TRANSCRIPT

002070

1 this case or to read, watch or listen to any report of or
2 commentary on the trial by any person connected with the trial
3 or by any medium of information, including without limitation,
4 newspaper, television, radio or the Internet. You are not to
5 form or express an opinion on any subject connected with the
6 case until this matter is submitted to you. It should be very
7 quickly five minutes.

8 (Outside the presence of the jury).

9 THE COURT: All right, we're outside the presence of
10 the jury panel. And Ms. Palm, there was a instruction that you
11 were requesting.

12 MS. PALM: Well --

13 THE COURT: I mean in regards to that -- regarding
14 the voluntary manslaughter.

15 MS. PALM: The involuntary manslaughter.

16 THE COURT: Involuntary, I'm sorry, yes.

17 MS. PALM: And -- and I have objections to many of
18 their instructions still to put on the record. I don't know
19 when the court wants to do that, but --

20 THE COURT: But for your client's decision on whether
21 or not he's going to testify, that's dependent on the decision
22 whether or not I will give a involuntary manslaughter
23 instruction; is that correct?

24 MS. PALM: That's correct, and as -- as well as we
25 would like to know the outcome of the instruction on whether

ROUGH DRAFT TRANSCRIPT

002071

1 the jury can consider alcohol intoxication or not.

2 THE COURT: Okay. All right, let's deal with the
3 voluntary instruction.

4 MR. LALLI: The voluntariness?

5 THE COURT: Involuntary.

6 MR. LALLI: Oh, and just -- just for the court's
7 edification, the modifications that we had discussed at the
8 last break on the voluntariness, I've made those and I e-mailed
9 the version to the court.

10 THE COURT: Yes, I do have those.

11 MS. PALM: And your Honor, my involuntary instruction
12 is at Page 13 of my instruction packet.

13 THE COURT: All right. Do you have that one, Mr.
14 Lalli?

15 MR. LALLI: I do.

16 THE COURT: All right. Do you have any objection to
17 the giving of the instruction?

18 MR. LALLI: Yes.

19 THE COURT: Okay.

20 MR. LALLI: A number of objections. Number one, it's
21 not their theory of the case. And I think throughout these
22 proceedings and pleadings, while settling instructions, it is
23 abundantly clear it is not their theory of the case. Their
24 theory is that this was an accident and/or it was some form of
25 or some ilk of self-defense. That's their defense, not

ROUGH DRAFT TRANSCRIPT

002072

1 involuntary manslaughter.

2 The problem with the involuntary manslaughter is what
3 the defense is attempting to do in this instruction, and part
4 of it is taking -- taken from NRS 200.070, they're only citing
5 a portion of the instruction. They're -- they're not citing
6 the complete statute on -- on involuntary manslaughter.

7 They've -- they've removed a section. When this case
8 was reversed by the Supreme Court, they looked at this issue of
9 involuntary manslaughter and how it operated with second degree
10 murder. Obviously, the court well knows those two things are
11 related. Has to do with when does an involuntary manslaughter
12 become a second degree murder.

13 I'm entitled to the entire instruction if it's given.
14 The problem is that is precisely the reason it got reversed.
15 And our Supreme Court said there is no evidence to support
16 this. Not only is the instruction improper, but there's no
17 evidence to support it. They said that in their opinion
18 reversing the case.

19 So it's not their theory, there's no evidence to
20 support it, and -- and just as a matter of the record as -- as
21 we've seen it thus far, there is no evidence to support it.
22 And finally, it creates this issue, this legal issue that the
23 -- the -- the Supreme Court has already said is a problem. So
24 you can't just give part of the statute. You've gotta give all
25 of it. And that is going to create a problem.

ROUGH DRAFT TRANSCRIPT

002073

1 THE COURT: All right, thank you. Ms. Palm.

2 MS. PALM: Well, your Honor, when the reversal came
3 back it was because the instruction had gone to the jury, which
4 we objected to, and the court had determined not to give, but
5 ended up in the packet anyway addressing a second degree murder
6 based on a felony murder theory unlawful act.

7 And the court said there's no notice of such a theory
8 and there was no evidence of such an unlawful act. So that's
9 the problem when -- why it got reversed. As far as the
10 involuntary goes, the statute has two alternative ways you can
11 have an involuntary. You can have the lawful act involuntary
12 or the unlawful act involuntary.

13 What I did with this instruction is I took out the
14 language from the statute for the unlawful act because that's
15 what would be a problem in this case. There's been no notice
16 that he did an unlawful act. But you still have the regular
17 involuntary that's based on recklessness doing a lawful act.
18 And I think that we do have evidence in this case from which
19 the jury could find that.

20 There's evidence that she was coming at him with a
21 knife. And there was evidence that he was extremely
22 intoxicated. The jury could determine that -- that if there
23 was a killing, it happened as a result of his recklessness. So
24 that is our theory that there is not a murder in this case.
25 However, if there's anything at all, it would be an

ROUGH DRAFT TRANSCRIPT

002074

1 involuntary. That's hour theory.

2 So we are entitled to instructions on our theory of
3 the case. I'm just defining involuntary manslaughter based on
4 the lawful act manslaughter that's set forth in the statute.
5 And instructions are supposed to be tailored, specifically to
6 the facts of the case.

7 Mr. Lalli is not entitled to instruction based on
8 theories that are not related to the facts of the case and
9 theories upon which we haven't had any notice for an unlawful
10 act involuntary. So we are entitled to those tailored
11 instructions. The State has a burden of -- of proving malice
12 beyond a reasonable doubt. And if they don't prove malice,
13 that they prove something less than malice, there's two types
14 of recklessness. You have either the extreme malignant
15 recklessness, which is malice for murder. Or you have just
16 regular recklessness, which is enough for involuntary.

17 So it's a subset of that type of murder. It's a
18 lesser included under these circumstances. It's Mr. O'Keefe's
19 theory of the case. We're entitled to tailor instructions and
20 that's all this is -- this is setting forth. This is the
21 instruction we're requesting.

22 MR. LALLI: In not one document that she's filed with
23 the court has she ever said it's her theory of the case. In
24 fact, in pleadings she said just the opposite. Yesterday it's
25 my recollection she -- I mean, she was incapable of coming up

ROUGH DRAFT TRANSCRIPT

002075

1 with a factual scenario that -- that has been adduced in this
2 case that fits that theory.

3 Her theory is that it was an accident or that it was
4 in self-defense or that the victim committed suicide. I mean,
5 that was a theory that was advanced in the opening. This --
6 this does absolutely -- it's not a lesser included of second
7 degree murder as we've alleged it as a malice murder. It is
8 not a lesser included. It's not her theory of the case.

9 THE COURT: Ms. Palm, I don't see this as a lesser
10 included. And with -- without any other testimony or evidence
11 in this case, I don't find that it's appropriate to give the I
12 happen voluntary manslaughter instruction. If your client
13 takes the stand and perhaps some other theory comes up, then
14 the court can address that. But at this point I don't find
15 that it's appropriate. So at this point I'm not going to give
16 the instruction.

17 If your -- like I said, if your client takes the
18 stand and some other evidence comes out, then the court would
19 be more than happy to revisit this issue.

20 MS. PALM: And then the other question was the
21 intoxication.

22 THE COURT: There was a new instruction that came
23 out. I have it here.

24 MR. LALLI: This would have been the same one that
25 the court printed out yesterday evening.

ROUGH DRAFT TRANSCRIPT

002076

1 THE COURT: Do you have an extra copy for Ms. Palm or
2 you can just show Ms. Palm yours, Mr. Lalli.

3 MS. PALM: And I see the State's instruction, and I
4 think it's -- it's confusing. It shifts the burden of proof.
5 Relieves the State of the burden of proving malice. We have an
6 alternative instruction at Page 28 that is based on the statute
7 that is just the wording of NRS 193.220.

8 And I understand that Mr. Lalli is going to probably
9 argue, as he did, last evening in chambers. I would say that
10 he cites the Leader (phonetic) case for mere intoxication can't
11 reduce murder. And if the court's not going to give a
12 manslaughter, I guess it's irrelevant any way, that language
13 wouldn't need to be in there. But the no act may be less
14 criminal is part of the statue -- statute. The rest is from
15 Leaders (phonetic), which would not be relevant if the court's
16 not giving the involuntary.

17 However, I think Leaders was just talking about mere
18 intoxication. It didn't say the jury couldn't consider
19 evidence of intoxication. And here the species of crime is
20 second degree murder. It requires the State to prove malice
21 beyond a reasonable doubt, either expressed or implied malice.
22 And I think that, you no he, in recent years since Leaders the
23 court has strengthened the independent requirements under the
24 statutes for murder. We have Bifurd (phonetic) that was
25 setting forth the -- the separate elements. Coleman (phonetic)

ROUGH DRAFT TRANSCRIPT

002077

1 talked about the fact that not every murder requires a specific
2 intent to kill does not relieve the State of the burden of
3 proving some kind of malice.

4 I think under a contemporary understanding of Nevada
5 law everybody knows we have to prove malice. And I think that
6 this instruction is our statute, it's relevant to whether they
7 can show malice, that Mr. O'Keefe was so intoxicated that he
8 fell, that he did something he didn't intend to do. I mean, I
9 think this -- their -- their instruction, if you stop just at
10 -- at by reason of his condition, just completely relieves the
11 State of their burden of proving malice.

12 It says, you know, not to even consider his
13 intoxication. I think the jury's allowed to consider his
14 intoxication but under Nevada law.

15 MR. LALLI: Your Honor, Leaders says exactly the
16 opposite. And Leaders is still the law today. In Leaders
17 exactly what Counsel is doing here, counsel did in Leaders.
18 They wanted an instruction the effect that voluntary
19 intoxication negates malice. That's what they wanted to do.
20 That's what she's requesting. That is not the law. And when
21 in the statute, the voluntary intoxication statute, they're
22 talking about degrees or species of a crime, they're talking
23 about crimes like murder, which can be of the first or of the
24 second, kidnapping, which can be first or of the second. And
25 voluntary intoxication can be considered if a jury wants to in

1 assessing the various degrees of those types of crimes.

2 Degree is no longer an issue here. This is a second
3 degree murder. It is the lowest degree of murder. So in
4 obedience to Leaders, I don't think the court can give the
5 instruction that Counsel is asking for. It violates Leaders,
6 and our instruction is taken verbatim from the statute up to
7 that section and then the language that we're using comes
8 almost verbatim from Leaders.

9 THE COURT: Although Leaders is, I think 2002 or so,
10 Leaders is still good law. It's not been overruled. And in
11 Leaders we deal with the issue of species or degrees of crime
12 and we don't have that anymore in this case. It's one crime at
13 second degree. And so for those reasons, I'm not going to give
14 that instruction.

15 MR. LALLI: You will give the instruction proffered
16 by State?

17 THE COURT: Yes.

18 MR. LALLI: Thank you.

19 MS. PALM: Well, and your -- your Honor, it's not --
20 we're not reducing it to manslaughter anymore, so I don't know
21 why that final sentence should be even in their instruction
22 anymore.

23 MS. GRAHAM: We changed the sentence.

24 MR. LALLI: Oh, that's --

25 MS. PALM: (Indiscernible).

ROUGH DRAFT TRANSCRIPT

002079

1 MR. LALLI: The -- the -- I'm sorry.

2 MS. PALM: Oh, I see. Okay, I -- you know what, I do
3 have yours, okay. So voluntary intoxication does not negate
4 the element. And if you're giving this instruction, I would
5 say -- well, I guess you're going to give it.

6 THE COURT: Okay. All right, do you need to confer
7 with your client?

8 MS. PALM: Yes.

9 THE COURT: All right.

10 MS. PALM: Can we go outside?

11 THE COURT: All right. Well, make sure the
12 corrections officer is with you.

13 (Court recessed at 11:40 a.m. until 11:59 a.m.).

14 (Outside the presence of the jury).

15 THE COURT: We're waiting for the late Mr. Lalli.

16 MS. GRAHAM: I think he just -- he's been in --

17 THE CLERK: He's coming.

18 MS. GRAHAM: -- there this whole time. He might be
19 in the bathroom.

20 (Pause in the proceedings).

21 THE COURT: Okay, Ms. Palm, do you have any other
22 witnesses?

23 MS. PALM: Your Honor, I have discussed -- my only
24 final witness would have been Mr. O'Keefe, but after discussing
25 the court's ruling on the alcohol evidence as well as the

ROUGH DRAFT TRANSCRIPT

002080

1 second or the involuntary as a lesser included, the second
2 degree malice murder, it's our position that the court's ruling
3 have burdened his decision on his right to testify. He does
4 not want to testify at this time because of those rulings.

5 THE COURT: Okay. Is the State going to have any
6 rebuttal witnesses?

7 MR. LALLI: Nope.

8 THE COURT: All right, let's just call the jury in.
9 We'll break for lunch. They have a lunch here in the back.
10 We'll -- we'll have the jury come back at 1:30. I'll have
11 counsel back at 1:00 o'clock so we can put it on the record all
12 the instructions, number them, and go through that process.

13 MR. LALLI: Very good.

14 MS. PALM: And I still have objections on their
15 instructions. Are we going to do that at 1:00?

16 THE COURT: Yeah. That's why --

17 MS. PALM: Okay.

18 THE COURT: -- I said we'll put the objections on the
19 record.

20 MS. PALM: All right.

21 THE COURT: And Mr. Lalli, if you -- if you have all
22 the instructions there, I think you've made the changes, can
23 you be so kind to -- we have so many copies here. If you can
24 be so kind to e-mail them to my JEA, and then we'll print out
25 copies for everybody so we have a complete --

ROUGH DRAFT TRANSCRIPT

002081

1 MR. LALLI: Yes, now --

2 THE COURT: Copy.

3 MR. LALLI: -- the only ones that I don't have are --

4 THE COURT: Well, we'll deal with that in just a
5 minute.

6 MR. LALLI: Okay.

7 THE COURT: We'll just tell the jury we're going to
8 take a break.

9 (In the presence of the jury).

10 THE MARSHAL: Please be seated.

11 (Pause in the proceedings).

12 THE COURT: Ladies and gentlemen, appreciate your
13 patience. The lunch for the jurors has been delivered and
14 we're going to provide to you at this time. The marshal will
15 escort you to the jury deliberation, not for deliberation.
16 You're not to deliberate because you haven't heard closing
17 arguments. We're just going to put you in that room for lunch
18 that court's providing for you.

19 So during this lunch recess, it is your duty not to
20 converse among yourselves or with anyone else on any subject
21 connected with this case or to read, watch or listen to any
22 report over commentary on the trial by any person connected
23 with the trial or by any medium of information, including
24 without limitation, newspaper, television, radio or the
25 Internet. You are not to form or express an opinion on any

ROUGH DRAFT TRANSCRIPT

002082

1 subject connected with the case until this matter is submitted
2 to you. We'll see you back at 1:30.

3 (Outside the presence of the jury).

4 (Pause in the proceedings).

5 THE COURT: All right, we're outside the presence.
6 Mr. Lalli, you said you had -- you had a question about one of
7 the instructions?

8 MR. LALLI: No, no, no, what -- what I was -- oh, the
9 -- I will forward to the court all the ones that I have either
10 typed or formatted. They're -- they're not in a perfect order
11 --

12 THE COURT: Okay.

13 MR. LALLI: -- but I assume we can order those when
14 we --

15 THE COURT: Yes.

16 MR. LALLI: -- when we come back.

17 MS. PALM: And -- and --

18 MR. LALLI: The -- I'm sorry.

19 MS. PALM: Did you get the one that I -- the ones I
20 e-mailed you that were just the blank rewritten ones that I
21 said I would do? I e-mailed them to you --

22 MR. LALLI: I did, but I --

23 MS. PALM: -- Clark and to Mr. Lalli.

24 MR. LALLI: I did receive them but I did not reform
25 at them.

ROUGH DRAFT TRANSCRIPT

002083

1 MS. PALM: Okay, because I thought that's -- you were
2 going to do that.

3 MR. LALLI: I was going to --

4 THE COURT: Can you get --

5 MR. LALLI: -- but I didn't get them in time.

6 THE COURT: Okay, can you do that now? I mean, do
7 you have them in your computer?

8 MR. LALLI: I'm sure I can.

9 MS. PALM: And Mr. O'Keefe will want the instruction
10 on testimony -- on his testimony.

11 THE COURT: Okay, was that in the packet or did you
12 pull that one out, Mr. Lalli?

13 MS. PALM: It was --

14 MR. LALLI: It was -- it should be in the packet that
15 I sent.

16 THE COURT: Okay. So -- so you're able to e-mail
17 that to the clerk or to my law clerk, my court clerk, my JEA.

18 MR. LALLI: Your Honor, I'm e-mailing these to your
19 JEA --

20 THE COURT: Okay.

21 MR. LALLI: -- so that the batch that I have has --
22 has just been sent to her.

23 THE COURT: And that includes the ones Ms. Palm
24 provided; is that correct?

25 MR. LALLI: Not the ones that she provided this

ROUGH DRAFT TRANSCRIPT

002084

1 morning. Although, I can -- do you want me to just forward
2 those to your JEA?

3 THE COURT: Yes, then I'll --

4 MR. LALLI: Okay.

5 THE COURT: -- then I'll -- we can put them in order
6 and make copies for everybody.

7 MR. LALLI: Okay.

8 THE COURT: And if we need to reformat we can do that
9 this afternoon.

10 MR. LALLI: Okay, those have been sent to your JEA.

11 THE COURT: Okay. We'll counsel back at 1:00,
12 closing at 1:30.

13 MR. LALLI: Thank you.

14 (Court recessed at 12:06 p.m. until 1:42 p.m.).

15 (Outside the presence of the jury).

16 THE COURT: We're on the record outside the presence
17 of the jury panel. I've been provided with some jury
18 instructions here that initially have been agreed upon by the
19 court. Ms. Palm, we'll number these in just a minute, but
20 besides these instructions here, are there additional
21 instructions you wish the court to give?

22 MS. PALM: Well, I had some objections to the
23 instructions still that we haven't made a record of.

24 THE COURT: Well, I --

25 MS. PALM: Okay.

ROUGH DRAFT TRANSCRIPT

002085

1 THE COURT: -- always ask that from both sides.

2 MS. PALM: Okay. My objection to the in arriving at
3 a verdict in this --

4 THE COURT: No, no, do you have any additional so I
5 can --

6 MS. PALM: Oh, additional, yes.

7 THE COURT: That's -- that 's what I'm asking for.

8 MS. PALM: As far as malice, their definition of
9 malice -- I'm trying to find which one that is in the stack.
10 Okay, I think it's --

11 THE COURT: About the fourth or fifth one in.

12 MS. PALM: Fourth one in.

13 THE COURT: And there's one with expressed malice
14 right after.

15 MS. PALM: Okay. I have a proposed instruction on
16 malice that also has the if -- if the State fails to either
17 prove malice or aforethought or disprove accident or
18 self-defense it's your guilty to return a verdict of not
19 guilty. I want them to have a instruction phrased in the
20 negative with respect to the second degree murder, which we
21 don't have in this packet, which I asked for on second degree
22 murder that if the State fails to prove any of elements, then
23 the jury has to return a not guilty verdict.
24 We are entitled to negatively phrased instructions
25 under Crawford (phonetic), and that's cited in my instructions.

ROUGH DRAFT TRANSCRIPT

002086

1 MR. LALLI: Your Honor, the voluntary -- I'm sorry,
2 the malice aforethought instruction in the packet has been
3 approved by the Nevada Supreme Court.

4 MS. PALM: And they've also approved negatively
5 phrased instructions. Meaning that just because there's a
6 correct instruction doesn't mean the defendant doesn't get the
7 negatively phrased instruction.

8 THE COURT: Okay. Let's mark your proposed so you
9 can have that as part of your record.

10 MS. PALM: Well, it's -- they're filed with the
11 court. Do you --

12 THE COURT: Okay. Well, which number is it so you
13 can identify --

14 MS. PALM: It's on page --

15 MR. LALLI: (Indiscernible) a page number.

16 MS. PALM: It's -- well --

17 THE COURT: Do you have that?

18 MS. PALM: -- that one is Page 8, and if -- if the
19 court wants to do some other tweaking on the language to
20 include the negatively phrased, I'll do that, too. But I think
21 he's entitled to a negatively phrased instruction on -- on
22 that.

23 The other one is on Page 10.

24 THE COURT: Okay, let's deal with the malice --

25 MS. PALM: Okay.

ROUGH DRAFT TRANSCRIPT

002087

1 THE COURT: -- instruction. Do you have anything
2 else to add, Mr. Lalli, as far as your objection to Ms. Palm's
3 proposed?

4 MR. LALLI: Yes, I don't think that instruction as
5 written has ever been approved by the Nevada Supreme Court.
6 Whereas, the one we're submitting has.

7 THE COURT: All right, the -- the malice aforethought
8 instruction and expressed malice proposed by the State have
9 both been approved by the Nevada Supreme Court. They are
10 accurate statements of the law, and they -- they specifically
11 set forth the definition of those two terms, and so that's why
12 I'm going to give these instructions and I'm not going to give
13 the defense proposed and -- and which number was that again,
14 Ms. Palm, so we can put it on the record?

15 MS. PALM: It was -- well, I actually had a second
16 one, but Mr. Lalli started talking. I have another definition
17 for malice on Page 10 of mine --

18 THE COURT: Okay.

19 MS. PALM: -- of my proposed instructions. And that
20 explains more what abandonment and malignant heart malice
21 requires. The extreme recklessness regarding homicidal risks,
22 that's from Coleman. I don't think that malice aforethought,
23 as explained in this old instruction, has been given forever
24 adequately defines for the jury the concept of malice.

25 I don't think that it tells them exactly what that

1 means. And I think this instruction's better.

2 (Pause in the proceedings).

3 THE COURT: Okay, that's instruction 10.

4 MS. PALM: Yes. Well, it's on my Page 10.

5 MS. GRAHAM: It's Page 10.

6 THE COURT: Page 10, I'm sorry, yes. Okay, Mr.
7 Lalli, on her instruction 10.

8 MR. LALLI: Your Honor, the -- her instruction 10 is
9 covered by the malice aforethought instruction that the court
10 has indicated it's going to give.

11 THE COURT: That is correct, so I'm not going to give
12 -- actually it's Page 10 of Ms. Palm's proposed instructions,
13 not instruction 10. Yes, Ms. Palm, next.

14 MS. PALM: Next is flight. We are requesting the
15 anti-flight instruction. That he is an on Page 27 of my
16 proposed instructions. And I think since the juries are
17 allowed to consider evidence of flight as guilt, they ought to
18 be able to consider evidence of non-flight as indicating the
19 opposite.

20 MR. LALLI: Your Honor, the citation for this
21 instruction is Caljick (phonetic). This is not the law in the
22 State of Nevada. In fact, the -- the cases in Nevada that talk
23 about flight say that in order to give a flight instruction,
24 there has to be no other indication as to why the person left
25 the scene.

ROUGH DRAFT TRANSCRIPT

002089

1 Here if there were a reverse flight situation in
2 Nevada or non-flight situation, which there's not, it's not as
3 though the defendant was there to embrace law enforcement when
4 they arrived. I mean, the facts are certainly contrary to
5 that. So he didn't say there to turn himself in or -- or to,
6 you know, in a forthright manner tell the police what happened,
7 so it's not supported by the law, and it's factually not
8 appropriate.

9 THE COURT: There isn't any relevant Nevada authority
10 on giving this instruction. I'm not going to give it.
11 However, it does not preclude Ms. Palm from arguing that he
12 didn't run, he stayed (indiscernible) he stayed to provide
13 assistance or not. But you're free to argue his non-flight.

14 MS. PALM: And I think that's all that I had as far
15 as additional instructions go.

16 THE COURT: Okay. I'm going to number these --

17 MS. PALM: Yeah.

18 THE COURT: -- real quick and assuming you have all
19 the same numbers, I mean the same order. The second to last
20 instruction is read back, it should be play back. That would
21 be number 27, but we need to get one for play back. So there
22 are 28 --

23 MR. LALLI: I've got a play back, your Honor --

24 THE COURT: You have a play back, all right.

25 MR. LALLI: -- if you just want to substitute mine.

ROUGH DRAFT TRANSCRIPT

002090

1 THE COURT: Thank you.

2 MR. LALLI: Can I have the one you just throw away?
3 I'm just going to put it in my packet and just make the
4 amendment to it. Thank you.

5 THE COURT: All right. There's 28 jury instructions.
6 Mr. Lalli, is State familiar with instructions 1 through 28?

7 MR. LALLI: Yes, your Honor.

8 THE COURT: Do you object to the giving of any of
9 those instructions?

10 MR. LALLI: No.

11 THE COURT: All right. And do you request any
12 additional instructions?

13 MR. LALLI: No.

14 THE COURT: And you're familiar with the verdict
15 forms and do you have any objections thereto?

16 MR. LALLI: I do not.

17 THE COURT: Okay. Ms. Palm, you're familiar with
18 instructions 1 through 28?

19 MS. PALM: Yes.

20 THE COURT: Do you have any objection to the giving
21 of instruction 1 through 28, other than you've already set
22 forth?

23 MS. PALM: In addition, your Honor, I object to
24 instruction 26. I think that the --

25 THE COURT: I'm sorry, which number?

ROUGH DRAFT TRANSCRIPT

002091

1 MS. PALM: 26.
2 THE COURT: Okay.
3 MS. PALM: I think --
4 THE COURT: Yes.
5 MS. PALM: -- that the language as to whether
6 defendant is guilty or not guilty misstates the burden. I
7 think it's misleading. I think it should say whether the State
8 has met its burden to prove beyond a reasonable doubt that the
9 defendant is guilty.
10 MR. LALLI: Which one, 26?
11 THE COURT: That's not 26.
12 MS. GRAHAM: That's 25.
13 MS. PALM: I'm sorry, I have it as 26.
14 THE COURT: All right, 25.
15 MS. PALM: Is it 25? Okay. In arriving at a
16 verdict?
17 THE COURT: Yes.
18 MS. PALM: So we're not starting with one as one.
19 THE COURT: No page one --
20 MS. PALM: Or the first page as 1.
21 THE COURT: -- is 1.
22 MR. LALLI: First page one is 1.
23 MS. PALM: Okay, I've got an extra one in here, then.
24 THE COURT: Well, it's number 25, so your objection
25 is?

ROUGH DRAFT TRANSCRIPT

002092

1 MS. PALM: My objection is I think it misstates the
2 burden by saying whether the defendant is guilty or not guilty.
3 It ought to say whether the State has met its burden to prove
4 beyond a reasonable doubt that the defendant is guilty, strike
5 not guilty.

6 THE COURT: Okay, Mr. Lalli.

7 MR. LALLI: Well, that's their charge. I mean, there
8 is a guilty verdict on the verdict form and there's a not
9 guilty verdict. So that's their charge. The court has already
10 instructed them in -- in voir dire in these instructions that
11 it's our burden to prove guilt beyond a reasonable doubt.

12 THE COURT: All right, so --

13 MR. LALLI: In addition, this just talks about
14 whether they can consider punishment.

15 THE COURT: Yeah, that's correct. So you're
16 objection's noted. Any other numbered instructions?

17 MS. PALM: As far as their malice aforethought
18 instruction, which is number 5, I think that it should have a
19 period after the first sentence or excused because or what the
20 law considers adequate provocation does not apply to
21 circumstances here, and I think it's confusing.

22 MR. LALLI: Well, adequate provocation could be, for
23 instance, self-defense. I mean it could be a whole number of
24 things, and it's phrased in terms of what the law considers.
25 So I think the sentence is proper.

ROUGH DRAFT TRANSCRIPT

002093

1 THE COURT: Yeah, I don't think this -- that
2 instruction 5 is misleading to the jury, so you're objection's
3 noted for the record. Any other numbers?

4 MS. PALM: Nope, that was the fine one -- the final
5 objection.

6 THE COURT: Okay. And besides those objections, do
7 you have any other objections to the giving of 1 through 28?

8 MS. PALM: No.

9 THE COURT: And you're requesting additional
10 instructions other than you've already -- you've already
11 discussed on the record?

12 MS. PALM: No.

13 THE COURT: Okay. And are you familiar with the
14 verdict form? Any objection thereto?

15 MS. PALM: No.

16 THE COURT: Okay. All right, we'll call the jury in,
17 and Ms. Palm, since we did not -- defense did not rest in front
18 of the jury, I'll ask you if you have any other witnesses and
19 then you'll say rest and I'll ask the State if they have any
20 rebuttal and then we'll go into closing.

21 MS. PALM: Okay.

22 THE COURT: Well, jury instructions.

23 MR. LALLI: Okay.

24 THE COURT: All right.

25 MS. GRAHAM: And, Judge, can we take ten minutes

ROUGH DRAFT TRANSCRIPT

002094

1 after reading to go into closing?

2 MR. LALLI: Well, why don't you set up now?

3 MS. GRAHAM: I -- well, I am. I just want to make
4 sure technically it's --

5 MR. LALLI: Right, let's do it now so --

6 THE COURT: Well, set it up now if you have --

7 MR. LALLI: -- we don't have to break --

8 MS. GRAHAM: Okay. All right.

9 MR. LALLI: -- take the jury out and bring them back
10 in.

11 MS. GRAHAM: How -- show me.

12 THE COURT: Yeah, I don't want to --

13 MS. PALM: Can I look at your instructions because I
14 have an extra one in here somewhere. I don't know what it is.

15 (Pause in the proceedings).

16 MR. LALLI: Are we --

17 MS. PALM: Found the culprit.

18 MR. LALLI: Are we turned over?

19 THE CLERK: Yes.

20 (Pause in the proceedings).

21 THE COURT: Are we ready for the jury to come in?

22 MR. LALLI: It's not reading it. I just need one
23 second to --

24 THE COURT: Okay.

25 MR. LALLI: -- reboot it.

ROUGH DRAFT TRANSCRIPT

002095

1 THE COURT: Well, can we work on that while I'm
2 reading the instructions?

3 MR. LALLI: Well --

4 MS. GRAHAM: Well, I have to change one --

5 MR. LALLI: -- it will be distracting.

6 THE COURT: Okay.

7 MS. GRAHAM: -- because of Trish's change.

8 THE COURT: All right.

9 (Pause in the proceedings).

10 (Court went off the record at 1:58 p.m. until 2:09 p.m.).

11 (Pause in the proceedings).

12 (In the presence of the jury).

13 THE MARSHAL: All rise for the presence of the jury.
14 Please be seated.

15 THE COURT: Ladies and gentlemen, I want to thank you
16 for your patience. We had a computer problem that's been
17 resolved. Ms. Palm, do you have any other witnesses you wish
18 to call in this case?

19 MS. PALM: No, your Honor, but I do have some
20 documents that I need to admit in.

21 THE COURT: All right. Defendant's Proposed Exhibit
22 K.

23 MR. LALLI: No objection.

24 THE COURT: Okay, it will be admitted.

25 (Exhibit K admitted).

ROUGH DRAFT TRANSCRIPT

002096

1 MS. PALM: And Defendant's Proposed Exhibit E.

2 THE CLERK: E's already admitted.

3 MS. PALM: Oh, I'm sorry, I'm looking at the wrong
4 thing then, I think.

5 THE CLERK: I have K and M.

6 MS. PALM: Oh, I'm sorry, it's five d's.

7 THE CLERK: Five d's? The military records, yes,
8 those are admitted. Sorry, those are not admitted. Five d's,
9 yeah.

10 MR. LALLI: Yeah, I have no objection to that.

11 THE COURT: Okay, they'll be admitted.

12 (Exhibit DDDDD admitted).

13 MS. PALM: Thank you.

14 THE COURT: Any other exhibits or --

15 MS. PALM: No, your Honor, and the defense rests.

16 THE COURT: Okay. Any rebuttal witnesses for State?

17 MR. LALLI: No, your Honor.

18 THE COURT: Ladies and gentlemen, both sides have
19 rested in this case. It is now my duty as judge to instruct
20 you on the law that applies to this case.

21 (Jury instructions; not be transcribed).

22 THE COURT: State, your closing, please.

23 STATE'S CLOSING ARGUMENT

24 MS. GRAHAM: Thank you, Judge. She's poison. I hate
25 her and I want to kill her. She took three years of my life.

ROUGH DRAFT TRANSCRIPT

002097

1 She sent me to prison. That's what the defendant said about
2 Victoria Whitmarsh. He killed her on the night of November
3 5th, 2008. He did it intentionally and he had a motive.

4 This is the verdict form that you will have in your
5 packet and you're going to be asked to deliberate on. And it's
6 really simple. If you can see it, there are three boxes. The
7 first box is second degree murder with use of a deadly weapon,
8 second degree murder without use of a deadly weapon and not
9 guilty.

10 I'm going to walk you through the evidence as you've
11 heard it in this past week, past seven days, and -- and I'm
12 going to apply that evidence to the law that the just -- judge
13 just instructed to you on this case. I'm going to show you how
14 (indiscernible) this case. First of all, let's get one thing
15 right out of the way from the get go. There's been all kinds
16 of talk about Brian being intoxicated.

17 There's no doubt, Detective Wildemann said he smelled
18 of alcohol, that he appeared to be intoxicated. There's been
19 testimony from neighbors that were on the scene on the night of
20 November 5th, 2008, that he appeared to be intoxicated. There
21 were statements by officers that he smelled of alcohol. In
22 fact, I think it was Officer Ballejos who testified that he
23 appeared to be extremely intoxicated. Guess what? That
24 doesn't matter.

25 MS. PALM: Objection, your Honor. May we approach?

ROUGH DRAFT TRANSCRIPT

002098

1 (Off-record bench conference)

2 THE COURT: You're objection's sustained.

3 MS. PALM: Thank you.

4 MS. GRAHAM: Voluntary intoxication is not a defense
5 to second degree murder. No act committed by a person while in
6 the state of voluntary intoxication shall be deemed less
7 criminal by reason of (indiscernible). Voluntary intoxication
8 does not negate the element of malice inherent in the crime of
9 murder as we've charged it, second degree murder. And I'll
10 explain second degree murder just a little bit later.

11 Ms. Palm has made a point of -- of showing a
12 photograph of the defendant after the -- the interview that he
13 had with Detective Wildemann, and the fact that he was so
14 intoxicated that the photo -- in the photo it depicted another
15 officer having to hold him up. That was in the interview room
16 several hours after he murdered Victoria. This was at the
17 crime scene.

18 He stood on his own with his hands behind his back.
19 Didn't have any trouble standing up by himself. He was not so
20 intoxicated that he did not understand what was going on in
21 that interview room.

22 Deadly weapon. You're going to be asked to determine
23 whether a deadly weapon was used in this case. And the law
24 defines a deadly weapon as in this case any weapon, device,
25 instrument, under the circumstances in which it was used is

1 readily capable of causing substantial bodily harm or death.

2 The weapon in this case, a knife.

3 I think that we can all agree that that knife that
4 was used to stab Victoria Whitmarsh is a deadly weapon that is
5 capable of causing substantial bodily harm or death. Result,
6 knock that out right away. What we have left is not guilty and
7 guilty of murder of a second degree with use of a deadly
8 weapon.

9 So let's talk about how we get there. First of all,
10 there's been some claims that perhaps defendant acted in
11 self-defense. I think you've heard statements and some
12 evidence throughout these past few days that perhaps Victoria
13 attacked him, that Victoria cut him. This is not -- this is
14 not a case of self-defense.

15 We're going to go through the instructions of
16 self-defense, but first of all, Victoria was described by many
17 witnesses as petite, small, little girl. The medical examiner
18 testified that she was five foot, four and weighed 108 pounds.
19 She's slight.

20 Self-defense, the killing of another in self-defense
21 is justified and not unlawful when the person who does the
22 killing actually and reasonably believes that there was eminent
23 danger, that he -- that Victoria, in this case, would have
24 killed him or caused him great bodily injury, and that it is
25 absolutely necessary -- that it was absolutely necessary for

ROUGH DRAFT TRANSCRIPT

002100

1 the defendant under the circumstances for him to use in
2 self-defense force or means that might cause the death of
3 Victoria for the purpose -- for the purpose of avoiding death
4 or great bodily injury to himself.

5 A bear fear of death alone or great bodily injury is
6 not sufficient to justify that killing. To justify taking the
7 life of another in self-defense, the circumstances must be
8 sufficient to excite the fears of a reasonable person placed in
9 a similar situation. The person killing must not act under the
10 influence of those fears alone -- must act under those fears
11 alone and not in revenge.

12 An honest but unreasonable belief and the necessity
13 for self-defense does not negate malice. Was defendant's
14 belief, if that's his theory, was it reasonable under the
15 circumstances? There's absolutely no evidence to corroborate
16 defendant's claim that he murdered Victoria in self-defense.
17 There isn't, except for his statements.

18 MS. PALM: Your Honor, I'm going to object to burden
19 shifting at this time.

20 THE COURT: I'm going to overrule the objection.

21 MS. GRAHAM: Thank you, your Honor.

22 THE COURT: It's closing argument.

23 MS. GRAHAM: You -- we've admitted into evidence the
24 statement that defendant made to Detective Wildemann. It was
25 audio recorded, video recorded. You're going to be able to

ROUGH DRAFT TRANSCRIPT

002101

1 have that back into deliberations with you to view again. But
2 there's some interesting things that defendant, you'll note,
3 you know, states in there. Detective Wildemann asked him
4 repeatedly how did you cut your hand?

5 I challenge you to go back there and count how many
6 times defendant said I don't know, I don't know, I don't know.
7 Later, later he says he grabbed the knife out of V's hand,
8 Victoria's hand, and said what the fuck are you doing, don't be
9 stupid. Prior to that, throughout the whole interview when
10 Detective Wildemann is questioning him on how he got the cut on
11 his happened, I don't know, I don't know, I don't know. But he
12 does know all kinds of other details. That audio/video speaks
13 for itself, folks. It does. It speaks for itself.

14 Credibility. The judge has given you instruction on
15 credibility. So that's really important here because not just
16 defendant, but all of the witnesses that have testified, you
17 have to judge their credibility. And credibility can be judged
18 based on somebody's fears, motives, interests or feelings.
19 What were Brian's motives when he made statements to Detective
20 Wildemann? What was his motive?

21 But, you say, okay, defendant has injuries, what are
22 -- what about defendant's injuries? We've got possibly a rug
23 burn on his face because he was taken into custody, he had to
24 be tazed and forced down and taken into custody at the scene.
25 He's got a cut on his finger. That cut, State submits to you

ROUGH DRAFT TRANSCRIPT

002102

1 that cut happened when he stabbed Victoria because he lost his
2 grip when the blood got on his hands. And that's consistent
3 with others that have committed stabbings.

4 He's got, I don't know, some -- some bruising on his
5 arm there. Well, Detective Taylor testified that when he took
6 him into custody, he had one arm behind his back and defendant
7 wasn't budging even after he had to be -- after he was tazed
8 once. It took a second cycle. The officers had to take him
9 into custody. And then the scratches on the back. I don't
10 know. Defendant's actions are not legally justified by a claim
11 of self-defense in this case.

12 He murdered Victoria. Now we're going to talk about
13 what second degree murder is. Murder in the second degree is
14 the unlawful killing of a human being with malice aforethought.
15 And that's a really strange word, malice aforethought. And
16 it's -- it's -- it's a concept that I'm hoping that I can
17 explain to you because it can be confusing if you're hearing it
18 for the first time.

19 And malice aforethought can be either expressed
20 malice or implied malice. The unlawful killing may be
21 effective by any of the various means by which (indiscernible)
22 in this case a stabbing. Malice aforethought means the
23 intentional doing of a wrongful act without legal cause or
24 excuse or what the law considers adequate provocation. For
25 instance, self-defense. We've already ruled that out.

ROUGH DRAFT TRANSCRIPT

002103

1 The condition of the mind described as malice
2 aforethought may arise -- okay, so the condition of mind of
3 malice aforethought may arise from anger, hatred, revenge or
4 from a particular ill will, spite or grudge toward the person
5 killed. It may also arise from any unjustifiable or unlawful
6 motive or purpose to injure another person receiving from a
7 heart, excuse me, fatally bent on mischief or with reckless
8 disregard of the consequences of the act.

9 Malice aforethought doesn't apply any deliberation,
10 the judge has told you that, or any lacks of time. It denotes
11 an unlawful purpose and a design as opposed to accident or
12 mischance. Victoria's murder was not an accident. She didn't
13 stab herself. Although, that may be another theory that it was
14 an accident. I think that with regard to the accident we have
15 some testimony from Mr. Schiro, I think it was that testified
16 to the State -- or I mean for the -- for the defense accidental
17 stabbing. It wasn't an accident and it wasn't -- and she
18 didn't stab herself.

19 We can use common sense, guys, but not imagination.
20 And that's exactly what Mr. Schiro did. He used his
21 imagination when he talked about this being an accidental
22 stabbing. In addition to his report being a supplemental
23 report after he had read some transcripts from a prior
24 proceeding of the defendant's testimony, he expanded -- he
25 expanded his report to include an accidental stabbing. And you

ROUGH DRAFT TRANSCRIPT

002104

1 talked to you about how he came to the conclusion that it could
2 have been an accident, and I think he testified he used his
3 imagination.

4 Well, he didn't use scientific means like a dummy or
5 any kind of taping or any kind of trajectory rods or anything
6 like that. But no, just his imagination. And let me tell you
7 something about that imagination. That imagination assumes
8 that Victoria was standing up when she was stabbed. Now, I
9 think the pictures kind of speak for themselves. You can look
10 at those. But it's highly doubtful based on the photos at the
11 crime scene that Victoria was standing when the defendant
12 stabbed her to death.

13 This is important, too, to understand, common sense,
14 not imagination. There's a jury instruction on common sense.
15 And the law allows you to use your common sense, and it allows
16 you to use the experiences and background that you bring to the
17 table. You're not supposed to leave that outside the door.
18 You can use your common sense and make reasonable inferences
19 based on your common sense from the evidence that's presented
20 to you from these last few days. And that's what that
21 instruction says, and you have that in your packet when you go
22 back.

23 Before we go to malice, I just want to make a couple
24 of points on -- on why this is not a suicide either. You know,
25 that -- that was another possible theory that the defendant has

1 thrown out there for you. And -- and I think, you know, based
2 on the fact that there was a stipulated portion of some medical
3 records that Victoria suffered from depression. She attempted
4 to commit suicide a few times.

5 And yes, sometimes she used a knife in that attempt
6 to commit suicide, sometimes scissors. But she always slit her
7 wrists. She didn't try to stab herself in an awkward position,
8 which both medical examiners, both Dr. Benjamin who performed
9 the autopsy and their expert medical examiner indicated to you
10 that it was not likely that that stab wound was self-inflicted.
11 It's very awkward, based on the trajectory and the entrance and
12 -- and the positioning, you know, on her right side for her to
13 get up there. It just doesn't even make any sense. Common
14 sense. It doesn't make sense that that was self-inflicted.

15 The fact that she was depressed and had anger
16 outbursts and that she committed suicide and oh, oh, of course,
17 of course, she was on medication, too. She was on medication
18 and darn it, she was on medication for depression so somehow
19 that makes her an aggressor in the situation. But never in any
20 of those medical records that are stipulated in evidence does
21 it ever state that she ever turned her aggression outwards and
22 went --

23 MS. PALM: Your Honor --

24 MS. GRAHAM: -- and tried to harm somebody else.

25 MS. PALM: -- may we approach?

1 THE COURT: All right.

2 (Off-record bench conference).

3 MS. GRAHAM: Again, folks, there's no evidence
4 (indiscernible) evidence in the record that you've heard that
5 Victoria ever turned a knife on anybody else, scissors on
6 anybody else but herself. Yes, she had episodes of depression,
7 she was on Effexor. Does that give somebody the right to can
8 kill her? To murder her? I don't think so. I don't think so.

9 All right, so let's get back to malice because as
10 I've explained, second degree murder requires State to prove
11 that the defendant had malice aforethought. So what is malice?
12 Well, we've got expressed malice and implied malice. All
13 right. Expressed malice is deliberate intention unlawfully to
14 take away the life of a human being, which is manifested by
15 external circumstances capable of proof.

16 Okay, expressed malice requires the intentional act,
17 intentional unlawful act (indiscernible) of an intentional
18 unlawful act, the stabbing. Malice may also be implied when no
19 considerable provocation appears or when all the circumstances
20 of the killing show an abandoned and malignant heart. And I
21 think all the circumstances together definitely show that
22 there's at a minimum implied malice.

23 Motive versus intent. Okay, that's important here,
24 okay. The State's not required to prove motive. And we'll get
25 to that. To constitute the crime charged in this case it's

ROUGH DRAFT TRANSCRIPT

002107

1 second degree murder, there must exist a joint -- a union or
2 joint operation of an act that's forbidden by law and intent to
3 do that act. In summary that means forbidden by law, a murder,
4 a stabbing, and the intent to do the act. The intentional
5 stabbing into Victoria's body.

6 The intent with which an act is done is shown by the
7 facts and circumstances surrounding the case. Do not confuse
8 intent with motive. Motive is what prompts a person to act.
9 Intent refers only to the state of mind. The state of mind
10 with which the act was done. Motive is not an element of the
11 crime charged, in this case second degree murder. We don't
12 have to prove a motive.

13 However, you may consider evidence of motive or lack
14 of motive when you come to your decision. The prosecution, we
15 are not required to present direct evidence of the defendant's
16 state of mind. You may infer it from the facts of the case.
17 That means the demeanor, the credibility, all the evidence
18 (indiscernible). We don't have to prove -- it would be kind of
19 hard, actually, to get in somebody's mind and know what they
20 were thinking at that moment. You kind of have to infer that
21 from all of the evidence. And that's going to be your job back
22 in the deliberation room once you have the evidence to use your
23 common sense and infer all of those things.

24 When defendant murdered Victoria acted with malice
25 aforethought, and although we are not required to prove motive,

ROUGH DRAFT TRANSCRIPT

002108

1 he certainly had a motive to kill Victoria. How do we know
2 that? Okay, well (indiscernible). We're going to look at his
3 actions before he murdered Victoria, during the time frame in
4 which he murdered Victoria, which is the specifically the night
5 of September 5th, 2008, and then we're going to look at his
6 actions afterwards, okay.

7 So how do we know he acted with malice aforethought
8 and had a motive? Before -- before he murdered Victoria he had
9 a motive. He had a motive. He told Cheryl Morris, I want to
10 kill the bitch. Cheryl Morris and him were in a relationship.
11 He talked to Victoria -- about Victoria all the time to Cheryl.
12 She's poison, I hate her, she took three years of my life. And
13 guess what, folks, you know -- you know that she did take three
14 years of his life because you know that defendant was
15 previously tried, convicted and sent to prison after Victoria
16 testified against him for battering her previously.

17 However, for purposes of that information, that
18 felony conviction that's been admitted into evidence of the
19 previous battery against Victoria, the judge has instructed you
20 that that evidence -- and you're going to have this entire
21 instruction back there -- evidence that defendant committed the
22 felony offense of battery and the statements made by Cheryl
23 Whitmarsh (sic), and the evidence that he's alleged to have
24 indicated his ability to kill with a knife by cutting a person
25 was not received and may not be considered by you to prove that

ROUGH DRAFT TRANSCRIPT

1 he is a person -- okay, this is important.

2 You cannot consider it to prove that he with as a bad
3 person, okay, or to prove that he had the propensity to commit
4 the crime. In other words that he could do it again. You
5 can't consider it for that.

6 MS. PALM: Your Honor, may we approach?

7 THE COURT: All right.

8 (Off-record bench conference).

9 THE COURT: Go ahead, Ms. Graham.

10 MS. GRAHAM: Judge, can we approach?

11 (Off-record bench conference).

12 MS. GRAHAM: But what you can consider that evidence
13 for is motive and intent in this case. You understand the
14 difference? You can't consider it, that he was a bad person or
15 that he had a propensity so act in the same manner. But you
16 can consider it as motive, that includes the statements that
17 Cheryl made and that includes the fact that he was previously
18 convicted of battering Victoria. Motive and intent, you can
19 consider it for that. That's an instruction the judge gave
20 you.

21 Okay. Now let's talk about that night.

22 (Indiscernible) November 5th, 2008. Folks you're going to have
23 a lot of (indiscernible) back there because both the State and
24 the defense have submitted lots of photos into evidence.
25 You're going to have it all back there. A lot of them are

ROUGH DRAFT TRANSCRIPT

002110

1 duplicates. The defendant -- defendant and -- and the State
2 have submitted some of the same ones. Not that they mean
3 anything more. It's just that they're -- they've been
4 submitted.

5 This is particularly telling. I think that you'll
6 remember in the statement that defendant made to Detective
7 Wildemann, Detective Wildemann kind of pointed the fact that
8 the bed was made up in the living room. And I think it's
9 interesting that it's neatly made up. Somebody was sleeping on
10 the couch that night. Somebody was sleeping on the couch that
11 night. That is neatly made up. It has not been disheveled
12 whatsoever.

13 A struggle took place in that room, in the bedroom.
14 CSA Maldonado, and you can see in that photo how the mattress
15 is kind of off the -- the top mattress is off the box screen.
16 The -- the blinds where the balcony is, by the way, those are
17 on the floor, blood. And you'll notice in the photo only one
18 side of the bed is unmade. Closet doors are off the track.
19 There's a shoe, there's a coat from over the blinds that had
20 already been fallen. There was a struggle going on up there in
21 that master bedroom. And we know that not just because of the
22 photos that we received, but because of the witnesses that have
23 come in here and they've testified this week and last week.

24 You remember Joyce Toliver? It seems like forever
25 ago, okay. The neighbor downstairs, the Tolivers. Mrs.

ROUGH DRAFT TRANSCRIPT

002111

1 Toliver was in bed ready to watch her soap operas. Yeah, she's
2 not sure exact time frame, but she knows she was in bed ready
3 to watch her soap operas that come on at Soap Net between 9:00
4 and 11:00 that evening. She's in bed, she starts hearing
5 thumping and bumping going on upstairs. It gets loud. So what
6 does she do? She turns the remote up. It goes on and it goes
7 on and it gets louder, and she hears crying, and then she hears
8 louder thumping and she -- she testified that she took a broom
9 and she hit the ceiling to try to get them to stop so she could
10 watch her soap operas.

11 Well, that didn't stop the noise. The noise
12 continued and it got louder and it woke Charles up, Cooky.
13 Remember, he was sleeping next to her? It woke him up. I
14 think he testified what the fuck. And Mrs. Toliver says it's
15 been going on for a minute. So he testified he took the broom
16 to the ceiling and it didn't stop.

17 So Cooky decides he's going to go up and confront the
18 defendant to try to keep it down. And he's in such a hurry he
19 puts on his wife's house slippers. In the meantime, while
20 Cooky's leaving to go upstairs, Joyce is still downstairs. And
21 if you recall, she demonstrated to you how loud that thumping
22 and bumping was. And then she heard moaning, crying and soft
23 moaning, and the moaning got louder and it just fell silent,
24 silent.

25 By the time Cooky got up there, he was angry. He was

ROUGH DRAFT TRANSCRIPT

002112

1 in a hurry because he was woken up in his wife's house shoes.
2 He reached the door. The door was open. He's yelling in
3 there, if you recall, hey, man, hey, man, keep it down. You
4 heard him testify that the defendant came out and said, come
5 get her, come get her. Cooky's look, come get who, man? She's
6 in there, she's in there. So what does Cooky do? He follows
7 him into the living room. The door's already open, right?
8 Door's already open.

9 Door's already open. He sees Victoria's legs on the
10 floor and blood every where. What's his reaction? What have
11 you done, man? And Cooky says that defendant gives him a crazy
12 look, a crazy look. Did he ever ask Cooky for help? No. Did
13 he say call 911, she stabbed her? I accidentally stabbed her?
14 No. He just looked at him with a crazy look that scared Cooky,
15 scared Cooky. That he ran so fast down the stairs that he left
16 Joyce's house slippers up there.

17 So what's he do? He's yelling, you know, yelling for
18 neighbors, somebody help, somebody call 911. He goes to Todd's
19 apartment. He gets Todd, and said -- and explains to Todd what
20 he just saw. And so Todd goes up there with him. The door's
21 still open, and Todd -- Todd goes in and Cooky behind him. And
22 defendant's in the bedroom, and Todd's like defendant looked --
23 Todd testified that defendant looked at him and said get the
24 hell out of here, man, and tries to take a swing at him. Get
25 the hell out of here after Todd sees Victoria's feet on the

ROUGH DRAFT TRANSCRIPT

002113

1 ground, his -- her legs, the bloody bed. Get the hell out of
2 here, and tries to take a swing.

3 He never asked for help. Never says call 911. Never
4 says she stabbed herself, man, help. Oh, and -- and then, of
5 course, Jimmy Hatchcox, the next door neighbor, remember he
6 came in here briefly testified. He had testified that him and
7 defendant had hung out occasionally. And he said he was in his
8 apartment, which by the way, you know, his living room faces --
9 or is -- is directly next to their living room, not their
10 master bedroom. Unlike the Toliver's, which is right upstairs.

11 And Jimmy says, I think after Mr. Lalli asks him, you
12 know, what did he think was going on? Well, he thought he was
13 beaten the shit out of her. Jimmy thought that he might be
14 beating the shit out of her. Well, definitely a struggle went
15 on. And this is the result, bruising. Oh, and of course,
16 blunt force trauma, the medical examiner testified. Victoria's
17 body, blunt force trauma, bruising all over her body.

18 You don't spontaneously bruise. Isn't that what Dr.
19 Benjamin said? Even though Victoria has Hepatitis C or had
20 Hepatitis C, you don't spontaneously bruise. Somebody put
21 those bruises on her. And you know who did that? Defendant
22 did that that night, and the neighbors heard it.

23 Okay, now let's get to after the murder because all
24 of this, folk, all of this has to do with his intent that night
25 and how he acted with malice aforethought. Okay, so after the

ROUGH DRAFT TRANSCRIPT

002114

1 murder when -- okay, this is the view that Cooky and Todd had
2 when they walked in the room shocked. Victoria lying on the
3 ground. And you know what, there's -- there's other photos,
4 and you're going to have them back there, and they're not
5 pleasant to look at.

6 The most important thing, I think, is that, you know
7 -- or one of the most telling things is that he never asked
8 anybody to call for help. He never did that. And he never
9 called himself. He never called 911 himself. If you have a
10 loved one laying there bleeding, you don't call 911? That
11 doesn't make any sense. What's the motive for not calling 911?
12 What's your state of mind and your intent when you see the
13 person you supposedly love lying on there in a pool of blood
14 bleeding out?

15 Oh, and -- and why didn't he call 911? Okay,
16 Detective Wildemann, you'll -- the statements, you know. He
17 tells Detective Wildemann several times that he did call 911,
18 okay. And when Detective Wildemann and Detective Kieger
19 (phonetic) confront him regarding that, what's his response? I
20 didn't want to leave the body, right? Okay, well that might
21 fly, but he did leave the body. He did leave Victoria's body
22 after he killed her. How do we know that? Well, the shoes
23 that had blood on them. After he stabbed her, he walked into
24 the bathroom, dropped her stretch pants on the floor. All the
25 while two cell phones laying side by side on the kitchen

ROUGH DRAFT TRANSCRIPT

002115

1 cabinet. He left her body. He left her body because he walked
2 his bloody footprints in the bathroom. But he didn't walk his
3 bloody footprints into the living room to grab the cell phone
4 to call 911. What's that say about motive and state of mind?

5 Talk about briefly -- because, you know, you've heard
6 it -- when -- when officers finally get to the scene, Todd
7 Armbruster calls 911, officers arrive and -- and we've got so
8 many officers. I think Santarossa was there first. Officer
9 Todd Conn there, the CIT officer, the Crisis Intervention Team
10 officer, that's trying to talk with Brian, get him to come out
11 of the bedroom. They don't know the condition or the name of
12 the unknown female that's lying in a pool of blood. That's all
13 the information they have from the details of the call, right?

14 They don't know what they're walking into. They go
15 up there, the door's open, they go into the living room, and to
16 protect themselves because they have no line of sight, they
17 don't know which bedroom. The only details they have are that
18 there's an unknown female lying in a pool of blood. Officer
19 Conn's there first trying to talk to him. I believe he arrives
20 second, but he's trying to talk to him. Come out, you know, if
21 she's injured. What does defendant say? She's alive, she's
22 dead, she's alive, she's still breathing. And -- and all the
23 while Officer Conn is trying to get him out of there.

24 He's not moving. He won't come out. Come in here.
25 Fuck you, fuck you. You think an officer should go into a

ROUGH DRAFT TRANSCRIPT

002116

1 situation like that? So then we have Sergeant Newberry and
2 Ballejos and Taylor that show up. And ultimately they're able
3 to go into the bedroom and they formulated a plan, they went in
4 there, and it wasn't until the defendant was tazed and taken
5 into custody, dragged out of the room that they were able to
6 get assistance to Victoria, but it was too late.

7 Sergeant Newberry reached down, put his hands on the
8 pulse of her neck, nothing. How long did it take her to bleed
9 out? Detective Benjamin it could have been five to ten
10 minutes. He could have called 911. Instead he was laying over
11 the body. Why? Why, was he waiting?

12 Then after he's taken into custody, he's in the
13 patrol car with Officer Hutcherson, being his belligerent self
14 that night. He makes statements, and Officer Hutcherson is
15 trained to write statements that may be helpful to a defendant
16 or helpful in the prosecution of the case. So when defendant
17 start talking, he starts writing what he's saying down. What's
18 he say? What does the defendant say in Hutcherson's car? He
19 says, I swear to God, V, I didn't mean to hurt you. Let's go,
20 let's do the ten years.

21 All right, defendant's recorded statement, you -- you
22 guys have seen it. You can see it again if you want. I can't
23 say anything else about that because it -- it just speaks for
24 itself. Credibility, folks. Credibility.

25 A couple more things. The stretch pants that

ROUGH DRAFT TRANSCRIPT

002117

1 Victoria had on. It's a little odd that she was undressed from
2 the waist down. And incidentally a photo not up there, two
3 socks are found on the bed. Her blood is saturated at the top,
4 and there's a mixture of defendant's blood and Victoria's at
5 the bottom of the pants. Okay.

6 DNA, I think the DNA says it all, really. She didn't
7 stab him. He got that cut while he was stabbing her. His
8 blood is up here. That's where his blood is.

9 MS. PALM: Your Honor, I'm going to object. She's
10 misstating the evidence.

11 THE COURT: The jury will make the determination
12 where the blood was located on the knife based on the evidence.

13 MS. GRAHAM: Mixture in the middle. But who's blood
14 was on the tip? Who's blood was on the tip of that knife?
15 Victoria's. All of that adds up to malice aforethought. The
16 abandoned and reckless disregard for the actions. The
17 consequences of his actions when he stabbed her. Defendant's
18 guilty of second degree murder with use of a deadly weapon.

19 THE COURT: Thank you, Ms. Graham. Ms. Palm.

20 MS. PALM: Thank you. I need to get the little
21 podium.

22 (Pause in the proceedings).

23 DEFENSE'S CLOSING ARGUMENT

24 MS. PALM: Good afternoon, ladies and gentlemen. I
25 want to start off by saying that this is only chance that I

ROUGH DRAFT TRANSCRIPT

002118

1 actually get to speak with you because the State has the burden
2 of proof, so they actually go last after me. So I'm going to
3 talk for a little while and then let Mr. Lalli (indiscernible)
4 get up and speak with you again.

5 I want to apologize if I've done anything during this
6 trial to offend anybody. Sometimes these things get heated and
7 you might see a little bit of that, and it's just the nature of
8 trial. So hopefully that didn't offend you and hopefully my
9 (indiscernible) of officers if you thought they were
10 distasteful in any way you won't hold that against my client.
11 I have a job to do and I take it seriously, so I start off with
12 that.

13 The single most important thing in this case is the
14 instruction on the presumption of innocence. And that is
15 instruction 17 in your packets, I believe. (Indiscernible). A
16 criminal defendant is presumed innocent until the contrary is
17 proved. He is entitled to that presumption of innocence until
18 they prove the contrary. And what they need to prove the
19 contrary, their -- their claim is a second degree murder. That
20 requires malice aforethought.

21 They have not proven malice aforethought in this
22 case. And you'll see the instructions on malice aforethought
23 is instruction 6 and 5, and then 16 is also relevant.
24 Instruction 6 and 5 tell you that it has to be either
25 intentional killing or some proof of intentional killing, which

ROUGH DRAFT TRANSCRIPT

002119

1 we don't have here, or implied malice, which you imply from the
2 circumstances which show an abandoned and malignant
3 (indiscernible). We don't have that here either. And then you
4 have to show, to prove the abandon and malignant heart malice,
5 the intentional doing of a wrongful act. They present
6 absolutely no evidence that Mr. O'Keefe did anything
7 intentionally. You'll see that also in instruction 16. To
8 constitute the crime charged, there must exist a
9 (indiscernible) or joint operation of an act forbidden by law
10 and an intent to do that act. They have nothing here about
11 circumstantial evidence. In some cases that can be enough.
12 But what they have here is not enough.

13 And I heard a lot about what our theories are in this
14 case. Our theory, our single theory is that they did not prove
15 beyond a reasonable doubt malice aforethought. So they haven't
16 proven any kind of murder. That's our theory. So don't be
17 confused on what the district attorney tells you on theory.
18 That's our theory. They haven't proved it.

19 And the reason that you have self-defense
20 instructions is because if there's any evidence of
21 self-defense, and there is in this case, and you'll see it in
22 the interview with the homicide detectives, there's evidence.
23 So that means that they have to disprove self-defense beyond a
24 reasonable doubt. They didn't disprove anything. They haven't
25 proved anything and they haven't disproved anything.

ROUGH DRAFT TRANSCRIPT

002120

1 What they have built their entire, entire case on is
2 exaggeration and innuendo. And you will see that with things
3 like the testimony of Cheryl Morris, their star witness. And
4 Cheryl Morris is a person who got up and told you she had a
5 casual relationship with Mr. O'Keefe. And to her a casual
6 relationship, apparently because she got in it, is -- is
7 getting a residence together and buying a car together, and
8 having a bank account together. And she signed her spouse a
9 month after she met Mr. O'Keefe. That's Cheryl Morris. That's
10 the person that they are staking their entire case on. Cheryl
11 Morris gives you this evidence --

12 MR. LALLI: Your Honor, I'm sorry. I'm going to
13 object. That misstates the testimony. Her testimony was that
14 she signed it, but that she did not write spouse on the
15 document.

16 THE COURT: Right, she testified that someone else
17 wrote spouse.

18 MR. LALLI: Right.

19 MS. PALM: And I thought I just said that she signed
20 her name (indiscernible).

21 MR. LALLI: I'm sorry, I thought I heard her say she
22 signed her name as spouse. If I heard it wrong, I apologize.

23 MS. PALM: Oh, and the jury can determine if they
24 think that looks like her handwriting or not, but I -- I -- my
25 argument is she signed her name next to where it says spouse.

ROUGH DRAFT TRANSCRIPT

002121

1 That's Cheryl Morris. (Indiscernible).

2 And the reason it's important is because Cheryl
3 Morris is their evidence for malice. Cheryl Morris tells you
4 that Mr. O'Keefe made threats against Victoria. Nobody else
5 told you that, nobody. You heard how they went to counseling
6 together. You heard how they went to union activities
7 together. You heard from Ms. (Indiscernible) the kind elderly
8 lady that came -- came yesterday that they were over at her
9 house together. Cheryl and Brian lived with Dorothy Robe, and
10 Dorothy Robe never saw any of that.

11 Now, you would think if he's making threats every
12 single day and sitting around demonstrating how he's going to
13 kill people, Dorothy Robe would have seen it. She didn't. She
14 pretty much laughed when I asked her was Victoria a meek
15 person, the other allegation that Cheryl Morris made. You
16 didn't hear that from anybody else. And Cheryl Morris told you
17 on the one hand Victoria's this meek person. On the other
18 hand, she's calling her repeatedly while Ms. Morris is trying
19 to have a relationship with Brian, Victoria's calling Cheryl.

20 And Victoria called her five times the final day that
21 they broke up, five times. And then hung up on her and was
22 yelling at her. That is not a person that she was describing
23 as so meek. Now, she came here with this little girl voice and
24 protesting how oh, no, she didn't want to hurt Brian, and you
25 know, she didn't have any hard feelings. Well, if that's the

ROUGH DRAFT TRANSCRIPT

002122

1 case, she's psychological disturbed because she did all this,
2 she got a bank account with him, she bought a car with him,
3 she's putting up with his drinking, she's putting up with his
4 cheating on her with somebody she knows has Hepatitis C, he
5 moves in the apartment with him, and then she's not disturbed
6 at all, she's not bothered at all when he just decides to go
7 with Victoria. And that's who they're relying on for their
8 (indiscernible). Dorothy pretty much discredits her entire
9 testimony.

10 I think the other thing Cheryl said was that Dorothy
11 wanted Brian out of the house. Well, Dorothy told you that --
12 that's not true. That wasn't what she said. She never said
13 that. She -- she's still friends with Brian today.

14 Now, I want to talk about why the doubt in this case
15 is not just reasonable, it's overwhelming. Joyce Toliver.
16 Joyce was a nice lady. She had absolutely no idea on time.
17 She couldn't be anywhere near right. And she starts hearing
18 the noises at 9:00 o'clock, and nobody else says that. But,
19 you know, other people have come in around 10:00 o'clock.

20 And she also says she hears moaning when her husband
21 goes upstairs and when he comes back downstairs. At one point
22 she called him into her apartment (indiscernible) something is
23 moaning. Well, at that point Charles had already gone back --
24 had gone upstairs to check things out and come downstairs.
25 When he went upstairs, Victoria was at least unconscious. She

ROUGH DRAFT TRANSCRIPT

002123

1 wasn't moaning. There was no moaning. So Joyce is mistaken on
2 what she heard and when she heard it. It's a little hard to
3 rely on that.

4 She heard some noises, she heard some bumping around.
5 But there was nobody that heard any yelling, there was nobody
6 that heard any screaming, there was nobody that heard anything
7 other than bumping around, which could have been one person
8 alone in the apartment.

9 Now, Cooky goes up there, sees -- sees the mess on
10 the bed and he gets scared. And when I asked him to clarify
11 what do you mean by the look on his face he (indiscernible) a
12 shocked look. Well, it's a lot sexier to say crazy, so I guess
13 we'll stick with the crazy look.

14 Cooky sees Brian saying come on, baby get up, get up,
15 get up. That kind of goes against finding that he had malice
16 for Victoria. He's trying to revive her. He's saying, come
17 on, baby, get up. He's trying to lift her up. And the door's
18 wide open, which supports the theory that Brian had just walked
19 in because you don't commit a crime and leave your door wide
20 open for everybody to hear it and stay in there and not try and
21 flee the scene if you have a guilty mind. You just don't do
22 that. That door is wide open when Charles gets up there.

23 And you see that from the photographs of the car.
24 The car seat was reclined. There was little cups of alcohol in
25 the car. The car seat's reclined. And then we have Jimmy

ROUGH DRAFT TRANSCRIPT

002124

1 Hatchcox. He hears a noise on the rail 15 minutes before the
2 final commotion where you go out and he opens the door again
3 and sees Cooky and Todd standing outside there. 15 minutes
4 before, that's when he sees Brian going in the apartment.
5 That's the first evidence we've had of Brian in the apartment.
6 He's walking in the apartment 15 minutes before the police are
7 called. But this noise ass been going on for an hour. So
8 whatever that noise was, it was not Brian.

9 And when -- when Jimmy's -- when Jimmy Hatchcox sees
10 Brian, Brian's not bloody. Brian doesn't have anything in his
11 hands. He's walking up from the car to go into his apartment.

12 And Jimmy also said, even though he made had said his
13 speculation that he thought there was something going on over
14 there, he also admitted he didn't know. It was entirely
15 speculation. All he heard was bumping. No yelling, no
16 screaming. And those walls are paper thin so you hear every
17 noise. You heard that, I think, from Jimmy and maybe from --
18 from Cooky also. So this noise that -- that the State is
19 trying to turn into this hour long beating, there's just no
20 evidence to support that Brian was even there during that.

21 And -- and -- and Jimmy says Brian's got a weird look
22 on his face. Well, Brian was plastered. We could tell that
23 from the video. When you look at the video and -- and actually
24 CSA Dan Ford gave that to you yesterday. I think when he saw
25 him it was about 3:00 o'clock in the morning, four hours after

ROUGH DRAFT TRANSCRIPT

002125

1 the police came. And he admitted we're having to hold him up
2 because he can't stand four hours later. That's how plastered
3 he was. And you can watch that video. I think it speaks for
4 itself, too. I think it tells you he's completely plowed. He
5 doesn't have his -- he is not having a rational intellect going
6 on there.

7 Nothing's making sense. You can see him searching
8 for facts. He's slurring his words. He's just all over the
9 place. His mind's not tracking, and I think if that video's
10 evidence of anything, it's just that he's plowed.

11 So the police call goes out at 11:01 in the morning,
12 and that's just after Brian's seen going into the apartment.
13 And the big thing is, you know, there's no male voice. You
14 heard Brian on that video. You heard, he's kind of loud.
15 There's times that you almost cannot -- the speakers got weird
16 because his voice is loud. He's loud when he's drunk. And
17 Officer Hutcherson told you that, too. He had to get out of
18 the car because Brian was so loud.

19 If Brian had been in that apartment and there had
20 been a domestic going on, I think everybody in that whole
21 apartment complex probably would have heard it. There wasn't
22 one.

23 The police, what I heard the police say is every
24 single one of them Brian saying get in here, get in here, come
25 on in here, come and help her, get the fuck in her. He was

ROUGH DRAFT TRANSCRIPT

002126

1 demanding that they come in over and over and over. He maybe
2 wasn't doing it the right way. He maybe wasn't doing it how a
3 sober would do it, who's acting rationally because they're
4 sober, but he was saying get in here, get in here, get in here.
5 And they weren't coming in. And he didn't act right in
6 response to them saying come out here. But he wasn't saying
7 don't come in here, you come in here, I'll shoot you, get out
8 of here. He wasn't doing any of that.

9 Oh, and back to Todd Armbruster, the whole get out of
10 here thing. Todd Armbruster admitted Brian was very
11 intoxicated. When he gets upstairs and Victoria has her pants
12 up and Brian's trying to render aid to her, Todd walks in and
13 says -- let me make sure I get this right -- hey, let me take a
14 look at her. He's not saying hey, let me help. Hey, let me
15 take a look at her. And Brian gets up and takes a swing at
16 him.

17 Well, I think it's not a far stretch that somebody
18 who is that plastered is not wanting somebody to come up and
19 take a look at his girlfriend when she's not fully dressed.
20 He's -- he's not the police coming, he's not an ambulance
21 coming. Cooky goes away and comes back with Todd Armbruster
22 who's saying hey, let me take a look at her. That's not a far
23 stretch to say that that might have set somebody when they're
24 that drunk.

25 So he gets up, takes a swing and stumbles. Just more

ROUGH DRAFT TRANSCRIPT

002127

1 evidence of how drunk he is. He's got nothing in his hands.
2 He's not -- he's not holding the knife. The knife's been on
3 the bed the whole entire time. Todd says he was -- he was tore
4 up.

5 Okay, the police enter and they're in that bedroom
6 for about, according to Newberry, a matter of seconds to a
7 minute, minute and a half. Brian's laying on the floor doing
8 nothing. He's cradling her head. He's not trying to hurt her.
9 He's not trying to do anything to the officers. You know, we
10 have this big whole, you know, the fear of going in, and that's
11 completely understandable.

12 But when they get in there, nothing's going on. He's
13 just laying there stroking her head and staring at her and not
14 responding. He's not even -- he's got her Hepatitis C blood
15 all over him even though he -- he's got cuts. That's not
16 acting rationally. That tells you how drunk he was. He's not
17 responding to their -- their warnings that he's going to get
18 tazed in a second.

19 He just lays there and gets tazed. I don't think
20 anybody wants that to happen to them unless they just don't
21 really understand what's going on around them. He gets tazed
22 two times because he's just ignoring them. That's not a
23 rational person, but it's not somebody who is guilty of
24 anything either. He's just drunk.

25 So I think I -- I think I caught a little spin from

ROUGH DRAFT TRANSCRIPT

002128

1 Detective Wildemann when he was talking about, you know, how
2 possessive he was being by the aggressive movements of covering
3 her body. I think most people would want somebody they loved
4 to shield their nakedness from the public view. I don't think
5 that that's a possessive thing. I think that that's kind of
6 their theory of the case is that Brian is possessive or
7 domineering somehow because you hear that in Victoria's meek
8 and -- and, you know, Brian is not saying please enough to
9 Detective Kieger, that kind of thing. It's the spin that they
10 want to put on it. I don't think it's -- it's a natural spin
11 on it, and it just doesn't make sense to me. I would sure hope
12 somebody would be covering me up if people are coming in. I
13 hope that would be their instinct.

14 MR. LALLI: Your Honor, I'm sorry, I would just
15 object to Counsel inflicting her own personal opinions --

16 THE COURT: Sustained the objection.

17 MR. LALLI: -- into the case. Thank you.

18 MS. PALM: There's nothing malicious in it, nothing
19 malicious out of that entire act. He's staring at her. He's
20 mumbling and he's incoherent, according to Todd Conn, Officer
21 Conn. And then we get to the part where I told you in the
22 beginning that none of them remember what happened in there.
23 They expect Mr. O'Keefe to, even though he's plowed. They
24 expect him to remember everything and every little thing he
25 doesn't remember, evidence of malice. But not one of them

1 remembered the same thing that happened in that time in the
2 bedroom.

3 Who went over the -- pardon? Oh, I thought somebody
4 was saying something to me. Okay. Who went over the body?
5 Officer Taylor said it was just he and Conn. Sergeant
6 Newberry, he says he went over her feet. We're talking about
7 people going on the other side of the body. Newberry, he went
8 over her feet. Who else was over there? Ballejos, Conn and
9 Taylor. Everybody was over there. Ballejos, he doesn't know
10 who. Hatchet (sic) was by her feet. And then Hatchet
11 (phonetic) and Taylor were on the other side of the body.
12 That's between two and five people, and nobody's got the same
13 story.

14 The use of force report. Brian was on top of
15 Victoria during the tazing. During when the tazers got him and
16 they're seizing up his muscles, he's thrown on top of Victoria
17 smothering her. Then we heard testimony that he fell on his
18 right arm during the first tazing, and that was Sergeant
19 Newberry. And then Taylor said Brian wouldn't comply. Well,
20 he's either on his arm and can't comply or he won't comply.
21 Two different stories.

22 Then we've got whether the lights were on and off.
23 Conn says the bathroom door is shut, the hallway light's on.
24 Taylor, there's a light in the hallway bathroom. They're just
25 all over the place. When you look at the photographs, which I

ROUGH DRAFT TRANSCRIPT

002130

1 didn't pull them all out, but you will have them all, you can
2 look at the lamp in the bedroom. That little lamp is not on.
3 The bathroom lights are on. And there is a photograph that, I
4 think, shows you we had from -- from CSA Maldonado that they
5 don't usually turn on, turn off lights when they first get
6 there. And this photograph shows you that that bedroom was
7 probably dark.

8 So then we get to where Brian was dropped on his
9 head. Newberry says it's in the living room he fell on his
10 face. Taylor, in the living room because Hatchet got involved.
11 Taylor also says he was dragged and then he changed it to
12 carried because they don't want to be responsible for anything
13 that happened on Victoria's body. Ballejos, he fell on his
14 face in the bedroom. Ballejos was watching. Nobody else says
15 that. Nobody else says he fell on his face in the bedroom.

16 So who -- who carried him out? Conn, just him and
17 Taylor. Newberry, Conn, Ballejos and Taylor. Ballejos says
18 Hatchet and Conn. They don't have the same story on anything
19 that happened in that bedroom. And they want to fault Mr.
20 O'Keefe for not having the same story. And these are trained
21 officers. They're trained to write reports. They're trained
22 to remember what -- what happens in a situation and testify.
23 They're all over the place.

24 They all conveniently remember, however, that none of
25 them stepped on Victoria's body, none of them stepped over

ROUGH DRAFT TRANSCRIPT

1 Victoria's body or bumped into it (indiscernible) and nobody
2 went over the bed. Because those are all facts that undermine
3 the Government's case. Because if they went over that bed,
4 then they might have messed with some of the blood evidence.
5 If they went over the body or there's a struggle over the body,
6 which I submit the evidence shows there probably was a struggle
7 over the body, there's a tazing going on and maybe five
8 officers and a struggle, then maybe some of the bruises came
9 from them that they're trying to say -- tie to my client.

10 It doesn't make any sense that nobody was bumping
11 into that body. And there's a very small amount of room
12 between the body and the -- the far wall. And you can look at
13 those photographs. They're trying too hard to make anything
14 negative in that room attributable to Mr. O'Keefe.

15 Then statements. Let's see, outside Taylor says,
16 Brian says you guys are mad at me, she tried to stab me.
17 That's not evidence of malice. The -- the use of force report
18 was the only evidence and documents that the police created
19 that showed that Mr. O'Keefe was extremely intoxicated.

20 MR. LALLI: I'm going to object, your Honor. That
21 misstates the evidence.

22 MS. PALM: I don't believe it does.

23 MR. LALLI: It --

24 THE COURT: Well --

25 MR. LALLI: Well --

1 THE COURT: -- the jury can determine -- I mean,
2 there's evidence of the video interview --

3 MR. LALLI: Correct.

4 THE COURT: -- regarding his conditions, also other
5 officers testified regarding his condition, Ms. Palm. That's
6 not the only evidence --

7 MS. PALM: I said documented.

8 MR. LALLI: Thank you, your Honor.

9 THE COURT: Documented, okay. Well, the videotape is
10 documentation.

11 MS. PALM: Document, paper.

12 THE COURT: All right, piece of paper.

13 MS. PALM: The only paper created to document Mr.
14 O'Keefe's extreme intoxication was the use of force report, and
15 that's not a public report. We got it pursuant to a court
16 order. And why wouldn't that put that report -- that
17 information in the police reports? I mean, we showed you the
18 -- the Metropolitan Police Department manual. (Indiscernible)
19 that might be important to a defense. They know that.

20 No one wanted to admit extreme intoxication because
21 they have to disprove that some kind of accident occurred.
22 They have to show malice. They're concerned about whether you
23 guys are going to think this is an accident or whether they've
24 met their burden of malice. So again, we don't document the
25 things that are favorable to Mr. O'Keefe. Just the -- just the

ROUGH DRAFT TRANSCRIPT

002133

1 stuff that, you know, Cheryl Morris' very trustworthy
2 statements.

3 And then we have his -- his lack of cooperation,
4 which, you know, is attributable to his extreme intoxication,
5 but they want to put the spin on it that showed he had malice
6 because he's not cooperating with the police.

7 He told them over and over again during that
8 interview, and I would encourage you to watch the interview
9 again, he didn't know what happened. He didn't know what
10 happened, he didn't know what happened, he didn't know what
11 happened. And neither do you from the evidence in this case.
12 It means there must be reasonable doubt. He knew Victoria's
13 history. And you have the evidence of the history.

14 MR. LALLI: Your Honor, I'm going to object. There's
15 no evidence to suggest the defendant knew or did not know her
16 history of mental illness. There's no evidence in the record
17 at all.

18 MS. PALM: Okay.

19 THE COURT: I'm going to sustain the objection.

20 MS. PALM: It's a fair implication that Mr. O'Keefe
21 who lived with Ms. Whitmarsh knew her history. And you know
22 what her history is. And we're not saying this to disparage
23 Ms. Whitmarsh, but this is a woman who had episodic euphoria,
24 anger outbursts (indiscernible) sleep, racing thoughts,
25 irritability, she cuts herself when she's angry. She cut

1 herself in 2001 before she even met my client. She was trying
2 to kill herself because of a fight with her husband. She went
3 beserk during a fight with her husband. She was cutting
4 herself for 15 years. Mr. O'Keefe likely knew that because he
5 lived with her. This is his significant other.

6 So for him to say I don't know what happened and his
7 drunk condition that makes sense. He knew her history. And
8 there's no other explanation for the knife in the room because
9 you saw the pictures of the kitchen, and I would encourage you
10 to look at those again. You can see on that kitchen counter
11 that nothing's disturbed. You would think if somebody is
12 grabbing a knife during a domestic and there's, you know, any
13 rush to get the knife or anything going on other than somebody
14 just taking the knife into the bathroom for some other purpose,
15 that things would be tipped over. You would see some kind of
16 mess. And there's papers right sitting up next to it. Nothing
17 -- there's no disarray at all, nothing.

18 That kitchen is pristine and clean, and there's one
19 knife missing out of there. Not all the -- all the knives
20 aren't knocked over. One knife missing out, nothing disturbed.

21 Officer Hutcherson, when -- when Brian's downstairs
22 being loud and he's not happy to go to the car and he's not
23 saying that he's not happy about being arrested and what did I
24 to, that's the words of an innocent man. And -- and
25 Hutcherson, I don't know if you caught it, but he was talking

ROUGH DRAFT TRANSCRIPT

002135

1 about my client falling asleep, and then he says and then when
2 he became conscious. Brian's passed out in that car and
3 Hutcherson knew that.

4 And then when he wakes up he's in the back mumbling
5 and he's talking to Victoria, and that's very clear, if you
6 listen to what he says. He's not talking to Hutcherson, he's
7 talking to Victoria. And he's saying, that's why I love you,
8 V, because you're so crazy. And what did I do wrong, and let's
9 do ten years. And I think he testified about it both ways,
10 let's do the ten years or let's do ten years. This is a woman
11 who's dying. They have a very short time to get her. His
12 statements are all addressing Victoria and any of if you even
13 had notes on that or you ask for a play back on that, I think
14 you'll hear that all -- every single statement that he made
15 when he's in the back seat mumbling to himself is addressed to
16 Victoria. That's why I love you V, because you're so crazy.
17 He's not making admissions of guilt. He's talking to the woman
18 that he loves.

19 When you have the evidence in the room, you see --
20 you'll see in the photographs and you saw it before the blinds
21 that are askew and the jacket laying on the floor. That's
22 consistent with Mr. O'Keefe just coming into that room and
23 there being some sort of struggle.

24 George Schiro, the fellow from Louisiana, he told you
25 that he looked at all the evidence and he considered the cuts

ROUGH DRAFT TRANSCRIPT

002136

1 on Mr. O'Keefe's hands defensive wounds, most likely defensive
2 wounds. And he explained to you how the DNA on the knife made
3 sense with that, that he got cut before. And I just heard Ms.
4 Graham saying that he likely got cut because his hands slipped
5 because the knife was all bloody.

6 Well, Ms. Whitmarsh was stabbed one time. She was
7 cut one time by that knife. If Mr. O'Keefe had done it, his
8 hand wouldn't be bloody yet. So his hand could not have gotten
9 cut from blood. So that theory makes no sense at all. You
10 would have to stab repeatedly to get a bloody hand for that to
11 happen. And -- and Mr. Schiro told you all the different
12 possibilities and why that one made the most sense. And about
13 the DNA on the knife, her DNA on the tip of the knife, mixed
14 DNA up further, Mr. O'Keefe's DNA on the top of the knife where
15 he would have grabbed it, and then mixed on the handle, and a
16 lot of those were drips.

17 And Mr. O'Keefe was dripping blood from his hand
18 after it was cut when he was at the scene. That's obvious.
19 That's not evidence of anything other than being attacked by a
20 knife. And it's obvious that when people came, Mr. O'Keefe was
21 making efforts to render aid to Victoria telling her get up,
22 get up, there's a folded up pillowcase that looked like it had
23 been held against something, rags, the pants are off. Well,
24 she's bleeding and he's trying to figure out where the blood's
25 coming from because he knows she cuts herself. The pants are

ROUGH DRAFT TRANSCRIPT

002137

1 all bloody.

2 MR. LALLI: I'm going to object, your Honor. That --
3 there's no evidence in the record to suggest that at all.

4 MS. PALM: To suggest what?

5 MR. LALLI: That that's why he pulled the pants off,
6 that he knows that she cuts herself. There's no evidence in
7 the record at all, none whatsoever to support that.

8 MS. PALM: I can argue the evidence.

9 THE COURT: Well, there isn't any evidence that he
10 was aware that she cuts herself. If you want to tell the jury
11 to draw that inference --

12 MS. PALM: I said if.

13 THE COURT: All right.

14 MS. PALM: I said if at the beginning of that
15 statement.

16 THE COURT: Okay.

17 MS. PALM: If Mr. O'Keefe is aware that she cuts
18 herself because he lives with her, and if he's concerned that
19 she's now bleeding and her pants are saturated with blood, it
20 makes sense that he's going to look for cuts. There's no
21 evidence of sexual assault in this case, none at all. The DNA,
22 this mixed DNA on those pants is on the leg of the pants. So
23 after she's bleeding, he's pulling heir pants off to see if she
24 cut her legs. That's the inference from that evidence.

25 You -- and you can look at the pattern of bleeding on

ROUGH DRAFT TRANSCRIPT

002138

1 those pants yourself and see how saturated they were. And
2 she's wearing dark clothes. You can't tell from looking at
3 somebody in dark clothes where a cut might be if they're
4 drenching with blood.

5 Now, I think there was some criticism of George
6 Schiro for talking about as a crime scene reconstructionist he
7 has to use his imagination. I think that's common sense. I
8 don't think that's anything to criticize him over. He has to
9 use an imagination to figure out how things might have happened
10 so he can eliminate and/or rule in things. That's what he
11 does. He has to be able to look at something and imagine how
12 that might have been used.

13 So they want to say he uses imagination. It was
14 interesting that Maldonado wouldn't admit to having any
15 imagination when I was asking her. I don't know what you mean,
16 use imagination. That seem like a common sense thing to do any
17 job, you use your imagination to figure things out.

18 Now, the three experts in this case, you heard three
19 experts. George Schiro, Dr. Benjamin, the State's expert, and
20 Dr. Grey, the medical examiner from Utah. All three experts
21 you cannot rule out accident, you cannot rule out suicide. I
22 don't know how you get more reasonable doubt than that. They
23 haven't shown you what happened in that room. You can't rule
24 those things out. And they have to disprove them. They have
25 to prove to you malice beyond a reasonable doubt.

ROUGH DRAFT TRANSCRIPT

1 And so they rely on things like Cheryl Morris. But
2 the experts, the experts are saying you can't rule out. Now,
3 there's a weird place if you're going to kill yourself. Well,
4 I think everybody can think that. That's just a weird place.
5 Why would you do that? We don't know, but we don't have to
6 explain that. They have to rule it out. They have to prove to
7 you that's not what happened. They have to prove that to you
8 beyond a reasonable doubt. And their own expert says you can't
9 rule it out. And Dr. Grey says you can't rule it, and George
10 Schiro says you can't rule it out.

11 Just by looking at the body you can't rule that out.
12 Now, they want to minimize the condition of her cirrhosis, I
13 think, because it makes her so prone to bruising. The experts
14 told you a lot of things she on her are old bruises or not
15 acute. They've got green in them. Big one on her back.
16 That's an older bruise. Dr. Benjamin told you that. The fresh
17 bruising that they think, front of the head, back of the head,
18 minor bruises. And then the arm right here where somebody
19 could have been grabbing her. And Dr. Benjamin said that would
20 be consistent with somebody trying to lift her up.

21 So there's no bruising on that woman that is
22 indicating anything malicious. And Dr. Benjamin said yes, you
23 know, I had to consider everything. I had to consider what the
24 detectives told me. The detectives who didn't bother to look
25 at Ms. Whitmarsh's mental history. The detectives who didn't

ROUGH DRAFT TRANSCRIPT

002140

1 bother to document how intoxicated Mr. O'Keefe is. Yes, I had
2 to, you know, trust them, rely on what they told me in making
3 my determination to call it homicide. And yes, I wanted to
4 know about a mental health history like that, yes.

5 So even that call is suspect. But bigger than that,
6 no matter what, you can't rule out accident, you can't rule out
7 suicide. Three experts. And I don't know if the trajectory's
8 going to come up. That was a little bit confusing to me, and
9 you think I heard a little bit of -- of that argument going on.
10 But Dr. Benjamin testified, you see the trajectory rod photo
11 which was the autopsy one. And I was confused by that because
12 it looks like it's kind of going back to the front. And she
13 said no, it's front to back. And I'm not sure I still get it.
14 But her explanation is what's in the report is what's accurate.
15 Front to back, left to right and downward and right into the
16 liver.

17 And Dr. Grey told you that Ms. Whitmarsh's liver was
18 very, very bad, and she would have been prone to bruising. And
19 that she did not take, in his experience, a severe beating or a
20 sustained beating as with match the stories of the neighbors of
21 hearing thumping going on for an hour. They just don't match
22 up. If she -- in her condition and her susceptibility to
23 bruising, if she had been beaten, not only would you have
24 probably heard more, you would have heard a man up there, but
25 she would have been bruised all over, and she wasn't. She just

ROUGH DRAFT TRANSCRIPT

002141

1 wasn't. And you can look at the overall photographs, and they
2 tell you that.

3 And he also said that the injury itself was
4 inconsistent with a purposeful blow of a knife because it
5 didn't hit any bone to stop it. And purposeful blows usually
6 go until they hit something. It just didn't happen. She also
7 had some hesitation marks that would be consistent with either
8 a struggle over the knife or a suicide. And again, nobody
9 knows. But they have to disprove it.

10 And, you know, Ms. Whitmarsh was very intoxicated, I
11 think one can assume from a two four alcohol level. That's
12 disinhibiting, you know. As unlikely as it is that somebody
13 might stab themselves in that location, somebody who's very,
14 very drunk and has emotional and mental health issues, that
15 might not be so weird.

16 And George Schiro told you and actually showed you
17 how awkward it would be to have that wound occur by somebody
18 else stabbing and have cuts sustained from that stabbing. And
19 hopefully you can all picture that. That was a really awkward
20 thing to look at and -- and in his mind very unlikely.

21 And, you know, there was some questioning of Dr.
22 Schiro or George Schiro about, you know, the fact that he is
23 hired by defense counsel and that he has worked with me before.
24 And I think he testified, you know, that's not unusual in
25 professional relationships. You get to know somebody, you work

ROUGH DRAFT TRANSCRIPT

002142

1 with them again, you call them again. There's nothing unusual
2 about that. And he's paid for by the very same funds as Dr. --
3 as any State's expert would be, very same funds. The county
4 pays the funds of an expert because it's necessary to a fair
5 trial. It's paid for by the same people that pay the
6 prosecution's salary and the detective's salary. There's
7 nothing toward about Mr. Schiro getting paid to be serving as
8 an expert.

9 There's no malice here. You heard from Lou DeSalvio,
10 Brian and Victoria were a couple. He's a union guy
11 (indiscernible) union (indiscernible) together. She
12 participated in his union activities. When Brian was trying to
13 get his help for drinking and went to Mr. Paisano from MINES,
14 you heard that. You heard that she was attending his -- his
15 counseling with him. This is a couple that is making steps to
16 look forward to a future together. There's no malice. He's
17 not sitting around, as Ms. Morris would have you think, hating
18 Victoria and planning something.

19 You have to consider -- it would be one of your jobs
20 as you're instructed in the jury instructions that tells you if
21 you're going to consider the statement at all as any evidence
22 against him, anything that he said in his statement. First you
23 have to determine for yourselves that that statement was
24 voluntarily given. And you have the jury instruction on that.
25 And part of that is for you to consider how intoxicated he was.

ROUGH DRAFT TRANSCRIPT

002143

1 And I submit to you that there's no evidence in front of you
2 (indiscernible) he was extremely intoxicated. And you can see
3 that in the video yourselves, but you

4 can also see it, I mean, just from, again, Dan Ford,
5 he had to hold him up because he couldn't stand up on his own.
6 So, you know, they can pull a picture out here, a picture out
7 there, but you have the testimony. And you can see for
8 yourself in the record how intoxicated he was. So you make
9 that determination before you consider that evidence. The
10 standard is preponderance of the evidence whether you determine
11 that his statement was voluntarily given. And then if you do
12 determine that, you can consider what he said.

13 And even what he said I don't think is incriminating.
14 But if you want to look at it as incriminating, first you have
15 to determine it was voluntarily given. Hope that's not too
16 confusing.

17 Now, some of the things that -- that they want to
18 rely on for malice are just absolutely silly. There were --
19 there were two separate bathrooms. There are things in two
20 different bathrooms. Well, she had Hepatitis C. That's not
21 surprising that people would keep different bathrooms. The
22 couch is made up as a bed. I don't think that's uncommon at
23 all. It's part of your common experience that a lot of times
24 people have a blanket on the couch or a pillow on the couch.
25 I'm not sure what that means.

ROUGH DRAFT TRANSCRIPT

002144

1 That he begged Detective Kieger -- when he was
2 begging Detective Kieger to write things down that were
3 important to his defense (indiscernible). I guess, that's, you
4 know, the theory of he's dominating the woman. Well, Detective
5 Kieger is a big girl, she could take care of herself, and you
6 saw Detective Wildemann's reaction to it.

7 Don't order her around. Well, isn't Detective
8 Wildemann treating her differently because she's a female. I
9 mean, I didn't see anything on that video that was -- meant
10 anything other than Brian is intoxicated, Detective Kieger was
11 nice to him, he thought she was paying attention.

12 He said do you understand me, he doesn't me. He
13 (indiscernible) please, please, please write this down. He's
14 begging. If you watch that again, most of the time that he's
15 talking to her, he's begging her to please document things and
16 please, please look at these things. And they didn't do them
17 anyway.

18 They didn't go look for the Paris video. They didn't
19 go check out her Monte Vista records. They didn't do them.
20 But he's begging her. He's not ordering her around. And he
21 called her young lady. God, he must be a killer.

22 He called her young lady. And he didn't completely
23 throw the woman that he loved under the bus when they were
24 asking what she did. It's horrible. It must be malice for
25 murder. He didn't want to hurt the woman he loved.

ROUGH DRAFT TRANSCRIPT

002145

1 He asks for coffee before a woman leaves the room and
2 he breaks down crying. I don't think that is uncommon for a
3 man who's middle aged to not want to really breakdown front of
4 a woman. If you watch that, I think that comes across as
5 perfectly understandable.

6 And, you know, Detective Wildemann is not a human lie
7 detector any more than any of you. You can judge the witnesses
8 for yourself and their credibility. You should not rely on
9 anybody else to tell you what they think is credible or not
10 credible. It's up to all of you.

11 So you can watch that video yourself and determine is
12 his remorse sincere. You can determine was he really crying,
13 did he blow his nose after? I think he did. But you can
14 determine that for yourself. And you shouldn't rely on his
15 interpretation of that because he's got a dog in the fight.

16 He lied to Brian about her being alive for most of
17 the interview until the very, very end of it when he -- Brian
18 tells him, you know, she's unconscious, you know, she -- we're
19 -- we're going to let you know, and Brian's asking how is V,
20 how is V? I love this woman, how is she?

21 And they're saying she's alive, she's alive, she's
22 alive. They knew how drunk she (sic) she was because she knew
23 he'd fall for that. They knew that that was going to work for
24 them so they take advantage of his intoxication when it suits
25 them.

ROUGH DRAFT TRANSCRIPT

002146

1 The State has relied on innuendo in absolutely every
2 corner of this case. They have to prove to you beyond a
3 reasonable doubt malice. You have no evidence of it. You had
4 weird little, you know, the thing about Kieger and Morris who
5 -- who tells you one thing and then, you know, you can see for
6 yourself what was going on with Morris.

7 There's no evidence of malice in this case. And the
8 State has not overcome the presumption of innocence. They have
9 not done that. They haven't disproved self-defense. They
10 haven't disproved accident. And conversely, they haven't
11 proved malice.

12 None of those things beyond a reasonable doubt. And
13 when we picked you as jurors, both sides, asked you questions,
14 and one of the things that you all said was that you believed
15 in the presumption of innocence. It's part of our
16 Constitution, what our country stands for, and that you would
17 follow that and make the State prove to you.

18 And if not, you would not have a problem returning
19 not guilty verdict. And that's what we're asking you to do.
20 The State has not met their burden and we'd ask you to please
21 return not guilty verdict. Thank you.

22 THE COURT: Thank you, Ms. Palm. Ladies and
23 gentlemen, we typically don't like to break up arguments of the
24 counsel at the end. Does anyone need a break now? All right,
25 we'll take a very short break and we'll resume with rebuttal

1 argument by Mr. Lalli.

2 During this recess, it is your duty not to converse
3 among yourselves or with anyone else on any subject connected
4 with the trial or to read, watch or listen to any report over
5 commentary on the trial by any person connected with the trial
6 or by any medium of information, including without limitation,
7 newspaper, television, radio or the Internet. You are not to
8 form or express an opinion on any subject connected with the
9 case until this matter is submitted to you. We'll see you back
10 in approximately five minutes.

11 (Court recessed at 4:07 p.m. until 4:20 p.m.).

12 (In the presence of the jury).

13 THE MARSHAL: Please be seated.

14 THE COURT: Go ahead, Mr. Lalli.

15 STATE'S REBUTTAL CLOSING ARGUMENT

16 MR. LALLI: Thank you. It was Ralph Waldo Emerson
17 who said all violence, all that is dreary, all that repels is
18 not power. It is the absence of power. In battering Victoria
19 in the hours leading up or the minutes leading up to her
20 ultimate death, the defendant didn't show us what kind of power
21 he has. He showed us how weak he is. Men who beat women.

22 We've been here a long time today. And I want to
23 thank you all for your attentiveness. The last person you
24 probably want to hear from is me. I would love to stand up
25 here for two or three minutes and sit down. But this case is

ROUGH DRAFT TRANSCRIPT

002148

1 to important for me to do that. And so I thank you in advance
2 for your indulgence. There are a number of areas that I want
3 to cover that, indeed, are important in your deliberations. So
4 I want to thank you in advance for that indulgence.

5 I want to start somewhat where Ms. Palm ended, and
6 that is the defendant's interview with members of the law
7 enforcement. She invited you to watch portions of that when
8 you deliberate and we'll watch portions of it together in my
9 comments. Very telling how the defendant treated Victoria, his
10 feelings about her. And we get insight into that in a number
11 of ways. One is how the defendant treated Detective Kieger
12 during the interview. It's very telling how he treats women
13 and certainly defense counsel has a different spin on it, a
14 different take on it.

15 Watch that for yourself. When he calls Detective
16 Kieger a young lady, when he tells her to write it down, when
17 he orders her to look at this, look at that. Decide for
18 yourself whether he's being disrespectful to her because she's
19 a woman. He certainly treats her differently than he treats
20 Detective Wildemann.

21 When you think about the defendant's true feelings
22 about Victoria, think about what happened when officers arrived
23 at the scene. There is a word in the law called chattel.
24 Chattel is something which is owned. And when police officers
25 storm into that room and the defendant is over her, and she's

ROUGH DRAFT TRANSCRIPT

002149

1 obviously dying, if not dead, he's not concerned about her,
2 he's not concerned about her health. He treats her like
3 chattel. This is his, don't look at her, don't look at her.

4 During the course of the interview with the police,
5 the subject of either her death or the fact that she one day
6 would soon die because of her Hepatitis came up. And it's very
7 telling the defendant's demeanor during the course of those
8 discussions.

9 And I want to play two of those for you. The first
10 one is when he is describing Victoria to the police. And he
11 tells the police of her medical conditions. And he says she's
12 going to die. So let's watch that together.

13 (The video was played).

14 MR. LALLI: She's sick, she's going to die, she's got
15 Hepatitis C, who cares, who cares? He could have been talking
16 about what he was watching on television that evening. The
17 other portion of the interview that is quite telling is his
18 reaction when he is told that she is dead, that she has, in
19 fact, died. Let's watch that.

20 (The video was played).

21 MR. LALLI: Now, is that somebody who's just trying
22 to hold it together until Detective Kieger leaves the room or
23 is that someone who really doesn't give a damn? Is that
24 somebody who already knew that Victoria was dead. He told
25 Charles Toliver at the scene. So when you consider did he love

1 this woman, his feelings about her, think about his reaction at
2 these critical terms during the interview.

3 The only evidence in this case, if you call it
4 evidence, of self-defense comes from the defendant's own mouth
5 during the course of his interview, evidence brought to you by
6 the State. It is the only arguable evidence of self-defense
7 that is here.

8 And it's quite curious. As you listen to what
9 occurred, his verge of those events, he doesn't tell you I had
10 no alternative but to stab her. He doesn't say I was backed
11 into a corner. He doesn't describe at all in I scenario of
12 self-defense. He wants to talk about what they did that
13 morning. He wants to talk about how she attacked him two days
14 ago. If -- if I'm correct, defense counsel said he was trying
15 to protect her and didn't really want to explain to the police
16 what happened that night. He spent an awful lot of time
17 telling the police about what happened two days earlier. So
18 nice try, about you that certainly wasn't going through his
19 mind.

20 When he's pressed, and he is pressed over and over
21 and over by Detective Wildemann. Just tell us what happened,
22 tell us what happened. He is given every opportunity, every
23 opportunity if this was self-defense, if this was an accident,
24 if something untoward happened, if he was attacked, he was
25 given every opportunity to explain that to police. He says I

ROUGH DRAFT TRANSCRIPT

002151

1 don't know how she got stabbed. I don't know what happened in
2 that apartment. I don't know how I got the cut on my hand. I
3 don't know how she got covered in blood. He doesn't know any
4 of those things. But he remembers everything that happened
5 that day.

6 Does he have a motivation to be untruthful with the
7 police? Of course, he does. Of course, he does. Has he
8 demonstrated his ability to be untruthful to the police? Well,
9 of course, he has. He does that during the course of the
10 interview. And at first thought the -- the idea that he lied
11 about calling 911, you might say who cares. About you that is
12 an important thing to be untruthful about.

13 And the whole idea that is very important for two
14 reasons. Let's watch it. Let's watch it so you can see his
15 demeanor, you can see how forceful is he.

16 (The video was played).

17 MR. LALLI: Check the phone, check the phone. That's
18 what a great liar does, check it, look at the evidence, I've
19 got nothing to hide. I called, I called, I called. Well,
20 guess what, that's something the police have the ability to
21 check on. Why is it important? It's important so that you can
22 gauge his credibility, his motivation during the course of that
23 interview. But it's also so important because his failure to
24 call is also inconsistent with self-defense, with accident.

25 There's no reason that somebody wouldn't call for

1 help if this woman wanted to commit suicide and he truly loved
2 her. There's no reason not to call the police if you had just
3 been attacked. She obviously had reported the police in the
4 prior incident.

5 MS. PALM: Objection, your Honor. States facts not
6 in evidence.

7 MR. LALLI: Well, at some point --

8 THE COURT: Sustained. Someone did. Sustained.

9 MR. LALLI: Yeah. But certainly, when you consider
10 his motivations in this case, it's not as though he's wanting
11 to protect her. She certainly had involved the criminal
12 justice system against him, which is evidenced by the judgment
13 of conviction, and we'll talk more about that. During the
14 course of the interview he says that Victoria said I want to
15 kill myself. Then later on in the interview she tried to kill
16 me. He's all over the board. He's making it up as he goes.

17 How is Victoria? He knows she's dead, he knows she's
18 dead. The court gives us some guidance on how we evaluate
19 credibility. It's instruction number 19, and I'm not sure if
20 you all still have your instructions with you. I'm not going
21 to read a lot of the instructions. I'll talk about some of
22 them.

23 But he tells us about credibility. How do you judge
24 it? And this is credibility from the witness stand, but it
25 certainly applies to life. Credibility or believability should

1 be termed by manner on the stand, relationship to the parties,
2 fears, motives, interests. Who's got the motive here? Who's
3 got the motive here to cover up what happened as his head's
4 down. And detective Wildemann calls him on it.

5 You don't need to think about this. You don't need
6 to make up a story here. Just tell me what happened. But the
7 important part of instruction 19 really begins at line 6 there,
8 where it says if you believe that a witness has lied about any
9 material fact in the case, you may disregard the entirety of
10 that witness or any portion of his testimony which is not
11 proved by their evidence.

12 The only evidence of self-defense, the only evidence
13 of what happened comes from the vague references that the
14 defendant makes during the course of his interview with the
15 police. He lied to them. He was untruthful to them.
16 Certainly, it carries little, if any, credibility and should be
17 disregarded.

18 I'd like to talk a little bit about November 5th,
19 what was happening that day. What was the temperature of the
20 relationship on that day between the defendant and Victoria?
21 All the evidence suggests that things were not going well
22 between them. And you can see how clean Victoria kept their
23 apartment. I'm showing you State's Exhibit No. 11, State's
24 Exhibit No. 5. The kitchen area, it's very tidy. There are
25 photos of the living room area. Everything has a spot and

ROUGH DRAFT TRANSCRIPT

002154

1 there's a spot for everything.

2 What's interesting is the bed, the couch. Things are
3 not just thrown there happenstance. It's made up as a bed.
4 And if you look at the photos of the apartment, there are two
5 bedrooms, but only one other bed in the house. Certainly, this
6 is very suggestive of the fact that Victoria was sleeping in
7 one area and the defendant was sleeping in the other. Not
8 exactly a loving couple. Not exactly the person that the
9 defendant in his statement to the police tells you that he
10 loves so much.

11 What else is going on that day? Well, they if to the
12 Paris, or at least that's what the defendant says. And he
13 describes how he's gambling during his interview. And he says
14 that Victoria had said to him that evening why just spend so
15 much money? Why just spend so much money? Let's listen to
16 that.

17 (The video was played).

18 MR. LALLI: Why did you spend so much money at Paris?
19 Does that sound like something two roommates or two boyfriend,
20 girlfriend, is that a happy conversation? Of course, not. Why
21 did you spend so much money in Paris? They're arguing.
22 They're arguing. And you've seen from the interview how the
23 defendant acts when he's agitated. How he actually he's
24 cuffed, he's in an interview room and at times he's standing up
25 making threatening gestures to Detective Wildemann. And

1 Detective Wildemann calls him on it. What the heck are you
2 doing? This is not going it go well for you. Sit down, don't
3 do that, don't do that again.

4 You've got a defendant who he's chained up in an
5 interview room and making threatening motions to a police
6 officer. So how -- how do you think he received Victoria's
7 criticism, her comment that he was spending too much money that
8 night? It didn't go over well as the crime scene suggests when
9 we saw it later on.

10 They obviously at some point wind up back at the
11 apartment. And we know that they don't go into the apartment
12 together. We know that they come up to the apartment
13 separately. And we know that because of Jimmy Hatchcox. He's
14 the neighbor who lives next door. He described for you a very
15 loud bang that he heard outside. And it was so loud, you've
16 got a guy who is recovering from surgery, and absolutely truth
17 be told, he's taking medications for his -- his surgery that
18 he's recovering from. But he's in pain.

19 Whatever he heard outside, the -- the noise that he
20 heard on the banister was to loud that it caused him to get up
21 and to see what it was. And it was the defendant alone. And
22 he described the look that he saw on the defendant's face. And
23 again, it's your memory that's important. It's your memory of
24 the testimony as it was received that's important.

25 Jimmy Hatchcox had seen the defendant out on that

ROUGH DRAFT TRANSCRIPT

002156

1 porch numerous times drinking at various stages of
2 intoxication. This wasn't intoxication that he saw. He didn't
3 see some drunk guy out there. He described this look on his
4 face. He's never seen it before. It's hard for him to
5 describe it.

6 But when he went back inside of his house and he sat
7 down, he asked himself, as he heard something next door, I
8 wonder if he's beating the crap out of her. And that's not
9 exactly what he said. But he told the police that that very
10 night in his voluntary statement, I wonder if he's over there
11 beating the crap out of her, which is totally consistent with a
12 fight that occurred, totally consistent with what the defendant
13 says happened, at least in that portion of the interview.

14 He was -- he was beating the crap out of her. We
15 know that from the medical evidence. And we're not suggesting
16 that he tied her up and he pummeled her for an hour. Good
17 heavens, we're not suggesting that. Does she have evidence of
18 blunt force trauma on her body? Of course, she does.

19 And it's important to understand what's happening in
20 there to consider the respective sizes. As Ms. Graham
21 indicates, she was a tiny person. 109 pounds or 108 pounds.
22 I've never seen anything like that on the scale that I can
23 remember. She was a tiny, tiny person, very short. Look at
24 State's Exhibit No. 60. This is a buff guy. What did -- what
25 did he tell the police that he did? He was a laborer? So he's

1 out at construction sites, moving cement, moving forming
2 stakes, lifting heavy stuff, doing the grunt work. But he's
3 doing it. He's a tough guy.

4 And if there's any question, we admitted for you to
5 State's Exhibit No. 56 and 57, their driver's licenses. And
6 why we might fudge a little bit on our weight, it certainly is
7 a good indication of their respective sizes. If you look at
8 State's Exhibit No. 57, five, four and 110 pounds. She weighed
9 a little less at autopsy. And you have the defendant five,
10 ten, 165 and he's got a build. He's got a build, as you can
11 see from the photograph that we showed you.

12 What kind of chance do you think Victoria had with
13 him? She had bruising on her body. Bruising on her head.
14 You're looking at State's Exhibit No. 86. Right in the middle
15 of her forehead. And the trauma's not only there. There was
16 more trauma on the backside of her head that's not visible
17 because of her hair. She had long black hair and it covered up
18 the injury to the back of her head.

19 She had an injury on her shoulder, which you're
20 seeing in State's Exhibit 91. And these two photos in
21 particular show what Dr. Benjamin described as acute bruising.
22 This was acute bruising, as opposed to older bruising. And
23 what does Dr. Benjamin tell you? And she's not the only one
24 that tells you, because the defense, their own expert agrees
25 with her. These are acute.

ROUGH DRAFT TRANSCRIPT

1 And Dr. Grey and Dr. Benjamin both agree that acute
2 means within hours or minutes of death. Within hours or
3 minutes of death. Who was Victoria with within hours or
4 minutes of death? With him. With him. Do you think that she
5 just banged her head on the ground to create this bruise or she
6 somehow took her shoulder and -- and threw it against an object
7 that caused this bruise she was going to kill herself that
8 night?

9 Sure, she had high blood alcohol level. And sure,
10 people who are chronic alcoholics, they fall down. Of course,
11 they do. Some of the acute bruising was on the lower portion
12 of her back, State's Exhibit 104. Totally inconsistent with a
13 drunk person falling down. Dr. Benjamin told you that.

14 Again, on the back of her shoulder in State's Exhibit
15 107. Again, both of these depict acute injury minutes or hours
16 within death. And State's Exhibit No. 89. What's that? Does
17 that look like a grab mark? Like he grabbed her arm in the
18 course of a struggle? Is that the kind of bruising somebody's
19 going to get from falling down? Or can you see what could
20 certainly be bigger marks on her arm?

21 And of course, she's got Hepatitis C and a cirrhotic
22 liver. But both Dr. Grey and Dr. Benjamin told you the fact of
23 cirrhosis, the fact of Hepatitis C does not create bruises on a
24 body. Every bruise that you see on her body is the product of
25 independent blunt force trauma, every single bruise represents

ROUGH DRAFT TRANSCRIPT

1 different blunt force trauma.

2 I'm going to talk more about bruising when we -- when
3 I hit malice. But think about what she was subjected to. I
4 want to talk about the injuries to the defendant's finger, the
5 cut marks. I want to talk a little bit about Mr. Schiro. He's
6 the defendant's high paid expert from Louisiana. And I'm going
7 --

8 MS. PALM: Your Honor, I'm going to object.

9 THE COURT: I'm going to sustain the objection.

10 MR. LALLI: Well -- well --

11 MS. PALM: Thank you.

12 MR. LALLI: -- I didn't complete my thought, which --
13 and I don't say that to disparage him. But it's certainly
14 relevant. The amount of money that man was paid is certainly
15 relevant in your consideration of his credibility. And what
16 does he say? What does he say? He says well, the injury on
17 the fingers either came before, during or after this event.
18 Well, thanks a lot. That's really sticking your neck out.

19 And he gives -- he acknowledges that there are
20 various ways that the -- the cutting to the defendant's hand
21 could have been caused. He acknowledges there are multiple
22 ways it could have been caused. But he then proceeds to tell
23 you the way he believes that it happened.

24 And -- and what did we hear on self-defense on
25 cross-examination? And again, this is not done to disparage

1 him or to be mean to him. He's a DNA person. He works in a
2 DNA laboratory in Louisiana. But it is certainly important
3 that he has a relationship with the Special Public Defender's
4 Office here in Clark County. He has a relationship with them.

5 And when this case originated, he told you it was
6 assigned to the Special Public Defender's Office. Ms. Palm at
7 the time worked in that office. And he told you that he looks
8 at cases for them. This is not the only case that he's
9 testified in that was a Special Public Defender case. He says
10 there are at least five cases that he's testified in. And you
11 don't testify unless you can use your imagination and find
12 something wrong or you can use your imagination and find
13 something that helps the defendant.

14 He was paid over \$10,000 -- \$10,000 to walk into this
15 courtroom and to say what he did.

16 MS. PALM: Objection, your Honor. That's misstating
17 the evidence.

18 MR. LALLI: No, it's not your Honor. His total --

19 THE COURT: I'm going to overrule the objection.

20 MR. LALLI: -- bill in this case was over, over
21 \$10,000. And when someone is getting that kind of money, do
22 you think that they might extend themselves a little bit? Do
23 you think it's out of the realm of possibility that they might
24 give you just a little more because it's a business. It's a
25 business. His primary job is again, back at the lab. This is

ROUGH DRAFT TRANSCRIPT

002161

1 his part-time job coming in and testifying in cases.

2 When you consider his credibility and how much weight
3 you're going to give Mr. Schiro, consider his areas of
4 expertise because he's got a lot of them. He testified that he
5 is an expert in the -- in the mechanism of death, even though
6 he's not a medical doctor. That he is an expert in crime scene
7 investigation. That he is an expert in DNA. That he is an
8 expert in bloodstain analysis. That he is an expert in crime
9 scene reconstruction. That he is an expert in shoe print
10 analysis, shoe print analysis. Interesting he wasn't asked any
11 questions about shoe print analysis.

12 And contrast that with the experts that the State
13 called. You had Dr. Benjamin. Well, she -- she is a
14 pathologist. She is a medical doctor. She doesn't do shoe
15 prints, she doesn't do fingerprints. She is a medical doctor.
16 Mr. Guenther, the State's latent print fingerprint expert. He
17 was called to explain why there weren't latent prints or why we
18 -- what we tried to do to find prints. He doesn't do DNA. He
19 doesn't do crime scene reconstruction. He doesn't do all these
20 other things.

21 Same is true of Jennifer Bas. She does DNA. It's
22 all she's done. Before she came to Metro she helped identify
23 deceased soldiers working for the military. Not Mr. Schiro.

24 The other thing to consider in the testimony of those
25 experts, Dr. Benjamin, Mr. Guenther and Ms. Bas, is how

ROUGH DRAFT TRANSCRIPT

002162

1 cautious they were in rendering their opinions. How careful
2 they were not -- not to extend themselves. How quick they were
3 to say I'm sorry, my science doesn't allow me to answer that
4 kind of question or I can't or I don't feel comfortable doing
5 that.

6 Mr. Schiro did it once and then he quickly retracted
7 when Ms. Palm was trying to qualify him as an expert. And
8 certainly, your memories control on that. But there was almost
9 nothing that he would not say. And again, he wasn't using DNA
10 equipment, he wasn't basing his opinions on scientific
11 evidence. He told you that he uses his imagination and that is
12 just not a credible expert.

13 What I want to do is talk for just a little bit about
14 State's Exhibit 123 -- I'm sorry, 128-A, which is the murder
15 weapon. I can't even get gloves on. You can tell I'm not a
16 forensic scientist. All right. This is the murder weapon.
17 This is the implement that killed Victoria Whitmarsh. And I'm
18 going to make a disclaimer right now I'm left handed, so I'm
19 going to use my left hand. The defendant is right handed and
20 Victoria was stabbed on the right side, not on her left side.
21 But I'm a lefty, so I'm going to use my left hand so I don't
22 cut myself being awkward.

23 But let's talk about the knife. And notice how thin
24 it is, which is important, because again, left handed. If the
25 knife is held even somewhat on the blade it is certainly

ROUGH DRAFT TRANSCRIPT

1 susceptible to being cut or to cutting your fingers just like
2 the cuts are on the defendant's hands. Have we proven that
3 that's how those cuts were sustained by him beyond a reasonable
4 doubt? Of course, not.

5 Is it unbelievable to understand that a person who is
6 intoxicated might be a little reckless in holding a knife and
7 sustain cuts during the course of utilizing it? Of course,
8 not. And it could very well be that he sustained the cuts on
9 his hands half a dozen different ways. But it doesn't matter.
10 It really doesn't matter. The importance of the injuries to
11 his fingers tells us who was holding this knife. That's what
12 it tells us.

13 And the DNA evidence is so telling, it's so powerful
14 because if you knew nothing else but that Victoria's blood was
15 on the tip of this blade, is that shocking? Of course, not.
16 This is the knife that killed her. Her blood was on this.
17 This blade was in her body.

18 What about the handle? Jennifer Bas very, very
19 clever, where did the sample come from? It didn't come from a
20 drop over here, it didn't come from an irrelevant place. She
21 told you she took the sample right from the bottom of the
22 knife, right from the butt of the knife, right from the
23 location where someone is going to be holding it rights where
24 the hand is going to be.

25 Why is the defendant's blood on the knife? Because

ROUGH DRAFT TRANSCRIPT

002164

1 he was handling the knife. He was handling the knife. And if
2 he didn't stab Victoria, why is his blood on the handle of the
3 knife? Why? Can you rely on the DNA evidence? You can't. It
4 is extremely powerful evidence.

5 You're told to bring your common experiences into the
6 courtroom. DNA holds people accountable for their actions.
7 And we've all heard how DNA exonerates the innocent. And in
8 this case, it clearly points you in the direction of who must
9 be held accountable in this case.

10 Now, I've talked a lot about the facts. I want to
11 talk to you some more about the law. And I want to start with
12 jury instruction number 17. It is the reasonable doubt
13 instruction. And during her closing argument, defense counsel
14 made the comment about, I believe at the time, if my memory
15 serves, she was talking about the Tolivers and talking about
16 time discrepancies. Ladies and gentlemen, first off, trials
17 are human events. Our witness are people. And we would expect
18 that they're going to be discrepancies.

19 But more importantly, I want you to look at the
20 reasonable doubt instruction that Judge Villani has given us.
21 And I'll start right at the beginning at line 2 where it says
22 the defendant is presumed innocent until the contrary is
23 proved. The presumption placed upon the State the burden of
24 proving beyond a reasonable doubt every material element of the
25 crime charged. Every material element of the crime charged.

ROUGH DRAFT TRANSCRIPT

1 Murder of the second degree is an easy crime to get
2 your arms around. It is the unlawful killing with malice
3 aforethought. Unlawful killing, malice aforethought. There
4 are two material elements to murder of the second degree. That
5 is what the State must prove beyond a reasonable doubt. Not
6 what time the beating started. Not where her car was parked.
7 Not all these other things. It's those two material elements.

8 And if you find that we have proven those two
9 material elements beyond a reasonable doubt, it is your
10 obligation as jurors to convict. So let's talk about that.
11 This is murder of the second degree. It is not murder of the
12 first degree. It is not premeditation, it is not deliberation.
13 It is not all of that mental state. It is murder of the second
14 degree, which in instruction 4 Judge Villani defines for us.

15 Murder of the second degree is the unlawful killing
16 of a human being with malice aforethought either expressed or
17 implied, jury instruction number 4. The defendant killed her.
18 And the defendant did it with malice. Two elements.

19 Let's talk about did he kill her. And we talked
20 about the knife, the blood, the DNA evidence. And the degree
21 of certainty associated with him handling that knife. Jennifer
22 Bas told you that the frequency or the certainty of his blood
23 being the blood on the handle of the knife right where one
24 would expect a person to hold it while they're using it was to
25 a degree of 1 in 600,000,000,000. And numbers that big are so

1 hard for us to get our arms around. But the number is derived
2 from taking the planet earth, which has 6.5 billion people on
3 it. And you multiply the planet earth by a hundred.

4 So now, you take earth, multiply it by a hundred and
5 think of all those people out there. Of all those planet
6 earths, there is one person, one person whose blood that could
7 be. Guess who? It's the defendant's. It's the defendant's.

8 And it's totally consistent with his own words
9 immediately after the crime occurred. What he says to Officer
10 Hutcherson. I swear to God, V, I didn't mean to hurt you. And
11 Officer Hutcherson did an excellent job, a head's up job of
12 listening to the defendant and he really didn't want to because
13 he told you, the guy was kind of annoying him. But he did a
14 great job by listening, pulling out his pad and as he heard
15 those things said, he wrote them down contemporaneously while
16 hearing those statements he wrote them down, which tells you
17 you can believe Officer Hutcherson when he --

18 MS. PALM: Your Honor, I'm going to object to --

19 MR. LALLI: -- walks into this --

20 MS. PALM: -- vouching.

21 THE COURT: I'm sorry?

22 MS. PALM: Vouching.

23 MR. LALLI: No, I'm arguing his credibility based
24 upon the process. I'm not vouching for him.

25 THE COURT: Overrule the objection.

ROUGH DRAFT TRANSCRIPT

1 MR. LALLI: You can believe him when he tells you
2 that. Was there malice? Was there malice in this case? And
3 we -- we've talked about malice. You've heard the term. And
4 you've heard the term expressed malice and implied malice. I
5 believe in jury instruction number 6 talks about expressed
6 malice and implied malice.

7 Let me just try to give you a little example. If I
8 take that knife that disappeared -- if I take that knife and I
9 decide I'm going to stab you because I want to kill you, that's
10 expressed malice. Taking the knife, I want to kill you, so I
11 stab you. Implied malice is taking that knife and saying I
12 don't really want to kill you, but I'm mad at you, I'm angry
13 with you, someone introduced a knife to this conflict, I don't
14 like it, I'm mad, I'm going to teach you a lesson here. I
15 don't want to kill you, but I want to -- I want to hurt you. I
16 want to hurt you. That is implied malice.

17 And the law does not distinguish in murder either
18 expressed malice or implied malice will do. And when you
19 consider whether there was malice in this case, whether the
20 defendant acted with malice, think about motive. State never
21 has to prove motive. We don't ever have to explain to you why
22 crimes occur, which is another way of -- of kind of phrasing
23 motive. We don't have to explain that.

24 But it certainly helps in understanding why people do
25 things, what motivates them. Motive could be very strong, such

1 as I needed to kill somebody for a certain reason. But motive
2 can be very subtle as well. Motive could be something as
3 subtle as harboring a long standing resentment towards somebody
4 else for another reason. Purely having some level of
5 resentment toward another person is motive. And it certainly
6 helps us to understand or explain sometimes why people do
7 things.

8 And I want to talk to you a little bit about Cheryl
9 Morris, who defense counsel spent a lot of time talking about.
10 What does Cheryl tell us? Well, she told us that the defendant
11 went to prison for a domestic battery conviction. And you
12 don't have to take Cheryl's word for that. You don't have to
13 trust her. You don't have to believe her. You have a judgment
14 of conviction that says that. It State's Exhibit 133.

15 So Cheryl's really not telling us anything that we
16 don't already know. Detective Wildemann testified about this.
17 He told you that the defendant was convicted of battery
18 constituting domestic violence, a category C felony. And you
19 learn from the judgment of conviction that it was pursuant to a
20 jury trial.

21 So much like we're experiencing now where there's a
22 jury who sits in the courtroom, the defendant is represented by
23 counsel, and witnesses come to the stand and they testify. And
24 one of those witnesses was Victoria Whitmarsh. She stood here
25 and in a courtroom like this one and testified against the

ROUGH DRAFT TRANSCRIPT

1 defendant. And the defendant was convicted. A jury like you
2 convicted him. And he was sentenced to prison. How much
3 prison time? Well, you learn in the judgment of conviction
4 that he was sentenced to a minimum of 24 months and a maximum
5 of 60 months. It's how we do things in Nevada. There's a
6 lower and an upper sentence. And it 's always a sentence in
7 prison in terms of months. So that's two to five years. Two
8 to five years that he was sent to prison.

9 And he was sent to the Nevada Department of
10 Corrections. There's no probation on this judgment of
11 conviction. So Victoria -- I'm sorry, Cheryl comes in and
12 testifies that yeah, during the course of our relationship the
13 defendant shared with me that he harbored some resentment
14 against Victoria Whitmarsh. Is that so hard to believe? Is
15 that so hard to understand that the primary witness against
16 somebody who sends had him to prison, that he's going to harbor
17 a little resentment toward her?

18 And when you are considering her testimony, and it's
19 powerful testimony, which is, you know, perhaps while -- why
20 she was challenged so much by a very able defense counsel. But
21 the evidence that she brings to this case is very powerful.
22 The things that the defendant said to her, I want to kill the
23 "B". She took a number of years from my life. Is that so hard
24 to believe?

25 Is Cheryl -- you heard at various times during her

ROUGH DRAFT TRANSCRIPT

002170

1 examination that she's testified at several hearings in
2 addition to the one in this case. Every one of those hearings
3 she's under oath. Is she going to commit perjury at a
4 preliminary hearing at a prior proceeding at this trial? Is
5 she really --

6 MS. PALM: Your Honor, I'm going to object to
7 vouching again.

8 MR. LALLI: It's -- I'm arguing credibility, your
9 Honor.

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

11 MR. LALLI: Is she really going to purger herself
12 because she has such animus toward the defendant? Perhaps he
13 wants to believe so.

14 When you consider malice and whether it exist, again
15 consider the bruises on the photos that we've already shown
16 you. There are new bruises. There are acute bruises, but
17 there are bruises in various stages of healing, which is so
18 important about malice. Victoria Whitmarsh had been roughly
19 handled in an ongoing bashing.

20 MS. PALM: Your Honor, I'm going to object.

21 THE COURT: I'm going to sustain that objection as
22 well.

23 MR. LALLI: Your Honor, it's -- it's relevant. It's
24 absolutely relevant to malice. It's -- it's --

25 MS. PALM: You want --

ROUGH DRAFT TRANSCRIPT

002171

1 THE COURT: Counsel approach, please.

2 (Off-record bench conference).

3 MR. LALLI: The evidence of bruising is certainly
4 suggestive of malice and how the defendant acted on November
5 5th certainly tells you whether he acted with a malicious heart
6 in preventing Victoria from getting assistance. The police
7 shows up, he refuses to get out of the room. Todd Armbruster
8 sees Victoria when he ultimately goes up, let me have a look at
9 her. The defendant stands up and swings at her -- at him.

10 And you've heard about some things that don't suggest
11 that this was a well planned or a well orchestrated crime. The
12 defendant leaving the door open. This was not a premeditated,
13 a deliberate, a willful murder.

14 It was a malicious murder. And when you think about
15 a door being left open -- and the testimony of other witnesses,
16 Mr. Toliver, for instance, who describes him down -- the
17 defendant down kind of holding her. His arms around her, baby,
18 don't do me like this, don't do me like this.

19 Is that someone who's concerned about her or is that
20 someone who's concerned about himself? Is that someone who
21 might be just a little panicked that people are coming into the
22 room and he tells them to leave. Is that someone panicked and
23 he takes a swing at somebody else because he's thinking oh,
24 crap, I really did it this time? A person can commit a murder
25 and regret it afterwards. That doesn't make the crime any less

ROUGH DRAFT TRANSCRIPT

002172

1 than murder.

2 The physical evidence in the room certainly shows you
3 that this was a killing with malice. And again, I apologize
4 for the photographs, but when you look at State's Exhibit No.
5 25, we all know that Victoria was unclothed when she was
6 discovered by the police. Her socks were on the bed. Her
7 pants were in the bathroom. So obviously, at some point the
8 defendant removed those pants, his blood is down by the ankles
9 or the bottom of those pants. Totally consistent with him
10 ripping that clothing off of her.

11 And is that what a person's going to do when they
12 have just been attacked or after somebody's attempted suicide
13 or after some accidental injury occurred, he's going to undress
14 her? State's Exhibit No. 26 we see a sock on the bed. And I
15 think defense counsel suggested that her clothing was removed
16 because the defendant was concerned for her and wanted to check
17 for injuries. Did he really think all of that bleeding was
18 coming from her feet and he needed to remove her socks?

19 When you consider whether Victoria was the aggressor,
20 the physical evidence tells us so much. You can see what is a
21 scarf on her leg, and there's blood on it. And the crime scene
22 analyst collected the scarf and it was admitted into evidence.
23 If you want to look at it, you have the ability to open the
24 evidence and (indiscernible) open the -- (indiscernible)
25 yourself.

ROUGH DRAFT TRANSCRIPT

002173

1 Fortunately, for all of us they were photographs
2 taken of it as well, so you don't need to, but you certainly
3 can if you want to. We see the association of that scarf with
4 Victoria. Something extremely curious and something extremely
5 telling when you consider whether Victoria was acting at all in
6 an aggressive manner. The scarf, if you look at State's
7 Exhibit No. 50, the scarf appears to be laying on her hand.
8 And the crime scene analyst responded and like the
9 investigators that they are, they preserve what they found.

10 And what they found is the scarf was not just draped
11 over her hand. It was attached to her hand by a -- you ladies
12 will know what that is -- a rubber band, a hair rubber band of
13 some sort. That's actually attached to her hand. And the
14 rubber band is attached to the scarf. Is Victoria really going
15 to put this device on her arm and decide to commit suicide and
16 decide to attack the defendant? Or put it together. Her
17 clothes are off. She's got some device around her wrist. Is
18 that evidence of something more sinister or contorted or
19 deranged? Because she's not responsive. She's not doing
20 things. The defendant's around her. The defendant's holding
21 her. Who put this on her wrist?

22 The other thing I'd like you to look at when you
23 consider malice is another photo which is somewhat subtle, but
24 really powerful once you look at it and think about it, and
25 that's Exhibit No. 31. This is Victoria's bed. And what

ROUGH DRAFT TRANSCRIPT

002174

1 you'll see is a sheet and a comforter on top. And clearly the
2 blood is on the sheet. And except for some kind of distant
3 blood droppings, there's no blood on the comforter or at least
4 on the top portion.

5 And when Mr. Schiro testifying appear he was opining
6 the various ways that Victoria might have been stabbed and her
7 relationship or physical relationship to the physical
8 relationship of her stabber, and I think it was Ms. Palm who
9 was standing here -- standing erect and Mr. Schiro standing
10 next her and describing how weird it would be to stab somebody
11 in that condition.

12 And there was a question from you. There was a
13 question from one of the jurors, and I don't remember which one
14 it was. But the question was would it make more sense if she
15 was laying down? Well, I would submit to you, ladies and
16 gentlemen, it certainly does. It certainly does make more
17 sense.

18 And when you look at this photograph, where does the
19 blood leading begin? She's in her bed. She's not laying on
20 top of this surface bleeding on the sheets, bleeding on the
21 comforter. She is lying on the sheets. And this evidence
22 suggests strongly that she was attacked while laying on in her
23 bed. And it is certainly evidence of malice.

24 Dr. Grey came all the way from Utah to tell us that
25 he could not rule out suicide. And we heard some discussion of

1 that in terms of a hesitation mark. And there are not
2 hesitation marks, there's one hesitation mark. And if you look
3 at State's Exhibit No. 102, you see it. The little red dot
4 right under the fatal injury to Victoria's (indiscernible).
5 That is what Dr. Grey called a hesitation mark.

6 And he says that sometimes in suicides -- and in is
7 his basis for concluding or for failing to rule out suicide --
8 he says that sometimes those who commit suicide you will see
9 hesitation marks. They're kind of testing the waters. They
10 want to know what it feels like -- what it's going to feel like
11 to cut themselves and so they'll take the knife or the object
12 and they'll -- they'll make a poke or a mark like that to see
13 how much it's going to hurt.

14 And he was asked on cross-examination, are you going
15 to expect someone to be engaging in that type of
16 experimentation during the course of a struggle, and everyone
17 says there was a struggle at the time. Look at that room.
18 Doors off the hinges, blinds falling down, bed ajar. There was
19 a struggle at the time that Victoria was murdered.

20 Is she really going to be testing the waters on
21 suicide during the course of that struggle? Imagine how
22 ludicrous that is. This was not a suicide. But the hesitation
23 mark is also consistent with murder because there was a
24 struggle. And would you expect someone who's going to be
25 attacked in their bed to just lie there and take it? Are they

1 going to fight back a little bit? Would you expect there to be
2 a struggle. And as someone is using their force to try to
3 stick that knife in, the person who's about to be slayed is
4 trying to fight that knife out and might it come out and go
5 back in again? Of course, it would. A hesitation mark is
6 completely consistent with murder. And yes, it is evidence of
7 malice in this case.

8 Mary Gianocos (phonetic) who is the director of
9 Voices Against Violence once said --

10 MS. PALM: Your Honor --

11 MR. LALLI: -- everything we know --

12 MS. PALM: -- I'm going to object to that.

13 MR. LALLI: It's --

14 MS. PALM: You want us to approach?

15 THE COURT: Yes, please.

16 (Off-record bench conference).

17 THE COURT: I'm going to sustain the objection.

18 MS. PALM: Thank you.

19 MR. LALLI: Everything we know about domestic
20 violence is that is about power and controlling people.
21 Fortunately, the defendant is no longer in control. In a very
22 short minutes you will be in control. And I would ask you to
23 use your power. Hold him accountable for what he did to
24 Victoria. Find him guilty of murder of the second degree with
25 use of a deadly weapon. Thank you.

1 THE COURT: Thank you, Mr. Lalli. The clerk will
2 swear in the marshal so take charge of the jurors during
3 deliberation.

4 (Swearing in the marshal).

5 THE COURT: The clerk will swear in the court
6 recorder.

7 (Swearing in the court recorder).

8 (Pause in the proceedings).

9 THE COURT: Go ahead, marshal, if you could take
10 charge of the jury.

11 THE MARSHAL: Just leave your jury instructions in
12 your chair.

13 THE COURT: Actually, they can take those with --
14 with them, officer. They can take their jury instructions.

15 THE MARSHAL: (Indiscernible).

16 THE COURT: Yes, you can take them with you if you'd
17 like.

18 (Outside the presence of the jury).

19 THE COURT: Is it propped open or -- all right, Ms.
20 Palm, I think you had a motion to make regarding one of the
21 Power Point frames.

22 MS. PALM: No, actually, I'm going to just base it on
23 cumulative error --

24 THE COURT: All right.

25 MS. PALM: -- at this point, your Honor. And I would

ROUGH DRAFT TRANSCRIPT

002178

1 ask that Ms. Graham's Power Point be made a part of the record.

2 THE COURT: All right.

3 MS. PALM: The court make that a court exhibit.

4 THE COURT: Yeah, I do -- actually, I didn't in this
5 case, but I do request that a copy of the Power Point be made a
6 court's exhibit for all cases.

7 MS. PALM: Thank you. We're making a motion for a
8 mistrial. First the first thing is that it appeared Ms. Graham
9 was using a photograph of my client obviously in handcuffs. I
10 don't think that photograph was admitted into evidence. I
11 don't recall it. It's obviously prejudicial to my client. She
12 misstated the evidence saying that there's no outward violence
13 in the medical record. Since we're limited to not showing all
14 the medical records, that's unfair and it's stating facts not
15 in evidence.

16 Then her Power Point referring to plural convictions
17 on the screen with -- which was supposed to be a type out of
18 the limiting instruction that we have. I don't have the
19 instruction number handy. But I --

20 THE COURT: It's 23. 23.

21 MS. PALM: 23, thank you. I objected at the time she
22 did that. It took me a minute to notice it because she was
23 reading it, and I was kind of following her as she read it.
24 And by the time I got to it, it had been up on the screen for a
25 minute or two. And then we approached and it had to stay up

1 there. There was really no other way for me to deal with it
2 until the court told her to take it down.

3 By that time I'm sure every juror was staring at that
4 thing to see what was the problem with it. So one of the
5 things is, you know, we litigated the introduction of other --
6 other bad acts. And when my client chose not to testify, it's
7 partly based on the court's ruling with regard to the
8 involuntary. But it was also because given the circumstances,
9 he didn't want to have to deal with his prior convictions,
10 aside from the one that was already in evidence. So that was
11 part of his decision not testifying. And then we have multiple
12 convictions up there on the screen for the jurors.

13 And I doubt that the jurors didn't pick that up.
14 Chris also -- I mean, Mr. Lalli also argued to other bad acts
15 inappropriately referring to other bruises as evidence of
16 ongoing rough treatment by client. That objection was
17 sustained, but the jury nevertheless heard it. And that issue
18 has been litigated and there was a court ruling, and we were
19 not expecting that, and it was entirely inappropriate.

20 With regard to malice, he argued that implied malice
21 means I don't really want to kill you, I'm mad, I'm going to
22 teach you a lesson. I think that reduces the burden on implied
23 malice, which requires that he know of an extreme risk and
24 disregard it anyway. It's not just trying to hurt somebody. I
25 did not object at that time because I just didn't want to call

ROUGH DRAFT TRANSCRIPT

002180

1 attention -- any more attention to it.

2 And then finally, he referred to the director of a
3 domestic violence advocacy group to address a quote, which I
4 think is appealing to the conscious of the community and trying
5 to then enlist him in the cause of domestic violence. And as
6 he had done during jury selection when he kept saying it's a
7 community problem, I mean, that's a pretty bad reference to
8 appealing to the conscious of the community.

9 So on those grounds, we move for mistrial.

10 THE COURT: Okay. Mr. Lalli.

11 MR. LALLI: Well, I'll just take one at a time. To
12 suggest because there was a typographical error on a slide that
13 at the end of felony said say felonies, that somehow the jury
14 is going to think that this defendant has multiple felony
15 convictions is almost unworthy of comment, quite frankly. That
16 a typographical error is going to somehow taint this jury
17 beyond bringing them back.

18 THE COURT: Actually, it wasn't felonies. It was
19 convictions.

20 MR. LALLI: Okay, convictions. I mean, whatever it
21 is, I can tell -- obviously, I didn't see it and I'm sitting
22 right here at counsel table and I have a monitor, you know, to
23 feet from my face.

24 With respect to other bad act evidence. Absolutely
25 no other evidence was introduced. The evidence is there, it's

1 -- my position is this is res gestae evidence. You can't just
2 ignore other bruises on her body. And I'm certainly entitled
3 to comment on it. If there was a -- a ruling in the prior
4 trial, then so be it. When you -- when you look at what
5 occurred, I was arguing evidence that was in the record.
6 Evidence that Ms. Palm herself took the time to elicit the age
7 of.

8 So the -- the various aging of the bruises was
9 something that defense counsel elicited. So, I mean, to
10 contort what happened in her favor certainly is -- is not, I'm
11 sure, what the court intended by that ruling. And you can't
12 just say res gestae is something in the middle. You can't
13 argue something without seeing that also or telling that part
14 of the story also. That is the situation with the bruising on
15 her body.

16 THE COURT: If you can hang on one second, Mr. Lalli.

17 (Pausing in the proceedings).

18 THE COURT: Go ahead, Mr. Lalli.

19 MR. LALLI: With respect to implied malice, the
20 example that I gave or implied malice, it is not uncommon for
21 those of us who try murder cases to give examples of what
22 conduct is or what conduct isn't, various degrees of murder.
23 And I would certainly defy her to find a case or some law or a
24 statute that says that my examples were not totally consistent
25 with implied malice or expressed malice. That is exactly what

1 they are. And so lowering the burden, I defy her to find a
2 case that stands for that proposition based upon the example
3 that I gave.

4 With respect to an advocacy group, there's nothing
5 inappropriate in argument to use quotations and to attribute
6 those to people. And I -- I don't know if -- if the argument
7 is that we somehow shifted the burden because I quoted somebody
8 who knows something about domestic violence as part of my
9 closing argument.

10 And -- and certainly, the quote is not objectionable.
11 It was consistent with me developing a theme in my closing
12 argument. The quote was, everything we know about domestic
13 violence is that it is about power and controlling people,
14 certainly is consistent with my theme.

15 Certainly consistent with the evidence in this case.
16 And merely identifying the person who gave that quote gives
17 credibility to the quote and certainly does not in any way harm
18 or bias the defendant other than it's a closing argument.

19 So certainly, we have done nothing that would come
20 even close to warranting a mistrial.

21 THE COURT: Thank you, counsel. On the issue of the
22 photograph, the photograph depicted in the Power Point actually
23 was admitted into evidence as Exhibit 58.

24 MS. GRAHAM: I knew it was, Judge, because I made
25 sure.

1 MS. PALM: May I see it, your Honor?

2 MS. GRAHAM: Because I made sure.

3 THE COURT: Okay.

4 MS. GRAHAM: I made sure.

5 MS. PALM: Okay, thank you. I wasn't sure. I said I
6 didn't think it was.

7 THE COURT: All right.

8 MS. PALM: I don't remember it.

9 THE COURT: Okay. The Power Point frame dealing with
10 the admonishment to the jury about felony offenses, domestic
11 battery, it's a limiting instruction to the jury. It did have
12 the word felony convictions versus felony conviction on this.
13 If I recall --

14 MS. GRAHAM: I typed it straight --

15 THE COURT: -- at the time there was an objection Ms.
16 Graham had not got to that portion of the Power Point to read
17 the word convictions. Ms. -- Ms. Palm objected. We had a
18 conference at the bench, and at that point when it was brought
19 to the court's attention, I directed Ms. Graham to remove that
20 frame from the -- from the -- the screen that the jury was
21 watching.

22 It was obviously a typographical error, it was error
23 to have it up, but it was of such a -- in this court's opinion,
24 such a miniscule error that it doesn't rise to any -- anything
25 for a mistrial. And again, I had -- the screen -- or the,

ROUGH DRAFT TRANSCRIPT

002184

1 excuse me, the frame was taken down within a matter of probably
2 less than one minute.

3 On the issue of other bruises, Mr. Lalli brought up
4 as far as -- I think his part of the argument was that this had
5 been an on going situation. I -- I did believe that that was
6 not inappropriate argument. There was a contemporaneous
7 objection, and I sustained the objection, and Mr. Lalli did not
8 address that issue any further.

9 On the implied malice issue, I believe the State did
10 provide an appropriate example of the implied malice. He did
11 not misstate the law. And Mr. Lalli cited or quoted the
12 director, I think it was the victim of violence advocacy group,
13 and because the -- the name of the group was identified with
14 this lady that Mr. Lalli was quoting, I just had a -- a
15 question about identifying that particular group. There was a
16 contemporaneous objection, and I sustained the objection. Mr.
17 Lalli did not refer to that group again.

18 So any mention, I think, on this issue was short
19 lived, very minimal. Furthermore, the jurors are advised that
20 what's stated in closing argument is not evidence. And so it's
21 very clear that this is not evidence for the jury to consider.
22 So I don't find in your totality of circumstances that any
23 error or errors, if any, warrant a mistrial at this point.
24 Anything else, State?

25 MR. LALLI: Yeah, may I just supplement --

ROUGH DRAFT TRANSCRIPT

002185

1 THE COURT: Sure.

2 MR. LALLI: -- a record? During the redirect -- I
3 think it was the direct examination of Dr. Grey, Ms. Palm asked
4 him whether this bruising was consistent with someone having
5 been beaten for an hour. She also asked him whether or not it
6 was consistent with somebody who had been beaten on an ongoing
7 basis, and he said no. So there -- she actually brought up
8 evidence of this during the -- the course of the trial. That
9 is in my notes.

10 So obviously, the court record of these proceedings
11 will -- will guide that. But my -- certainly my recollection
12 is she opened that door during the course of this trial.

13 MS. PALM: And I don't believe I asked that question.

14 MR. LALLI: Well, the record --

15 THE COURT: Well, the record --

16 MR. LALLI: -- speaks for itself.

17 THE COURT: -- the record will bear that -- I don't
18 have a specific recollection on that, but the record, you know,
19 will be transcribed and everyone will have a transcript of it.
20 Has everyone given their contact numbers to the court clerk?

21 MR. LALLI: Your Honor, I just want to put, if I
22 could --

23 THE COURT: Yes.

24 MR. LALLI: -- some matters of closing argument that
25 Ms. Palm did that I believe were violative of her

ROUGH DRAFT TRANSCRIPT

002186

1 responsibilities as an attorney. All those times that we were
2 forced to object during the course of her closing argument, for
3 example, arguing that Cheryl Morris had signed her name as
4 spouse when, in fact, the testimony was that she didn't. I'm
5 not going to go tit for tat, but I certainly want as part of
6 this record her misconduct during the course of her closing
7 argument as well.

8 THE COURT: I think there was misstatements perhaps
9 on both side, but yes, Ms. Palm?

10 MS. PALM: And I don't believe that's what I said. I
11 believe that I said she signed right next to the word spouse.
12 I don't believe I said that she signed the word spouse, but the
13 jury could look at the handwriting themselves after his
14 objection. But I don't believe that's what I said.

15 THE COURT: I don't recall specifically, but it got
16 my attention on that issue. The transcript will bear out
17 exactly what was stated. All right, the marshal is going to --
18 after we leave here, the marshal's going to check with them to
19 see how late they want to stay. They're not deliberating right
20 now because we're going to bring the two alternates in here to
21 sit in the jury box, but I didn't want to them in obviously
22 while we're arguing these issues.

23 MR. LALLI: Okay.

24 THE COURT: So as soon as we know how late they want
25 to stay, we will contact you on your cell phones.

ROUGH DRAFT TRANSCRIPT

002187

1 MR. LALLI: Very good. Thank you, your Honor.

2 MS. PALM: Thank you.

3 THE COURT: All right. As soon as we can get
4 everyone out, we can bring the --

5 MS. PALM: Okay.

6 THE COURT: -- the alternates in.

7 (Court recessed at 5:42 p.m.).

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

ROUGH DRAFT TRANSCRIPT

002188

INDEX

STATE'S CLOSING ARGUMENT	81
DEFENSE'S CLOSING ARGUMENT	102
STATE'S REBUTTAL CLOSING ARGUMENT	132

WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
-------------	---------------	--------------	-----------------	----------------

DEFENDANT'S WITNESSES:

Tracy Burger	11			
Chelsea Collins	28			
Robert Francis Paisano	34	40	52	

* * *

EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
---------------------	-----------------

DEFENDANT'S EXHIBITS:

Exhibits XXXX, YYYY, ZZZZ, AAAAA	30
Exhibit EEEEE	32
Exhibit CCCCC	49
Exhibit K	80
Exhibit DDDDD	81

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.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
303-798-0890



JULIE LORD, TRANSCRIBER



DATE

ROUGH DRAFT TRANSCRIPT

ORIGINAL

1 INST

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 02 2010

BY Carol Donahoo
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 BRIAN KERRY O'KEEFE

12 Defendant.

CASE NO: C250630

DEPT NO: XVII

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.

08C250630
INST
Instructions to the Jury
024142



002191

INSTRUCTION NO. 2

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

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

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt. In this case, it is charged in an Amended Information that the Defendant committed Murder of the Second Degree with Use of a Deadly Weapon on or about the 5th day of November, 2008, did then and there wilfully, feloniously, without authority of law, and with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing at and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a knife.

INSTRUCTION NO. 4

Murder of the second degree is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 5

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 6

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

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

INSTRUCTION NO. 7

The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime. The jury may infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 8

You are instructed that if you find a defendant guilty of murder, you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was used.

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that the offense was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 7

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or, any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

The killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:

1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and

2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

INSTRUCTION NO. 11

A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

INSTRUCTION NO. 12

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

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

INSTRUCTION NO. 13

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

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

The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

INSTRUCTION NO. 17

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 15

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. Voluntary intoxication does not negate the element of malice inherent in the crime of murder.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

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

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

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

1
2 The Defendant is presumed innocent until the contrary is proved. This presumption
3 places upon the State the burden of proving beyond a reasonable doubt every material
4 element of the crime charged and that the Defendant is the person who committed the
5 offense.

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

12 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a
13 verdict of not guilty.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 The evidence which you are to consider in this case consists of the testimony of the
3 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

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

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

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

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

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

21
22
23
24
25
26
27
28

1
2 The credibility or believability of a witness should be determined by his manner upon
3 the stand, his relationship to the parties, his fears, motives, interests or feelings, his
4 opportunity to have observed the matter to which he testified, the reasonableness of his
5 statements and the strength or weakness of his recollections.

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 20

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 21

Statements of the defendant made to homicide detectives have been admitted into evidence. Before the jury may take such statements into consideration, the prosecution has the burden of proving by a preponderance of the evidence that the statement was voluntary. A statement is involuntary if it was coerced by physical intimidation or psychological pressure. Voluntariness under the law requires that the act be a product of rational intellect and free will.

Several factors are relevant in deciding whether a suspect's statements are voluntary: the youth of the accused, his lack of education or his low intelligence, the lack of any advice of constitutional rights, the length of detention, the repeated and prolonged nature of questioning, and the use of psychological punishment such as the deprivation of food or sleep. A suspect's prior experience with law enforcement is also a relevant consideration.

A suspect's intoxication will make a statement inadmissible only if the accused is intoxicated to the extent of being incapable of understanding the meaning of his comments.

INSTRUCTION NO. 22

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

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

1
2 Evidence that Brian O'Keefe committed the felony offense of domestic battery, or is
3 alleged to have made statements indicating an intent to harm Victoria Whitmarsh, and
4 evidence that he is alleged to have indicated an ability to kill with a knife by cutting a person
5 in the sternum area was not received and may not be considered by you to prove that he is a
6 person of bad character or to prove that he has a propensity to commit any crime. Such
7 evidence was received and may be considered by you only for the limited purpose of
8 determining the issue of whether or not Brian O'Keefe had a motive or intent to commit the
9 crime charged.

10 Neither the felony conviction, nor the other acts, if believed, necessarily establish
11 proof of motive or intent to commit the crime charged. You must weigh this evidence in the
12 same manner as you do all other evidence.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 24

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 25

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INSTRUCTION NO. 26

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

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

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

1
2 If, during your deliberation, you should desire to be further informed on any point of
3 law or hear again portions of the testimony, you must reduce your request to writing signed
4 by the foreperson. The officer will then return you to court where the information sought
5 will be given you in the presence of, and after notice to, the district attorney and the
6 Defendant and his/her counsel.

7 Playbacks of testimony are time-consuming and are not encouraged unless you deem
8 it a necessity. Should you require a playback, you must carefully describe the testimony to
9 be played back so that the court recorder can arrange his/her notes. Remember, the court is
10 not at liberty to supplement the evidence.

INSTRUCTION NO. 28

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:


DISTRICT JUDGE

1 TRAN

FILED

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COPY
DISTRICT COURT

Nov 23 10 20 AM '10

Christine Lalli
CLERK OF COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C250630

DEPT. XVII

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

WEDNESDAY, SEPTEMBER 1, 2010

RECORDER'S ROUGH DRAFT TRANSCRIPT OF HEARING RE:

DAY 8 - JURY TRIAL

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.,
Assistant Deputy District Attorney
STEPHANIE GRAHAM, ESQ.,
Deputy District Attorney

For the Defendant:

PATRICIA PALM, ESQ.,

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

ROUGH DRAFT TRANSCRIPT

1 LAS VEGAS, NEVADA; WEDNESDAY, SEPTEMBER 1, 2010

2
3 [Proceeding commenced at 10:00 a.m.]

4 [Outside the presence of the jury panel]

5
6 THE COURT: You can make a minute order? I mean a minute entry?

7 THE CLERK: I will?

8 THE COURT: No. A minute entry that the Marshal was sworn in.

9 THE CLERK: Okay.

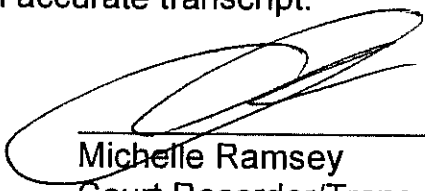
10 [The Clerk swore the Officers to take charge of the jury during deliberations.]

11 [Proceeding concluded at 10:01 a.m.]

12 [The Evening recess was taken at 5:00 p.m.]

13
14
15
16
17
18 * * * * *

19
20
21 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
22 acknowledge that this is a rough draft transcript, expeditiously prepared, not
23 proofread, corrected or certified to be an accurate transcript.

24
25 
Michelle Ramsey
Court Recorder/Transcriber

ROUGH DRAFT TRANSCRIPT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 01, 2010

08C250630

The State of Nevada vs Brian K O'Keefe

September 01, 2010 9:00 AM

Jury Trial

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Carol Donahoo

RECORDER: Michelle Ramsey

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- 9:00 a.m. Jury returned to deliberate.

At the hour of 3:45 p.m. the Jury presented a note with a question to the Court. Court held a telephonic conference with Christopher Lalli, Chf Dep DA, and Patricia Palm, Esq., regarding the note. An answer was provided to the Jury. The Question and Answer provided was marked for identification as Court's Exhibit 16 and ADMITTED.

At the hour of 4:55 p.m. the Jury presented another note to the Court indicating that they were still deadlocked. The Court again held a telephonic conference with counsel regarding the note. Court and counsel agreed to release the Jury for the evening with the understanding that they would return at 9:00 a.m., September 2, 2010, to continue deliberations. Court noted there is a possibility of an Allen Charge being given after further deliberations. The Note was marked for identification as Court's Exhibit 17 and ADMITTED.

Court thanked and excused the alternates and ORDERED, trial CONTINUED.

CUSTODY

CONTINUED TO: 09/02/10 9:00 AM

08C250630

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 02, 2010

08C250630

The State of Nevada vs Brian K O'Keefe

September 02, 2010 9:00 AM Jury Trial

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Carol Donahoo

RECORDER: Michelle Ramsey

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- 9:30 a.m Jurors returned to continue deliberations.

At the hour of 10:15 p.m. the Jury presented a note to the Court indicating that they were still deadlocked. The Note was marked for identification as Court's Exhibit 18 and ADMITTED.

10:43 a.m. OUTSIDE THE PRESENCE OF THE JURY: Robert Daskas, Chf Dep DA, present on behalf of Christopher Lalli, Chf Dep DA, and Stephanie Graham, Dep DA, present on behalf of the State; Patricia Palm, Esq., present on behalf of Deft. O'Keefe, who is also present. Court advised counsel of the notes it had received from the Jury.

JURY PRESENT: Court gave an Allen Charge to the Jury. At the hour of 10:55 a.m. the Jury returned to the Jury room to continue their deliberations.

At the hour of 11:38 a.m. the Jury indicated that they were still deadlocked. The Note was marked for identification as Court's Exhibit 20 and ADMITTED.

JURY PRESENT: Stephanie Graham, Dep DA, present on behalf of the State; Patricia Palm, Esq., present on behalf of Deft. O'Keefe, who is also present. Court noted the Jury is deadlocked at 10 to 2. It is fruitless to continue deliberations at this time. Therefore, COURT FINDS, that due to the hopeless deadlock of the Jury, it is a manifest necessity to declare a MISTRIAL. Court thanked and excused the Jury and ORDERED, matter set for status check; Deft. REMANDED to custody.

PRINT DATE: 03/22/2011

Page 3 of 5

Minutes Date:

September 01, 2010

002223

08C250630

CUSTODY

09/14/10 8:15 AM STATUS CHECK: NEW TRIAL DATE

1 TRAN

FILED

Nov 23 10 20 AM '10

Ann L. Ramsey
CLERK OF COURT

2
3
4
5
6
7
COPY
DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 BRIAN KERRY O'KEEFE,

12 Defendant.

CASE NO. C250630

DEPT. XVII

13
14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 THURSDAY, SEPTEMBER 2, 2010

16 **RECORDER'S ROUGH DRAFT TRANSCRIPT OF HEARING RE:**

17 **DAY 9 - JURY TRIAL**

18
19 **APPEARANCES:**

20
21 For the State:

STEPHANIE GRAHAM, ESQ.,
Deputy District Attorney
ROBERT J. DASKAS, ESQ.,
Chief Deputy District Attorney

22
23
24 For the Defendant:

PATRICIA PALM, ESQ.,

25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

ROUGH DRAFT TRANSCRIPT

1 LAS VEGAS, NEVADA; THURSDAY, SEPTEMBER 2, 2010

2
3 [Proceeding commenced at 10:46 a.m.]

4 [Outside the presence of the jury panel]

5
6 THE COURT: All right. Ready, Ms. Palm?

7 MS. PALM: Yes, sir.

8 THE COURT: All right. We're outside the presence of the jury panel.

9 Defendant's here with counsel. Represented by the District Attorney's Office for the
10 State. Yesterday, we had received a note from the jurors, from the foreperson, Mr.
11 Lamb. His note reads as follows, which is already part of the record: we had
12 examined all evidence, read the instructions carefully, taken two votes and have not
13 been able to resolve unanimously.

14 Later in the afternoon yesterday, we received another note from Mr.
15 Lamb, the foreperson, advising us: we are deadlocked ten to two.

16 We had the jurors come back this morning at 9 o'clock, perhaps
17 around 10:15 or 10 o'clock this morning.

18 THE CLERK: Nine thirty.

19 THE COURT: Nine thirty, so they've only been deliberating -- no, they didn't
20 get here until --

21 THE MARSHAL: They got -- they got here at 9 and they actually went in
22 about 9:35.

23 THE COURT: And when did you get the note?

24 THE CLERK: About 10:15.

25 THE COURT: All right. So after about forty-five minutes of deliberations this

ROUGH DRAFT TRANSCRIPT

1 morning, the following note was sent out from the foreperson: Your Honor, we are
2 still locked at ten to two. The hold outs feel they cannot change their minds with the
3 evidence provided. The others feel the same. We ask the Court for further
4 instruction and/or release of duties. We cannot move forth.

5 After each note, I had a conference with counsel. And the most
6 recent note this morning, the Court advised the parties that it would give an Allen
7 charge to the jurors and that's what we're going to do at this time.

8 MS. PALM: And for the record that would be the charge from Wilkins versus
9 State?

10 THE COURT: Yes.

11 MS. PALM: Okay. Thank you.

12 MR. DASKAS: I'm sorry, Judge. I apologize for interrupting. Chris Lalli was
13 stuck in Court. He asked me to run down here.

14 THE COURT: Okay.

15 MR. DASKAS: And if you're going to give the charge pursuant to the, is it
16 Witkins?

17 THE COURT: Wilkins.

18 MR. DASKAS: Well, I apologize, Wilkins; that's all we're concerned with,
19 Judge.

20 THE COURT: Okay.

21 MR. DASKAS: So thank you.

22 THE COURT: Yes.

23 THE COURT: While we're waiting, just so you know, we received a note
24 also from Juror 5. It says: I am flying out Friday at 7 a.m., September 3rd. If still in -
25 - looks like deliberations -- no -- still deadlocked, can an alternate be used?

1 MS. PALM: Do you want a response?

2 MS. GRAHAM: Yes.

3 THE COURT: Well, we'll see how this -- it looks like they've been
4 deadlocked since mid afternoon yesterday.

5 [In the presence of the jury panel]

6 THE COURT: All right. This is a resumption of the case State versus Brian
7 O'Keefe. We are in the presence of the jury panel. We received a note from the
8 foreperson, Mr. Lamb, is that correct?

9 PROSPECTIVE JUROR NO. 5: Yes, sir.

10 THE COURT: Advising us that there is an impasse and requested further
11 instruction. And at this time I'm going to read to you another instruction and after
12 this instruction I ask you to go back to the jury deliberation room.

13 The verdict must -- your verdict must represent the considered
14 judgment of each juror. In order to return a verdict, it is necessary that each juror
15 agree thereto: your verdict was be unanimous. It is the duty as jurors to consult
16 with one another and to deliberate with a view to reach an agreement. If you can do
17 so without violence to individual judgment, each of you must decide the case for
18 yourself, but do so only after an impartial consideration of the evidence with your
19 fellow jurors.

20 In the course of your deliberations, do not hesitate to reexamine your
21 own views and change your opinion if convinced it is erroneous, but do not
22 surrender your honest conviction as to the weight or effect of evidence solely
23 because of the opinion of your fellow jurors or for the mere purpose of returning a
24 verdict. You are not partisans. You are Judges. Judges of the facts. Your sole
25 interest is to ascertain the truth for the evidence in the case.

ROUGH DRAFT TRANSCRIPT

1 At this time the Marshal will escort you back into the jury deliberation
2 room.

3 [Colloquy between the Court and the Marshal]

4 [Jury exiting to deliberate]

5 [Outside the presence of the jury panel]

6 THE COURT: All right, we're outside the presence of the jury panel.
7 Anything from the State?

8 MS. GRAHAM: No, Judge.

9 MR. DASKAS: No, Judge. I would just -- Robert Daskas on behalf of
10 Christopher Lalli. He's in a preliminary hearing. He asked me to show up this
11 morning.

12 THE COURT: All right.

13 MR. DASKAS: So I stood in for him.

14 THE COURT: All right. Thank you. Anything, Ms. Palm?

15 MS. PALM: No, Your Honor.

16 THE COURT: All right. We'll see what happens.

17 MS. PALM: Thank you.

18 [Matter commenced at 11:39 a.m.]

19 [Outside the presence of the jury panel]

20 THE COURT: We're going to set this on tomorrow's calendar for setting a
21 new trial date.

22 MS. GRAHAM: Well --

23 MS. PALM: Tomorrow? We're hoping for a status check in a week.

24 MS. GRAHAM: -- we've agreed to a week to status check. Judge, do you
25 know if we're going to be able to talk to the jury or just --

ROUGH DRAFT TRANSCRIPT

1 THE COURT: I'll ask them.

2 MS. GRAHAM: Okay. At least find out how they're going that will help us --

3 THE CLERK: Do you want a week?

4 MS. PALM: We were asking for a week --

5 THE CLERK: September --

6 MS. PALM: -- to see if there's any room to --

7 THE COURT: Okay.

8 MS. PALM: -- do anything.

9 THE CLERK: September 14th.

10 MS. PALM: Okay. And could you kind of let me know what the available
11 dates would be just so I can see when our experts will be available?

12 THE COURT: Check with Carol.

13 MS. PALM: Okay. For another sixty-day.

14 THE CLERK: Our stack begins October. You don't want to do it now, this
15 year or next year?

16 MS. PALM: He's invoked.

17 THE MARSHAL: Officers and members of the Court, Department 17, jurors.

18 [In the presence of the jury panel]

19 THE COURT: All right for the record I have a note from the jury foreperson,
20 Mr. Lamb. A note advising me that the jury is deadlocked, unable to reach a verdict.
21 And you've indicated that the last vote was ten to two; is that correct, sir?

22 PROSPECTIVE JUROR NO. 5: Yes, sir.

23 THE COURT: All right. And, Mr. Foreman, is it your opinion at this time that
24 the jury is, in fact, deadlocked and that it would be fruitless to continue with the
25 deliberations?

1 PROSPECTIVE JUROR NO. 5: Yes, Your Honor, it is.

2 THE COURT: Okay. The Court does find that the jury is hopelessly
3 deadlocked. Just for the record, yesterday afternoon we received a similar note that
4 there was an impasse with the jury and so the Court finds that there is a manifest
5 necessity to declare a mistrial. Mistrial is declared.

6 Ladies and gentlemen, I'd like to thank you for your service. I want to
7 personally thank you. I'm just going to have the Marshal escort you back into the
8 jury room very briefly. I just want to come back and personally thank all of you for
9 your service and answer some questions you may have. And so at this time -- can
10 you escort the jury? My Court -- my law clerk here will escort you back to the
11 deliberation room. And again I want to thank you for your service and again I'll talk
12 to you a little bit more in length in the jury room.

13 PROSPECTIVE JUROR NO. 5: Thank you, Your Honor.

14 THE COURT: So please follow my law clerk.

15 [Jury excused]

16 [Outside the presence of the jury panel]

17 THE COURT: Okay, we're going to set a status check for you -- status
18 check of setting of a new trial on the following day.

19 THE CLERK: September 14th, 8:15.

20 THE COURT: Then counsel are free to contact my Court clerk here to see if
21 some available dates if this matter cannot be resolved. I'm going to speak with the
22 jury just for a few minutes. If they wish to speak with counsel, then I'll send the law
23 clerk out and have you come on in.

24 MS. PALM: Okay. Thank you, Your Honor.


25 THE COURT: Okay. Thank you.

ROUGH DRAFT TRANSCRIPT

[Proceeding concluded at 11:44 a.m.]

* * * * *

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.



Michelle Ramsey
Court Recorder/Transcriber

ROUGH DRAFT TRANSCRIPT

ORIGINAL

818

VJRU

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 02 2010

DISTRICT COURT
CLARK COUNTY, NEVADA

BY: Carol Donahoo
CAROL DONAHOO, DEPUTY

THE STATE OF NEVADA,

Plaintiff(s),

CASE NO. C250630

DEPT. NO. XVII

-VS-

BRIAN KERRY O'KEEFE,

Defendant(s).

08C250630

VJRU

Verdict Submitted to the Jury But Returned
024138



VERDICT SUBMITTED TO JURY
BUT RETURNED UNSIGNED

Attached hereto is the verdict form which was submitted to the Jury in the above
entitled action, but returned unsigned.

DATED: This 2nd day of September, 2010.

Steven D. Grierson, Clerk of the Court

By: Carol Donahoo

Carol Donahoo, Deputy Clerk

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

THE STATE OF NEVADA,
Plaintiff,
-VS-
BRIAN KERRY O'KEEFE,
Defendant.

DEPT NO: XVII

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

☐ Guilty of Murder of the Second Degree With Use of a Deadly Weapon
☐ Guilty of Murder of the Second Degree Without Use of a Deadly Weapon
☐ Not Guilty

FOREPERSON

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****September 14, 2010**

08C250630

The State of Nevada vs Brian K O'Keefe

September 14, 2010 8:15 AM**Status Check****New Trial Date****HEARD BY:** Villani, Michael**COURTROOM:** RJC Courtroom 11A**COURT CLERK:** Carol Donahoo**RECORDER:** Michelle Ramsey**REPORTER:****PARTIES****PRESENT:**

JOURNAL ENTRIES

- Christopher Lalli, Chf Dep DA, present on behalf of the State and Patricia Palm, Esq., present on behalf of Deft. O'Keefe, who is not present.

Motion to Withdraw FILED IN OPEN COURT. Conference at the Bench. Court directed the Court Clerk to contact Drew Christensen for appointment of counsel. Ms. Palm advised she has already been in contact with him; colloquy. COURT ORDERED, Motion to Withdraw GRANTED; Patricia Palm is APPOINTED as counsel of record on this case. COURT FURTHER ORDERED, matter set for status check. Court noted Ms. Palm has requested the trial transcripts.

CUSTODY**CONTINUED TO:** 09/16/10 8:15 AM

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

FILED

SEP 9 8 24 AM '10

CLERK

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 BRIAN K. O'KEEFE,

13 Defendant.

) CASE NO: C250630

) DEPT. NO: XVII

) DATE:

) TIME:

14
15
16 **ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION BY DEFENDANT**
17 **O'KEEFE TO PRECLUDE THE STATE FROM INTRODUCING AT TRIAL OTHER**
18 **ACT OR CHARACTER EVIDENCE AND OTHER EVIDENCE WHICH IS UNFAIRLY**
19 **PREJUDICIAL OR WOULD VIOLATE HIS CONSTITUTIONAL RIGHTS**

20 This matter having come before the Court on August 17, 19 and 20, 2010, on a
21 Notice of Motion and Motion by Defendant O'Keefe, to which an Opposition was filed by
22 the State, and the Court having heard argument and been fully advised in the premises,
23 and good cause appearing therefore;

24 IT IS HEREBY ORDERED that the Motion is GRANTED, in part, and DENIED, in
25 part, as follows:

26 A. As to the request to preclude the State from introducing
27 evidence showing that O'Keefe had claimed to Cheryl Morris that he could kill
28 anyone with a knife and had demonstrated how he would kill with knives: The
Court finds that this evidence is relevant to the issues in the case, and that it
should be admitted; therefore, the Defendant's request is DENIED.

1 B. As to the request to limit the State to presenting the
2 Judgment of Conviction for felony domestic battery with the redaction to omit
3 reference to the concurrent sentence in another case, i.e., C207835: the Court
4 finds such redaction appropriate; therefore, the Defendant's request is
5 GRANTED.

6 C. As to the Defendant's request to preclude the State from
7 introducing any evidence of a sexual assault allegation related to Defendant's
8 prior burglary conviction: the Court finds such preclusion appropriate; therefore,
9 the Defendant's request is GRANTED.

10 D. As to the Defendant's request that the State be precluded
11 from introducing the term "Sexual Assault Kit" or making any reference to any
12 sexual assault in the trial: the Court finds such preclusion warranted; therefore,
13 the Defendant's request is GRANTED, and the parties will instead reference the
14 kit as a "DNA collection kit."

15 E. As to the Defendant's request that the State be precluded
16 from introducing photographs of Victoria Whitmarsh's bruises: the court finds that
17 the evidence indicates that blunt force trauma, which is consistent with self-
18 defense or an attack, is relevant to the issues in the case; therefore, the
19 Defendant's request is DENIED.

20 F. As to the Defendant's request that the State be precluded
21 from introducing any evidence of racial slurs by Defendant: the court finds such
22 preclusion is proper; therefore, the request is GRANTED.

23 G. As to the Defendant's request that the State be precluded
24 from introducing the hearsay statement of Charles Tolliver "Baby, he done killed
25 that girl": the Court finds that such preclusion is warranted; therefore, the
26 Defendant's request is GRANTED and the State's will not introduce this hearsay
27 statement.
28

1 H. As to the Defendant's request to preclude the State from
2 introducing through a homicide detective an expert opinion on the nature of
3 O'Keefe's wounds: the Court finds that the State has withdrawn its request to
4 present the testimony as "expert" opinion, however, the opinion of the officer is
5 appropriate as a lay opinion; therefore, the defendant's request to preclude the
6 opinion is DENIED.

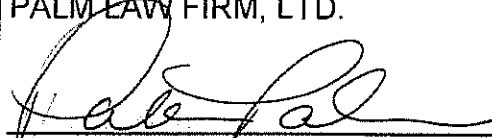
7 I. As to the Defendant's request to preclude the State from
8 introducing evidence regarding the prior trial, conviction or appeal: the Court
9 finds that such preclusion is proper; therefore, the request is GRANTED.

10
11 IT IS SO ORDERED this 3 day of ^{Supt} August, 2010.
12
13
14
15

16 MICHAEL P. VILLANI

17 DISTRICT COURT JUDGE

18
19 Respectfully submitted by:
20 PALM LAW FIRM, LTD.

21 

22 PATRICIA A. PALM
23 1212 Casino Center Blvd.
24 Las Vegas, NV 89104
25 (702) 386-9113
26
27
28

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****September 14, 2010**

08C250630

The State of Nevada vs Brian K O'Keefe

September 14, 2010**8:15 AM****Status Check****New Trial Date****HEARD BY:** Villani, Michael**COURTROOM:** RJC Courtroom 11A**COURT CLERK:** Carol Donahoo**RECORDER:** Michelle Ramsey**REPORTER:****PARTIES****PRESENT:**

JOURNAL ENTRIES

- Christopher Lalli, Chf Dep DA, present on behalf of the State and Patricia Palm, Esq., present on behalf of Deft. O'Keefe, who is not present.

Motion to Withdraw FILED IN OPEN COURT. Conference at the Bench. Court directed the Court Clerk to contact Drew Christensen for appointment of counsel. Ms. Palm advised she has already been in contact with him; colloquy. COURT ORDERED, Motion to Withdraw GRANTED; Patricia Palm is APPOINTED as counsel of record on this case. COURT FURTHER ORDERED, matter set for status check. Court noted Ms. Palm has requested the trial transcripts.

CUSTODY**CONTINUED TO:** 09/16/10 8:15 AM

1 TRAN

COPY

FILED
FEB 4 2 10 PM '11

[Signature]
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9
10 Plaintiff,

11 vs.

12 BRIAN KERRY O'KEEFE,

13 Defendant.
14

)
)
) CASE NO. C250630

)
) DEPT. XVII
)
)
)
)
)
)
)
)
)

15 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

16 THURSDAY, SEPTEMBER 16, 2010

17 RECORDER'S TRANSCRIPT OF HEARING RE:

18 STATUS CHECK: AVAILABILITY OF DR. BENJAMIN FOR TRIAL
19

20 APPEARANCES:

21 For the State:

CHRISTOPHER LALLI, ESQ.,
Chief Deputy District Attorney

22
23 For the Defendant:

PATRICIA PALM, ESQ.,
24

25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; THURSDAY, SEPTEMBER 16, 2010

2 [Proceeding commenced at 8:31 a.m.]

3
4 MR. LALLI: Good morning, Your Honor. Christopher Lalli.

5 THE COURT: C250630, Brian O'Keefe. Mr. O'Keefe's present
6 with Ms. Palm. Mr. Lalli for the State. This is a status check on
7 Dr. Benjamin's availability; is that what -- that's what it says on
8 the calendar.

9 MR. LALLI: No. It's just on for resetting.

10 THE COURT: That's what I thought. I don't know why this is
11 on here.

12 MR. LALLI: Just with respect to that issue, Your Honor, we
13 had previously noticed Dr. Dutra [phonetic] and the defense said --
14 had opposed that. The Court ultimately ruled we could call him.
15 We didn't call him, but I want to put the defense on notice and I
16 have previously that we certainly reserve the right to call him in
17 the future.

18 THE COURT: All right. They can file a motion to exclude in
19 the future as well. Okay.

20 All right, just for a new trial setting; is that where
21 we're at?

22 MS. PALM: Yes. We need to set the trial, Judge.

23 THE COURT: All right.

24 MS. PALM: And Mr. O'Keefe has always invoked his sixty-day
25 trial right. If it's going to be a minute, Your Honor, can I

1 approach?

2 THE COURT: Sure.

3 MS. PALM: And just for the Court's information, we do want -
4 - we do want to set a speedy trial, but we are reserving our right
5 to pursue an extraordinary writ to the Nevada Supreme Court; and if
6 we do that, we understand that it would change whatever date we
7 get.

8 THE COURT: Okay. Unfortunately, through the rest of the
9 year it looks like I have all firm settings and numerous death
10 penalty cases.

11 [Colloquy between the Court and Clerk]

12 THE COURT: March date.

13 MS. PALM: And we would object to a March date because he
14 does have a sixty-day.

15 THE COURT: January -- I could put you in January, but I have
16 older -- I have cases that are numerous weeks with firm settings,
17 the death penalty cases --

18 MR. LALLI: I have a death --

19 THE COURT: -- and they've been set for six months.

20 MR. LALLI: -- I have a death penalty case set on December
21 10th, Your Honor, that's been continued before. I'm not sure what
22 the Court's calendar is, but I'm certainly free beginning of
23 December.

24 THE COURT: 'Cause I've got -- I'll be out of the office for
25 a period of time. And, Ms. Palm, February is my civil cycle, so

1 that's why we can't put you in February. I mean, I can have you
2 trail the case in January, but -- but if it doesn't -- if we put
3 you there and we have these other firm settings, then we're going
4 to push you back into May or June.

5 MS. PALM: Is the January case another in-custody?

6 THE COURT: I've got the Lacy Thomas case which is as far as
7 I know will never negotiate and its three weeks. The 24th is a
8 death penalty case, a week and a half.

9 MS. NYIKOS: Judge, I think that's mine. I'm not sure it's
10 going.

11 MS. PALM: Well, we would ask for as soon as you can set us,
12 Judge.

13 THE COURT: We can give you the 24th, but I mean there's
14 already a death penalty case set.

15 MR. LALLI: On what day? On what month?

16 THE COURT: January 24th is the start time.

17 MS. NYIKOS: Oh, no. I'm sorry. I thought you were talking
18 about October.

19 THE COURT: No. Schneider. It's a different case.

20 Ms. Palm, it's up to you.

21 MS. PALM: We'll take the soonest available.

22 THE COURT: Well --

23 MS. PALM: Even if that means we trail.

24 THE COURT: Okay, we'll trail with the understanding it's --

25 MR. LALLI: Is that the -- the 24th that's trailing?

1 THE COURT: It's a Schneider case. It's a death penalty
2 case. I don't know who has that with your office.

3 MR. LALLI: I'm not -- I'm not sure. I know I've got a firm
4 setting on a case that's been continued multiple times on February
5 7th, so I mean I would have to be -- Judge Mosley's continued this
6 case numerous times and he's quite adamant at the fact that it is
7 going on February 7th, so as long as the Court understands that I'm
8 not available beginning on that day.

9 THE COURT: That would --

10 MR. LALLI: If we --

11 THE COURT: -- that'll give --

12 MR. LALLI: -- if we begin --

13 THE COURT: -- us two weeks.

14 MR. LALLI: Yeah, that should be more than enough time.

15 THE COURT: All right.

16 THE CLERK: Calendar Call will be January 18th at 8:15. Jury
17 Trial January 24th at 10 a.m.

18 THE COURT: Okay, Ms. Palm, you understand that you're
19 trailing a death penalty case.

20 MS. PALM: I do understand that, Your Honor. Do you want to
21 give us a second date in case or should we just wait?

22 THE COURT: No. Just wait. You can -- I think Mr. Figler's
23 the attorney on that case.

24 MR. LALLI: Is the --

25 THE COURT: It's been continued three times.

1 MR. LALLI: -- is the 24th -- is the death penalty case, is
2 that set for the 24th as well?

3 THE COURT: Yes.

4 MR. LALLI: Okay. Very good.

5 MS. PALM: Thank you, Your Honor.

6 THE COURT: All right.


7 MR. LALLI: Thank you.

8 THE COURT: You're welcome.

9 [Proceeding concluded at 8:18 a.m.]

10
11
12
13
14
15
16 * * * * *

17
18
19
20
21 ATTEST: I hereby certify that I have truly and correctly
22 transcribed the audio/video proceedings in the above-entitled case
23 to the best of my ability.

24 
25 Michelle Ramsey
Court Recorder/Transcriber