

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
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Electronically Filed  
Dec 16 2014 08:35 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

v.

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**APPELLANT'S APPENDIX VOLUME VI PAGES 937-1169**

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**INDEX**  
**PATRICK NEWELL**  
**Case No. 66552**

	<u>PAGE NO.</u>
Amended Criminal Complaint filed 11/26/2012 .....	003-004
Amended Information filed 06/16/2014.....	310-312
Bail Bond filed 02/20/2013 .....	192-195
Criminal Complaint filed 10/11/2012.....	001-002
Defendant's Notice of Witnesses, Pursuant to NRS 174.234 filed 06/09/2014.....	307-308
Demand for a Speedy Trial filed 11/19/2013 .....	219-220
District Court Minutes from 12/04/2012 through 08/21/2014 .....	368-405
Ex Parte Motion for Release of Medical Records filed 12/18/2012.....	170-171
Ex Parte Motion for Release of Medical Records filed 04/08/2013.....	196-197
Ex Parte Order for Release of Records filed 06/10/2014 .....	309
Information filed 11/30/2012.....	005-008
Instructions to the Jury filed 06/16/2014.....	316-359
Judgment of Conviction filed 08/29/2014.....	362-363
Justice Court Minutes from 10/12/2012 through 11/27/2012 .....	009-013
Memorandum to Defendant's Motion for Summary Judgment to Compel Discovery filed 01/13/2014.....	269-271
Motion for OR Release or, in the Alternative, Motion to Reduce Bail filed 11/07/2012 .....	018-023
Motion for OR Release or, in the Alternative, Motion to Reduce Bail filed 12/26/2012 .....	174-178
Motion for Reduction in Bail filed 11/06/2013 .....	212-217
Motion for Summary Judgment to Compel Discovery filed 12/26/2013 .....	229-238
Motion to Appoint Counsel filed 01/21/2014.....	273-276
Motion to Continue Trial Date filed 02/27/2014.....	296-298
Motion to Dismiss Counsel and Appointment of Alternate Counsel filed 02/18/2014....	283-291
Motion to Dismiss Counsel and Permit Defendant to Proceed in Pro Per filed 10/15/2013.....	203-210
///	

1	Motion to Dismiss Standby Counsel and Appoint Alternate Standby Counsel filed 01/13/2014..	262-268
2	Motion to Shorten Time filed 01/06/2014.....	255-260
3	Motion to Withdraw as Counsel filed 09/09/2013 .....	200-202
4	Motion to Withdraw as Counsel of Record filed 01/03/2013 .....	187-191
5	Notice of Appeal filed 01/02/2014 .....	251-253
6	Notice of Appeal filed 09/19/2014 .....	364-367
7	Notice of Confirmation of Counsel filed 11/05/2012.....	014
8	Notice of Dismissal of Counsel filed 04/29/2014 .....	301-302
9	Notice of Expert Witnesses filed 01/31/2014.....	280-281
10	Notice of Motion filed 11/06/2013.....	211
11	Notice of Motion filed 11/19/2013.....	218
12	Notice of Motion filed 12/26/2013.....	248
13	Notice of Motion filed 12/26/2013.....	249-250
14	Notice of Motion filed 01/06/2014.....	254
15	Notice of Motion filed 01/13/2014.....	261
16	Notice of Motion filed 01/21/2014.....	272
17	Notice of Motion filed 02/18/2014.....	282
18	Notice of Witnesses filed 01/31/2014 .....	277-279
19	Notice to Place on Calendar filed 11/19/2012.....	024
20	Order Releasing Medical Records filed 12/18/2012 .....	172-173
21	Order Releasing Medical Records filed 04/11/2013 .....	198-199
22	Rebuttal to State's Opposition to Defendant's Motion for a Reduction in Bail Amount filed	
23	12/26/2013 .....	239-247
24	Reporter's Transcript of Preliminary Hearing heard 11/27/2012.....	025-169
25	Second Amended Information filed 06/19/2014 .....	313-315
26	State's Opposition to Defendant's Motion for OR Release or, in the Alternative, Motion to	
27	Reduce Bail filed 01/02/2013 .....	179-186
28	State's Opposition to Defendant's Motion for Reduction in Bail filed 11/21/2013.....	221-228
	///	

1	Substitution of Attorney filed 04/04/2014.....	299-300
2	Substitution of Attorneys filed 11/07/2012 .....	015-017
3	Supplemental Notice of Wintesses filed 06/05/2014 .....	303-306
4	Supreme Court Order Dismissing Appeal filed 02/26/2014 .....	292-295
5	Verdict filed 06/19/2014.....	360-361

6

7

### TRANSCRIPTS

8

Recorder's Rough Draft Transcript of Proceedings,

9

**Jury Trial—Day One**

Date of Hrg: 06/16/2014..... 583-767

10

Recorder's Rough Draft Transcript of Proceedings,

11

**Jury Trial—Day Two**

Date of Hrg: 06/17/2014..... 768-936

12

Recorder's Rough Draft Transcript of Proceedings,

13

**Jury Trial—Day Three**

Date of Hrg: 06/18/2014..... 937-1169

14

Recorder's Rough Draft Transcript of Proceedings,

15

**Jury Trial—Day Four**

Date of Hrg: 06/19/2014..... 1170-1278

16

Recorder's Transcript of Hearing,

17

Arraignment

Date of Hrg: 12/04/2012..... 406-408

18

Rough Draft Recorder's Transcript,

19

Calendar Call

Date of Hrg: 06/10/2014..... 526-535

20

Rough Draft Recorder's Transcript,

21

Calendar Call and Defendant's Motion to Continue Trial Date

Date of Hrg: 03/11/2014..... 504-506

22

Rough Draft Recorder's Transcript,

23

Calendar Call and Motion in Limine

Date of Hrg: 06/12/2014..... 536-582

24

Rough Draft Recorder's Transcript,

25

Damian R. Sheets, Esq's Motion to Withdraw as Counsel of Record

Date of Hrg: 02/05/2013..... 419-422

26

Rough Draft Recorder's Transcript,

27

Damian R. Sheets, Esq's Motion to Withdraw as Counsel of Record; Defendant's Motion for OR Release or, in the Alternative, Motion to Reduce Bail; and Calendar Call

28

Date of Hrg: 01/15/2013..... 409-418

1	Rough Draft Recorder's Transcript, Defendant's Pro Se Demand for Speedy Trial; Status Check: Discovery	
2	Date of Hrg: 12/31/2013 .....	481-493
3	Rough Draft Recorder's Transcript, Defendant's Pro Se Demand for Speedy Trial; Status Check: Discovery; and Defendant's Pro Se	
4	Motion for Reduction in Bail	
5	Date of Hrg: 12/03/2013 .....	473-476
6	Rough Draft Recorder's Transcript, Defendant's Pro Se Demand for Speedy Trial; Status Check: Discovery; and Defendant's Pro Se	
7	Motion for Reduction in Bail	
8	Date of Hrg: 12/17/2013 .....	477-480
9	Rough Draft Recorder's Transcript, Sentencing	
10	Date of Hrg: 08/21/2014 .....	1279-1300
11	Rough Draft Recorder's Transcript, State's Request: Address Status of Deft Counsel/Trial Setting	
12	Date of Hrg: 04/29/2014 .....	507-516
13	Rough Draft Recorder's Transcript, State's Request: To Address Trial Setting	
14	Date of Hrg: 05/08/2014 .....	517-525
15	Rough Draft Recorder's Transcript, Status Check: Confirmation of Counsel	
16	Date of Hrg: 02/19/2013 .....	423-426
17	Rough Draft Recorder's Transcript, Status Check: Confirmation of Counsel	
18	Date of Hrg: 02/26/2013 .....	427-429
19	Rough Draft Recorder's Transcript, Status Check: Discovery	
20	Date of Hrg: 10/15/2013 .....	450-472
21	Rough Draft Recorder's Transcript, Status Check: Discovery; Defendant's Pro Se Demand for Speedy Trial; Motion for Summary	
22	Judgment to Compel Discovery; and Defendant's Motion to Shorten Time	
23	Date of Hrg: 01/14/2014 .....	494-503
24	Rough Draft Recorder's Transcript, Status Check: Discovery/Trial Readiness	
25	Date of Hrg: 10/01/2013 .....	443-449
26	Rough Draft Recorder's Transcript, Status Check: Trial Readiness	
27	Date of Hrg: 03/26/2013 .....	430-432
28	Rough Draft Recorder's Transcript, Steven K. Parke, Esq's Motion to Withdraw as Counsel	
	Date of Hrg: 09/19/2013 .....	433-435
	///	

1	Rough Draft Recorder's Transcript,	
	Steven K. Parke, Esq's Motion to Withdraw as Counsel	
2	Date of Hrg: 09/24/2013 .....	436-442

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
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CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

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Plaintiff,

CASE#: C285825-1

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vs.

DEPT. XX

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PATRICK NEWELL,

11

Defendant.

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13

BEFORE THE HONORABLE JEROME TAO, DISTRICT COURT JUDGE

14

WEDNESDAY, JUNE 18, 2014

15

**RECORDER'S ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS  
JURY TRIAL - DAY 3**

16

APPEARANCES:

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18

19

20

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Deputy Public Defenders

21

22

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24

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RECORDED BY: SARA RICHARDSON, COURT RECORDER

**INDEX OF WITNESSES**

**STATE'S WITNESSES**

**DAY**

**PAGE**

**DERRICK PHILLIPS**

Direct Examination by Mr. Stephens	2	15
Cross-Examination by Mr. Coffee	2	33
Redirect Examination by Mr. Stephens	2	45
Recross Examination by Mr. Coffee	2	47

**AARON GACH**

Direct Examination by Ms. Wong	2	52
Cross-Examination by Mr. Coffee	2	70
Redirect Examination by Ms. Wong	2	81
Recross Examination by Mr. Coffee	2	84
Further Redirect Examination by Ms. Wong	2	85

**ADAM CARLOS**

Direct Examination by Mr. Stephens	2	86
Cross-Examination by Mr. Coffee	2	104
Redirect Examination by Stephens	2	111
Recross Examination by Mr. Coffee	2	112

**THEODORE BEJARANO**

Direct Examination by Ms. Wong	2	117
Cross-Examination by Mr. Coffee	2	146
Redirect Examination by Ms. Wong	2	165
Recross-Examination Mr. Coffee	2	167

**BRYANT COREA**

Direct Examination by Mr. Stephens	3	6
Cross-Examination by Mr. Gutierrez	3	19
Redirect Examination by Mr. Stephens	3	25

**SHERI JONES**

Direct Examination by Mr. Stephens	3	26
Cross-Examination by Mr. Coffee	3	33
Redirect Examination by Mr. Stephens	3	37
Recross Examination by Mr. Coffee	3	37



	<b><u>STATE'S WITNESSES</u></b>	<b><u>DAY</u></b>	<b><u>PAGE</u></b>
1			
2	<b>BRYAN GRIGGS</b>		
3	Direct Examination by Ms. Wong	3	39
4	Cross-Examination by Mr. Coffee	3	46
5			
6	<b>BRETT KNUDSON</b>		
7	Direct Examination by Mr. Stephens	3	49
8	Cross-Examination by Mr. Coffee	3	57
9			
10	<b>VINCENT ROBERTS</b>		
11	Direct Examination by Mr. Stephens	3	81
12	Cross-Examination by Mr. Coffee	3	88
13	Redirect Examination by Mr. Stephens	3	94
14	Recross Examination by Mr. Coffee	3	96
15			
16	<b>BRIAN KOWALSKI</b>		
17	Direct Examination by Ms. Wong	3	98
18	Cross-Examination by Mr. Coffee	3	107
19	Cross-Examination by Mr. Coffee [Continued]	3	135
20	Redirect Examination by Ms. Wong	3	150
21	Recross Examination by Mr. Coffee	3	154
22	Further Redirect Examination by Ms. Wong	3	158
23	Further Recross Examination by Mr. Coffee	3	161
24			
25			
	*****		
	<b><u>DEFENSE WITNESSES</u></b>	<b><u>DAY</u></b>	<b><u>PAGE</u></b>
	<b>PATRICK NEWELL</b>		
	Direct Examination by Mr. Coffee	3	170
	Cross-Examination by Ms. Wong	3	188
	Questions of the Jurors by the Court	3	199
	Follow-up by Mr. Coffee	3	200
	Follow-up by Ms. Wong	3	201
	Questions of the Jurors by the Court	3	202
	Redirect Examination by Mr. Coffee	3	204
	Recross Examination by Ms. Wong	3	207
	Further Redirect Examination by Mr. Coffee	3	212
	Further Recross Examination by Ms. Wong	3	214
	Further Redirect by Mr. Coffee	3	216

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

INDEX OF EXHIBITS

STATE'S EXHIBITS

DAY                      PAGE

1 through 17 [by stipulation]	2	17
19 through 20 [by stipulation]	2	6
21 [by stipulation]	3	105

\*\*\*\*\*

DEFENSE EXHIBITS

DAY                      PAGE

A	2	38
B	2	39
C	2	148
D [by stipulation]	3	96
E	3	163

1 WEDNESDAY, JUNE 18, 2014 AT 10:17 A.M.

2  
3 [Outside the presence of the jury panel]

4 THE COURT: All right. Back on the record on State versus Patrick Newell,  
5 C285825. Mr. Newell is present in custody with his attorneys.

6 Anything that either side wanted to address or put on the record before  
7 we bring the jury in?

8 MR. STEPHENS: Your Honor, I just wanted to give you a heads up on kind of  
9 the scheduling for this morning at least.

10 THE COURT: Okay.

11 MR. STEPHENS: We have four witnesses that we intend to get on before  
12 lunch. I believe most of them will be short. I think we can do it within a two hour  
13 timeframe here, but we might have to go a little bit long. Our last of the four  
14 witnesses this morning has some personal issues that he's to testify this morning.  
15 So we just ask that we might have to delay lunch just 20 minutes or so just to make  
16 sure we get him on the stand.

17 THE COURT: Okay. That's okay with me if it's okay with you guys.

18 MR. COFFEE: Sure.

19 THE COURT: And hopefully the jury doesn't have any, you know, issue with  
20 that. But, yeah, that's totally fine. Okay.

21 All right. Let's go ahead and bring the jury in, Randy.

22 [In the presence of the jury]

23 THE COURT: All right. Will counsel stipulate to the presence of the jury.

24 MR. COFFEE: Yes, Judge.

25 MS. WONG: Yes.

1 THE COURT: All right. State, who is your next witness?

2 MR. STEPHENS: Bryant Corea.

3 THE MARSHAL: Remain standing. Raise your right hand and face the clerk,  
4 please.

5 **BRYANT COREA**

6 [having been called as a witness and being first duly sworn, testified as follows:]

7 THE COURT CLERK: Please be seated. Please state your name and spell  
8 your first and last name for the record?

9 THE WITNESS: My name is Bryant Corea; B-R-Y-A-N-T, C-O-R-E-A.

10 THE COURT: You may proceed.

11 MR. STEPHENS: Thank you, Your Honor.

12 **DIRECT EXAMINATION**

13 BY MR. STEPHENS:

14 Q Office Corea, how are you employed? Start with the easy ones.

15 A I work for Las Vegas Metro Police Department.

16 Q Okay. And are you assigned to any particular unit or division?

17 A Patrol in south central.

18 Q How long have you been an officer with Metro?

19 A Five years now.

20 Q Were you working on or about October 10<sup>th</sup> of 2012?

21 A Yes.

22 Q And what shift were you working that night?

23 A Graveyard.

24 Q What hours were you working?

25 A It starts at 10 p.m. and it ends at 8 a.m.

1 Q In the early morning hours of the 10<sup>th</sup>, were you dispatched to the Circle  
2 K at 9487 South Las Vegas Boulevard?

3 A Yes.

4 Q Is that in Clark County, Nevada?

5 A Yes.

6 Q How is it that you became aware that you needed to go to the Circle K?

7 A I was on a traffic stop at Las Vegas Boulevard and Silverado Ranch  
8 and I heard Officer Aquino get dispatched to a call by herself for some type of  
9 disturbance call at the Circle K. And I went over the radio and said I was gonna  
10 clear with a ticket and be en route to back her.

11 Q Okay. So Officer Aquino, that's someone who works with your patrol?

12 A Yes.

13 Q Okay. What was the basis of the report then? It was just a disturbance  
14 of some sort?

15 A As far as I knew it was just some kind of disturbance at a Circle K. I  
16 thought it was like some guy refusing to leave.

17 Q All right. How long did it take you to respond to that location?

18 A Maybe two minutes.

19 Q Two minutes or so; okay. Do you recall what time you arrived there?

20 A No.

21 Q Would it refresh your recollection to refer to a CAD report?

22 A Yes.

23 Q And what is the CAD report?

24 A It basically just documents all of our events and issues event numbers,  
25 and has details about all our calls.

1 Q Okay. And this is automated by a central computer of some sort?

2 A Yes.

3 MR. STEPHENS: [Indiscernible] CAD report.

4 MR. COFFEE: Sure.

5 BY MR. STEPHENS:

6 Q Would it refresh your recollection to review the CAD report to determine  
7 what time --

8 A Yes.

9 Q -- [indiscernible] you arrived?

10 A Looks like I arrived at 1 a.m.

11 Q And does the CAD report -- would it also indicate what the initial call  
12 was about?

13 A Yes.

14 Q Would it refresh your recollection to refer to the report?

15 A Yes.

16 MR. STEPHENS: I'm showing the CAD report again for the record.

17 MR. COFFEE: Sure.

18 THE WITNESS: I came out as a 416b, which is a just other disturbance type  
19 of call.

20 BY MR. STEPHENS:

21 Q Okay. Were there any details as to what the disturbance was about?

22 A Yes. In the details it just says in the parking lot by the pumps throwing  
23 matches; drunk white male; late 30s, early 40s; 5'7"; black hair; plaid shirt, dark  
24 pants; negative weapons or drugs; trying to start a fight with a customer.

25 Q Okay. So that was the initial call?

1 A Yes.

2 Q When you arrived on scene, a few minutes after you decided to  
3 respond there, what was it that you observed?

4 A Oh, when I first arrived on scene I saw to my left by the gas pumps I  
5 saw a shirtless Hispanic male, who I later found out to be Theodore Bejarano. He  
6 was shirtless and he was just sitting by one of the gas pumps and he was rocking  
7 back and forth. And I couldn't understand what he was saying. He's just kind of like  
8 moaning or something. And then South Point security was at the front of Circle K  
9 and he was waving me down. So I rolled my passenger side window down and I  
10 was like, what's up. And he said, oh, that guy over there by the gas station,  
11 referring to Patrick Newell, just tried to light this other guy on fire. And I was like, all  
12 right, let me get out of my car and see what's going on. So as I was getting out of  
13 my car Officer Aquino was rolling up behind me, maybe a few seconds later, and  
14 when she got out I was like, hey, go talk to that guy, referring to Theodore, and I'll  
15 go talk to Patrick. Patrick was starting to walk towards the Circle K, and I just  
16 started walking towards him and I was just like, hey, what happened.

17 Q Okay. Let me ask you a couple more questions about that. So the  
18 initial person that you spoke to was someone with South Point security?

19 A Yes.

20 Q Okay. And based upon your conversation with him, did it appear that  
21 the initial call from the CAD report was potentially inaccurate?

22 A Yes.

23 Q And why did it appear inaccurate? What things did you kind of have  
24 concerns with?

25 A Well, we didn't hear any of that type of radio traffic that someone was

1 possibly lit on fire or that someone actually did get lit on fire. A call came out like as  
2 another disturbance. It should've came out with a higher priority than that, so --

3 Q Now when you first arrived you said Theodore was sitting near one of  
4 the gas pumps and I believe you said he was shirtless?

5 A Yes.

6 Q Did he have anything on on the lower half of his body, if you recall?

7 A I think he might have had shorts on.

8 Q Okay. And where was -- you mentioned a Patrick Newell. Is that  
9 individual present in the courtroom today?

10 A Yes, he's sitting in the middle I believe.

11 Q I'm sorry.

12 A Blue shirt.

13 Q Wearing the blue shirt.

14 MR. STEPHENS: Your Honor, will the record reflect identification of the  
15 Defendant?

16 THE COURT: Record will so reflect.

17 MR. STEPHENS: Thank you.

18 BY MR. STEPHENS:

19 Q Where was he located when you first --

20 A I believe he was standing by his truck. It was a red Dodge Ram.

21 Q And where was the Dodge Ram parked?

22 A I believe in front of pump three.

23 Q So based upon the initial report that came out in your initial  
24 conversations with some people, were you confused as to what was really going on  
25 at this point?



1           A     Yeah, I was extremely confused and I wasn't sure when South Point --  
2 when the South Point security guard said it I was just like what. I didn't really know  
3 what he meant by that. I didn't know if Theodore had actually been lit on fire. If he  
4 was -- maybe referring -- maybe Patrick had like tried lighting him on fire but was  
5 unsuccessful. I wasn't sure.

6           Q     Just kind of lost?

7           A     Yeah, so I just got out. I was like, all right, let me try to start figuring this  
8 out.

9           Q     So what was your intension in speaking with Mr. Newell?

10          A     I just wanted to know --

11          Q     What was going on?

12          A     -- what happened --

13          Q     Was --

14          A     -- and what was his involvement with the whole thing.

15          Q     So you were just investigating what was going on?

16          A     Right.

17          Q     Where did you speak with Mr. Newell at?

18          A     I believe we started midway between the Circle K and his vehicle.

19 When I asked him what happened he's like, oh, I'll tell you what happened. And he  
20 started telling me that Theodore was asking him for change or for a ride and that --

21          Q     Before we get into that real --

22          A     Sure.

23          Q     Did the Defendant seem interested in speaking with you?

24          A     Yeah, extremely.

25          Q     Okay. Can you describe his demeanor for us?

1           A     He's very nonchalant. Very cooperative with me. He was eating  
2 gummy worms when he was first walking towards the Circle K. He was just walking  
3 like I wasn't even really there until I asked him what happened then he was -- he  
4 wanted to keep talking.

5           Q     And did you place either Teddy or the Defendant in handcuffs when you  
6 initially arrived?

7           A     No.

8           Q     Okay. Now you said you had this conversation with him, and the  
9 question I believe you asked is kind of what's going on, what happened?

10          A     Right.

11          Q     And what was the Defendant's response.

12          A     He said I'll tell you what happened and that's when he started telling me  
13 about his whole altercation with Theodore. And we started out in the middle, but I  
14 believe he walked me back over by his truck so he could show me -- so he could  
15 basically re-enact the scenario to me.

16          Q     Okay. Did he indicate whether or not any argument occurred between  
17 him and Theodore?

18          A     Yes. He said that Theodore wouldn't leave him alone; that he kept  
19 asking him for change for a ride, and that he thought that he was really drunk and he  
20 just wanted to be left alone.

21          Q     Okay. Did he tell you what his response was to Theodore continually  
22 asking for a ride?

23          A     He told me that he kept telling him no and to leave him alone and  
24 Theodore kept harassing him. So he said that he tried to go over to the Circle K  
25 inside and he told the clerk, hey, you know, tell this guy to leave me alone; he's

1 harassing me, he's harassing me. He said he went back outside to the pumps and  
2 Theodore was still there and he was still bothering him. So he said he pulled out a  
3 knife and he said if you don't -- you know, if you don't leave me alone I'll cut you or  
4 something like that, and Theodore said you're not gonna do anything, you're not  
5 gonna do anything. And Patrick told me that he said I'll do you one better and he  
6 grabbed the gas pump and he said that he lightly sprinkled Theodore's shirt and  
7 then he patted it down. And he was re-enacting that with me because he reached  
8 over and he like started patting my uniform down and I was just nodding my head.  
9 And then after that he's like he possibly got lit on fire, but that's all I'm gonna say.

10 Q He said he possibly got lit on fire?

11 A Yeah. That he may or may not have. I don't remember his exact  
12 words.

13 Q Did he ever -- he mentioned that he pulled a knife on Theodore. Did he  
14 ever show you the knife that he used?

15 A I don't know if he showed it to me when he was re-enacting it. He  
16 might've tried to go into his pockets, but I told him don't go in your pockets. I didn't  
17 see the --

18 Q Why is that?

19 A Well, I didn't want him to have a knife and do something against me.

20 Q Okay.

21 A So I just told him, you know, you don't -- just keep your hands out of  
22 your pockets. It wasn't until afterwards when I told him to stand in front of my patrol  
23 car so I could speak to Officer Aquino. That's when I asked him if he had any  
24 weapons and that's when he ended up taking the knife and lighter out.

25 Q Okay. Did he have anything else in his pockets at this time?

1 A That I recall -- I don't recall.

2 Q Don't recall. But you recall a knife and a lighter in his pockets -- coming  
3 from his pockets?

4 A Yes.

5 Q And the Defendant himself removed those?

6 A Yes.

7 Q The -- can you describe the knife for us if you recall?

8 A I think it was just a small pocket knife.

9 Q Okay.

10 A I don't remember the color or anything.

11 Q Do you know whether or not it was attached to a keychain or anything?

12 A I don't know.

13 Q And the lighter's just a regular lighter, nothing too --

14 A Just the type that you operate with your thumb I believe.

15 Q All right. It's like a cigarette lighter rather than like a barbeque lighter?

16 A Right.

17 Q You described the Defendant's demeanor earlier when you initially  
18 started talking with him. Did his demeanor at all change as you continued to speak  
19 with him?

20 A Not particularly. He just kept eating gummy worms throughout the  
21 entire conversation and that was basically it. He's acting like -- he was basically  
22 acting like it was no big deal and I remember him telling me that he thought he was  
23 acting in self-defense.

24 Q He told you he was acting in self-defense?

25 A Yeah.

1 Q Did he ever say what the victim was doing that made him believe that  
2 he was acting in self-defense?

3 A No.

4 Q Did he ever tell you whether or not the victim -- or Theodore had any  
5 weapons during the incident?

6 A No.

7 Q Did he ever tell you that -- whether or not Theodore ever balled up his  
8 fists or challenged him to fight?

9 A No.

10 Q So it's just his own blanket statement that he was acting in self-  
11 defense?

12 A Yes. He said that anybody else in his position would do the same thing.  
13 I remember him saying that multiple times.

14 Q He said that multiple times you said?

15 A Yes.

16 Q Did the Defendant ever mention to you any sort of physical handicap  
17 that he has?

18 A Not that I recall; no.

19 Q Did -- based upon the Defendant's story that he told you, did you look  
20 for any matches that were on the ground to corroborate the dispatch call?

21 A I didn't find any matches on the ground.

22 MR. COFFEE: Objection, based on -- he didn't --

23 MR. STEPHENS: Sorry, I misspoke. I apologize.

24 MR. COFFEE: Yeah.

25 MR. STEPHENS: I did misspeak.

1 BY MR. STEPHENS:

2 Q Based upon the dispatch call, did you do any -- did you look for any  
3 matches on the ground?

4 A Based on the dispatch call I -- really when I showed up I didn't have any  
5 idea of what the details were. I didn't really hear whatever dispatch said over the  
6 radio. All I really heard -- all I was clueing in was that Officer Aquino was going to  
7 some type of disturbance call and that was basically it. I didn't hear anything about  
8 matches, a fire, a possible fire.

9 Q Okay. So you weren't necessarily aware of -- the matches may have  
10 been thrown or may not have been thrown?

11 A Right.

12 Q You just knew it was a disturbance of some sort?

13 A Right.

14 Q Okay. When you arrived did an ambulance eventually arrive on scene?

15 A Yes.

16 Q And what did the ambulance workers do when they arrived?

17 A I believe they went and checked Theodore out and spoke with Officer  
18 Aquino, if anything.

19 Q Was the -- was Theodore eventually transported in the ambulance?

20 A Yes.

21 Q And did you ever have any conversations with Theodore?

22 A No.

23 Q So far, and I may not have just asked you enough questions, but as far  
24 as I understand you spoke with the South Point security guard and the Defendant?

25 A Mm-hmm. Yes.

1 Q Okay. Did you review any surveillance video while you were there?

2 A Yes. I went to -- I believe I asked the clerk if she could check the video.  
3 I think it was a female. It might've been a manager that showed up later and they  
4 went over and rewound it and showed me a really short clip of the incident.

5 Q Okay. And was the incident at the pumps?

6 A Yes.

7 Q What other investigation did you do?

8 A Well, I spoke with Officer Aquino and I told her everything that Patrick  
9 had just told me. And then I believe she told me that --

10 Q You don't have to tell me what she told you.

11 A Okay. And then after we talked, more officers started showing up. And  
12 like I said, originally everybody thought it was just some kind of disturbance call;  
13 otherwise, there would've been a lot more officers showing up. But as dispatch  
14 started advising what was actually going on more officers showed up, and then we  
15 just got different officers doing different things to help out with the call. Officer  
16 Knudson went to the hospital and he called I believe major crimes or violent crimes  
17 detectives. He advised them of the call that we had, and then he also spoke with  
18 Officer Aquino and gave her updates on Theodore's condition.

19 Q Okay. Based upon the -- your investigation and the investigation of  
20 other officers, did you make any arrests that day?

21 A Yes. After I spoke with Officer Aquino -- I can't recall if either I or she  
22 put Theodore under arrest, but one of us placed him into handcuffs and then put him  
23 in the back of a patrol car.

24 Q I believe you said Theodore. You arrested Theodore?

25 A Oh, I'm sorry. Patrick.

1 Q Patrick?

2 A Yes.

3 Q Okay. So the Defendant was the only one you arrested that day?

4 A Yes. Theodore got transported to the hospital.

5 Q And why it that you arrested -- why was it that you arrested the  
6 Defendant?

7 A Well, after reviewing the video surveillance we could see Patrick  
8 basically reaching over to Theodore and lighting him on fire. And basically  
9 everybody's statements -- from what I gather Officer Randall got voluntary  
10 statements from everyone else corroborating the incident.

11 Q Okay. I apologize to go back for just one second. I forgot to ask you  
12 one last question. The -- when the Defendant told you that he was -- at one point  
13 had pulled a knife on Theodore, did he ever show you how he was using the knife?

14 A He just kind of -- he put his hands out like this. And I don't remember  
15 which hand he had it in; he just said that he stood like this with his fist closed around  
16 the knife and just told him, you know, if you don't leave me alone I'll cut you.

17 Q What was that statement he said?

18 A Don't know the exact words, just something to the effect that he would  
19 cut him if Theodore didn't leave him alone.

20 MR. STEPHENS: Court's brief indulgence, Your Honor.

21 THE COURT: Sure.

22 BY MR. STEPHENS:

23 Q Just a couple more questions, Officer Corea. So you initially arrived  
24 and then you speak to the South Point security officer and then you speak to the  
25 Defendant; is that correct?



1 A Yes.

2 Q Okay. And how long of a conversation do you have with the  
3 Defendant?

4 A A few minutes I suppose.

5 Q Okay. And after that conversation what do you do with the Defendant?

6 A That's when I told him, hey, I need you to speak to my partner. You  
7 know, head over to the front of my car while we figure this out.

8 Q Okay.

9 A And he said okay and when I left him there he turned around. I think he  
10 sat down on my patrol car and he kept eating gummy worms.

11 Q Okay.

12 A That's when I started talking to my partner about everything.

13 Q Okay. So you did not immediately arrest him at that point?

14 A No.

15 Q Okay. How much further investigation did you do or about how much  
16 time passed before any specific arrest was made, if you know?

17 A I wouldn't be able to recall. Maybe a half hour or so

18 Q Half hour or so; okay.

19 MR. STEPHENS: I'll pass the witness.

20 THE COURT: Cross-examination?

21 MR. GUTIERREZ: Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 BY MR. GUTIERREZ:

24 Q Good morning again, Officer Corea.

25 A Good morning.

1 Q Now you indicated that you were the first to arrive on scene?  
2 A Yes.  
3 Q You were actually the back-up officer though?  
4 A Yes.  
5 Q So Officer Aquino, she was the responding officer -- the lead officer?  
6 A Yes.  
7 Q Okay. You showed up initially first. You got there, what, a few  
8 seconds, maybe a minute before her?  
9 A Yep.  
10 Q Okay. And as you're driving up all you know is it's a disturbance?  
11 A Yes.  
12 Q At that point in time you don't know really any details, any facts,  
13 anything about it?  
14 A Yes.  
15 Q Kind of rolling in there blind. Now the first person you see -- you're  
16 being flagged down by the South Point security guard?  
17 A Yes.  
18 Q Okay. And he's wearing what, a yellow vest?  
19 A He was wearing a South Point -- I think just his security uniform.  
20 Q So --  
21 A I don't remember if he was wearing a vest or not.  
22 Q So he wasn't wearing -- you don't remember if he --  
23 A I don't remember.  
24 Q -- was wearing a vest or not?  
25 A I don't recall. I know he was wearing a South Point uniform, but I don't

1 know --

2 Q But he's --

3 A -- if he had a vest on top.

4 Q If you were to describe his physical appearance what did he look like?

5 A I believe he was pretty tall, kind of heavysset.

6 Q Can you describe his hair?

7 A I don't recall.

8 Q It's all right. He didn't have any, but that's okay.

9 There's been -- all right. So when you showed up you talked to him  
10 briefly. He said a few thing, trying to describe what happened. You said it didn't  
11 really make a whole lot of sense to you?

12 A Yes.

13 Q Okay. But then Officer Aquino, she rolls up and so you get out of your  
14 car and she goes to talk to the South Point security guard.

15 A No, she went to go talk to Theodore.

16 Q Theodore. That's right. She went to talk to Theodore first.

17 A Yes.

18 Q And you went to talk to Patrick?

19 A Yes.

20 Q Now, when you rolled up, where's your car -- where did you park your  
21 car?

22 A I think near the front entrance of the Circle K.

23 Q All right. So -- now, when you exit the vehicle and you're going over  
24 there to walk -- to talk to Patrick, it could've been that he was walking right towards  
25 your car since you're over near the entrance?

1 A Is that a question?

2 Q Yeah. It could've been that he was walking right towards your car --

3 towards you; right?

4 A It didn't appear that he was -- he wasn't making eye contact with me.

5 He was just eating his gummy worms and he was walking towards -- it appeared like

6 he was walking towards the side of Circle K to go around -- not around the back, but

7 kind of in the general direction of the main entrance. I didn't really get the

8 impression that he was walking towards me.

9 Q There's a lot of focus on gummy worms; right?

10 A I just kind of remember that vividly.

11 Q Kind of remember that; right?

12 A Yeah, that was one of the things that stuck out.

13 Q Yeah. That probably would have stuck out to me too. Did it also stick

14 out -- did you know that he was diabetic at the time?

15 A No.

16 Q No. Oh, you didn't have that information?

17 A No.

18 Q Okay. Now you went over and you talked with Patrick Newell for a

19 good amount of time by his truck; right? Did you?

20 A I don't recall how long the conversation lasted.

21 Q But it's fair enough to say that you went over, you stood with Patrick

22 Newell and you guys talked for a little bit?

23 A Yes.

24 Q Okay. Now as you're talking, you didn't have your notepad out, did

25 you?

1 A I don't recall.

2 Q You weren't taking any written notes at the time?

3 A Not that I can remember. I'm not sure.

4 MR. GUTIERREZ: Court's indulgence.

5 BY MR. GUTIERREZ:

6 Q Now you said that Patrick told you he acted in self-defense?

7 A Yes.

8 Q Now Patrick answered your questions; right?

9 A Well, basically I asked -- when I approached Patrick I asked him  
10 something to the effect, hey, what happened and basically he went off on a speech  
11 about this entire incident.

12 Q So he anxious to go ahead and tell you what happened?

13 A Yes.

14 Q He wanted to go ahead and tell you everything that happened?

15 A Yes, even after waiting for detectives to show up he kept trying to hail  
16 me down. And while I was busy doing other stuff he just kept saying, you know,  
17 hey, officer, let me talk to you; hey, officer, let me talk to you, and I told him, you  
18 know, just wait; detectives are gonna come out and they'll interview you.

19 Q He just really wanted to get his story out. He wanted to go ahead and  
20 talk to you.

21 Now, he was cooperative though. He did everything that you told him  
22 to?

23 A Yes.

24 Q When you told him to go ahead and stand by your car, he stood by your  
25 car. He followed your directions. He was cooperative. He never tried to run?

1 A No.

2 Q No. He never tried to leave for anything like that?

3 A [Shaking head in the negative.]

4 Q Now did you go ahead -- you didn't go ahead and write a report or  
5 anything?

6 A No.

7 Q No. And so if you had written a report a lot of these details that maybe  
8 you're not clear on you'd have those to refresh your memory; correct?

9 A Yes.

10 Q All right.

11 A I believe I did an officer's report, but I wasn't able to pull it.

12 Q Okay. Now, when you showed up -- you indicated in your testimony  
13 that you actually got to go ahead and see a short clip on the surveillance video?

14 A Yes.

15 Q Does -- did Flo -- does the name Flo sound familiar to you?

16 A No.

17 Q No; okay. But somebody from Circle K went ahead and showed that to  
18 you?

19 A Yes.

20 Q Okay. Now as far as any of the conversations that Officer Aquino had  
21 with Theodore or, you know, the paramedics when they showed up, you weren't  
22 there -- you weren't present when those conversations took place; right?

23 A No.

24 Q You're just over there; Patrick's telling you what's going on. He's  
25 walking you through what happened, trying to give you his side of the story?

1 A Yes.

2 Q Okay. All right.

3 MR. GUTIERREZ: Court's indulgence.

4 I don't have any other questions. Thank you, Officer Corea.

5 THE COURT: Any redirect?

6 MR. STEPHENS: Briefly.

7 **REDIRECT EXAMINATION**

8 BY MR. STEPHENS:

9 Q Officer Corea, I'm assuming you don't recall exactly when this call in  
10 issue came out?

11 A That's correct.

12 Q Would it refresh your recollection to refer to the CAD?

13 A It would.

14 MR. STEPHENS: May I approach, Your Honor?

15 THE COURT: You may.

16 THE WITNESS: Time the call came out?

17 MR. STEPHENS: Yeah, what time did the call came out. That's what I'm  
18 asking you to refresh your recollection about.

19 THE WITNESS: 0051.

20 BY MR. STEPHENS:

21 Q And interpret that for -- not military.

22 A 12:15 in the morning.

23 Q 12:51 in the morning.

24 You did review the surveillance video that night?

25 A Yes.

1 Q And when you were speaking to the Defendant he said the victim  
2 possibly got set on fire?

3 A Yes. He wasn't outright saying that he lit him on fire. He just said that it  
4 possibly happened at one point.

5 MR. STEPHENS: I'll pass the witness.

6 THE COURT: Anything further?

7 MR. GUTIERREZ: No further questions, Your Honor.

8 THE COURT: Thank you, officer, for your testimony. You're free to go.

9 State, who is your next witness?

10 MR. STEPHENS: Sheri Jones.

11 THE MARSHAL: Please step up on the witness stand. Remain standing and  
12 raise your right hand and face the clerk, please.

13 **SHERI JONES**

14 [having been called as a witness and being first duly sworn, testified as follows:]

15 THE COURT CLERK: Please be seated. Please state your name, spell your  
16 first and last name for the record.

17 THE WITNESS: Sheri Jones; S-H-E-R-I, J-O-N-E-S.

18 THE COURT: You may proceed.

19 **DIRECT EXAMINATION**

20 BY MR. STEPHENS:

21 Q Ms. Jones, how are you employed?

22 A I'm a paramedic with AMR.

23 Q And how long have you been employed as a paramedic with AMR?

24 A A paramedic five years. I've been with AMR a total of ten and a half.

25 Q All right. What do you do as in responsibilities as a paramedic?



1 A Answering 9-1-1 calls and caring for patients.

2 Q Okay. How often do you get called to -- called out to treat patients?

3 A It varies on a day to day. It could be as little as one; it could be as

4 many as 10 calls in a 12 hour shift.

5 Q Okay. Were you working the graveyard shift on October 10<sup>th</sup> of 2012?

6 A Yes.

7 Q And were you asked to go to 9487 South Las Vegas Boulevard, a Circle

8 K?

9 A Yes.

10 Q When you -- I guess I should ask you this. How initially did the call

11 come out to you guys?

12 A The call came out as a behavior problem or psychiatric problem. We

13 received it as someone attempting to light himself on fire.

14 Q Someone trying to light himself on fire?

15 A Yes. Those were the notes that were given to us.

16 Q Okay. Now do you actually drive the ambulance or you -- did you drive

17 the ambulance, let me ask you that?

18 A No, my partner did.

19 Q And who -- what's your partner's name?

20 A Bryan Griggs.

21 Q Was there anyone else with you that night?

22 A I had a new hire; an intern.

23 Q Do you recall about what time you arrived at the Circle K location?

24 A It was approximate -- we got the call I believe right around one o'clock

25 in the morning.

1 Q You arrived about one o'clock?

2 A Give or take a little; yes.

3 Q Give or take some time; all right.

4 When you first arrived what did you observe?

5 A Actually, we hold short on all psychiatric calls and we didn't go until the  
6 police had gotten there.

7 Q Okay. So you waited for police to arrive?

8 A Yes.

9 Q Did you have your lights and sirens on when you were coming into the  
10 location?

11 A I do not remember. We did while we were responding to the call, but  
12 once we hold short we turn everything off.

13 Q How far away did you hold short?

14 A Approximately 200 yards.

15 Q So it sounds like Metro arrived first?

16 A Yes.

17 Q And then you pull on the scene?

18 A Yes.

19 Q What do you see when you first arrive?

20 A When we arrived on scene, when I got out of the vehicle I saw a  
21 gentleman standing there with no shirt and shorts on that had obviously looked like  
22 he had -- was on fire at one point.

23 Q Can you describe how it appeared to you that -- how did you come to  
24 that conclusion that he was set on fire?

25 A When -- like I said, when I got there he had no shirt on. His hair was

1 singed and he had like mesh basketball shorts on that were still -- looked like they  
2 were kind of smoldering or smoking.

3 Q All right. Can you describe that individual's demeanor?

4 A He was extremely upset and kind of hysterical.

5 Q Okay. And when you say upset was that like angry upset?

6 A No. He was crying and just -- he was extremely upset.

7 Q Do you recall specifically what he was saying?

8 A Not while we were on scene.

9 Q Okay. Did you treat this individual?

10 A Yes, I did.

11 Q Did you come to learn his name?

12 A Yes, I did.

13 Q Did you come to learn his name?

14 A Yes, I did.

15 Q Was his name Theodore Bejarano?

16 A Yes.

17 Q When you initially start treating him did you notice any other injuries  
18 besides the smoldering shorts and the singed hair?

19 A He had first and second degree burns on his head and his torso, as well  
20 as his arms?

21 Q Did you smell anything as you approached him?

22 A Burning flesh and singed hair.

23 Q Can you describe the injuries that you saw on his face?

24 A He had first degree burns on his -- mainly on the left side of his face,  
25 which is almost like a sunburn. I believe he had one or two blisters, but mainly it

1 was first degree burns on the left side of his face, around his mouth; he had around  
2 his nose also, as well as his hair was singed. He had -- you could actually see  
3 some reddening in his scalp. And that was just his face.

4 Q Okay. The lips area -- was there any specific injury you noticed on his  
5 lips?

6 A There was some reddening and you can also see some -- almost like  
7 discoloration -- like black -- like they -- someone -- people get that when they inhale  
8 smoke. It's like a -- they inhale smoke, so it's -- they get a black soot around their  
9 mouth and nose.

10 Q Okay. Describe the injuries on his torso area?

11 A He had first degree burns around his entire -- around his entire torso,  
12 which is almost like a sunburn, as well he had second degree burns, which are  
13 blistering, to different spots of his torso. Like I said, mainly on the left side his chest  
14 and his belly and they went around his left flank into just the part of his back.

15 Q Did it appear that the torso area had become more burned than the  
16 actual face area?

17 A Yes.

18 Q Was there any blistering on the torso area?

19 A Yes, there was.

20 Q Do you know when you initially started treating him whether any of  
21 those blisters had -- I don't know what the correct term is, but popped?

22 A I don't remember specifically.

23 Q Okay. Can you describe the injuries on his arms?

24 A He had first and second degree burns on his left arm, as well as both of  
25 his hands and his palms.

1 Q And was there any blistering on his hands?

2 A Yes.

3 Q On your -- as one of your duties, are you asked to make estimations on  
4 how much surface area was burned?

5 A Yes.

6 Q And in this case did you do that?

7 A I did.

8 Q And what is your estimation as to how much his body was burned?

9 A In my report I actually estimated incorrectly. I went back and I  
10 estimated it at approximately 33 percent of his body.

11 Q What was the initial number that you gave?

12 A I believe it was four to five percent. I forgot the zero.

13 Q You forgot one of the zeros and that changed the percentage?

14 A Both the zeros. It should've been 40 to 50 percent.

15 Q Okay. But as you sit here today it's your belief that it's more accurately  
16 33 percent?

17 A Yes, sir.

18 Q That's just an error that happens?

19 A Yes.

20 Q How was it that you began to treat these injuries? What did you first do  
21 to start treating Theodore?

22 A First what I did is I had him take off his shorts and his underwear so he  
23 was completely naked. Had him sit on my -- on my gurney and then we loaded him  
24 back into our truck. I put a burn sheet over him, which is just pretty much a sterile  
25 dressing to go completely over his body. I put him on some oxygen. I started an IV

1 to give him some fluids and pain medication.

2 Q And what is the purpose of this pain medication? Is it to stop the  
3 burning or what is it for?

4 A It's to -- whenever you have a sunburn or a first or second degree burn  
5 it's extremely painful. And it's just to help alleviate some of the distress that he was  
6 in as far as pain.

7 Q Okay. After you do that what do you do?

8 A We started taking him to UMC trauma, which is our destination for any  
9 burn patient.

10 Q Okay. About how much time did you spend with him outside the  
11 ambulance before you transported him, if you recall?

12 A Do my notes for the call. From the time we went in with the police  
13 department and the time we started transporting it was approximately seven  
14 minutes.

15 Q When you actually get him loaded into the ambulance can you describe  
16 Theodore's demeanor at this time?

17 A He was crying. He was in pain. He kept saying, you know, he couldn't  
18 understand why anybody would this, and he kept asking me if he was gonna ever  
19 see his child -- his daughter again. He was -- just went from crying to just screaming  
20 because he was in so much pain.

21 Q What did you do once you arrived at UMC?

22 A We took him inside to -- inside the trauma center and I -- we had moved  
23 him over to their gurney and I gave my report to the hospital staff and then I worked  
24 on my report.

25 Q Okay. Did you have any other interaction with Theodore after you

1 handed him over to the hospital staff?

2 A No, I did not.

3 MR. STEPHENS: Court's indulgence, Your Honor.

4 I'll pass the witness.

5 THE COURT: Cross-examination?

6 MR. COFFEE: Thank you.

7 **CROSS-EXAMINATION**

8 BY MR. COFFEE:

9 Q Did he remain verbal in the back of the ambulance then?

10 A Yes, sir.

11 Q Is one of things that you do as a paramedic try to get a history?

12 A Yes.

13 Q Did you attempt to do that with him?

14 A Yes.

15 Q Was he able to provide one?

16 A Yes.

17 Q Said he'd been lit on fire by another man?

18 A Yes.

19 Q When you are -- you're administering pain medication, you said?

20 A Yes.

21 Q Burns are very painful; right?

22 A Yes, sir.

23 Q When you administer the pain medication are you concerned about

24 interactions -- what else might be in a person's system?

25 A Yes, sir.

1 Q Did you ask if he'd been drinking?

2 A Yes, sir.

3 Q Did he say he'd been drinking?

4 A Without looking at my chart, if he had been drinking then it would be in  
5 my narrative.

6 Q Is that your chart?

7 A Yes, sir.

8 Q Would it help refresh your recollection to look at that?

9 A Yes, if I could.

10 Q Will you take a look, please?

11 A Since I did not put it in my narrative then he -- then he must have said  
12 he was not drinking. Because I -- if someone is drinking then they always -- I always  
13 put it in my narrative.

14 Q Okay. And that is one of the standard questions in your normal practice  
15 that you would ask just to get a baseline, a history; is that correct.

16 A In mine, yes.

17 Q And there's no reason in particular you wouldn't have asked it in this  
18 case. It's fair to assume that it was asked?

19 A Yes.

20 Q All right. Did you ask about narcotics -- if he had any narcotics in his  
21 system?

22 A Yes. Because I ask if anybody's been drinking, if they have any  
23 narcotics --

24 Q Okay.

25 A -- or if they smoke.



1 Q Okay. Do you know the answers to those questions?  
2 A No. He stated no.  
3 Q He stated no. But, again, he stated no to drinking also. He did appear  
4 intoxicated to you?  
5 A No, he did not.  
6 Q Did you do a blood draw?  
7 A I do not do that.  
8 Q That would be something that would take place at the hospital?  
9 A Yes, sir.  
10 Q Somebody else would have to follow-up on that if they wanted  
11 information about it?  
12 A Yes, sir.  
13 Q All right. Same thing with toxicology. You don't do toxicology in the  
14 back of your van?  
15 A No, sir.  
16 Q That would be something that would take place at the hospital that  
17 somebody would have to follow-up?  
18 A Yes, sir.  
19 Q You said you were -- you waited about 200 yards out?  
20 A Yes, sir.  
21 Q And that's a fairly good distance?  
22 A Yes.  
23 Q How long did you wait the 200 yards?  
24 A I would have to check.  
25 Q Okay.

1 MR. COFFEE: Unless -- is it okay [indiscernible]?

2 THE WITNESS: We arrived on scene at midnight 58 and that was holding --  
3 holding short. And then we went in with Metro at 1:01 a.m.

4 BY MR. COFFEE:

5 Q Okay. So you're three minutes, give or take. I mean, it could be two;  
6 could be four depending on how we split the clock, but about three minutes; is that  
7 fair?

8 A Yes, sir.

9 Q And you're watching what's going on during that three minutes?

10 A We could see the gas station, but we can't see what's going on.

11 Q That's what I was going to say because I was a little confused with the  
12 testimony before. You couldn't tell that the person had been burned at that distance  
13 visually?

14 A No.

15 Q That was actually when you got closer to him?

16 A Yes, sir.

17 Q Could you see people at the gas station at 200 yards?

18 A I could -- I can't recall.

19 Q Okay. When you actually got to the gas station and you saw Theodore,  
20 where was he again?

21 A He was standing at the end of an island -- like a pump island.

22 Q So he's up and still mobile, still able to walk?

23 A Yes.

24 Q And still able to talk --

25 A Yes.

1 Q -- because you said he was verbal. Okay. Very good.

2 MR. COFFEE: Thank you. Nothing further.

3 MR. STEPHENS: Just a few questions, Your Honor.

4 **REDIRECT EXAMINATION**

5 BY MR. STEPHENS:

6 Q Do you have any specific recollection of asking Theodore whether or  
7 not he had been drinking that night?

8 A I don't specifically remember asking him.

9 Q Okay. And do you have any specific recollection asking him as to  
10 whether or not he smokes?

11 A Again, I don't have -- I can't say I did do it.

12 Q And you potentially respond to several calls during a shift?

13 A Yes.

14 Q And do you recall Theodore specifically telling you that he does or does  
15 not smoke?

16 A I do not remember.

17 Q Okay. One more question. Do you specifically recall whether  
18 Theodore told you whether he was drinking or was not drinking?

19 A I don't specifically remember.

20 MR. STEPHENS: I'll pass the witness.

21 **RECROSS EXAMINATION**

22 BY MR. COFFEE:

23 Q But without specifically remembering, it seems like you're a person who  
24 takes their job seriously?

25 A Yes, sir.

1 Q You have a methodology to what you do?

2 A Yes, sir.

3 Q You do it in just about every case. I would imagine you've got a  
4 checklist of things; is that fair?

5 A Yes, sir.

6 Q One of those things is you ask people if they've been drinking or if  
7 they're on drugs?

8 A Yes, sir.

9 Q Because it's important for the history?

10 A Yes, sir.

11 Q So there's no reason to think that that didn't happen in this case, is  
12 there?

13 A I can't say I specifically asked it, but usually that is one question -- three  
14 questions I do ask.

15 MR. COFFEE: Very good. Thank you.

16 THE COURT: Anything further?

17 MR. STEPHENS: No, Your Honor.

18 THE COURT: Thank you, ma'am, for your testimony. You're free to go.

19 State, who's your next witness?

20 MS. WONG: Bryan Griggs.

21 THE COURT: While the next witness is on his way in, let me ask the  
22 members of the jury. We've been going for about an hour. Anyone need a break?

23 All right. Bring the next witness in.

24 THE MARSHAL: Please set up on the witness stand. Remain standing and  
25 raise your right hand and face the clerk, please.

**BRYAN GRIGGS**

[having been called as a witness and being first duly sworn, testified as follows:]

THE COURT CLERK: Please be seated. Please state your name and spell your first and last name for the record.

THE WITNESS: Bryan Griggs; B-R-Y-A-N, G-R-I-G-G-S.

THE COURT: You may proceed.

MS. WONG: Thank you, Your Honor.

**DIRECT EXAMINATION**

BY MS. WONG:

Q Good morning, Mr. Griggs.

A Good morning, ma'am.

Q How are you employed?

A I'm an electrician and an EMT.

Q Okay. Were you also employed as an electrician back in 2012?

A No, ma'am.

Q Okay. But currently you are. You work both jobs?

A Yes, ma'am.

Q Okay. How long have you been a paramedic?

A Roughly three years.

Q So on October 10<sup>th</sup> of 2012 what shift were you working?

A I want to say it was the 1700 to 05 front half, so it would've been Sunday through Wednesday, every other Thursday?

Q And that would be graveyard?

A Yes, ma'am.

Q Now on October 10<sup>th</sup>, 2012 approximately 12:45 in the morning or so,

1 were you dispatched to a Circle K located at 9487 South Las Vegas Boulevard?

2 A Yes, ma'am.

3 Q What was the nature of that call?

4 A Came across on our MBT, which is our -- it gives us our notes and our  
5 type of calls. It's a little computer system. It came across as a psych suicide.

6 Q A psych suicide?

7 A Yes, ma'am.

8 Q Were there any other details provided?

9 A There were notes saying hold short, waiting for Metro. I can't recall the  
10 whole thing, but I remember it stating that patient -- or -- patient trying to light himself  
11 on fire or something like that. They're all garbled.

12 Q Okay. Now were you working by yourself on that day or with other  
13 people?

14 A No, ma'am. I had my partner and we had an intern that was there. I  
15 think I was second shift.

16 Q Okay. And was your partner Sheri Jones, the lady we just saw?

17 A Yes, ma'am.

18 Q And did you then respond to that location?

19 A Yes, ma'am.

20 Q How soon thereafter did you arrive?

21 A We got the call 12:45. We were there -- there within probably five  
22 minutes or so.

23 Q All right. And who was driving the ambulance?

24 A I was.

25 Q Now when you responded to the scene were you the first to arrive or

1 did Metro arrive first?

2 A We held short within 500 meters or so. The thing we see -- we were  
3 first there and we saw Metro pull in; we pulled in right behind them.

4 Q Okay. And what was your responsibility when you arrived on scene?

5 A To find out what's going.

6 Q Okay. What do you mean by that?

7 A Assess the scene. So we find out what's going on and what type of call  
8 it was. Because we got there -- it was just what the note said --

9 Q Okay.

10 A -- patient was trying to light himself on fire.

11 Q All right. So specifically what did do?

12 A We got out of the truck, put our gloves on. I remember Teddy running  
13 up to us saying I've been lit on fire. So my partner wanted to strip him down;  
14 grabbed the burn sheet with -- her and the intern. I went to check out the other  
15 gentleman.

16 Q So while Sheri and the intern were tending to the victim what did you  
17 do?

18 A I had to get a quick assessment of the other gentleman on scene; get  
19 his blood pressure, medical history, find out what was going on.

20 Q So there was another gentleman also on scene.

21 A Yes, ma'am.

22 Q Can you describe that person?

23 A Yes, ma'am. He was tall gentleman, probably mid-50s, early 60s on  
24 scene.

25 Q Now how did you know that this gentleman was also associated with

1 the call?

2 A Metro directed me in that direction.

3 Q So this older gentleman, do you see him in the courtroom today?

4 A Yes, ma'am.

5 Q Will you please point to him and describe an article of clothing that he is

6 wearing?

7 A Gentleman with the beard, blue shirt.

8 MS. WONG: May the record reflect the identification of the Defendant?

9 THE COURT: The record will so reflect.

10 MS. WONG: Thank you.

11 BY MS. WONG:

12 Q So you did make contact with the Defendant at that point?

13 A Yes, ma'am.

14 Q Okay. And did you have a conversation with him?

15 A Yes, ma'am.

16 Q Can you tell us what he told you?

17 A Went up to him, introduce myself. He introduced himself as Patrick. I

18 asked him if he had any medical problems; he said no. He was sitting on the car --

19 Metro's car -- the hood eating gummy worms.

20 Q Was he in handcuffs at the time?

21 A No, ma'am.

22 Q Okay. That's why he was able to eat gummy worms?

23 A Yes, ma'am.

24 Q All right. And were there any Metro officers with him?

25 A There was -- I don't recall. They were in the area.



1 Q They were in the area; okay.

2 A I don't remember where everyone was at.

3 Q Okay. They weren't standing there standing guard watching him?

4 A No, ma'am.

5 Q All right. So he's there's sitting -- gummy worms, you asked him if he

6 had any medical issues?

7 A Yes, ma'am.

8 Q And he specifically said what?

9 A I don't recall. I don't recall what he said.

10 Q I'm -- sorry. Yes or no. Did he say he had any medical issues?

11 A No, ma'am, not that I recall.

12 Q Okay. And so once you asked him about his medical condition what

13 else did you ask?

14 A I remember my partner Sheri yelling at me saying hey, we got to go;

15 hurry up, hurry up, we got to go. So I got a set of vitals real quick, asked him what

16 happened.

17 Q When you ran these tests on him did anything come back abnormal?

18 A His blood pressure was a little elevated.

19 Q Okay. Aside from that was there anything else?

20 A No, ma'am.

21 Q All right. So he was medically cleared?

22 A We can't medically clear him. I give the set of vitals to County fire and I

23 let them decide --

24 Q Okay.

25 A -- because we were actually getting ready to leave when they pulled up.

1 Q Did you have any further contact with the Defendant? Did you have  
2 any conversations with him?

3 A Yes, ma'am.

4 Q Okay. Can you tell us about that?

5 A At -- I remember going up to him, introducing -- getting the set of vitals,  
6 asked him what happened, and he told me that a guy was asking for money, he told  
7 him to get away --

8 Q Okay. A guy -- some guy was asking him for money, meaning the  
9 victim was asking him for money?

10 A Yes, ma'am.

11 Q Okay. And he told him, meaning who's he?

12 A Patrick.

13 Q Okay. The Defendant told him what?

14 A To get away. Apparently the victim, Teddy, didn't get away. He said he  
15 -- I don't remember what I wrote on my statement. But I remember he saying he  
16 pulled out the nozzle of the gas tank and lit him on fire.

17 Q Okay. So the Defendant said he pulled the nozzle out of the gas tank  
18 and sprayed the victim -- sprayed the victim with gas?

19 A Yes, ma'am.

20 Q Did he ever at any point say it was an accident that gas just came out of  
21 a nozzle?

22 A No, ma'am. Not that I recall.

23 Q Okay. And what else did he say besides he took the gas -- the nozzle  
24 out and sprayed the victim with gas?

25 A And he lit him on fire.

1 Q Then he admitted that he lit him on fire?  
2 A Yes, ma'am.  
3 Q All right. Did he say anything else?  
4 A Stuff like this doesn't happen to him in California.  
5 Q All right. And was there anything else or was that the end of the  
6 conversation?  
7 A I want to say that was -- from what I recall it was the end of the  
8 conversation because we had to go.  
9 Q All right. Now, what was the Defendant's demeanor at the time that he  
10 told you all this?  
11 A Very casual, like nothing happened.  
12 Q Did he ever tell you that he felt scared?  
13 A No, ma'am. He didn't even look scared.  
14 Q Did he ever tell you that the victim threatened him?  
15 A No, ma'am.  
16 Q Did he say that he did this in self-defense?  
17 A No, ma'am.  
18 Q And did you observe any injuries on the Defendant?  
19 A No, ma'am, there were none.  
20 Q Okay. So now at some point you did end up transporting the victim to  
21 the hospital?  
22 A Yes, ma'am.  
23 Q Did you have any conversations with the victim while you were in the  
24 ambulance?  
25 A I was driving. I could hear everything that was going on.

1 Q Okay.

2 A Teddy was back there screaming, saying that he wasn't sure if he was  
3 going to see his wife or kids again, stuff like that.

4 MS. WONG: I'll pass the witness.

5 THE COURT: Cross-examination?

6 **CROSS-EXAMINATION**

7 BY MR. COFFEE:

8 Q You didn't ask Mr. Newell specifically whether he was defending  
9 himself?

10 A No, sir.

11 Q You didn't ask Mr. Newell whether or not the person had harassed him  
12 for ten to 15 minutes before the fire started?

13 A No, sir. That's not my job.

14 Q That's what I was going to say. You're a step ahead of me. It's not  
15 your job; right?

16 A No, sir.

17 Q That's Metro, that's detectives. He didn't deny having lit the man on  
18 fire; is that fair?

19 A Yes, sir. He did not deny it.

20 Q And you said he didn't seem scared. Now, by the time you get there  
21 Metro's arrived?

22 A We pulled up with Metro.

23 Q Okay. And you actually sat at a distance for two to three minutes  
24 beforehand according to --

25 A Yes, sir.

1 Q -- according to logs -- a couple hundred yards maybe.  
2 A Yes, sir.  
3 Q And that's normal practice?  
4 A Yes, sir.  
5 Q By the time you get there the confrontation was over; is that fair?  
6 A Yes, sir.  
7 Q You didn't see Mr. Newell run and try to attack Mr. Bejarano in any  
8 way?  
9 A No, sir.  
10 Q You didn't see Mr. Bejarano get up and charge Mr. Newell in any way?  
11 A No, sir.  
12 Q Not when you were at the scene or when you were at the distance for  
13 the two to three minutes?  
14 A No, sir. It was 12:45, one o'clock in the morning.  
15 Q Yeah. The point is the conflict appeared to be over by the time you got  
16 there?  
17 A Yes, sir.  
18 Q But Mr. Newell's blood pressure was elevated still?  
19 A Yes, sir.  
20 Q You don't know if that's normal or not for him?  
21 A Yes, I don't know.  
22 Q You were asked about medical problems. Your concern primarily is  
23 immediate medical problems as an EMT for example; right?  
24 A Yes.  
25 Q For example, if -- the blood pressure -- did you do anything to treat his

1 blood pressure?

2 A No, sir.

3 Q It wouldn't be something you'd do. You're an EMT; right?

4 A Even medics wouldn't. I mean, there's a few drugs medics need to do  
5 to help lower the blood pressure, but there isn't much. The hospital has to deal with  
6 it.

7 Q The hospital has to do deal with it. And the point being, when you  
8 asked about medical problems, it was clear what you were asking is if he needed  
9 medical help, he needed treatment; is that fair?

10 A Yes, sir.

11 Q And he didn't need medical help or treatment?

12 A Yes, sir.

13 Q All right. Do you know whether he was diabetic or not?

14 A No, sir.

15 Q You said you weren't sure about the exact words when you asked  
16 medical problems. Might he have mentioned diabetes to you at that point?

17 A He possibly could have.

18 Q He might have; okay. Do you know about injuries? Did he mention  
19 anything about that?

20 A No, sir.

21 MR. COFFEE: Okay. Fair enough. Thank you for your time.

22 THE WITNESS: You're welcome, sir.

23 THE COURT: Anything further, State?

24 MS. WONG: No, Your Honor.

25 THE COURT: Thank you, sir for your testimony. You're free to go.

1 THE WITNESS: Thank you, sir.

2 THE COURT: State, who is your next witness.

3 MR. STEPHENS: Officer Knudson.

4 THE MARSHAL: If you could step up to the witness stand, please, officer.

5 Remain standing. Raise your right hand and face the clerk, please.

6 **BRETT KNUDSON**

7 [having been called as a witness and being first duly sworn, testified as follows:]

8 THE COURT CLERK: Please be seated. Please state your name and spell  
9 your first and last name for the record.

10 THE WITNESS: Brett Knudson; B-R-E-T-T, K-N-U-D-S-O-N.

11 THE COURT: You may proceed.

12 MR. STEPHENS: Thank you, Your Honor.

13 **DIRECT EXAMINATION**

14 BY MR. STEPHENS:

15 Q Officer Knudson, how are you employed?

16 A By the LVMPD.

17 Q All right. And how long have you been working there?

18 A About five years now.

19 Q Are you currently assigned to any patrol or unit?

20 A Currently I'm assigned to South Central 11 patrol.

21 Q Okay. On October 12<sup>th</sup> -- or sorry, October 10<sup>th</sup> of 2012 were you  
22 working in that same command?

23 A Well, yeah, South Central Area Command; yes, I was.

24 Q Okay. And were you dispatched to a call coming from 9487 South Las  
25 Vegas Boulevard?

1 A Yes.

2 Q Is there a Circle K located at that address?

3 A Yes.

4 Q Do you recall about what time you were dispatched to that area?

5 A It was nighttime. I don't recall specifically, but I'd probably say around  
6 like 2100 or 2200, 9 or 10 p.m.

7 Q Okay. Would it refresh your recollection to refer to the CAD report?

8 A Sure.

9 MR. STEPHENS: Your Honor, may I approach?

10 THE COURT: You may.

11 THE WITNESS: Okay.

12 BY MR. STEPHENS:

13 Q Does that refresh your recollection?

14 A Yes.

15 Q About what time would you have arrived at?

16 A It looks like midnight -- midnight 55.

17 Q Okay. So almost one o'clock?

18 A Yep.

19 Q Is that when you specifically decided to go to that residence was at  
20 midnight 55?

21 A Yes.

22 Q And I said residence. I apologize, I meant location.

23 A Yes.

24 Q Okay. Can you describe what you observed when you arrived?

25 A When I arrived there was an ambulance. There was -- I think there



1 were two patrol vehicles there. My partners, Officer Corea and Officer Aquino.  
2 There was a male victim in the back of -- in an ambulance and then there was a  
3 male standing in front of Officer Corea's patrol vehicle in handcuffs.

4 Q At that time he was in handcuffs when you saw him?

5 A Yes.

6 Q The individual that was inside the ambulance did you have an  
7 opportunity to speak to him at all at that time?

8 A No.

9 Q Can you describe -- did you hear anything coming from the ambulance?

10 A Yes.

11 Q What did you hear?

12 A Screams.

13 Q Were they angry screams, painful screams; can you describe the  
14 scream a little bit?

15 A A painful screams, I guess. It's just -- long screams.

16 Q Okay. Do you recall specifically what was being said or was it just a  
17 scream?

18 A It's muffled from the doors. I didn't hear what was actually being said.

19 Q And you said there was an individual by Officer Corea's vehicle?

20 A Correct.

21 Q Can you describe that individual for us?

22 A White male adult with gray hair.

23 Q Is that individual present in the courtroom today?

24 A Yes.

25 Q Can you point to him and describe something he's wearing?

1 A Wearing a blue button-up collared shirt.  
2 MR. STEPHENS: Will the record identification, Your Honor?  
3 THE COURT: The record will so reflect.  
4 MR. STEPHENS: Thank you.  
5 BY MR. STEPHENS:  
6 Q Where was he at? Was he standing in front of the patrol vehicle?  
7 Where was he actually located?  
8 A He was standing -- yeah, directly in front of the patrol vehicle by the  
9 bumper area, but I believe he was actually sitting on the front buddy bumper area.  
10 Q Okay. Was he doing anything at that time or just sitting?  
11 A I think he was just -- I think he was sitting and like eating something --  
12 something like that, I don't know.  
13 Q He was eating something?  
14 A I can't remember. Yeah, I think he was eating something.  
15 Q Okay. Do you -- but you believe he was handcuffed at that time?  
16 A Yeah, I think so. Yeah, his hands were behind his back.  
17 Q Okay. How was he eating anything if he was handcuffed?  
18 A He's kind of like bringing it up to the side.  
19 Q And then reaching his head down?  
20 A Yeah.  
21 Q Okay.  
22 A If I remember correctly.  
23 Q Okay. Do you specifically recall him being in handcuffs?  
24 A I'm 99 percent sure he was in handcuffs.  
25 Q Did you have any conversations with the Defendant?

1 A Yes.

2 Q How did those conversations begin?

3 A Officer Corea and Officer Aquino were trying to figure out what kind of  
4 crime or what kind of incident we had, so I was standing basically as a cover officer  
5 just observing the Defendant and that's all I was doing.

6 Q Okay. So you weren't necessarily speaking with him?

7 A No.

8 Q Can you describe the Defendant's demeanor?

9 A Calm, talkative.

10 Q From your prospective did it appear that he wanted to speak with  
11 police?

12 A Yes.

13 Q What was it that made you believe that he wanted to speak to police?

14 A I wasn't asking him any questions and he was just talking to me.

15 Q Okay. What was it that the Defendant was telling you?

16 A He was telling me to the effect that I would have done the same thing to  
17 the victim.

18 Q He's telling you that you would have done the same thing?

19 A Correct.

20 Q What was your response to that?

21 A I said I would never do that to anybody.

22 Q Did he ever make any statements to you that he did the right thing?

23 A Yes.

24 Q What was it that he actually said, if you can recall?

25 A He said -- he also said something to the effect that if he was in

1 California that he wouldn't even be in this situation.

2 Q Did these statements surprise you?

3 A Yes.

4 Q Why is that?

5 A Didn't seem normal.

6 Q His statements didn't seem normal or --

7 A The actions didn't fit the -- from what he was saying to me. I was -- kind  
8 of unbelievable.

9 Q Did you see any injuries on the Defendant?

10 A Not until I got to the hospital.

11 Q Was the Defendant transported to the hospital?

12 A Yes.

13 Q Who was in the back of the ambulance?

14 A Just the ambulance workers -- just EMTs.

15 Q And was the victim or the Defendant in the back of the ambulance?

16 A Victim.

17 Q Okay. The individual that you were speaking to -- or that was speaking  
18 to you --

19 A Okay.

20 Q -- outside Officer Corea's car, was that the Defendant or the victim?

21 A Defendant.

22 Q Okay. And so did the Defendant have any injuries on him?

23 A No.

24 Q Did you eventually contact any other police officers to come to the  
25 scene?

1 A Yeah. We called violent crime detectives. I can't recall which actual  
2 detective it was -- whatever on call one there was.

3 Q Okay. What did you do after making that phone call?

4 A They told me that they were going to meet -- follow the victim to -- I  
5 think we went to UMC and then they would meet me down there and we'd go from  
6 there.

7 Q So did you follow the ambulance to UMC?

8 A Yes.

9 Q Are you tailgating the ambulance or anything?

10 A Yes.

11 Q And do you hear anything coming from the ambulance?

12 A Not from my vehicle; no.

13 Q When you arrived at the hospital what did you observe?

14 A I observed burns on the victim's face and the left side of his body and  
15 him screaming.

16 Q And was this a similar scream that you initially heard when you arrived  
17 at the gas station?

18 A Yes.

19 Q When you say the burns, were any of the burns peeling?

20 A Yes.

21 Q Did it appear that his skin had blistered?

22 A Yes.

23 Q Where were the blisters located; if you can recall?

24 A From what I remember mostly in his face and his upper left arm area.

25 Q Okay. Was he covered with anything?

1 A At the hospital he was just wearing a sheet -- bed sheet.  
2 Q Did you attempt to speak to the victim at that time?  
3 A Yes.  
4 Q And how did that go?  
5 A Screams.  
6 Q Screams?  
7 A Yeah. He wasn't able to -- I don't think he was able to comprehend any  
8 kind of conversation with me.  
9 Q What did you do at that time?  
10 A Waited for detectives.  
11 Q Okay. Did you ever ask whether or not the victim could fill out a  
12 voluntary statement for you?  
13 A I did.  
14 Q And what was the victim's response?  
15 A He didn't say anything. He continued screaming.  
16 Q Did he even acknowledge that you had asked the question?  
17 A No.  
18 Q Did you wait at the hospital until the detectives arrived?  
19 A Yes.  
20 Q And at some point the detectives arrived?  
21 A Yes.  
22 MR. STEPHENS: Court's brief indulgence.  
23 THE COURT: Sure.  
24 MR. STEPHENS: I'll pass the witness.  
25 THE COURT: Cross-examination.

## CROSS-EXAMINATION

1  
2 BY MR. COFFEE:

3 Q So if there was going to be some sort of voluntary statement by Mr.  
4 Bejarano you were unable to get it?

5 A Correct.

6 Q He was in too much pain by the time you got to the hospital?

7 A Correct.

8 Q You turned the case over to the detectives?

9 A Correct.

10 Q Detectives would be the one to follow up at a later date and get a  
11 voluntary statement if they thought it was necessary?

12 A Correct.

13 Q Wouldn't be you. Your job ended that night at the hospital?

14 A That's correct.

15 Q You said something about Mr. Newell said -- you know, done the same  
16 thing if in my place or in my shoes, something like that; right?

17 A Correct.

18 Q And you said I never would?

19 A That's correct.

20 Q Are you a patrol officer?

21 A Yes.

22 Q Do you carry a service revolver?

23 A I do.

24 Q Why?

25 A Protection.

1 Q Are you willing to use it if you have to?

2 A Yes.

3 Q Have you had to?

4 A No.

5 Q It's a difficult decision I would imagine; yes?

6 A It is.

7 MR. COFFEE: Thank you. Nothing further.

8 THE COURT: State, anything further?

9 MR. STEPHENS: No, Your Honor.

10 THE COURT: Thank you, officer, for your testimony. You're free to go.

11 THE WITNESS: Thank you.

12 THE COURT: State, who's your next witness?

13 MS. WONG: Judge, can we approach?

14 THE COURT: Sure.

15 [Bench conference -- not recorded]

16 THE COURT: All right. Ladies and gentlemen, the next witness is not  
17 available until one o'clock, so we're going to go ahead and take a lunch break. It's  
18 going to be a little bit longer just because of that scheduling issue.

19 During the lunch break you are admonished that until you begin  
20 deliberations you are under oath and have not been discharged. Do not reach any  
21 conclusions about this case as you've not heard all the evidence. Do not talk to  
22 anyone about this case. Do not investigate any facts of this case. Do not view any  
23 media, press or any reports about this case. Do not talk to anyone who may be  
24 involved in any way with this case. Do not discuss the facts of this case with each  
25 other. Remember to wear your badge at all times in and around the courthouse.



1 Please leave notebooks on your chairs and we'll see around one o'clock then; all  
2 right. Thank you.

3 [Outside the presence of the jury]

4 THE COURT: All right. We're still on the record outside the presence of the  
5 jury. Anything that either side wanted to memorialize or put on the record?

6 MR. COFFEE: Yes, Judge. Ms. Wong and I've been discussing the jury  
7 instructions. And I will let Ms. Wong explain the situation because I don't want to  
8 misstate anything.

9 MS. WONG: Okay.

10 THE COURT: All right.

11 MS. WONG: Your Honor, in Count 3 the State wanted to amend -- instead of  
12 charging a straight assault with use of a deadly weapon we were just going to  
13 charge attempt assault with a deadly weapon. The language, however, regarding --  
14 in line 17 of the Amended Information where it states that the Defendant did  
15 unlawfully attempt to use physical force against another person. That would be  
16 stricken obviously because you can't attempt an attempt battery. So the State  
17 wanted to amend Count 3 to simply charge attempt assault with a deadly weapon  
18 based upon the evidence that came out yesterday. And I think Mr. Coffee has an  
19 objection to that and I'll let him state his objections.

20 MR. COFFEE: I do, Judge. And I don't believe that Nevada law recognizes  
21 and attempt assault. It's an attempt attempt. Essentially there are two sections to  
22 the statute. One is an attempt battery. The other has to do with placing somebody  
23 in reasonable apprehension of bodily harm. I think the second section requires  
24 actual fear. There's not a lot of Nevada cases on it. I found some things out of the  
25 Ninth Circuit; other circuits disagree. But I think a necessary element for that

1 second section is actual fear and that's -- I think the problem with the State's case.  
2 The reason they're moving to amend is they haven't been able to show that Mr.  
3 Bejarano was in actual fear. The battery that we're talking about is what happens  
4 after the fire's lit, not beforehand.

5 THE COURT: Right. When he's waving -- are we talking about him waving  
6 the knife around? Is that the situation?

7 MR. COFFEE: Yeah, waving the knife around afterwards. My position is  
8 Nevada doesn't recognize an attempt assault. They've never seen an attempt  
9 assault charged. Again, for the battery portion I know you can't attempt an attempt;  
10 like, essentially, you're at the same spot. I think also -- because of the way this is  
11 structured and requires the victim to actually be afraid, the second section of the  
12 statute is what they're relying on, I think they're deleting an element essentially by  
13 offering an attempt. Because if they weren't offering an attempt what I would be  
14 asking for is an instruction that says you have to show that there was actual  
15 apprehension on the part of the victim. I think they're completely deleting that  
16 element by trying to charge it as an attempt. I think it's very clever. And I've told  
17 Mrs. Wong -- Ms. Wong as much that I thought it's a very clever way to get to  
18 essentially the same charge, 1 to 5 as opposed to 1 to 6. I just don't know if it's  
19 legally indicated. We'll submit to the Court's discretion on that.

20 THE COURT: Well -- I mean, let me ask you this. Why do you even believe  
21 that fear is an element? I mean, I assault -- let's say I go up to, you know, a navy  
22 seal and I say I'm about to punch you and I get ready to wind up and punch him.  
23 He's probably not really going to be afraid of me, but he could believe that I'm about  
24 to punch him, that's still an assault. Why is fear even an element?

25 MR. COFFEE: It's -- well, any by fear -- and I use fear as the shorthand. It's

1 reasonable apprehension of bodily harm --

2 THE COURT: Right.

3 MR. COFFEE: -- is what we're talking about right actually. The Ninth Circuit  
4 has interpreted a statute for Arizona that mirrors our statute's language to require  
5 that the victim actually be in some sort of fear. There are numerous situations  
6 where there may not be any fear involved and it's simply not an assault. If it's an  
7 attempt battery -- if the Court, for example, took a swing at the navy seal and meant  
8 to hit him in the face.

9 THE COURT: Right.

10 MR. COFFEE: That qualifies for the first part of assault.

11 THE COURT: Right.

12 MR. COFFEE: That is it would be an assault under the first prong, attempt  
13 battery.

14 THE COURT: Right.

15 MR. COFFEE: But if what you are trying to do is scare the person then you  
16 have -- then the person actually has to be scared. The second prong is scaring the  
17 person, the first prong is an attempt battery that fails. Statute's split, there's an aura  
18 in between and that's the distinction between the two prongs. One is actually trying  
19 to physically hurt the person, you failed to do it. You miss when you throw a punch,  
20 whatever it might be. The second prong is trying to make them afraid. I think that's  
21 much more appropriate for what we've got. The modification that Ms. Wong's talked  
22 about actually addresses that second prong trying to make them afraid. But when  
23 you try to make them afraid I think you actually have to make them afraid, again.

24 THE COURT: Well -- I mean -- okay. I'm guessing the problem here is this.  
25 You have a guy who was in the induced coma so he doesn't remember much of

1 anything. He doesn't remember what he actually felt. He doesn't even remember  
2 the incident happening. But you have testimony from other people that he's waving  
3 the knife around in the vicinity of this guy's penis saying I'm gonna cut your -- I  
4 forgot the exact -- I'm gonna cut your dick off or whatever he's going to say.

5 MR. COFFEE: Yeah.

6 THE COURT: Now this guy may not actually remember, because he's been  
7 in a coma, feeling any fear, but how does not -- I mean, I guess I'm asking the State  
8 why do you even need that amendment considering somebody said yeah, he was  
9 waving this knife around near his penis, and this guy's got his clothes his off  
10 because his clothes have been burned, saying I'm gonna cut your dick off, why do  
11 you even need the amendment?

12 MS. WONG: Your Honor, my concern more so is I don't think enough  
13 evidence was presented to show that the victim was even aware that the knife was  
14 there. It's one thing to require actual fear, which I contend we do not need to prove,  
15 contrary to what Mr. Coffee said my position was. I don't believe that you actually  
16 have to show actual fear. I think fear is judged by an objective standard, so even if  
17 a police officer or some navy seal was not afraid of something if the reasonable  
18 person in that same position would have been afraid I think that's still -- that still  
19 meets the fear requirement. My concern is I don't think we've even shown that the  
20 victim was even aware that the Defendant was waving a knife at his penis. That's  
21 why. I don't want to create --

22 THE COURT: Well -- I mean -- again, the victim's awareness is a funny thing  
23 because we're talking about a guy who was in a coma. He wasn't -- he doesn't --  
24 whatever he was aware of at the time we'll never be able to know --

25 MS. WONG: Right.

1 THE COURT: -- because he doesn't remember it.

2 MS. WONG: Correct.

3 THE COURT: But if -- to the extent that it's objective, if you have other people  
4 saying, yeah, this guy was waving a knife around and saying I'm going to cut your  
5 penis, does it matter what the victim himself -- I mean, the jury can make an  
6 inference at that time he probably did feel fear. We don't actually have testimony  
7 because he doesn't have an independent memory, but -- I guess I'm not sure why  
8 you think you haven't already met the statute already.

9 MR. COFFEE: And, Judge, if I might. The Court brings out a real interesting  
10 point? Suppose what he is doing is trying -- suppose Teddy's in the medically  
11 induced coma and he brings the knife and threatens to cut off his penis --

12 THE COURT: Right.

13 MR. COFFEE: -- is that an assault? That's -- I mean, that's essentially the  
14 question. If he's unaware of it is it assault? The second prong of the statute says  
15 apprehension of bodily harm. That they placed the person in apprehension of bodily  
16 harm. I will tell you --

17 THE COURT: Well, if I --

18 MR. COFFEE: -- the Ninth Circuit --

19 THE COURT: -- if I go to a guy and he's in a coma and I'm getting -- and I  
20 take a knife and I'm getting ready to plunge the knife into his body and say a nurse  
21 stops me and knocks the knife out of my hand. At the very least you would think  
22 that would meet the second element -- the second or which is I attempted to use  
23 physical force on the person. Whether or not the person is aware of it or not there  
24 was clearly an attempt to use physical force; right?

25 MR. COFFEE: Absolutely.

1 THE COURT: Even if he didn't know it.

2 MR. COFFEE: Absolutely. And you can be found guilty of an attempt battery  
3 assault --

4 THE COURT: Right.

5 MR. COFFEE: -- but there's two prongs. There's an attempt battery assault,  
6 that's one. There's no indication that he actually attempted to cut this person, so  
7 that doesn't play here. It's only the second part of the statute which is put  
8 somebody in reasonable fear of -- reasonable apprehension of bodily harm. When  
9 the Ninth Circuit is looked -- there's a case called *Skeet* and it's in a footnote. It's  
10 footnote three or footnote six that I'll produce for the Court. It's addressed -- that's  
11 very short of language; reasonable apprehension of bodily harm or actual -- whether  
12 or not you have to have actual fear. The Ninth Circuit has said that you do. The  
13 Seventh Circuit said something different. It's a split of circuits and it's an undecided  
14 position in Nevada. But I will tell you on this language the Ninth Circuit says you  
15 have to have -- for this particular portion of the statute actual fear. The Seventh  
16 Circuit says something different. That's where it is. And I will tell you the Ninth  
17 Circuit's analysis and -- sent the case to Ms. Wong, is not very extensive. It's simply  
18 a footnote that says in the Ninth Circuit actual fear is required for this sort of fright  
19 battery -- or fright assault as opposed to attempt battery assault. The Court  
20 understands what I'm saying there I take it?

21 MS. WONG: I believe Arizona statute, however, also says that you have to  
22 cause immediate apprehension -- apprehension of immediate bodily harm, so --

23 THE COURT: Yeah. I mean, it's --

24 MS. WONG: The statute's slightly different from ours --

25 THE COURT: It's a pretty interesting --

1 MS. WONG: -- so I wouldn't analogize to theirs.

2 THE COURT: It's a pretty interesting --

3 MR. COFFEE: It's readily able.

4 THE COURT: -- issue here. The issue here is, all right, he doesn't actually  
5 attempt to cut off his penis, so you don't need the second prong. So the only way to  
6 meet an assault would be he places the person in reasonable apprehension of  
7 immediate bodily harm.

8 MR. COFFEE: Right.

9 THE COURT: The question here is this. The guy doesn't remember what he  
10 felt. He doesn't remember anything because he was in the whole coma situation.  
11 Can the jury, even without his own testimony of his own state of mind, infer that a  
12 reasonable person in that circumstance would have felt that and sort of attribute that  
13 to the guy who doesn't remember what his own feelings were. That's one way to  
14 look at it; in which case you're making it a wholly objective test that almost has no  
15 element of subjectivity to it. That's interesting. It's an interesting question. I --

16 MR. COFFEE: It is an interesting question. And the second portion of the  
17 question, what we've been debating is, if we're relying on only that portion of the  
18 statute, can you commit an attempt?

19 THE COURT: An attempt --

20 MR. COFFEE: For example, if the person's in a --

21 THE COURT: -- to put someone in reasonable apprehension.

22 MR. COFFEE: If the person's in a coma and I wave a knife trying to frighten  
23 them when they have no ability to be frightened, which is arguably what we have  
24 here or close to it. I mean, he's out of his head, he's been burnt. Maybe no  
25 awareness if there's an knife, is that an attempt assault.

1 THE COURT: Right.

2 MR. COFFEE: That's what Ms. Wong's trying to do to protect the record.

3 And, again, I thought --

4 THE COURT: Right. Well --

5 MR. COFFEE: -- it was very shrewd --

6 THE COURT: -- the coma one's even a little bit extreme. Let's even say you  
7 have a guy you don't know -- a guy who has -- visually impaired but you don't know  
8 it.

9 MR. COFFEE: Right.

10 THE COURT: The coma guy you know he's not going to be apprehending  
11 anything. But let's say I wait and I confirm not knowing that you're blind.

12 MR. COFFEE: Right.

13 THE COURT: I think -- I want to put you in fear, but I don't know that you're  
14 not actually in fear because I don't know that you can't actually see the knife.

15 MR. COFFEE: Correct.

16 THE COURT: So what you want to do is you want to amend Count 3. You're  
17 just dumping the assault with a deadly count --

18 MS. WONG: Yes. I just want to amend it --

19 THE COURT: -- and you want to set suit --

20 MS. WONG: -- and make it an attempt assault.

21 THE COURT: -- on attempt assault with a deadly weapon. The attempt  
22 being, he attempted to place someone in reasonable apprehension of immediate  
23 bodily harm not knowing that this guy three years later wouldn't remember a thing  
24 because of his coma.

25 MS. WONG: Or maybe he didn't even realize it at the time; yes.



1 THE COURT: So basically -- okay. So basically you are -- okay. We're  
2 dump -- if we do this we're dumping assault with a weapon, so the question -- the  
3 legal question is, is there such a crime as attempt assault with a deadly weapon --

4 MR. COFFEE: Yes.

5 THE COURT: -- that can be met by someone who doesn't actually attempt to  
6 cut off his penis but merely threatens to do so while holding a knife and the guy  
7 doesn't remember anything about that.

8 MR. COFFEE: Yes.

9 MS. WONG: Correct.

10 THE COURT: Or the other way you analogize is the guy is unable to perceive  
11 it. It's kind of legally the same thing.

12 MR. COFFEE: Yeah.

13 THE COURT: That's an interesting one. I have to say I've never even -- not  
14 even in all these law school hypotheticals do we talk about a guy who had a coma  
15 and doesn't remember anything years later.

16 MR. COFFEE: And I will tell you I search attempt assault last night and told  
17 Ms. Wong that I would. What I found for it, attempted assaulted comes up in a lot of  
18 documents. Attempt assault, not so many. Most of the time it's New York or New  
19 England where assault's something different. Their assault is our battery. It's a  
20 physical touching.

21 THE COURT: Yeah, I noticed that. That's what -- when you started talking  
22 the Ninth Circuit cases, and I haven't looked at Arizona, that was my first thought is  
23 that states define assault differently, so I'm not sure how helpful all those other  
24 circuit decisions are.

25 MR. COFFEE: And the case is *Skeet*, but it's mentioned in an unpublished

1 order. I sent the cite to Ms. Wong and forwarded it to the Court. I can't remember --

2 [Colloquy between the State and defense counsel]

3 THE COURT: So let me make sure I understand, State. Right -- as things  
4 stand right -- what you're proposing, you're not even going to try the whole  
5 subjective -- objective thing and leave the assault with the deadly weapon. You are  
6 just -- you just want to dismiss that and substitute the attempt assault, if there is  
7 such a thing?

8 MS. WONG: Correct.

9 MR. COFFEE: And, Judge, we're not objecting to notice, so the record's  
10 clear, and I told Ms. Wong that I wouldn't. We're not objecting to notice.

11 THE COURT: You're objection is, is there such a crime?

12 MR. COFFEE: My objection is, is there such a crime. There is -- as far as  
13 notice, she has the right to charge attempt in ever lesser included. We certainly  
14 recognize that right, so my objection is just at this point whether or not it's a crime.

15 MS. WONG: And I don't think they have any legal authority that says it is a  
16 problem.

17 THE COURT: You know, what I want to do -- let me [indiscernible]. What I at  
18 least want to do is go and look at the attempt statute because if I'm recalling it  
19 correctly, although I know the statute's been amended a couple times, I believe the  
20 statute actually says an attempt to commit any of the crimes enumerated. And I  
21 think it actually lists a bunch of statutes in there --

22 MR. COFFEE: Yes.

23 THE COURT: -- so the question is, is assault one of the ones that's listed in  
24 there. Let me double -- I don't remember that.

25 MR. COFFEE: I don't know that it was statute numbers, but I thought this

1 might come up. And the one thing that we looked at was use of a deadly weapon.  
2 Use of a deadly weapon doesn't -- there are certain crimes that are non-  
3 probationable, but use of a deadly weapon can enhance any crime under Nevada  
4 law.

5 THE COURT: Right.

6 MR. COFFEE: But even with that it's a legal and possibility to have, for  
7 example, an involuntary manslaughter with a deadly weapon because essentially  
8 you have mental states that are inconsistent; that you're attempting to use a deadly  
9 weapon versus an accidental killing. Our position is we've got similar -- we got a  
10 crime of impossibility on an attempt assault, so --

11 MS. WONG: I mean, you can attempt to scare somebody. That's not a legal  
12 or a factual impossibility. You can attempt to scare somebody.

13 MR. COFFEE: It's true. I don't disagree with that.

14 THE COURT: Yeah, but the problem here is -- this is -- I think this is Mr.  
15 Coffee's argument. The problem is since you're -- okay. Attempt to place another  
16 person in reasonable apprehension of immediate bodily harm. All right. I guess, if  
17 you're going off the second half of that, which is it's an unlawful attempt to use  
18 physical force, then you have an attempt to do an attempt.

19 MS. WONG: Right, which is why I'm striking that language.

20 THE COURT: But you're saying you're just sticking with the first part. It's an  
21 attempt to place another person in reasonable apprehension of immediate bodily  
22 harm.

23 MS. WONG: That's correct.

24 THE COURT: That's interesting. Let me do this. Let me take the lunch hour  
25 and kind of surf around a little bit as well and look at the statute because I -- it's

1 been a really long time since I looked at the AWDW statute. You're telling me that --  
2 I had a recollection that maybe it had statute numbers --

3 MR. COFFEE: It might.

4 THE COURT: -- but you're telling me it doesn't. I -- you know -- I know --

5 MR. COFFEE: I don't know.

6 THE COURT: -- they amended [indiscernible]. I just don't remember. It's  
7 been a long time, so let me check on that. If it's a statute that says an attempt to do  
8 one of these things, and that's not one of those things, then that's the answer right  
9 there, but I just don't remember.

10 MR. COFFEE: Okay.

11 THE COURT: Anything else you guys want to address while we're here.

12 MR. COFFEE: No, I think we're --

13 MS. WONG: No. And I just want to let the Court know the statute that says  
14 that we can charge an attempt for a particular crime is 175.501.

15 THE COURT: 175.501.

16 MS. WONG: Yes. This jury may convict of lesser included offense or  
17 attempt.

18 THE COURT: Right. Okay. That's interesting.

19 MR. COFFEE: It doesn't define what attempt is then; right?

20 MS. WONG: No.

21 MR. COFFEE: Attempt is -- I think there's another one that says attempt's  
22 failure to complete whatever, yeah.

23 THE COURT: Yeah, there's another statute --

24 MS. WONG: Yes. Well, that's just the -- yeah, that's the one.

25 THE COURT: -- but that's the other one that I want to double check, but

1 interesting. All right. I guess I'll see you guys at one o'clock or shortly before. Let  
2 me, you know, kind of surf on this. It's an interesting legal question that's for sure.

3 MR. COFFEE: Thank you, Judge.

4 THE COURT: All right. Thanks, guys.

5 [Recess taken at 11:50 a.m.]

6 [Proceedings resumed at 12:58 p.m.]

7 [Outside the presence of the jury]

8 THE COURT: Okay. Back on the record State versus Patrick Newell,  
9 C285825. We are outside the presence of the jury. Mr. Newell is present in  
10 custody. Anything else -- anything you guys want to address before we bring the  
11 jury in?

12 MR. STEPHENS: No, Your Honor.

13 MS. WONG: No.

14 THE COURT: Okay. Let's do this real quickly. Before the lunch break we  
15 had essentially an oral motion by the State to amend the Amended Information to  
16 change Count 3 from assault with a deadly weapon to attempt assault with a deadly  
17 weapon, specifically placing another person in reasonable apprehension of  
18 immediate bodily harm to which the defense had an objection.

19 I thought about it during the lunch break. I did some research and  
20 unfortunately the research isn't all that helpful. Just for the record a couple places I  
21 looked. If you look in Am. Jur. -- 6 Am. Jur. 2d Assault and Battery Section 11. The  
22 first sentence of that section says this: The authorities are in conflict whether an  
23 attempt to commit an assault is a criminal offense. It then lists a bunch of cases  
24 from multiple states that go both ways. 93 A.L.R. 5<sup>th</sup> 683 has a list of cases. It says  
25 the Courts in the following cases took the view that a criminal offense of assault may

1 be attempted: Alabama, Alaska, Arkansas, Connecticut, Florida, Hawaii, Illinois,  
2 Indiana, Kansas, Maryland, Michigan, Nebraska, New Hampshire, New York and  
3 Oregon. However, the Courts in the following cases took the view that an assault  
4 cannot be attempted: California, Colorado, Florida, Georgia, Louisiana,  
5 Massachusetts, New Jersey, North Carolina, Ohio, Oklahoma, Tennessee, Texas  
6 and Wisconsin.

7           Now during the limited time I had, obviously didn't have time to read all  
8 those cases, nor am I going to have time to read all those cases, and frankly, nor  
9 am I going to read all those cases, but I'm going to guess some of them are  
10 distinguishable just because they may define the crime of assault in different ways.  
11 That's one thing I did not have time to check to see which of those states actually  
12 have the same assault statute that Nevada has. But the point of all this research  
13 being it appears that this is very much an open question. I did double check.  
14 There's nothing published -- or unpublished from the Nevada Supreme Court that I  
15 could find.

16           So what I did is I took a look at some of these statutes here. You have  
17 two statutes that define more or less the crime of assault. You have NRS 175.501,  
18 which is the statute of the case -- which is the statute that the State cited to, which  
19 says the defendant may be found guilty of any offense necessarily included in the  
20 offense charged or of an attempt to commit either the offense charged or an offense  
21 necessarily included therein if the attempt is an offense. You also have NRS  
22 193.330, which defines the punishment for attempts, says as follows: An act done  
23 with the intent to commit a crime, and tending but failing to accomplish it, is an  
24 attempt to commit that crime. A person who attempts to commit a crime, unless a  
25 different penalty is prescribed by statute, shall be punished as follows. Then it has a

1 long list of all the various punishments. If it's an attempt to commit category A, B  
2 felony -- category B felony, category C felony, et cetera, et cetera.

3           So the analysis to me appears to be as follows: The attempt statute  
4 that we have appears to be pretty broad. One thing I did notice in looking through a  
5 bunch of statutes is there are certain criminal offenses for which a legislature knows  
6 how to exclude certain types of offenses. For example, they talk about  
7 enhancements. You know, they talk about any category B felony, except the crimes  
8 of da, da, da, da, are enhanced through certain ways. So it appears to me the  
9 legislature certainly knows how to exclude offenses from certain broad statutes  
10 when they so choose.

11           There's no exclusion in NRS 193.330 for the crime of assault with a  
12 deadly weapon or the crime of assault. So that suggests that it was the legislature's  
13 intent that the -- intent that the attempt statute be broad and be applied to the  
14 assault statute. Having said that, in criminal cases the analysis always runs at two  
15 levels. There's what's in the statute and there's also what's required or prohibited  
16 by the constitution, which is -- which always comes into play in any criminal statute  
17 -- in any criminal case because you always have conflicting things between statutes  
18 and Defendant's rights.

19           There are certainly certain types of offenses that you would think on  
20 their face, even though they're not prohibited by NRS 193.330, would violate the due  
21 process clause. For example, an attempt to commit involuntary manslaughter is one  
22 that just facially wouldn't even make sense because attempt is a specific intent  
23 crime and involuntary manslaughter actually is a negative intent crime. You can't  
24 have a specific intent to commit a negative intent crime. That on its face doesn't  
25 make any sense. But I don't know that that analysis applies to assault.

1           Let me say this. Before the break we also had this analogy that I threw  
2 out there about an attempt to place a blind person in reasonable apprehension of  
3 danger. The more I thought it, the more I thought that's not actually what's going on  
4 here. That's not a good analogy because the difference is that's more of an  
5 impossibility thing. In other words, if I'm waving a knife at a blind -- at a guy who's  
6 blind and deaf and I don't know it, the crime's not actually happening even as it's  
7 happening because it's impossible. The guy does not perceive anything, he can't  
8 apprehend any danger; therefore, it's not even happening as it's happening. That's  
9 not really what's going on in this case. What's -- the problem in this case is the  
10 victim doesn't remember anything. Well, not remembering now doesn't mean it  
11 didn't happen. It's not impossible that it happened; he just doesn't remember it.  
12 There may not be any evidence, but it doesn't mean that it was an impossibility  
13 when it happened.

14           MR. COFFEE: And the only point that I would make, Judge, is -- may have  
15 just been lit on fire. We don't know if he's perceiving anything at that point. The  
16 testimony that we have is that the threat came immediately after he's lit on fire right  
17 when he's about to sit down. I don't know what he's capable of perceiving and what  
18 -- and what he's not.

19           THE COURT: No, of course. Right.

20           MR. COFFEE: But -- so it may be a good analogy with a blind person, it may  
21 not --

22           THE COURT: Right. It's --

23           MR. COFFEE: -- we just don't know.

24           THE COURT: Right. It's possible because there was testimony from the  
25 victim that as a result of the injuries he had some depth perception and some vision



1 problems, so it's entirely possible he doesn't see a thing. But the problem -- but the  
2 difference between that and the blind person thing is the blind person analogy is it's  
3 necessarily impossible. It's not happening even as it happens. In this case what we  
4 have is an absence of evidence, but that doesn't mean the crime was impossible as  
5 it was happening back in the year 2010, right, 2012.

6 MR. COFFEE: Twelve.

7 THE COURT: So I'm not sure that's a very good analogy the more I thought  
8 about it, and so -- because that's more of an impossibility type thing, and that's not  
9 what we have here. Having said that, I'm not even sure -- even though there's an  
10 absence of evidence, okay, the fact that it wasn't necessarily true that the crime  
11 couldn't have happened, because you had somebody who may or may not have  
12 been able to perceive, but we don't have any evidence that he couldn't, I'm not sure  
13 that the State can't actually proceed on the assault with a deadly weapon in the  
14 sense that the jury could legally, based on the facts and circumstances, may be able  
15 to find that he was in reasonable apprehension, but nonetheless, that's not the  
16 issue.

17 The State seems uncomfortable -- you know, maybe it's legally possible  
18 they could do it, but the State doesn't seem, what I gather, all that confident that  
19 they're going to do that, so they want to add the attempt. So the way I'm analyzing  
20 this, and I'm not saying this is the way the Supreme Court's going to analyze it,  
21 because at the very least the Supreme Court's going to have more than an hour to  
22 think about this and they're going to be able to read some of these cases, but the  
23 statute on its face, 193.330, appears to be extremely broad. It appears not to  
24 exclude the crime of assault, even though the legislature, based on the way they  
25 drafted other statutes, seems perfectly capable of excluding certain crimes if they

1 want to do that.

2 In addition, when you apply the crime of attempt to the crime of assault,  
3 at least to the portion of the assault statute that's limited to placing another person in  
4 reasonable apprehension of immediate bodily harm, I don't know that I see an  
5 obvious constitutional defect with that. I think that you couldn't apply it to the second  
6 portion of the assault with a deadly weapon statute which says you're unlawfully  
7 attempting to use physical force because you have an attempt to do an attempt and  
8 that doesn't make any sense.

9 There are some crimes as I said where I can see an obvious  
10 constitutional defect, like, you know, involuntary manslaughter, any crime that relies  
11 on negligence, for example, is a state of mind because you can't have specific intent  
12 to do a negligent thing. But the first half of the assault with a deadly weapon statute,  
13 meaning placing another person in reasonable apprehension of immediate bodily  
14 harm, not being a negative intense statute, I don't see any obvious defect that would  
15 on its face make -- at least I don't see a due process problem that you couldn't apply  
16 the attempt statute to the assault with a deadly weapon statute.

17 Now I know Mr. Coffee mentioned that there was a Ninth Circuit case  
18 that talked about fear being an element of assault. Well, I guess -- I haven't read  
19 that case and I haven't had time to do that. Fear is a funny thing because I threw  
20 out the analogy with a navy seal. Fear -- if he apprehends that I'm going to hit him,  
21 even though he was a navy seal, and if I do hit him it's not really going to hurt him,  
22 well, can he say he's in fear. Fear is a word of emotion and I'm not sure -- you  
23 know, emotions are a funny thing. You know, he may feel fear in the sense of yeah,  
24 this guy's going to hit me, but it's not going to hurt as opposed to fear -- yeah, fear  
25 when he hits me it's really going to hurt. Those are two different things. But I'm not

1 sure that at least -- that fear is -- in the sense of not only am I going to hit him, but  
2 I'm going to cause damage and it's going to hurt a lot. I'm not sure that's an  
3 element you can read into the statute because then I can just threaten navy seals at  
4 will and that can't be the way the statute was written, or Arnold Schwarzenegger, or  
5 anybody who's stronger than me and not afraid of me.

6 So I'm not -- I'm not sure what the Ninth Circuit case you're citing says  
7 because, as I said, I didn't have a lot of time and I didn't have time to read that, but  
8 that's off of an Arizona case. In this case, the way I read the statute -- the limited  
9 research I have, I'm not sure that fear as an emotion is an element so much as it  
10 may be that fear is an element to this if you mean -- if by fear you mean I believe  
11 and maybe I'm afraid that it's going to happen as opposed to it's going to hurt or it's  
12 going to inflict damage or anything like that.

13 MR. COFFEE: And, Judge, I used fear because it was a shorthand that they  
14 used --

15 THE COURT: Right.

16 MR. COFFEE: -- in the cases in the Ninth Circuit. I think more accurately I  
17 don't think the cases were particularly well worded on that point. I think it's  
18 reasonable apprehension, but actual apprehension of bodily harm --

19 THE COURT: Right.

20 MR. COFFEE: -- is what we're talking about when we're in fear. I think it's  
21 the language of the statute. They shorthanded fear because it's handled in a  
22 footnote --

23 THE COURT: Right.

24 MR. COFFEE: -- but I think that's what we're talking about is apprehension of  
25 bodily harm.

1 THE COURT: Yeah. I mean, I would think that would have to be the case  
2 and that's the word that our statute uses, which is apprehension, rather than fear. In  
3 fact, some other states statutes do use the word fear of harm, which, you know, fear  
4 is a more complicated word. Apprehension seems to be I perceive; whether or not  
5 I'm actually afraid of it in an emotional way I perceive it's about to happen. But, in  
6 any event, that's -- I guess, that's the analysis I can come up with, which the statute  
7 appears to be broad. 193.330, it appears not to exclude assault even though the  
8 legislature indicated their ability to exclude crimes some -- certain other statutes  
9 when they so wish. I don't see any obvious constitutional defect. Again, involuntary  
10 manslaughter is also not specifically excluded by the legislature, but there's a clear  
11 logical gap there that, you know, that it just wouldn't be able to fall in the statute for  
12 all kinds of reasons, so probably there's a due process problem at the very least and  
13 maybe other constitutional problems with it as well. But since I'm not sure that I see  
14 any obvious problem with them, and it looks like the legislature's intent was to  
15 [indiscernible] everything with the attempt statute, I'm going to go ahead and grant  
16 the State's motion to amend Count 3. But, Mr. Coffee, having said all that, you're  
17 welcome to say anything you want to preserve this for appeal because it is kind of  
18 an interesting issue that, as he indicated, states are even divided on, so go ahead  
19 and make whatever record you want to make.

20 MR. COFFEE: There are a couple points that I would like to make. The  
21 necessarily included language in the attempt statute that it includes all necessarily  
22 included offenses. You could convict somebody on a necessarily included offense.  
23 Our position is that an offense which is legally impossible can't be necessarily  
24 included, and that attempt assault is legally impossible so that that language doesn't  
25 cover attempt assault. I understand the Court's rationale. I still think there has to be

1 some kind of showing of reasonable apprehension of bodily harm. I think that  
2 element gets deleted by what we're doing.

3 The other thing I would -- there are two other things that I would point  
4 to. One is the rule of lenity, which says essentially that statutes are to be strictly  
5 construed against their maker. I just -- somebody will cite that at some point on the  
6 appeal and I want to make sure we mention it at the district court level.

7 The other thing that I would point out is when we're talking about an  
8 involuntary and the specific exclusions, I agree with the Court's analysis. The one's  
9 that's more troubling I think is involuntary with the use of a deadly weapon, which  
10 the Court has said is an impossibility, but I can logically think of all kinds of things;  
11 maybe not Russian roulette, but something akin to Russian roulette. Russian  
12 roulette becomes so reckless that it's probably a second.

13 THE COURT: Right.

14 MR. COFFEE: But I can think of all kinds of things -- mumblety-peg, for  
15 example, when I'm throwing a knife between somebody's feet and it slips and hits  
16 an artery and they die. No intent to kill them, it's my -- you know, my best friend,  
17 whatever it might be, but it would certainly be involuntary. And I could see the use  
18 of a deadly weapon coming into play there, but they've said that's a logical  
19 impossibility. I think that's more of what we've got here, so I just wanted to make  
20 sure that the record was clear on our position.

21 THE COURT: Right. All right. I mean -- as I said, it's an interesting issue.  
22 States have gone every which way. It's always interesting whenever I read, you  
23 know, the general guides like Am Jur and CJS and the first sentence is states are in  
24 disagreement on this, so I don't know where that leaves us. Basically it's going to  
25 go up to the Supreme Court one way or the other. Assuming that Mr. Newell is

1 convicted, which obviously I don't know, this may be something they have to hash  
2 out and -- but that's -- you know, that's the best analysis I could come up with based  
3 upon what limited guidance I have, which is basically a couple statutes and not a lot  
4 of cases, and then a lot of cases that go every which way.

5 So -- you know -- so, State, you can go ahead and file the -- I guess it  
6 would be the Second Amended Information amending Count 3 and we'll go from  
7 there then; all right.

8 MR. COFFEE: Very good.

9 THE COURT: State, do you have your next witness outside; is he here?

10 MR. STEPHENS: Let me check.

11 He's here, Your Honor.

12 THE COURT: All right. Let's go ahead and bring the jury in then, Randy.

13 Is there anything else you guys want to address while we're here or no?

14 MR. COFFEE: No.

15 THE COURT: Okay. Let's go ahead and bring them in.

16 [In the presence of the jury]

17 THE COURT: Will counsel stipulate to the presence of the jury.

18 MS. WONG: Yes, Your Honor.

19 MR. COFFEE: Yes, Judge.

20 THE COURT: All right. State, who is your next witness?

21 MR. STEPHENS: Vincent Roberts.

22 THE MARSHAL: And if you will please step up into the witness stand. Raise  
23 your right hand and face the clerk, please.

24 **VINCENT ROBERTS**

25 [having been called as a witness and being first duly sworn, testified as follows:]

1 THE COURT CLERK: Please be seated. Please state your name and spell  
2 your first and last name for the record.

3 THE WITNESS: Name is Vincent Roberts. Spelling of the last name,  
4 R-O-B-E-R-T-S.

5 THE COURT: For the record can you spell --

6 THE WITNESS: First name Vincent, V-I-N-C-E-N-T.

7 THE COURT: Sorry. I thought you were just spelling the last name.

8 All right. Counsel, you may proceed.

9 MR. STEPHENS: Thank you, Your Honor.

10 **DIRECT EXAMINATION**

11 BY MR. STEPHENS:

12 Q Mr. Roberts, how are you employed?

13 A I'm employed with the Las Vegas Metropolitan Department as a senior  
14 crime scene analyst.

15 Q All right. And what are the jobs of a crime scene analyst?

16 A Well, the jobs I do as a crime scene analyst is to document crime  
17 scenes to a variety of different methods. We do it through photography, note taking,  
18 diagrams, evidence collections, latent print processing and whatever is important at  
19 that time for the crime scene.

20 Q Were you working in October of 2012 with the Metropolitan Police  
21 Department?

22 A Yes, I was.

23 Q And were you working the graveyard shift?

24 A Yes, I was.

25 Q How many years have you been working now with Metro?

1 A Sixteen and a half years.

2 Q Were you dispatched on October 10<sup>th</sup>, 2012 to a Circle K on South Las  
3 Vegas Boulevard?

4 A Yes, I was.

5 Q And why were you called out there?

6 A I was called for an incident at the gas station involving what was alleged  
7 to be someone set on fire.

8 Q When you arrived on scene what did you observe? Who was there?

9 A When I arrived on scene officers were there. And basically they brief us  
10 and let me know what the scene is involving.

11 Q Okay. So after you're briefed what do you do?

12 A After I brief, if I recall, I did check out a few things of areas that were  
13 going to be of importance for documentation purposes. Once I did that I  
14 documented the scene and took photographs of the scene, took photographs of the  
15 subject and then I collected some evidence there.

16 Q Okay. So you took photographs of the subject.

17 A Yes.

18 Q Can you describe that subject for us?

19 A Subject was a white male adult, his name Patrick Newell.

20 Q Okay.

21 A And basically -- I basically told him what my purpose was for taking the  
22 photographs and took the photographs.

23 Q Is Patrick Newell present in the courtroom today?

24 A Yes, he is.

25 Q Can you point to him and describe something he's wearing?



1 A He's wearing the blue shirt.

2 MR. STEPHENS: Will the record reflect identification of Defendant?

3 THE COURT: The record will so reflect.

4 MR. STEPHENS: Thank you, Your Honor.

5 BY MR. STEPHENS:

6 Q So you said you initially kind of surveyed the area and took pictures of  
7 some areas that you found interesting I believe was your testimony?

8 A That is correct.

9 Q What areas did you take photos of?

10 A I took photos of gas pumps, particularly gas pumps number one and  
11 three; also of the red truck that he was driving at the time. I have the license plate  
12 PNEWELL on it. And also I took certain views -- in my report I basically indicate that  
13 I took what were views of cameras that are mounted on the building and I took  
14 photos showing the direction of what those cameras would have saw because I  
15 knew that was going to be important for the documentation purposes.

16 Q Okay. I want to show you just a few photos of -- that have previously  
17 been admitted. Showing you State's Exhibit 1. What is this?

18 A That's a photograph showing actually two things. I'm showing the  
19 Circle K and then secondarily you actually see a camera mounted right there.

20 Q Let me show you State's Exhibit 2. And what are we looking at here?

21 A State's Exhibit 2 I have the one pump location, number one here. And  
22 then there's some items of evidence, clothing here and there's another item area  
23 here. This is the truck that I photographed and it's pump number three.

24 Q Okay. And why was it that you photographed these items?

25 A These items were items that I had saw that were going to be of interest,

1 and to document views of that area.

2 Q I'm showing you State's Exhibit 4. What are we looking at here?

3 A State's Exhibit 4 I'm showing you clothing. Here -- secondarily there's  
4 some towels right here. And then these are some Denver Bronco flip flops I also  
5 documented and had returned back to the victim.

6 Q And it was your understand that it was the victim's property?

7 A Yes.

8 Q Showing you State's Exhibit 7. Do you recognize that?

9 A Yes, I do.

10 Q What's that?

11 A State's Exhibit 7 is going to be a shirt that was charred, and I basically  
12 documented that and recovered that item.

13 Q And where was that located?

14 A That was actually in the previous photograph. It's going to be to the  
15 south of the pump, so in this direction here. So it's -- I can't really see it. I'm sorry.

16 Q Let me see. Maybe this one's the better photo.

17 A Yeah, it's right here.

18 Q Right there, okay. Now did you at any time lay out this clothing to  
19 determine whether or not there was anything inside the clothing?

20 A In the particular case of the shirt, it was very charred and almost kind of  
21 melted, so very difficult to open up and do that. So it was put into a paint can  
22 because of the possible accelerant. That was procedurally something that we would  
23 do. And then secondarily on the shorts there was going to be a cigarillo pack that  
24 was kind of melt onto that that I tried to document and then get that into the paint  
25 can as well.

1 Q Did you take any photos of the shorts and the cigarillo packs?  
2 A Yes, I did.  
3 Q Showing you State's Exhibit 8. Do you recognize this?  
4 A Yes, I do.  
5 Q Is that the photo you took of the shorts?  
6 A Yes, it is.  
7 Q And what's over here on the right hand side?  
8 A This is the cigarillo pack and you can actually see some charring on the  
9 liner of the pants.  
10 Q Okay. And what's over here on the left hand side?  
11 A That is currency.  
12 Q That's currency. Where did that currency come from? Was it on the  
13 ground?  
14 A It came from inside the pocket there.  
15 Q Now you said you impounded the shirt and also the shorts?  
16 A Yes. Uh-huh.  
17 Q Okay. When you impounded the shirt and the shorts did anything catch  
18 your attention as you were impounding them?  
19 A I'm sorry?  
20 Q Did anything stand out to you as you were impounding the shirt and the  
21 shorts?  
22 A That they were in a charred condition consistent with what I was being  
23 told happened at the scene.  
24 Q Did you take -- you said you took some photos of the subject. You've  
25 identified that subject as the Defendant. Can you describe his demeanor as you

1 were taking photographs?

2 A At the time, in my opinion, his demeanor was basically like a little  
3 arrogant and just seemed unconcerned at the time and not really cooperative.

4 Q Is this one of the photos you took of the Defendant?

5 A Yes, it is.

6 Q Now it appears at this time that his pockets are pulled out.

7 A Yes.

8 Q Did you pull those out?

9 A No, I did not.

10 Q Did you ask him to pull those out?

11 A No, I did not.

12 Q They were already pulled out?

13 A They were already pulled out.

14 Q Did you tell the Defendant to smile in this photo?

15 A No, I did not.

16 Q While you were at the scene did you look for any matches on the  
17 ground?

18 A I did not see any matches on the ground.

19 Q Okay. After you took photographs of the scene what did you do?

20 A After I took photographs of the scene and the subject I then went to  
21 UMC trauma and photographed the victim.

22 Q When you arrived at UMC was the victim alert?

23 A He was somewhat not really alert. They were attending to him at that  
24 time, so my time there was just kind of limited as far to what I could really do.

25 Q When you arrived describe what you -- describe the victim when you

1 arrived?

2 A When I arrive victim was on a gurney, medical intervention was in  
3 place, and I began to try to document the injuries that I could see on the victim at  
4 that time.

5 Q Now as you're documenting the injuries to the victim are you moving  
6 tubes and wires and sheets?

7 A I try not to if it's going to interfere with the care of the patient. So in this  
8 case because of the burning and things I tried not to disturb him too much because  
9 of the burning that I saw.

10 Q I just wanted to show you a few of these photos. Showing you State's  
11 Exhibit 11. Do you recognize that?

12 A Yes, I do.

13 Q Is that a photo you took of the --

14 A Yes, it is.

15 Q You also took a photo of his hand -- or his arms?

16 A His arms; yes.

17 Q Is that a photo of his left arm?

18 A Yes, it is.

19 Q You took a photograph of his chest. I'm showing you State's Exhibit 16.

20 A Sixteen; yes.

21 Q And this is the condition that you found him in when you arrived?

22 A Yes, it is.

23 Q Did you attempt to speak with him at all?

24 A No, I did not. He was not -- not able to speak with him. It's not  
25 generally something I would do anyway, but --

1 Q In this instance you didn't at all?

2 A Right.

3 MR. STEPHENS: I'll pass the witness.

4 THE COURT: Cross-examination?

5 MR. COFFEE: Can I have Court's indulgence for just a moment?

6 THE COURT: Sure.

7 MR. COFFEE: Judge, there is one other photo that we are retrieving from my  
8 office. We talked to the district attorneys and they're going to graciously let us put it  
9 in after this witness if it doesn't get back in time rather than slow the process down.

10 THE COURT: Okay. Sure.

11 **CROSS-EXAMINATION**

12 BY MR. COFFEE:

13 Q It's not generally something you would do you said about talking to the  
14 gentleman at the hospital?

15 A Yes, it's not part of my job duties.

16 Q You are a CSA?

17 A Yes.

18 Q Your job is to document the scene?

19 A Yes.

20 Q You are trained to do that?

21 A Yes.

22 Q You are not trained to conduct interviews necessarily?

23 A As interviews, no.

24 Q That is something a detective might do?

25 A Yes.

1 Q You are not trained to follow up leads outside the scene necessarily.  
2 That's also something a detective would do?

3 A Depending on what you're referring to as leads.

4 Q Okay. If it was something physical that needed to be documented that  
5 somebody found they may call you out to do it?

6 A If it was something physically that we need to be documented then that  
7 would be yes.

8 Q Okay. You don't go to the hospital and get records, for example?

9 A No, I do not go get records.

10 Q You don't subpoena items from other places?

11 A Do not subpoena at all.

12 Q You don't do searches of SCOPE or some kind of criminal database to  
13 see people's criminal background?

14 A No, I do not.

15 Q All those are things that might be in a detective's purview and not in  
16 your purview; is that fair?

17 A That would be fair.

18 Q Is there anything in particular that Mr. Newell refused to do for you?

19 A Anything in particular he refused to do?

20 Q Yeah.

21 A Well, like I said, generally when I first went to try and document he  
22 wasn't that cooperative because -- again, he was basically -- I'm not gonna say he  
23 said this exactly, but he didn't feel he did anything wrong, and therefore -- just trying  
24 to tell him why I was documenting and why I needed to take the photographs, that  
25 was just the initial start of the conversation.

1 Q Okay. Wasn't as friendly as he might have been?

2 A He was not friendly.

3 Q Okay. But didn't refuse your commands when you asked him to take  
4 photos. It's not like -- you've had situations where they probably had to hold people  
5 up for you to take photos of them; right?

6 A That's correct.

7 Q He wasn't like that?

8 A Initially -- like I said, it took a little bit of talking to say why I had to do it.  
9 He wasn't understanding at first, and so I just basically explained to him again these  
10 are documents that we normally do, and then basically we were able to get it done.  
11 As far as being resistant, no.

12 Q No; okay. And that's what -- you answered my question and set up my  
13 next question. Talking -- all it was was talking with Mr. Newell. You had to explain  
14 what was going on; had to say I need to document this. He was resistant because  
15 he didn't think he'd done anything wrong, but nobody had to physically grab him and  
16 pull him around; is that fair?

17 A I'm sorry. I couldn't hear the last part.

18 Q Nobody had to physically grab him and pull him around from place to  
19 place.

20 A No, I didn't have to physically -- no.

21 Q And you didn't have to have the other officers physically grab him and  
22 pull him around; is that fair?

23 A No.

24 Q And he didn't try to take off and run from you when you were taking  
25 pictures?



1 A No, he did not.

2 Q And you've seen people that just do this?

3 A I'm sorry.

4 Q Do this, just shut their mouth. Refuse to say anything. Don't want to  
5 interact. You've seen people that do that on occasion in criminal investigations?

6 A People have done that, yes.

7 Q He didn't do that?

8 A No, not really.

9 Q Not really. In fact, he told you he thought he hadn't done anything  
10 wrong.

11 A Well, I don't know exactly what he said, but basically he was -- his  
12 position was why we doing this, I didn't do anything kind of thing.

13 Q All right. Fair enough. You don't remember is exact words?

14 A No, I do not.

15 Q You didn't have a tape recorder?

16 A I'm sorry?

17 Q You didn't have a tape recorder?

18 A No, I did not.

19 Q You didn't record his conversations?

20 A No, I did not.

21 Q If you had a tape recorder we might know his exact words, but you  
22 didn't so we don't; fair enough?

23 A Fair enough.

24 Q But you got the gist of things?

25 A What do you mean by gist of things?

1 Q You're an intelligent man.

2 A I'm sorry?

3 Q You seem to be an intelligent man.

4 A Oh, yeah.

5 Q You are educated in how to document crime scenes.

6 A Yes.

7 Q The general idea of things, the gist. You understood Mr. Newell to be  
8 saying something akin, something like, something in the ball field of I don't think I've  
9 done anything wrong. That was the impression he gave you, irregardless of what  
10 his exact words were?

11 A The impression I got from Mr. Newell was he didn't really want to  
12 cooperate with me taking the photographs and that's why I had to [indiscernible] to  
13 him and get that done. That's what I'm gonna answer.

14 Q Okay. Again, the question is, and you volunteered this when -- we can  
15 play it back if you need me to, but you volunteered this, he didn't think he'd done  
16 anything wrong. Do you remember volunteering that from that seat about two  
17 minutes ago?

18 A I said I didn't recall exactly what he said, but, yes, I did say that.

19 Q Okay. Just so we were clear.

20 There are situations where you might do a diagram; yes? Are you  
21 trained to do that or is that somebody else who does the crime scene diagrams?

22 A No. We do diagrams only in certain cases.

23 Q Not every case?

24 A This is not one -- this is not one of them.

25 Q Okay. Well, you're a step ahead of me. I'll get there, I promise.

1 A Okay.

2 Q Okay. There are people that are trained to do diagrams in Las Vegas  
3 Metropolitan Police Department?

4 A Yes, and I'm one of them.

5 Q Okay. There we go. And you are one of them. It's not like, for  
6 example, Bullfrog County where you have two people in the police department and  
7 don't have a CSA available, you can do a diagram if necessary; correct?

8 A Yes, that's correct.

9 Q You're trained to do it?

10 A Yes.

11 Q You didn't do it in this case?

12 A We're not required to do it in this case. This does not apply.

13 Q I didn't ask if you were required to do it. I asked you if you did it?

14 A No, I did not.

15 Q Okay. You did not do one in this case. Exact dimensions, for example,  
16 the distance from the gas pumps to the hose where the air and water is, we don't  
17 have the documented any place?

18 A No.

19 Q The distance from the front window of the Circle K to the pumps, we  
20 don't have that documented. We can see photographs and get a general idea, but  
21 we don't have the measurements?

22 A Yes.

23 Q Did you take any photographs from inside the Circle K where the clerk  
24 was working?

25 A No, I don't recall doing that.

1 Q Okay. Don't know for certain what the clerk's view of outside was or  
2 was not?

3 A No.

4 Q That was something you could document, it just didn't happen in this  
5 case?

6 A If I knew the information I would do that.

7 Q Okay. But, again, it was something that could be documented; you  
8 didn't do it in this case. May not even thought of it?

9 A Didn't have any information.

10 MR. COFFEE: Okay. Subject to the other photograph, whether than  
11 belaboring things, I've got somebody coming back, but I'm going to pass the  
12 witness.

13 THE WITNESS: I'm sorry. I can't understand what you're saying. Sorry.

14 MR. COFFEE: That's okay.

15 THE WITNESS: Okay.

16 MR. COFFEE: You don't need to --

17 THE WITNESS: Okay. I just can't --

18 MR. COFFEE: Pass the witness.

19 THE COURT: Any redirect?

20 MR. STEPHENS: Just briefly.

21 **REDIRECT EXAMINATION**

22 BY MR. STEPHENS:

23 Q I want to show you State's Exhibit 1. I want to draw your attention over  
24 to this right hand area over here.

25 A Yes.

1 Q From where did you take this photo?

2 A I took that photo from the direction of -- by the pump towards the door  
3 there.

4 Q Okay. So that would have been the pump where the clothing would've  
5 been?

6 A Yes.

7 Q And why was it that you did not take any photos of the victim at the  
8 scene?

9 A I'm sorry, I couldn't hear.

10 Q That was a terrible question and I was too quiet. Why did you not take  
11 any photos of the victim at the Circle K?

12 A Of the victim at Circle K?

13 Q Yes.

14 A The victim was not present at the scene. Yeah, he was already at  
15 UMC.

16 Q One more question on this. From this photo here do you happen to  
17 know where the cash register is located?

18 A I would not know where the cash register from this photo is located, but  
19 I can tell that the view -- I couldn't really tell you what the view would be.

20 MR. STEPHENS: Okay. I'll pass the witness.

21 MR. COFFEE: Permission to approach your clerk?

22 THE COURT: Sure. Oh, this is the new exhibit you were talking about?

23 MR. COFFEE: Yes.

24 ///

25 ///

**RECROSS EXAMINATION**

1

2 BY MR. COFFEE:

3 Q I'm going to show you another photo since I think you're probably the  
4 person who took it.

5 THE COURT CLERK: Stipulating that that's being admitted?

6 MR. COFFEE: Yes.

7 MR. STEPHENS: Yes.

8 MR. COFFEE: I believe so. I think stipulation, yes.

9 THE COURT: And what's the exhibit number on this one now?

10 MR. COFFEE: Defendant's D.

11 THE COURT: All right. So Defendant's --

12 THE WITNESS: Sorry?

13 THE COURT: So Defendant's D --

14 THE WITNESS: I really have a hard time hearing, so --

15 MR. COFFEE: It's okay.

16 THE WITNESS: -- I apologize for --

17 MR. COFFEE: And I apologize; I will raise my voice.

18 THE WITNESS: Okay.

19 THE COURT: All right. So hang on. So for the record, Exhibit D is admitted  
20 by stipulation; is that correct?

21 MR. COFFEE: Yes.

22 THE COURT: Is that correct, State?

23 MR. STEPHENS: Yes.

24 THE COURT: All right.

25 ///

1 BY MR. COFFEE:

2 Q Okay. I'm going to show you what's been admitted as Defendant's D.

3 A Defendant's D; okay.

4 Q All right. And this is another photograph that you took that evening?

5 A Yes.

6 Q And we don't have the same silly grin on the face on this one it doesn't  
7 look like; right?

8 A No.

9 Q You were asked some questions about time and the victim being gone.  
10 What time did you get to the scene?

11 A I got to the scene about 1:28 in the morning.

12 Q This is October 10<sup>th</sup>?

13 A Yes.

14 Q And it is -- 1:28 and Mr. Newell -- and I'm going to try to zoom in. This  
15 is -- I'm showing you State's 10. And it may not be -- I may have to approach you so  
16 you can get a better look at this. Is that okay?

17 A Okay.

18 Q Showing you State's 10. Does it look like his hair's blowing in that?

19 A I couldn't really tell you from the photograph.

20 Q And don't remember one way or the other whether it was windy?

21 A Don't remember one way or the other.

22 Q Okay. Was he wearing a coat?

23 A He's not wearing a coat.

24 MR. COFFEE: All right. Thank you, sir.

25 THE COURT: Any redirect?

1 MR. STEPHENS: No, Your Honor.

2 THE COURT: Thank you, sir, for your testimony. You're free to go. Thank  
3 you.

4 THE WITNESS: Thank you.

5 THE COURT: State, who's your next witness?

6 MS. WONG: Detective Brian Kowalski.

7 THE MARSHAL: Can you step up in the witness stand, please. Remain  
8 standing. Raise your right hand and face the clerk, please.

9 **BRIAN KOWALSKI**

10 [having been called as a witness and being first duly sworn, testified as follows:]

11 THE COURT CLERK: Please be seated. Please state your name and spell  
12 your first and last name for the record.

13 THE WITNESS: It's Brian Kowalski, B-R-I-A-N; last name is  
14 K-O-W-A-L-S-K-I.

15 THE COURT: You may proceed.

16 MS. WONG: Thank you, Your Honor.

17 **DIRECT EXAMINATION**

18 BY MS. WONG:

19 Q Detective, how are you employed?

20 A I'm employed by Las Vegas Metropolitan Police Department as a  
21 detective.

22 Q Okay. What particular crime unit?

23 A I'm on the violent crimes unit right now.

24 Q Okay. And back in October 10<sup>th</sup> of 2012 which unit were you on?

25 A I was on the major crimes detail, which is basically violent crime details,



1 except it's the graveyard hours.

2 Q All right. And how long have you been with Metro overall?

3 A I've been with -- about nine and a half years now.

4 Q How long have you been a detective?

5 A About five and a half years.

6 Q So I want to direct your attention to October 10<sup>th</sup> of 2012 at  
7 approximately one o'clock in the morning. Were you contacted by an Officer  
8 Knudson regarding a man being lit on fire at a Circle K?

9 A Yes, we were; myself and my partner, Detective Johnson.

10 Q Okay. Was that Detective Kevin Johnson?

11 A Yes, ma'am.

12 Q Is Detective Johnson still currently employed with Metro?

13 A No, he retired about a year and a half ago.

14 Q All right. So did you in fact respond to the Circle K located at -- on  
15 South Las Vegas Boulevard?

16 A I did. I believe Detective Johnson responded there first. I responded to  
17 the hospital and then met him at the scene afterwards.

18 Q Okay. Who was the lead detective on the scene?

19 A Detective Johnson was.

20 Q So you first responded to the -- to UMC?

21 A Yes.

22 Q All right. And why did you respond to UMC?

23 A Usually our protocol is if there's someone at the hospital, a victim or a  
24 witness or something like that, one of us will go to the scene or two of us will go to  
25 the scene and we send one detective to the hospital to try to talk to the victim or

1 ascertain his injuries or anything like that.

2 Q Did you make contact with the victim in this case?

3 A He was intubated when I arrived and I was unable to speak with him, so  
4 I finished up at the hospital after I talked to the doctors and went to meet Detective  
5 Johnson on scene.

6 Q And the victim that you saw at the hospital that was Theodore  
7 Bejarano?

8 A Yes.

9 Q So then ultimately you met with Detective Johnson at the Circle K?

10 A Yes.

11 Q What was Detective Johnson doing when you arrived?

12 A I believe we were just about to review the video when I arrived.

13 Q Okay. Did you in fact view the video?

14 A I did.

15 Q And where did you view this video?

16 A We viewed it in the Circle K office -- the manager's office. They had a  
17 TV and video set up in the back.

18 Q All right. And what did you do after viewing the video?

19 A I believe after we viewed the video I met with Detective Johnson. He  
20 basically gave me the details that he'd already been informed of by the patrol  
21 officers that were on scene. And then we decided -- we reviewed the witness  
22 statements that had been written out and ultimately we ended up speaking with Mr.  
23 Newell.

24 Q Okay. Was -- so the Defendant was -- or Mr. Newell was present at the  
25 scene when you first arrived?

1 A Yes, he was still on scene when I arrived.

2 Q Where was he when you first arrived?

3 A I believe he was with patrol officers. I don't exactly recall where he  
4 was. I believe he was standing with patrol by one of their patrol vehicles.

5 Q By the time that you made contact with him where was he?

6 A When we made contact he was still with the patrol officers. I believe he  
7 was in handcuffs at the time. We asked him if he wanted to tell us his side of the  
8 story. I believe Detective Johnson removed his handcuffs and then we proceeded  
9 to us my vehicle to do the interview in.

10 Q All right. So -- okay. Is your vehicle a marked vehicle or it is  
11 unmarked?

12 A No, it's an unmarked -- I believe at the time it was a gray Crown  
13 Victoria.

14 Q Were you, Detective Johnson, as well as Patrick Newell inside that  
15 vehicle?

16 A Yes, it was the three of us.

17 Q Okay. So this individual that you know as Patrick Newell do you see  
18 him in the courtroom today?

19 A I do.

20 Q Will you please point to him and describe an article of clothing that he is  
21 wearing?

22 A Seated right there. He's wearing a blue long sleeved shirt.

23 MS. WONG: May the record reflect the identification of the Defendant?

24 THE COURT: The record will so reflect.

25 ///

1 BY MS. WONG:

2 Q Just want to go back for one second. How long did you actually view  
3 the video?

4 A I think maybe watched it once or twice. I think Detective Johnson may  
5 have watched it once before I arrived, and then we watched it I think once or two  
6 times after that to get me up to speed on what was going on.

7 Q I want to show you what's already been admitted as State's Exhibit  
8 Number 1. Do you know what angle of the Circle K we're looking at here?

9 A If I remember correctly, I believe we're standing in the parking lot  
10 looking -- I guess that would be west towards the front entrance.

11 Q Okay. Is that where the gas pumps would be?

12 A Yeah, yeah. We're closer than the gas pumps are I believe because it  
13 looks like we're standing at the base of the parking spaces, but I believe the gas  
14 pumps would be behind us.

15 Q Okay. So the gas pumps would be further away than what the picture  
16 shows here?

17 A From what it looks like to me. It looks like we're standing almost at the  
18 end of the parking spots there. I believe they were a little further set back.

19 Q Where's the -- where are the cashiers -- the registers?

20 A I believe the registers if -- going to be on the right side of this pillar.

21 Q You can draw on it.

22 A Oh, I can. Okay. I believe the registers are in this area behind here.

23 Q Okay. And I want to direct your attention to -- do you see this object  
24 right here?

25 A Sort of; yes.

1 Q Do you know what that is?

2 A Not that I can say.

3 Q It's just some machine of some sort -- some -- do you see an object  
4 here though?

5 A I do see something there; yeah.

6 Q Okay. And can you see the cash register from this angle? Can you  
7 actually see the cash register?

8 A I personally can't, but -- not where I'm sitting, but -- like I said, it was not  
9 something I looked to see where exactly the cash register was at.

10 Q Okay. All right. I want to get back to the interview that you did with the  
11 Defendant.

12 A Mm-hmm.

13 Q You said the Defendant was out of handcuffs.

14 A Yes.

15 Q And was he seated in the front of the patrol car or in the backseat?

16 A He was in the front passenger seat. Detective Johnson was in the front  
17 driver seat as primary and then I was in the back passenger side.

18 Q So prior to interviewing the Defendant was he read *Miranda*?

19 A Yes. Detective Johnson --

20 Q And who read him --

21 A Detective Johnson read him *Miranda* prior to the interview and then at  
22 the start of the interview on tape.

23 Q Prior to the interview and at the start of the interview on tape, how many  
24 interviews took place?

25 A Well, I -- we spoke to him briefly before we went into the car as if you

1 wanted to give his side of the statement. And I believe Detective Johnson advised  
2 him that he was the suspect in this, and that if he would be giving a statement it  
3 would be a suspect statement and he would be advised of his *Miranda* rights. And  
4 Detective Johnson advised him once prior to us even starting the full on formal  
5 interview and then a second time when we actually started the formal interview in  
6 the car on the recorder.

7 Q So the first time that you guys had this interview with the Defendant  
8 was he inside the patrol car?

9 A No. We spoke to him outside the patrol car prior to us going into the  
10 car.

11 Q All right. But he was read *Miranda* by Detective Johnson?

12 A Yes.

13 Q And the Defendant did indicate that he understood his rights and was  
14 willing to talk to you?

15 A Yes.

16 Q Okay. And then he gave a statement?

17 A Yes.

18 Q And then subsequently you -- did you ask the Defendant if he wanted a  
19 recorded statement?

20 A The Defend --

21 Q Defendant. He wanted his statements recorded.

22 A Well, we advised him that it would be a taped statement. It would be a  
23 recorded statement. And in the interview we even said -- asked him --

24 Q I'm talking about the first statement that you got from the Defendant  
25 when he was not inside the patrol car.

1           A     Oh, yeah. No, we advised him that we wanted to do a formal taped  
2 statement with him --

3           Q     Okay.

4           A     -- and that anything -- any time we talk to people we'll do a quick prelim.  
5 Just say, you know, hey, what happened. And then once it gets into more pertinent  
6 information, reference the case or anything that could be incriminating, we stop and  
7 then we'll say, hey, would you like to do your full formal statement, and --

8           Q     So do --

9           A     -- he wanted to tell us his side of the story.

10          Q     All right. So do you recall what statements the Defendant made during  
11 this untapped interview?

12          A     Not particularly. It was pretty much the same stuff we had discussed in  
13 the full interview.

14          Q     Okay. So there was nothing discussed in this first interview that would  
15 not be contained in the second recorded interview?

16          A     No, I don't believe. I don't believe the first interview -- it wasn't a long  
17 extensive interview. It was pretty much a 30 second blurb of hey, tell us what  
18 happened.

19          Q     Okay. So the interview only last for about 30 seconds?

20          A     Roughly.

21          Q     Thirty second, a minute; okay.

22          MS. WONG: Now I'm going to move to admit State's proposed Exhibit  
23 Number 21. It's by stipulation of the parties.

24          THE COURT: Are you stipulating, Mr. Coffee?

25          MR. COFFEE: Yes.

1 THE COURT: All right. So 21 is admitted.

2 BY MS. WONG:

3 Q Now who was doing the questioning primarily during this taped  
4 interview with the Defendant?

5 A Detective Johnson.

6 Q And during this interview the Defendant was again read his *Miranda*  
7 rights?

8 A Yes, by Detective --

9 Q Again waived those rights and agreed to speak with you?

10 A Yes.

11 Q And you were present during this interview?

12 A I was.

13 [State's Exhibit 21 played -- not transcribed]

14 BY MS. WONG:

15 Q Detective Kowalski, you indicated that when you first saw the  
16 Defendant he was handcuffs?

17 A Yes.

18 Q Do you know whether or not he was actually under arrest at that time?

19 A I believe he was. According -- if I remember correctly, the patrol officers  
20 had already placed him under arrest after they spoke to him.

21 Q Okay. So after you and Detective Johnson reviewed the evidence, if  
22 you felt that no crime has been committed would you have the discretion and the  
23 authority to let the Defendant go?

24 A Yes.

25 Q Now in this case, after having reviewed the view and after having



1 interviewed the Defendant, did you decide to go ahead and arrest the Defendant?

2 A Yes.

3 Q Even though he's somewhat claiming self-defense here in -- in his  
4 interview?

5 A Yes.

6 Q Why?

7 A At the time we believed it was excessive response. There were other  
8 alternatives as opposed to lighting someone on fire that could have rectified the  
9 situation. And so, like I said, Detective Johnson was the lead and he made the  
10 determination between the two of us that probable cause existed for the arrest.

11 Q And the Defendant was then transported to --

12 A He was placed back into handcuffs. I believe one of the patrol officers  
13 transported for us because at the time we don't have cages or anything in our cars,  
14 so we usually utilize patrol car transport, which at the time they took him down to  
15 CCDC. We go back to the office and complete all the required paperwork.

16 MS. WONG: Pass the witness.

17 THE COURT: Cross-examination?

18 **CROSS-EXAMINATION**

19 BY MR. COFFEE:

20 Q You used a technical term there that I want to talk to you a little bit  
21 about it, probable cause. You are trained?

22 A Yes.

23 Q You went to the police academy before you became a detective?

24 A Yes.

25 Q You received POST certification at the police academy I would

1 imagine?

2 A Yes.

3 Q They taught you some basics about report writing and that sort of thing?

4 A Mm-hmm.

5 Q Yes?

6 A Yes.

7 Q Being a detective's a promotion?

8 A Yes. We -- it's a tested position.

9 Q Tested position?

10 A Yes, it's not -- technically, per our contract, it's not a promotion; it's a

11 tested position.

12 Q Okay. Not everybody on the force is a detective?

13 A Correct.

14 Q It's not a situation where you go to another officer and say today I'm  
15 going to be a detective, tomorrow you're going to be a detective. You have to take a  
16 test to get there?

17 A Yes, you take a test; compete with other people who want to be  
18 detectives.

19 Q And that's controlled I suppose -- the testing's to make sure there's  
20 merit involved with it --

21 A Yeah.

22 Q -- to some extent?

23 A Yes.

24 Q Controlled by union contracts, that sort of thing?

25 A Civil service, all that. Yeah.

1 Q Civil service type sort of thing. Being a detective also means some  
2 additional training, doesn't it?

3 A Yes. We have more options than most patrol officers have.

4 Q There's more funds to send you to training, for example?

5 A No, not right now. There are no --

6 Q Not right now. The budget [indiscernible].

7 A Yeah, there are not funds to be sent anywhere.

8 Q There's more -- yeah, sending I suppose was -- it was a loaded  
9 question. There is some additional training they give you though?

10 A Yes.

11 Q For example, as a patrol officer you might learn to write reports?

12 A Yes.

13 Q And they would teach you that you want to put important details in  
14 reports; yes?

15 A Yes.

16 Q You can't get everything obviously, but big facts you get because  
17 somebody might have to rely on them later?

18 A Yes.

19 Q You want to be honest in reports; yes?

20 A Yes.

21 Q You want to be fair in reports?

22 A Yes.

23 Q And you try to be evenhanded to some extent?

24 A Yes.

25 Q And that report writing carries over to being a detective also I would

1 imagine?

2 A Yes.

3 Q In fact, as a detective you might be tasked with putting more detail in  
4 the reports. Maybe not more reports an absolute number, but reports become more  
5 detailed to some extent?

6 A Yes.

7 Q With major violators -- I think you said you were on major violators at  
8 this point?

9 A Major crimes unit.

10 Q Major crimes. They use different terminology for different --

11 A Changes like the wind.

12 Q Yeah. Major crimes -- with major crimes the reports may be even more  
13 detailed?

14 A Could be.

15 Q And one of the things that you learn being a detective -- you know, I'm  
16 coming around to this probable cause thing, but I want to make sure that the jury  
17 understands the perspective you've got on it. Interviewing, for example, you learn  
18 some interviewing techniques?

19 A There are some interview classes, yes.

20 Q And you've taken some of those interview classes?

21 A I have, yes.

22 Q Which classes did you take?

23 A I believe it was interviewing and interrogation, one and two.

24 Q Okay. Is that the Reid course?

25 A I believe one of them was a Reid course; one of them through PATC.

1 Q Okay. And -- so -- again, so the jury understands how these interviews  
2 work, you've worked with Detective Jackson [sic]?

3 A Johnson.

4 Q Johnson; I'm sorry. Detective Johnson before?

5 A Yes.

6 Q And you partner on this particular case to some extent?

7 A Yes, he's a partner on this particular case. We say partner, we are not  
8 partnered up like the --

9 Q It's not like the movies?

10 A -- TV show. Yeah -- no, not like that.

11 Q It's not like the movies. Partners may rotate, but you are partners. And  
12 the reason you partner up is because you may see something Detective --

13 A Kowalski.

14 Q Kowalski that Detective -- who is it?

15 A Johnson.

16 Q Johnson didn't see, for example.

17 A Yes.

18 Q And vice versa?

19 A Mm-hmm.

20 Q Yes?

21 A Yes.

22 Q So the fact that -- for example, Johnson was lead detective doesn't  
23 mean that you're passing the buck about things that may or may not have been  
24 done in the investigation. You're both kind of responsible for the investigation?

25 A Yes.

1 Q For example, if there was something obvious or glaring that Mr. Newell  
2 should have been asked about, you'd be responsible for that just as Johnson would;  
3 correct?

4 A Yes.

5 Q And while Johnson takes the lead, in fact, towards the end Detective  
6 Johnson even asks you is there anything else you'd like to add?

7 A Yes.

8 Q Okay. Now back to the beginning, and I know it's a long way around to  
9 get, probable cause.

10 A Yes.

11 Q That's one of those terms that talk about a legal necessity for an  
12 arrest --

13 A Yes.

14 Q -- is that a fair description?

15 A Yes. If we don't have probable cause we can't make an arrest.

16 Q Okay. And probable cause simply -- it doesn't mean that you've  
17 decided that a person's guilty or not guilty. That's not your function; is that fair?

18 A Correct.

19 Q That is the function of these folks; right?

20 A Yes.

21 Q It's just simply whether you not have enough information to make an  
22 arrest --

23 A Yes.

24 Q -- is that a fair characterization; yes?

25 A Yes.

1 Q And it can be -- don't want to get into too technical terms because that's  
2 not appropriate, but arrest and conviction aren't the same thing?

3 A No.

4 Q The fact that you thought there was enough to arrest doesn't say the  
5 jury has to convict. That's not the way this works; right?

6 A No.

7 Q It is left in their hands?

8 A Yes.

9 Q Okay. I want to talk to you about the interview for a moment. I want to  
10 talk to you about -- let me ask you something first. Detective Johnson -- are you  
11 aware that Mr. Newell filed a citizen review complaint against Detective Johnson?

12 A Yes, I was made aware of that.

13 Q Sixteen pages complaining about the investigation that was done in this  
14 case.

15 A Yes.

16 Q Okay. And I'm not allowed to get into the details of that complaint, but I  
17 just wanted to make sure that you were aware that it was out there.

18 A I am aware that it was out there, yes.

19 Q Now, as a detective you have access to -- it's not like -- I'm talking  
20 about the TV shows. It's not like the old west, we have computer databases now;  
21 right?

22 A Right.

23 Q And you can do searches of criminal history, that sort of thing; yes?

24 A Yes.

25 Q The searches are not just for Nevada. The searches are nationwide to

1 some extent?

2 A Some are yes; some are not.

3 Q It is not perfect. There are things that are left out?

4 A True.

5 Q More serious offenses tend to be caught by the interstate system; for  
6 example, if there'd been a murder conviction for Mr. Newell that would likely show  
7 up on a database someplace?

8 A I would hope so.

9 Q But if he jaywalked it may not make the database?

10 A I couldn't speak to the accuracy of other departments or that.

11 Q Okay. The point being though that you do do those sorts of things. The  
12 database is called?

13 A The one we use locally is SCOPE.

14 Q The one locally is SCOPE. That's for Nevada. And the ones we you  
15 use -- there's a thing called NCIC also?

16 A And NCIC, yes.

17 Q NCIC's ran by the federal government?

18 A Correct.

19 Q It's called the national crime information computer; yes?

20 A Yes.

21 Q And that's the one where they're supposed to put major violations; yes?

22 A Yes.

23 Q One of the things I would imagine as a detective when you're  
24 investigating [indiscernible] case that you want to determine is whether or not -- you  
25 knew that Mr. Newell was claiming self-defense?



1 A Yes.

2 Q One of the things I would imagine you would want to determine is  
3 whether or not a person has a violent history. That might be important?

4 A We'll look.

5 MS. WONG: Judge, can we approach?

6 THE COURT: Sure.

7 [Bench conference -- not transcribed]

8 BY MR. COFFEE:

9 Q Okay. Where we were at. If somebody claims self-defense you might  
10 like to look at their history for violence?

11 A Out of practice we're trained to run everyone we come into contact with.

12 Q Okay.

13 A Victims, witnesses, suspects.

14 Q Okay. And, again, because of the peculiarities of a courtroom I want to  
15 limit what we're talking about to history for violence, if I might; okay.

16 A Okay.

17 Q You looked into Mr. Newell's record in SCOPE, Nevada's criminal  
18 database; yes?

19 A Yes.

20 Q No violent history convictions in Nevada SCOPE?

21 A I believe not.

22 Q You looked into arrests in Nevada's database; yes?

23 A Yes.

24 Q No violent arrests in Mr. Newell's past; correct?

25 A Correct.

1 Q You looked into the national crime information computer, and that goes  
2 back years, decades; yes?  
3 A Yes.  
4 Q No violent convictions in Mr. Newell's past?  
5 A Yes.  
6 Q You looked for violent arrests. And arrests don't always show up in that  
7 NCIC?  
8 A Not always, but --  
9 Q But violent -- bad violent ones do on occasion?  
10 A They should.  
11 Q No violent arrests in NCIC in Mr. Newell's past; correct?  
12 A Correct.  
13 Q In fact, based on your search you could find no history of violence for  
14 Mr. Newell whatsoever; is that fair?  
15 A That's fair.  
16 Q And Mr. Newell was 61 years old at the time; yes?  
17 A I believe so.  
18 Q You know that Theodore Bejar -- I can't pronounce the last name.  
19 A I will butcher it as well.  
20 Q The State's used the term Teddy. If that's okay, I'm going to use Teddy  
21 with you.  
22 A Works for me.  
23 Q Okay. You know that Teddy was taken to the hospital.  
24 A Yes.  
25 Q There were reports that Teddy had been intoxicated.

1 A I believe so from witnesses. People said he appeared to be intoxicated.

2 Q One of the things when you were looking into -- I would imagine a fight  
3 or an altercation, that might be one of the considerations whether or not somebody's  
4 intoxicated?

5 A Yes.

6 Q Intoxicated people tend to act erratically. Not everybody, but on  
7 occasion?

8 A Yes.

9 Q Alcohol reduces inhibitions, I think might be the fair characterization;  
10 right?

11 A I agree with that.

12 Q And in this instance, while you arrested Mr. Newell for probable cause  
13 of acting beyond what he should've done in the instance, lighting the man on fire,  
14 you did watch a videotape; correct?

15 A Yes.

16 Q And the videotape bore out much of what Mr. Newell said in that  
17 interview with you that in and around his truck -- Teddy kept moving in and around  
18 the truck; was leaning on the truck. You could see Mr. Newell approach Teddy. He  
19 said he asked him to leave the truck. We don't have audio, but Mr. Newell's  
20 description was by and large consistent with what you saw on the videotape; is that  
21 fair?

22 A Yes.

23 Q And I would imagine the reactions -- when you watched the videotape  
24 and Teddy is sprayed with gasoline does he run away?

25 A I don't believe he runs away so much as backs away.

1 Q He backs away by the second pump for a few steps?  
2 A Yes.  
3 Q Appears to wipe off his face and then he engages again, right, he  
4 moves forward?  
5 A Yes.  
6 Q That doesn't appear to be particularly rational, does it?  
7 A I wouldn't say so.  
8 Q And that might raise suspicions with the alcohol and the other things  
9 that we've talked about; is that fair that he might be acting irrational?  
10 A Yes.  
11 Q You know that he was taken to the hospital.  
12 A I do.  
13 Q Which hospital was he taken to?  
14 A UMC, University Medical Center.  
15 Q Okay.  
16 A Their trauma unit.  
17 Q And do you know if a blood draw was done at the hospital?  
18 A I do not. I do not have access to the medical records. That would've  
19 been something Kevin -- or Detective Johnson would've followed up with.  
20 Q Okay. And, again, we're not going to pass the buck to Detective  
21 Johnson. It just wasn't done in this case; right?  
22 A I said I couldn't to speak it. I don't know if it was done or not.  
23 Q Okay. Anything -- you got a notebook there.  
24 A Mm-hmm.  
25 Q Is that involving this case?

1 A This is.

2 Q You reviewed it before you came in?

3 A I did.

4 Q You knew you might be testifying; yes?

5 A Yes.

6 Q And nothing in that notebook or the folder that you're aware of that they  
7 looked at the blood draw in any way?

8 A I have no copies of any medical records in my paperwork.

9 Q Okay. Nobody followed up on anything at the hospital to the best of  
10 your knowledge; correct?

11 A To the best of my knowledge I know Kevin -- Detective Johnson went to  
12 interview the victim, but I do not know if he received medical information. I know he  
13 got a medical release done, but again, I don't know -- I don't have those record  
14 release.

15 Q Do you know if a toxicology was ever done or if Detective Johnson or  
16 you ever requested a toxicology to be done to see if there was anything else in  
17 Teddy's system that might be causing --

18 A I can say I did not request a toxicology report.

19 Q You did not?

20 A I did not.

21 Q And we don't know if Johnson did. It's no place in your folder?

22 A I couldn't say if he did or not.

23 Q No place in the file?

24 A Not in my file; no.

25 Q And you got -- I know Johnson's retired, but you got access. There's a

1 police database. You got access to what he did?

2 A I've access -- well, I don't have access to everything he did because I  
3 cannot go into his cases, but I've accessed all the paperwork that's been filed under  
4 this event number.

5 Q Perfect. And you try to keep that as complete -- because somebody  
6 like me may ask you questions about toxicology --

7 A Correct.

8 Q -- a couple years later. And there's no evidence that anybody ever  
9 looked into a toxicology to see what might've been in Teddy's system; is that fair?

10 A Well, I -- yes. I don't have any.

11 Q Now there was talk of *Miranda*. You are familiar with *Miranda*?

12 A Yes.

13 Q And *Miranda* is a case that essentially says you have to advise  
14 somebody of their rights before you can take an interview if they're in custody?

15 A Correct.

16 Q I mean that's a real short description, but that's it. Do you have a card  
17 -- a *Miranda* card with you?

18 A I do.

19 Q And is it the same card that they used?

20 A It's the same card I've had.

21 Q For a long time?

22 A For a long time.

23 Q And the rights haven't changed --

24 A Not to my knowledge.

25 Q -- since then? Okay. I want to go through that card with you. Very

1 good. Now the interview takes place at 3:48 in the morning is when it starts?

2 A I believe 3:48 is when it ends. I could tell you exactly when it starts if  
3 you'd like.

4 Q Sure. I'm sorry, 3:44 on the -- look at the voluntary statement or maybe  
5 you got a better --

6 A According to the transcription, Kevin Johnson says it started at  
7 approximately 0328 hours.

8 Q 0328. I'm sorry. Okay. And I was looking --

9 MR. COFFEE: Permission to approach?

10 THE COURT: You may.

11 BY MR. COFFEE:

12 Q I was looking at this transcription.

13 A And I was looking at this in the details when he starts date and time of  
14 the interview at --

15 Q Yeah.

16 A -- and then the 3:28. That could be the end time.

17 Q Okay. The 3:44 or 3:40 that I was getting from the other caption might  
18 be the end time?

19 A That is the end time.

20 Q We can agree that it started after 3 a.m. in the morning?

21 A Yes.

22 Q And this had been one o'clock in the morning when the event had taken  
23 place, give or take?

24 A I believe the event started at one.

25 Q So we're talking at least two and a half hours later?

1 A Yes.

2 Q You said there was a short interview that took place. I'm not going to  
3 say off the record, because nothing's off the record; right?

4 A Right.

5 Q But there's a short interview that takes place before he's placed in the  
6 police car for a longer interview?

7 A Yes.

8 Q Now there's also facilities at Las Vegas Metropolitan Police Department  
9 to interview people in rooms videotaped?

10 A There are.

11 Q That wasn't done in this instance?

12 A No. We usually -- just because we're graveyard detectives and we do  
13 not have the resources that most other ones have; we kind of have to do a lot of our  
14 work in the field and kind of on the fly.

15 Q Understood. The resources are limited. Offices aren't always open at  
16 two in the morning, that sort of thing; is that fair?

17 A Fair. Yes.

18 Q That short interview, how long did that last, do you remember?

19 A It was very short. I believe -- like I said, I think Detective Johnson  
20 talked to Mr. Newell; said if he wanted to give a story or not; he said he did.  
21 Detective Johnson read him *Miranda* quickly because it was a suspect interview; he  
22 was in custody --

23 Q Okay.

24 A -- and said, you know, what happened. And when he started telling us  
25 the story I think -- based on the fact that it was probably going to be more long and



1 involved Kevin said, you know what, hold on a second; we'll just do a full taped  
2 statement with you if you're willing to.

3 Q How many of these sorts of interviews have you done?

4 A [Indiscernible.]

5 Q Just suspect interviews?

6 A Probably hundreds at this point?

7 Q Probably hundreds at this point. You've been in situations where  
8 people have refused to talk?

9 A Yes.

10 Q Or at first weren't sure if they wanted to talk?

11 A I've had many interviews that start with people saying they want to talk,  
12 and then the minute the recorder starts they decide they don't want to. It's neither  
13 here nor there for us.

14 Q Yeah, or vice versa. People say I'm not sure I want to talk and then  
15 they say wait a minute, wait a minute, I decided I want to give my side?

16 A Sure, that's happened too.

17 Q Yeah, both happened. There was never any question that Mr. Newell  
18 wanted to talk that you saw; right?

19 A No. Mr. Newell was adamant he wanted to tell us his side of the story.

20 Q Okay. Now it takes place at 3:30, give or take. Do you know how long  
21 Mr. Newell had been up at that point?

22 A No, I do not.

23 Q Had anybody asked in the voluntary statement?

24 A No.

25 Q Okay. And nothing in any other -- the police report or things that you

1 got if he -- you don't know if he woke up at six the morning before or woke up 30  
2 minutes before he went to the Circle K, you just don't know?

3 A Don't know.

4 Q Okay. We talked about training and the Reid method. The Reid  
5 method is a method of interrogation and interviewing; is that fair?

6 A That's fair.

7 Q And they teach you certain techniques to be able to keep talking for one  
8 thing -- to answer questions specifically?

9 A Yes.

10 Q They teach you things like to be non-confrontational?

11 A Yes.

12 Q And they teach you the direction to take interviews on occasion to try to  
13 keep the music playing, for lack of a better description. Try to keep things going;  
14 correct?

15 A Yes.

16 Q For example, if a Defendant starts to shut down and doesn't want to talk  
17 about anything you might change the subject to try to keep him talking about other  
18 things and then come back to it. You have to have some smarts to use the  
19 technique [indiscernible]?

20 A Yeah, there's -- yes, there's techniques like that.

21 Q But there's -- and it's -- the technique -- the book's actually, I don't  
22 know, a hundred and fifty pages or so.

23 A If that.

24 Q Yeah, but it's more than a handout; fair enough?

25 A Fair enough.

1 Q Fair enough. I want to step through the interview. Well, let's go  
2 through the card first because we had that up. What's the first thing that he was  
3 told?

4 A You have the right to remain silent.

5 Q Okay. Did he exercise that?

6 A No, he chose to speak with us.

7 Q Okay. Next line.

8 A Anything you say can be used against you in a court of law.

9 Q Okay. So you telling him anything he says can be used against him.  
10 He has the right to shut down at that point and he doesn't?

11 A He has the right to stop the interview at any point he wants.

12 THE COURT: Can I get counsel to approach very quickly?

13 MR. COFFEE: Yeah.

14 [Bench conference -- not transcribed]

15 THE COURT: All right. Ladies and gentlemen, just -- I'm sorry -- first of all, I  
16 apologize to everyone for the interruption, but just kind of looking at you guys it kind  
17 of looks like a couple of you need a break right now. So let's go ahead and take a  
18 quick break.

19 You're admonished that until you begin deliberations you're under oath  
20 and have not been discharged. Do not reach any conclusions about this case as  
21 you've not heard all the evidence. Do not talk to anyone about this case. Do not  
22 investigate any facts of this case. Do not view any media press or internet reports  
23 about this case. Do not talk to anyone who may be involved in any way with this  
24 case. Do not discuss the facts of this case with each other. Remember to wear  
25 your badge at all times. Please leave your notebooks on your chairs. Let Randy

1 know when you're ready.

2 And, detective, if I could get you to hang out for just one second just so  
3 you're not walking out with them; okay.

4 [Outside the presence of the jury]

5 THE COURT: All right. We're still on the record outside the presence of the  
6 jury. The detective is still present in the courtroom.

7 Again, Mr. Coffee, on the record I apologize for the interruption. I hope  
8 that it wasn't an awkward place, but just watching the jury I could see a couple of  
9 them, you know, start to shift around that suggested me they kind of needed a break  
10 for a couple minutes, so --

11 MR. COFFEE: I appreciate the Court's interruption actually, because if we're  
12 starting to lose them I don't want them to miss something important.

13 THE COURT: Right. All right. So let's do this. Let's all take a quick break.

14 Detective, if you want to step out in the hallway. Do you need to use  
15 the restroom or anything or you want --

16 THE WITNESS: No, I'm good. Thank you, sir.

17 THE COURT: All right. Then -- you know, let's have you step out anyway  
18 because I think there's one sidebar that we did have we need to memorialize. But  
19 let's take a quick break right now and we'll come back and do that; all right.

20 [Recess taken at 2:29 p.m.]

21 [Proceedings resumed at 2:37 p.m.]

22 [Outside the presence of the jury]

23 THE COURT: We're back on the record on State versus Patrick Newell, Case  
24 Number C285825. During the cross-examination of Detective Kowalkski, there was  
25 one sidebar that we probably need to memorialize. At one point Mr. Coffee was

1 asking the detective about NCIC and whether he runs NCIC or does NSCOPE  
2 criminal background checks as part of his investigation on a case involving self-  
3 defense. The State asked for a sidebar. And what happened at sidebar was they  
4 expressed the concern whether Mr. Coffee was going to go into the criminal history,  
5 if any, of the victim, and if so, they were going to make an objection. But Mr. Coffee  
6 stated at the sidebar that he was not going to ask about the victim's criminal  
7 background. He was only going to ask about the Defendant's lack of a violent  
8 criminal history. And so strictly speaking, no objection was actually made because  
9 Mr. Coffee indicated he was not going to go there. But that was my impression of  
10 the sidebar, but if you guys have any additions to make to that record you're  
11 obviously very welcome to.

12 MS. WONG: No. That's entirely accurate, Your Honor.

13 THE COURT: Mr. Coffee, anything to add to that?

14 MR. COFFEE: I do, and it doesn't have to do with the sidebar. But I was  
15 recently held ineffective for not inquiring into a battery arrest that was 30 years old  
16 during a trial, so I figured it's better to ask than not -- than not ask. I'm asking the  
17 Court's permission to allow me to go into the criminal history of Theodore Bejarno.  
18 He's got a robbery conviction -- or attempt robbery conviction. I believe it's 20 years  
19 old. I believe he's off paper, outside the ten years. I didn't ask him about it when he  
20 was on the stand for those reasons. But I suppose the relative violent nature of the  
21 two is at question to some extent, so for that reason I would ask to be able to inquire  
22 into it -- at least to have made the request.

23 THE COURT: Well, here's the problem, just as an observation. I don't know  
24 which case you're talking about in which you were held ineffective for not doing that.  
25 The problem that I have, it's more of a technical evidentiary thing. You didn't ask

1 the victim about his own record, so asking the detective about it based on NCIC  
2 would technically be hearsay. If you had a JOC for this 20 year old arrest maybe it's  
3 a different thing, but, you know, whether or not it's admissible as a defense, you  
4 have an evidentiary problem because you didn't get an admission from the victim  
5 that he has this arrest. And I don't know how you're going to prove it other than --  
6 you know, NCIC, as you guys know, is hearsay at least as to someone who's not  
7 hear in the courtroom.

8 MR. COFFEE: Someone -- yeah. I had a good faith basis to ask -- and I  
9 suppose since we're talking about NCIC, I had a good faith basis to ask Mr. Bejarno  
10 about it. I think that's all I need as a defense attorney is a good faith basis to inquire  
11 into it. I don't need a judgment of conviction, unlike the State. I didn't do that. If  
12 there's any fault involved in that, that fault is mine and I'll answer for it later if that's  
13 the reason that it's not coming in at this point. But I did not --

14 THE COURT: Well, I'm not -- I'm just making an observation because I'm not  
15 -- you know, obviously, I just -- I didn't know that you do or don't have a JOC. I was  
16 making an observation that, well, since you -- if you've asked for permission for --  
17 from me and you gotten it and you asked the victim and he says, yeah, I got this  
18 conviction, you don't need any paperwork because you have an admission. But as  
19 you sit here right now with the victim not here, you know, I'm presuming the question  
20 you're going to ask is did you look at a NCIC on the victim and is it -- well, that's kind  
21 of the problem is you have a hearsay problem, and that's separate and apart from  
22 whatever the ruling was in the case that you're talking about. That was just --

23 MR. COFFEE: Sure.

24 THE COURT: -- an observation that I had right off the top of my head, but --  
25 anyway -- so on behalf of the State, what's your response?

1 MS. WONG: Your Honor, the State's objection goes beyond simple hearsay.  
2 That's improper character evidence. The victim was discharged from probation in  
3 2000, so that's conviction is now 14 years old. It's over ten years. You're not  
4 allowed to inquire into that felony. I get that this is a self-defense case, and if the  
5 Defendant were aware of the victim's conviction or this particular crime that certainly  
6 they can ask him about it, but there's no evidence of that, so that's why this  
7 conviction cannot come in, and it can't be inquired whether it's be of the victim or of  
8 this detective.

9 MR. COFFEE: And if I might, one more thing just so the record's complete.  
10 We did try to find the victim of the attempt robbery I believe; correct, Seth? And we  
11 were unable to locate that person from investigative purposes. I thought under *Petty*  
12 we were allowed to put that person on if they had an opinion as to the violent nature  
13 of Theodore. We tried to find the victim. We were unable to do that through our  
14 investigative office.

15 THE COURT: Yeah. I mean, there's a couple things going on. The State  
16 obviously has a point where if -- even if he has a -- this violent history there's a  
17 question about whether or not Mr. Newell had any reason for knowing that.  
18 Certainly if he did know about that, and that certainly would affect his state of mind,  
19 but I didn't hear you say that you believe that Mr. Newell had any reason to know of  
20 that. But the second thing is you indicated just on the surface there's this evidentiary  
21 issue which is, you know, if you had the victim on the stand now as a matter of  
22 evidence you could get in, but you don't, so getting it through the detective you have  
23 all these other -- you know, hearsay problems is really one of the issues here.

24 MR. COFFEE: And is the Court saying that I would've been allowed to inquire  
25 into --

1 THE COURT: No, I'm not saying that. What I'm saying is even before you  
2 get there, whether you would've or wouldn't have, that was my first thought is --

3 MR. COFFEE: Oh.

4 THE COURT: -- well, how are you going to get it in through this guy who's  
5 sitting here right now. That's the problem.

6 MR. COFFEE: Because I was going to ask the Court for leave to recall the  
7 victim. Send my investigator and subpoena him and bring him in and ask him about  
8 it. And just so that's on the record that I've asked for that remedy also, Judge, so it's  
9 clear.

10 MS. WONG: And just for post-conviction purposes, Your Honor, even had Mr.  
11 Coffee tried to -- well, first of all, he tried to inquire of the victim about his felony  
12 conviction I would have jumped up and down. I think everybody here knows that  
13 that's improper because the conviction is too old and the Defendant himself had no  
14 personal knowledge of that conviction or that crime.

15 THE COURT: Let me ask you. What is in the victim's record? Is it just a 20  
16 year old robbery or is there stuff since then? Because, you know, one of the things  
17 about it -- and, you know, this isn't necessarily a legal thing, but in terms of  
18 balancing out the factors, we all know that people when they're 18 versus people  
19 when they're 40, you know, they're different things. Does he have a string of stuff  
20 since then or is it just a 20 year old thing and nothing since then that we're talking  
21 about?

22 MR. COFFEE: I believe in terms of violence --

23 MS. WONG: Yeah, that was it.

24 MR. COFFEE: -- this is primarily it. He's got DUIs since, I think, is --

25 MS. WONG: Maybe some PCS --



1 MR. STEPHENS: I think there's an unlawful --

2 MS. WONG: -- and misdemeanors.

3 MR. STEPHENS: -- paraphernalia [indiscernible].

4 MS. WONG: Yeah.

5 MR. COFFEE: And maybe some drug charges since also.

6 THE COURT: Yeah. I mean, so we're talking about something that's a little  
7 bit distant in time that wasn't known to the Defendant. I mean, if it were more  
8 recent you would have certainly a much stronger case, but -- and old is Mr.  
9 Bejarano; does anyone even know?

10 MR. COFFEE: He's around 38 now.

11 THE COURT: So this robbery may have been something he did when he was  
12 18 --

13 MS. WONG: Yes.

14 THE COURT: -- kind of a thing.

15 MR. COFFEE: That's close. He was 18, 20.

16 THE COURT: Yeah. I mean, because based on all that, plus the hearsay  
17 issues, I under -- I completely understand the request. And it's a request that, you  
18 know, if I were in your position I would make as well because it's something that  
19 certainly could help your defense. But based on the -- how old it is, the fact that  
20 there's no evidence that Mr. Newell knew about it, and putting aside even the  
21 hearsay problem, which obviously it would be a big problem at this stage -- I  
22 understand the reason for the request, but given all those facts and circumstances  
23 it's denied; okay.

24 MR. COFFEE: Very good. Thanks, Judge.

25 THE COURT: All right. Anything else you guys want to address before you

1 bring the detective back in? And let me ask you this, just as a timing type thing. It's  
2 my understanding that this is the State's last witness. I don't know how much longer  
3 you're going to be in cross, and I'm not going to put a time limit on it. I really -- the  
4 question I'm going to ask is this. If he's only going to be -- you know, right now it  
5 sounds like you've not necessarily reached a final decision with your client about  
6 whether he's going to testify or not.

7 MR. COFFEE: Okay.

8 THE COURT: But before he testifies I'm just going to recanvass -- it's not  
9 going to be as long as the canvass I did the first day, but I said on the first day that  
10 I'm going to pick it back up after the State rests. So the question is, if there's only  
11 five more minutes left with the detective, would you want another break after the  
12 State rests to talk with him or what do you envision happening? And, you know,  
13 maybe if it's another hour with the detective then we're going to take a break  
14 anyway, but I just want to get some idea of what you thought was going to happen in  
15 terms of sending -- coming -- having the jury come in and take a break or when do I  
16 do the canvass.

17 MR. COFFEE: And I hate to do that because the jurors begin to wonder  
18 what's going on --

19 THE COURT: Right, exactly.

20 MR. COFFEE: -- and why we're doing that. I don't know -- from doing the  
21 canvass now I just don't want to say yeah or nay right now is my problem. I'm not  
22 convinced until we're done with this that we've made a decision.

23 THE COURT: Okay. So then after the State rests, after your cross, after any  
24 redirect that they have and recross, you would want time to talk with your client; is  
25 that what you're really asking for?

1 MR. COFFEE: If we could have just -- it would take -- literally I could do it in  
2 about five minutes, but I could do it in less than that. It's -- Mr. Newell and I have a  
3 pretty good understanding on things, and a lot of this comes down to I think the  
4 advice that I give Mr. Newell. And to be honest, I haven't made a clear decision at  
5 this point.

6 THE COURT: Okay. So basically then what I'm going to anticipate is  
7 however long it takes with the detective, when the State rests we're just going to  
8 send the jury out again and that's just what we're going to have to do, right, so that  
9 you can at least have a conversation with your client.

10 MR. COFFEE: We could -- we could also play the 9-1-1 tape, which we're  
11 going to admit in our case in chief.

12 THE COURT: Oh, that's right. I forgot. Yeah.

13 MR. COFFEE: Yeah.

14 THE COURT: Well -- but the problem is -- okay. But the State's not playing  
15 that. You want to play that; right?

16 MR. COFFEE: Right.

17 THE COURT: So your thought then was the State was going to rest, you  
18 were going to what, play the 9-1-1 tape and then we can take a break and you could  
19 talk with your client?

20 MR. COFFEE: Yes.

21 THE COURT: Okay. We could do it that way. I'm always concerned about  
22 bringing the jury in for five minutes, sending them out.

23 MR. COFFEE: Yeah.

24 THE COURT: Yeah. Because then they start to wonder what the heck and  
25 all that kind of stuff. Okay. So let's do it that way then. All right.

1 And, Mr. Newell, just for the record you obviously are, you know, much  
2 -- you're educated, you followed the discussion about what we're going to do  
3 procedurally in terms of -- it sounds like your client -- I'm sorry -- your attorney wants  
4 another moment to talk with you about whether you're going to testify; right?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: So what we're going to do is the State's going to rest -- the  
7 other day during my canvass I said that after the State rests I was going to ask you.  
8 But technically what we're going to do is the State's going to rest, he's going to --  
9 your lawyer's going to play the 9-1-1 tape, then we're going to take a break and then  
10 we'll do the recanvass.

11 THE DEFENDANT: I understand.

12 THE COURT: You understand and agree with that?

13 THE DEFENDANT: Yes. Yes, Your Honor.

14 THE COURT: All right. Let's do it that way then.

15 [In the presence of the jury]

16 THE COURT: All right. Will counsel stipulate to the presence of the jury.

17 MR. COFFEE: Yes, Judge.

18 MS. WONG: Yes, Your Honor.

19 THE COURT: All right. Detective, you understand that you're still under  
20 oath?

21 THE WITNESS: Yes, sir.

22 THE COURT: All right. Mr. Coffee, you may resume.

23 MR. COFFEE: Thank you.

24 **BRIAN KOWALSKI**

25 [resumed the stand and testified further on cross-examination as follows:]

1 BY MR. COFFEE:

2 Q And we talked about the first couple of lines of the card that read for  
3 *Miranda* -- the *Miranda* rights that you give.

4 A Yes.

5 Q We'll pick back up there.

6 A Sure.

7 Q I think we talked about the right to remain silent and anything you say  
8 can and will be used against you in a court of law?

9 A Yes.

10 Q The rights continue to talk about the right to an attorney?

11 A Yes.

12 Q And they say essentially that you have the right to an attorney and if  
13 you can't afford one --

14 A One will be appointed for you.

15 Q -- will be appointed. Before questioning in fact?

16 A Before questioning, yes.

17 Q And you've had people in your hundreds of interviews that say -- raise  
18 their hand and say I want an attorney; right?

19 A Yes.

20 Q Mr. Newell didn't do that?

21 A He did not.

22 Q And looking at the transcript and listening to the voluntary statement, he  
23 answered the questions that were asked to him; is that fair?

24 A Yes.

25 Q He volunteered -- in fact, there's a long part where he just goes on

1 explaining and explaining and explaining and there's no questions --

2 A Yeah.

3 Q -- on the table; right?

4 A Right.

5 Q He seemed anxious to talk; is that fair?

6 A He wanted to tell us his side of the story.

7 Q Now he said at one point I hope I get it 95 or 95 -- 98 percent right;  
8 something like that?

9 A He said that he hopes the video confirms 95 to 98 percent of what he  
10 said.

11 Q Okay. There we go. So he understands that he may not have  
12 everything a hundred percent because nobody does I would suppose?

13 A Correct.

14 Q But he hopes that most of the things are beared out by the video?

15 A Yes.

16 Q And, in fact, most of the things were brought out by the video?

17 A Yes.

18 Q It doesn't mean that he includes all the details in his statement  
19 necessarily though?

20 A No.

21 Q And let me give you an example of that. There's a point after he goes  
22 through this long description where you're partner at the time, Detective Johnson --

23 A Yes.

24 Q -- stops him and says I saw something on the videotape and you didn't  
25 mention that. You went back to the store.

1 A Yes.

2 Q And he says, yeah, I did. I went back to the store and I talked to the  
3 clerk and I asked him to call 9-1-1; yes?

4 A Yes.

5 Q And that appeared to be consistent with what you saw in the videotape,  
6 that he'd actually went back to the store, poked his head in and --

7 A Yes, and from other witness statements, yeah.

8 Q Yeah. He went back in and asked for help essentially; right?

9 A Yeah, for them to call 9-1-1, yeah.

10 Q Okay. Now, if you hadn't asked the question about that, I suppose you  
11 wouldn't have got the answer; does that make sense?

12 A Well, it does -- I believe so, yeah. I believe as -- when we asked at the  
13 start of the -- or I should say when Detective Johnson asked tell us what happened,  
14 and he gave us his long version, I believe he thinks that that -- that was the end of  
15 his statement. That was all he recollected at the time.

16 Q That's all he recollected at the time. And you knew there was  
17 something a little different on the tape and you just asked for an explanation  
18 because it made -- it made sense. It's one of those things the detective -- hey, why  
19 didn't he mention that?

20 A Yes.

21 Q Again, human and we're not perfect; is that fair?

22 A Correct.

23 Q Okay. And also it's important some of the times for detectives to ask  
24 the appropriate question, and you're trained to ask the appropriate question, to kind  
25 of fill in those gaps?

1 A Correct.

2 Q At any point in the interview is Mr. Newell asked whether he intended to  
3 kill Teddy?

4 A I don't believe so, no.

5 Q At any point in the interview is he asked specifically did you intend to  
6 catch him on fire?

7 A No.

8 Q He says something along the lines of I was trying to scare him; do you  
9 remember that?

10 A I -- yes.

11 Q Okay. Listening to it again, is it clear that Mr. Newell minimized -- I  
12 think minimized is the wrong word. Mr. Newell didn't appear to be aware of the  
13 extent of the injuries; is that fair?

14 A I don't know if I would say he was unaware of the extent of the injuries.  
15 I believe he didn't believe it would cause any injuries. He trivialized the injury  
16 caused.

17 Q Okay.

18 A And his -- I believe his words -- at one point he said he believed any  
19 sane or normal -- he didn't see a problem in what he did.

20 Q Okay. Do you remember -- and let's take a look. Did you bring a copy  
21 of the voluntary statement with you?

22 A The audio -- the transcripts --

23 Q Yes.

24 A -- of the audio?

25 Q The transcription.



1 A Yes, I have a copy of that.

2 Q Okay. And I want to walk through it just briefly if we might. You asked  
3 him -- at some point he's asked if he understood the purpose of the interview; yes?

4 A Yes.

5 Q And he said that he did; yes?

6 A Yes.

7 Q And what is the purpose? I don't mean to be naïve, but what is the  
8 purpose of the interview?

9 A The purpose is to hear his side of the story. To hear what he thinks  
10 transpired; what he perceived; what he believed was going on, and to hear in his  
11 own words what exactly happened.

12 Q From a police perspective, purpose is also to gather evidence; is that  
13 fair?

14 A Correct.

15 Q For example, you might hope that somebody lies about something; is  
16 that fair?

17 A I don't hope they lie about some --

18 Q I shouldn't say hope, but you understand my point?

19 A Yes.

20 Q You might catch somebody in a lie about something; see if they're  
21 minimizing?

22 A See if they're minimizing. See if they're trying to deceive us. Seeing if  
23 they're trying to do any number of things; yes.

24 Q In fact, there's techniques for that. You might offer them descriptions --  
25 for example, if it's a sexual assault case you might say she actually asked you to do

1 this or something; right?

2 A There's many techniques to elicit information, yes.

3 Q Okay. I think -- I can't remember what that one's called particularly, but  
4 you understand my point. Providing an out --

5 A Yes.

6 Q -- I think is essentially what they call it. His statement [indiscernible]  
7 though; right?

8 A Mm-hmm. Pretty straight forward with us. I don't believe he tried to  
9 deceive us in any way.

10 Q That's what I was going to ask. He didn't try to deceive you in any way.  
11 He says at some point the man didn't appear any more burned than -- I don't  
12 remember the term that he used. I don't think it was man on the moon, but it was  
13 something like that.

14 A Something along those lines.

15 Q That statement would seem to indicate that he may not be aware how  
16 extensive Teddy's injuries are?

17 A Possible.

18 Q On the tape -- afterwards you got to review the tape. After the fire's lit  
19 Teddy continues to walk around; is that fair?

20 A I don't know if I could say continued to walk around, but -- I mean, he  
21 didn't immediately drop to the ground.

22 Q There we go. He didn't immediately drop to the ground. He pulls off  
23 clothes, takes off -- disrobes --

24 A Tries to get the fire off, yeah.

25 Q -- when the clothes are on fire. And he gets up and walks at different

1 points. He sits down at some point and then he gets up and walks again towards  
2 where the fire and water -- the water hose --

3 A Okay.

4 Q -- might be?

5 A Maybe. I don't know -- I don't know what his mindset was at the time,  
6 but --

7 Q Okay. But my point is, he is not -- you've been to scenes where people  
8 aren't doing any movement?

9 A I've been to those scenes, yes.

10 Q And this isn't one of those scenes necessarily. He as clearly in pain;  
11 yes?

12 A Yes. Well, I said -- per the video, yeah --

13 Q Yeah.

14 A -- it appears he was in pain.

15 Q Appears that he was in pain, but didn't appear to be completely  
16 immobilized after the fire?

17 A No, he was not immobilized until later.

18 Q Mr. Newell went through great pains to explain how many times he tried  
19 to get this to stop?

20 A Yes.

21 Q In the video it appears that this goes on for a long time. I mean, eight,  
22 ten, twelve minutes; something --

23 A Something like -- I'd have to see the exact times on the video, but --

24 Q But it's -- it's a fairly long -- there's a pretty good interaction between  
25 them?

1 A Yes.

2 Q It's not simply give me a ride?

3 A No.

4 Q And you shouldn't ask me for a ride; I'm going to light you on fire.

5 A No, it's longer than that.

6 Q That's not what we got?

7 A Yes.

8 Q And there are numerous opportunities -- you were asked by the State

9 the reason for the arrest and you said there were other things that might've been

10 done; remember that?

11 A Yes.

12 Q There were numerous opportunities for Teddy to walk away from this; is

13 that fair?

14 A Yes.

15 Q Never happened; right?

16 A No.

17 Q And you of course weren't in Mr. Newell's shoes, so we just kind of

18 have to put things together after the fact; is that fair?

19 A Sure.

20 Q Did you have a chance to look at the scene before the interview?

21 A I did not; no.

22 Q Okay. I want to show you Defendant's Exhibit B. See what's hanging

23 from the rearview mirror there?

24 A Yes, sir, I do.

25 Q What is that?

1 A It appears to be a handicapped placard.

2 Q At any point in the interview is Mr. Newell asked about any physical  
3 frailties that he had?

4 A No.

5 Q Was he asked specifically about whether or not he's diabetic?

6 A No.

7 Q Specifically about whether or not he may have back problems?

8 A No.

9 Q Whether or not he may be on disability?

10 A No.

11 Q Now, you understand -- again, you got some training the legal field  
12 here. You understand that in court when we come to a jury the burden is on the  
13 State to prove the case?

14 A I do.

15 Q Had you noticed the handicap placard?

16 A I did not.

17 Q And we don't have Detective Johnson, so we don't know whether he  
18 may have or may not have?

19 A Couldn't say.

20 Q It's not mentioned anyplace in any of the reports?

21 A No.

22 Q And to the best of your knowledge Detective Johnson, off camera, in  
23 the informal interview, anyplace else in the documentation, there's no indication that  
24 anyone asked Mr. Newell about physical frailties; is that fair?

25 A That's fair.

1 Q Mr. Newell did say that Teddy had said, quote, some other threatening  
2 stuff; is that right?

3 A I believe so.

4 Q Mr. Newell said he'd never had an experience like this?

5 A That's what he said, yes.

6 Q And Mr. Newell also talked about after the fire trying to pat down Teddy  
7 to put the fire out; do you remember that?

8 A Mm-hmm. Yeah, that's what he said.

9 Q You looked at the video. He doesn't actually touch Teddy, does he?

10 A No, not that I saw.

11 Q But that's what he said his intentions were. Him and another person  
12 were trying to pat down Teddy afterwards?

13 A Yeah, I believe the security guard was the first one there from the South  
14 Point.

15 Q You -- he was asked how he was threatening -- how Teddy was  
16 threatening --

17 A Yeah, it was asked.

18 Q -- do you remember that?

19 A Yes.

20 Q And he said verbalization and attitude, meaning he'd said something  
21 and I suppose the aggression that took place during the exchanges that are the  
22 videotape is what you take that to mean; right?

23 A We took it as a generality, yes.

24 Q Okay. Did you ask him to give any details about what he saw in  
25 Teddy? Did he look at his face? Did Teddy look -- I mean, do we go into those kind

1 of minute details or that's just not there?

2 A No, we did not pull out those details. We asked him how was he  
3 threatening you; the only thing we got back was that it was verbalization and his  
4 attitude.

5 Q Okay.

6 A Mr. Newell didn't expound on it.

7 Q Okay. He had said before though I'm not that kind of person, but when  
8 I think my vehicle or life is in jeopardy, this 60 year old is not going to sit there and  
9 let it happen. He did say that?

10 A Yes.

11 Q And you're familiar with Nevada's self-defense laws to some extent?

12 A I am.

13 Q You realize that -- are you familiar with trespass also?

14 A The law of trespass?

15 Q Yeah.

16 A Yeah.

17 Q Okay. Can I walk out of this courtroom and sit in the front seat of a  
18 police cruiser if I wanted?

19 A Probably not.

20 Q Probably be illegal; right?

21 A Yeah.

22 Q Trespass?

23 A Yes.

24 THE COURT RECORDER: I can't hear your responses.

25 THE WITNESS: Yes. I'm sorry.

1 BY MR. COFFEE:

2 Q And you'd have the right tell me not to do that?

3 A Yes.

4 Q You would probably tell me not to do that?

5 A You'd probably be asked and then told; yes.

6 Q Yes. And you understand that people have the right to protect their  
7 property to the extent of -- if I refused to get out of the police cruiser you'd probably  
8 grab me by the ear and pull me out?

9 A Yes.

10 Q People have the right to protect property?

11 A Yes.

12 Q That's a fair characterization?

13 A That's a fair characterization.

14 Q And people who don't mean to start a fight don't have a duty to retreat  
15 in Nevada; right?

16 MS. WONG: Objection.

17 THE COURT: Rephrase the question.

18 BY MR. COFFEE:

19 Q Is there any duty to retreat in Nevada? We've agreed on the --

20 MS. WONG: Objection. The jury's going to get instructed on that.

21 BY MR. COFFEE:

22 Q Do you know if there's a duty to retreat in Nevada? You're a trained  
23 officer.

24 THE COURT: All right. Hang on, hang on, hang on.

25 Well -- all right. He's a police detective. Here's what I'm going to do. A



1 police -- ladies and gentlemen, I'm going to instruct you as follows. A police  
2 detective obviously has some training and experience in the law; however -- and so  
3 I'm going to allow the question for purposes of the detective explaining why he came  
4 to the conclusions he did and why he arrested the Defendant. However, you should  
5 know that his training and experience in the law is -- he's not a lawyer; he didn't go  
6 to law school. It may or may not reflect the law as it will be instructed to you and the  
7 law that you are to apply to this case. Does everybody understand that? So with  
8 that admonishment I'm going to allow the question.

9 MR. COFFEE: Okay.

10 BY MR. COFFEE:

11 Q Does a person need to retreat in Nevada?

12 A Not that I know of.

13 Q Okay. You don't have to run away when somebody physically  
14 confronts you; is that fair?

15 A No, that's fair.

16 Q Other states may do something different?

17 A I don't know about other states.

18 Q But you're Nevada trained?

19 A Nevada.

20 Q Of course we have a little bit more than just standing ground. Mr.  
21 Newell tried to get help at some point or he said he did; right?

22 A He said he did, yes.

23 Q And the video seemed to back that up that he went to the --

24 A The video backed up him going into the store. I couldn't say, but the  
25 witnesses said that he --

1 Q The witnesses said as much?

2 A I believe the clerk said that he was asked to call 9-1-1.

3 Q And I don't want you to jump to any conclusions. Please don't. If I'm  
4 asking you to, please correct me. But common sense -- he has an interaction with  
5 Teddy on the tape where Teddy's standing at the back of his truck reaching in or  
6 around the truck. Do you remember that when things started?

7 A Yes.

8 Q And he walks up to Teddy and has a conversation with Teddy and it  
9 appears that they are -- their body language says that something's escalating at  
10 some point?

11 A I wouldn't go that far, but -- I mean --

12 Q Okay.

13 A -- they were in some sort of conversation.

14 Q Some sort of conversation. Maybe verbal confrontation. We just don't  
15 know because we don't have audio.

16 A Exact -- yes.

17 Q But Mr. Newell approaches Teddy on the passenger side of his truck?

18 A Correct.

19 Q Teddy backs away for a second. Mr. Newell walks away and Teddy  
20 goes right back to where he was?

21 A Yes.

22 Q That happened several times?

23 A Yes.

24 Q And then Mr. Newell walks to the store?

25 A Yes.

1 Q Pokes his head in?

2 A That's on the video that I saw. I didn't see anybody -- I only have a  
3 video of the incident at the pumps.

4 Q I was going to say, you may not have looked at every angle of the  
5 video?

6 A I didn't have every angle. Detective Johnson probably did.

7 Q Okay. The videos are multiple angles. If I tell you that there's a video  
8 admitted into evidence where he pokes his head in you wouldn't have any reason to  
9 disagree?

10 A I would not disagree with that.

11 Q And that certainly might be indicative of him poking his head in to say  
12 call for help. It might corroborate what he said?

13 A It might, yes.

14 Q And that's an important point, corroboration. As a trained detective you  
15 know what the term corroboration means?

16 A I do.

17 Q And corroboration means things that back up what he said. It's a legal  
18 term, but it simply means something that backs up what he said?

19 A Yes.

20 Q For example, if Teddy was walking down the street and you just saw  
21 Mr. Newell take a bucket of gasoline and light him on fire that wouldn't corroborate  
22 what was said in the statement?

23 A That would be different than what he said in the statement.

24 Q But most of the things by and large that you could corroborate were  
25 corroborated from the statement?

1 A Yes.

2 Q You were asked if there was anything else that you would like to ask or  
3 you would like to get out towards the end of the interview; is that right?

4 A Correct.

5 Q And you asked about phone calls to the police?

6 A Yes. I asked if Mr. Newell had a cell phone on him. If he could -- had  
7 made an attempt to call 9-1-1.

8 Q Okay. And he said that he hadn't had his cell phone?

9 A Correct.

10 MR. COFFEE: Thank you, Detective Kowalski.

11 THE COURT: Any redirect?

12 MS. WONG: Yes, Your Honor.

13 **REDIRECT EXAMINATION**

14 BY MS. WONG:

15 Q Detective, Mr. Coffee asked you earlier if he went down and sat in your  
16 patrol car you would have the authority to pull him out and use a little bit of force and  
17 get him out of your car; right?

18 A If he refused to get out after I asked him to leave, yes.

19 Q Okay. Would you have the right to then set him on fire?

20 A No.

21 Q Now earlier you said it was irrational for the victim to not leave after he  
22 was sprayed with gas?

23 A Yes, I did.

24 Q Okay. Now, is that -- is somebody who's been sprayed with gas  
25 required to leave a gas station?

1 A No.

2 Q But lighting somebody on fire can be unlawful?

3 A Yes.

4 Q Now earlier Mr. Coffee said the Defendant indicated he intended to pat  
5 down Teddy; right?

6 A He stated that he patted down Teddy, but the video did not show that  
7 he patted down Teddy.

8 Q That's right. And then Mr. Coffee asked you, well, his intent was to pat  
9 down Teddy?

10 MR. COFFEE: Objection. That's not exactly what I said. I can repeat the  
11 exact question if you'd like.

12 MS. WONG: Can you repeat exactly what you said?

13 MR. COFFEE: I said that Mr. Newell had said that he had patted down Teddy  
14 and the video bear that out?

15 THE WITNESS: Yes.

16 BY MS. WONG:

17 MS. WONG: And then -- but then you added that he intended to pat down  
18 Teddy; correct? That's what you said? Is that what you said, Mr. Coffee?

19 MR. COFFEE: I don't believe so.

20 BY MS. WONG:

21 Q All right. So the Defendant never said he intended to pat down Teddy?

22 A No. He told us he did pat down him down and the video did not  
23 corroborate that.

24 MR. COFFEE: And can I correct -- because I think what I said he may have  
25 intended, we just don't know. He wasn't asked about it. I think that's what I asked.

1 MS. WONG: If that's what he asked then that's fine.

2 MR. COFFEE: Yeah, I think that's what I asked.

3 MS. WONG: But I didn't -- I heard that he intended to pat him down.

4 BY MS. WONG:

5 Q Now you didn't ask the Defendant about his medical conditions?

6 A No.

7 Q He didn't volunteer that information either?

8 A No, he didn't.

9 Q Did you restrict what the Defendant could talk about during his  
10 interview?

11 A No.

12 Q So if he wanted to volunteer his medical issues with you he could have?

13 A He could have, yes.

14 Q He just chose not to?

15 A Yes.

16 Q Now I believe Mr. Coffee mentioned something where the Defendant  
17 never indicated he had an intent to light the victim on fire; is that correct?

18 A I don't -- I don't if that's exactly what he said.

19 MR. COFFEE: I can repeat the question --

20 MS. WONG: Go ahead.

21 MR. COFFEE: -- if you'd like.

22 MS. WONG: Go ahead.

23 MR. COFFEE: I asked if you -- I asked if the detective asked if he specifically  
24 intended to light him on fire? If it was ever asked in the interview?

25 THE WITNESS: No, we did not ask him if he intended to light Teddy on fire.

1 BY MS. WONG:

2 Q Okay. Did the Defendant admit to you that he did light Teddy on fire?

3 A He did make those statements in the interview.

4 Q Okay. And he never indicated that that was an accident?

5 A No. He stated -- I believe -- the one page of the interview he states,  
6 after spraying Teddy he said, if you don't leave I'm gonna light you on fire. And then  
7 when Teddy didn't leave he lit him on fire.

8 Q Or in his words, he lit his ass on fire?

9 A I believe that was a direct quote.

10 Q Did the Defendant ever say he was scared?

11 A I don't believe so specifically saying that he was afraid or scared.

12 Q I mean, he did say he wanted to scare the victim?

13 A He did say he wanted to scare the victim.

14 Q But he never actually said he himself was scared?

15 A No, he did not say he was in fear.

16 Q In fact, the first time he mentions anything being in jeopardy was when  
17 he makes that statement that maybe his vehicle or his life was in jeopardy, this 60  
18 year old wasn't gonna sit there and take it?

19 A Yes.

20 Q And that appears on page 7 of the voluntary statement; correct?

21 A Correct.

22 Q And how long is this entire voluntary statement?

23 A It appears to be ten pages long.

24 Q Okay. So 70 percent into this interview is when he volunteers the  
25 information that he felt either himself or his truck was in jeopardy?

1 A Yes.

2 Q And then when you asked -- or when Detective Kevin Johnson asked  
3 him how -- what was it the victim was doing that was threatening or saying that was  
4 threatening?

5 A Yes.

6 Q Was the Defendant ever able to articulate what threats the victim  
7 made?

8 A The only thing he said was in his verbalization and his attitude.

9 MS. WONG: I'll pass the witness.

10 THE COURT: Any recross?

11 **RECROSS EXAMINATION**

12 BY MR. COFFEE:

13 Q Bottom of page 7.

14 A Um --

15 Q Voluntary statement.

16 A Yes.

17 Q That's the only thing he said? Did you maybe miss something? Let's  
18 look at the last words on the bottom of page 7. What's the last answer?

19 A When he said, I'll cut you -- I'll cut you up. And then Kevin followed up  
20 with, was it after you told him you cut him, and he said he couldn't remember when  
21 that was said.

22 Q Okay. So --

23 A So we don't know if he was being threatened after he was threatened or  
24 if he was the instigator in the threatening.

25 Q I understand, but the point being, he did say that it was more than just



1 words and gestures. He said at some point he said I'll cut you -- Teddy had said I'll  
2 cut you up?

3 A Yes.

4 Q Right? And you were asked questions on the initial cross whether or  
5 not you asked him specifically whether or not he intended to kill Teddy, and you said  
6 that you hadn't asked him?

7 A We hadn't.

8 Q Did you ask him specifically if he was frightened?

9 A Did I ask that specific question? No, I did not ask, are you frightened?

10 Q Did Detective Johnson ask specifically if he was frightened?

11 A No.

12 Q It was clear from the context that he thought the man had approached  
13 his vehicle? This man isn't going to place his life or vehicle in jeopardy, something  
14 along those lines; right?

15 A That's what he said later in the interview, yes.

16 Q All right. And it is clear from the context he talks about threats at some  
17 point; correct?

18 A Correct.

19 Q You were talked about intentionally -- whether he intentionally lit the  
20 person on fire and I asked whether you cleared them -- cleared that up or not; right?

21 A Yes.

22 Q I want you to look at the top of page 6 and let's talk about the whole  
23 quote; okay?

24 A Okay.

25 Q What he said -- and I'm going to start with, I said; okay. I said, I swear

1 to God, okay, you come further I'm gonna light you. And he did, okay, and I lit his  
2 ass on fire, but it was not the kind of thing that I -- I mean, by God, we had another  
3 guy there. We patted him down, we made it out. You know, it was something just to  
4 scare him to get him the hell out of there. That's what he says; right?

5 A Yes.

6 Q Okay. Was there follow-up after that quote? This is page 6, the  
7 interview continues for some time. Was there follow-up as to whether or not he was  
8 just trying to scare him or whether he was trying to intentionally light him on fire?

9 A Well, he told us he intentionally lit him -- I mean, he said, I will light you  
10 up, and then he lit him up. I mean, that's intentional in my opinion and --

11 Q Understood. He says he's trying to scare him also --

12 A Yes.

13 Q -- you'd agree with that? If I say I'm going to light you up, that might be  
14 a threat, would you agree with that?

15 A If I'm covered in gasoline, yes, I'm going to think that's a threat.

16 Q Okay. Might be a viable threat; might not be a viable threat?

17 A Yes.

18 Q Okay. And lighting somebody up is a physical action --

19 A Yes.

20 Q -- we could agree with that?

21 A Yes.

22 Q Okay. Did he also tell you nobody tries to injure somebody like that?

23 A He did say that.

24 Q Didn't that give pause as to whether or not he was trying to intentionally  
25 lightly him on fire?

1       A     Well, it kind of -- it gave me pause because after you light someone on  
2 fire and then say no one does things to that -- to other people; well, you just did that  
3 to someone else, so that's kind of why would you do it then if you think that's a bad  
4 thing.

5       Q     You think it's a bad thing?

6       A     Yeah. If you're saying people don't do that and then -- but you had just  
7 done it, to me that's almost trivializing what you did that -- normal people wouldn't do  
8 that.

9       Q     Did you ask him if you thought it was necessary?

10      A     No, we didn't ask that specific question.

11      Q     Did you ask him if the thought -- I know you thought he had other ways  
12 out of the situation. Did you ask him if he thought he had other ways out of the  
13 situation -- other options?

14      A     I did not ask him that.

15      Q     Did Detective Johnson ask him that?

16      A     No.

17      Q     Lighting somebody on fire is a desperate act, isn't it?

18      A     I wouldn't do it.

19      Q     But, again --

20      A     I wasn't in that situation, but that would not be the first thing or the last  
21 recourse I would take. If I was worried or in fear of anything I would've never left the  
22 store after I had someone call the police.

23      Q     You would have retreated and that might --

24      A     I would have waited.

25      Q     -- and that might have been a smarter thing to do. It's not

1 [indiscernible] required under Nevada law; we talked about that right?

2 A No.

3 Q You don't have to retreat?

4 A Correct.

5 Q Don't have to leave your property out there to get keyed or whatever it  
6 might be; right?

7 A Correct.

8 Q You have a right to tell somebody to leave your property alone; right?

9 A Yes.

10 Q Hindsight's 20/20 I suppose?

11 A That's what I hear. Yes.

12 MR. COFFEE: Thank you, detective.

13 THE COURT: Anything further, State?

14 MS. WONG: Yes, Your Honor, just a few questions.

15 **FURTHER REDIRECT EXAMINATION**

16 BY MS. WONG:

17 Q Detective, have you ever dealt with other cases where the suspects are  
18 claiming self-defense?

19 A Yes.

20 Q So in this particular case the Defendant didn't talk about his fear, or  
21 how scared he was, or how threatened he felt?

22 A He made mention, but nothing -- yes --

23 Q Okay.

24 A -- I mean, it was mentioned.

25 Q Normally in cases where the suspects are claiming self-defense --

1 MR. COFFEE: Objection; comparing this to other cases. This isn't another  
2 case.

3 MS. WONG: It's reasonableness.

4 THE COURT: All right. I'm going to make -- I'm going to allow for the same  
5 reasons that I allowed the question by Mr. Coffee, which is, if it's part of the  
6 detective's training experience, and if it was one of the reasons why he concluded  
7 that Mr. Newell was -- that probable cause existed against Mr. Newell, I'll allow for  
8 that reason, but as to whether or not legally speaking --

9 MS. WONG: Right. No. Absolutely.

10 THE COURT: -- those other cases were, you know, valid or not or whether  
11 they should've led to convictions or not is beyond the scope of the detective's --

12 MS. WONG: Absolutely.

13 THE COURT: -- knowledge and expertise. But with those -- so with those  
14 limitations I'll allow the question.

15 MS. WONG: Thank you, Your Honor.

16 BY MS. WONG:

17 Q So in those other self-defense cases that you've been -- investigated,  
18 do the suspects volunteer information regarding how fearful they were?

19 A Yes.

20 MR. COFFEE: Objection; irrelevance.

21 MS. WONG: Your Honor just overruled that objection.

22 MR. COFFEE: No, that was a different objection.

23 THE COURT: Well, technically it's a different question. So -- all right. I think  
24 there's a way you can rephrase the question. Here's -- let's do this. Ms. Wong,  
25 maybe lay a little bit more foundation. I know where you're going, but I think you

1 need to lay a little bit more foundation on his experience with those other cases and  
2 behavior and that kind of thing; all right.

3 MS. WONG: Okay.

4 BY MS. WONG:

5 Q Detective, when somebody claims self-defense and you're doing an  
6 investigation to see whether it's a valid self-defense claim or not, what is one of the  
7 factors that you have to determine to decide whether or not the self-defense claim's  
8 legitimate?

9 MR. COFFEE: Objection --

10 MS. WONG: I'm laying a foundation.

11 MR. COFFEE: Well, but again -- valid has a very interesting connotation  
12 because it's for these people to decide whether or not his self-defense claim is valid,  
13 not for this officer. That's my objection. If you wanted to put it in terms of PC for the  
14 arrest that's fine, but you need to preface it with that because you're asking for his  
15 opinion as to whether or not the charges are valid and that's inappropriate.

16 MS. WONG: I said for his investigation purposes. To lead you to a probable  
17 cause determination.

18 MR. COFFEE: There we go.

19 THE WITNESS: Yes.

20 BY MS. WONG:

21 Q What is something that you look at?

22 A We usually look at the imminent threats and if there's a -- what the fear  
23 is; if there's a fear for life, property, someone else, that kind of thing.

24 Q All right. And in this case fear was articulated to you?

25 A No, fear was not.

1 Q And imminent threat was not articulated to you?

2 A No.

3 Q Whereas in other cases they may have?

4 A Yes.

5 Q Now Mr. Coffee directed you to page 6 of the voluntary statement  
6 where the Defendant says -- five lines from the bottom where it says nobody tries to  
7 injures somebody like that and disfigure them for the rest of their life. You don't do  
8 that to a human being. Can you finish the rest of that statement?

9 A You know, unless you're in war, unless you're combat it's a different  
10 story, but -- but, you know, you treat -- you teach someone a lesson they're not  
11 going to do it again and maybe they'll tell their friends and their friends won't do it  
12 again.

13 Q So on the one hand the Defendant says he wouldn't do that to a  
14 person, but on the other hand says he's going to teach somebody a lesson?

15 A Yes.

16 Q That's what he says in his statement?

17 A Yes.

18 MS. WONG: No further questions.

19 THE COURT: Any recross?

20 **FURTHER RECROSS EXAMINATION**

21 BY MR. COFFEE:

22 Q We talked about the purpose of interviews. Remember when we  
23 started and we talked about voluntary statements, the purpose of interviews and  
24 whether or not Mr. Newell was aware of the purpose?

25 A Yes.

1 Q And we said from the police perspective the purpose may be to gain  
2 evidence?

3 A Yes.

4 Q You agree with that?

5 A I do.

6 Q Why not ask him if he was afraid?

7 A He -- there are many questions we could and couldn't ask. We don't  
8 ask every single question. If Mr. Newell was afraid he could have volunteered it.

9 Q Okay, but hold on. Mr. Newell's not trained in the law?

10 A Yes.

11 Q Mr. Newell doesn't know the ins and outs of self-defense?

12 A Yes.

13 Q You do?

14 A Yes.

15 Q You know what's pertinent and what's not?

16 A Yes.

17 Q You were gaining information, you were gaining evidence; yes?

18 A Yes.

19 Q Why not ask if Mr. Newell was afraid?

20 A Because we didn't ask that specific question.

21 MR. COFFEE: No, you didn't. Thank you.

22 THE COURT: State, anything further?

23 MS. WONG: No further questions.

24 THE COURT: Thank you, detective, for your testimony. You're free to go.

25 THE WITNESS: Thank you, sir.



1 THE COURT: State, do you have any additional witnesses or evidence to  
2 introduce?

3 MS. WONG: Your Honor, at this point the State will rest.

4 THE COURT: All right. Mr. Coffee, do you have any evidence that you wish  
5 to introduce at this stage? Do you want a quick break to organize?

6 MR. COFFEE: I do, Judge. There is the 9-1-1 call. Can I have the Court's  
7 indulgence?

8 THE COURT: Sure.

9 MR. COFFEE: Permission to approach, Judge?

10 THE COURT: Sure.

11 MR. COFFEE: I'll get it admitted before we play it.

12 Judge, I have a 9-1-1 call that was made the evening of the event. It is  
13 made by the clerk at the Circle K. He's unavailable for medical reasons as the Court  
14 was aware beforehand, and I think there's been a pretrial ruling that this was going  
15 to be admissible. I'd ask that it be admitted at this point. I'd ask that it be played  
16 into evidence.

17 THE COURT: What's the number that was just assigned to it?

18 MR. COFFEE: It's Defendant's E.

19 THE COURT: Defendant's E.

20 State, any objection?

21 MS. WONG: No objections.

22 THE COURT: All right. E is admitted and you may play it for the jury.

23 **[DEFENSE EXHIBIT E ADMITTED]**

24 MR. COFFEE: Very good.

25 **[Defense Exhibit E played -- not transcribed]**

1 THE COURT: Mr. Coffee, your next witness or do you want a short break  
2 right now?

3 MR. COFFEE: If we could have just a short break, Judge.

4 THE COURT: All right. Ladies and gentlemen, we're going to take a short  
5 break. During this break you are admonished that until you begin deliberations  
6 you're under oath and have not been discharged. Do not reach any conclusions  
7 about this case as you've not heard all the evidence. Do not talk to anyone about  
8 this case. Do not investigate any facts of this case. Do not view any media, press  
9 or internet reports about this case. Do not talk to anyone who may be involved in  
10 any way with this case. Do not discuss the facts of this case with each other.  
11 Remember to wear your badge at all times around the courthouse. Please leave  
12 your notebooks on your chairs and let Randy know when you're ready.

13 [Outside the presence of the jury]

14 THE COURT: All right. We're still on the record outside the presence of the  
15 jury. Anything that you guys want to address or memorialize?

16 MS. WONG: No, Your Honor.

17 THE COURT: All right. Mr. Coffee, let me just say one quick little thing here.  
18 It's been a pretty well litigated trial. There haven't been a lot of really, you know, just  
19 sort of shenanigans going on here, but I will say this. I didn't say anything in front of  
20 the jury. I didn't jump in because it's been really under the case. And as I said, it's  
21 been a pretty well litigated case. When Ms. Wong asks a question, you don't get to  
22 just make a speaking objection and then tell her how to reask the question; okay.  
23 You make an objection; you let me rule on it. If it's going to be complex you ask for  
24 a sidebar. I know you know how to do that because we've had a few sidebars; right.  
25 I didn't jump in there because it's not my goal to embarrass you in front of the jury,

1 but you don't get to sit there and sort of lecture and play this role of you know more  
2 than she does; all right.

3 MR. COFFEE: Understood.

4 THE COURT: If you have an objection you make the objection. If it's going to  
5 be more than one sentence then you ask to approach; all right. Is that clear?

6 MR. COFFEE: Understood, Judge. Also understand that when we get to  
7 closing arguments and somebody misstates something I will object loud and will  
8 object continuously if I think something's misstated.

9 THE COURT: Well, you can certainly raise any objections that you think are  
10 proper that you need to raise on behalf of your client, but I'm talking about how you  
11 do it. You make your objection. If it's going to be more than just an objection --  
12 hearsay objection, whatever it is, then you ask to appropriate and you can state your  
13 objection to me in a sidebar, but you don't get to sit there and have this  
14 communication with Ms. Wong about hey, here's how you need to ask that question,  
15 counsel; here's how you need to do, that kind of thing.

16 MR. COFFEE: And I wasn't attempting to do that, Judge. You can feel free  
17 to look at what we got on the record there. She said I'd asked a question a certain  
18 way and I said actually it was this.

19 THE COURT: No, no, no. I'm not talking about that exchange. I'm talking  
20 about --

21 MR. COFFEE: Okay, because --

22 THE COURT: -- the last one. I'm talking about the --

23 MR. COFFEE: -- I thought we were talking about that exchange.

24 THE COURT: No. I'm talking about that last one where -- unfortunately, I  
25 didn't write down the specific question, but you basically got into this argument with

1 her. The earlier ones I let go because they were fine. Ms. Wong frankly didn't even  
2 seem to mind, and frankly it sped things up --

3 MR. COFFEE: Correct.

4 THE COURT: -- where you said, okay, no, that's what I -- that's not what I  
5 asked; here's what I asked, it sort of clarified things.

6 MR. COFFEE: Understood.

7 THE COURT: I'm talking about that very last one where basically you guys  
8 got into this back and forth. You know, I probably should've jumped in. I didn't just  
9 because we're this close to the end of the case, and as I said it hasn't been a  
10 problem yet, but you don't get to do that. You make your objection. You wait for a  
11 ruling from me. If I want you to approach, I ask you to approach, but you don't get to  
12 have this conversation with Ms. Wong in front of the jury; all right.

13 MR. COFFEE: I apologize to the Court then.

14 THE COURT: All right. Then let's go ahead and take a short break. And,  
15 you know what, did you want a minute to talk to your client by the way?

16 MR. COFFEE: I did.

17 THE COURT: Do you want to move him into the back room for second?

18 MR. COFFEE: If we could.

19 THE COURT: Let's go ahead and do that.

20 [Recess taken at 3:31 p.m.]

21 [Proceedings resumed at 3:39 p.m.]

22 [Outside the presence of the jury]

23 THE COURT: This is -- back on the record State versus Patrick Newell,  
24 C285825. Mr. Newell's present in custody. We are outside the presence of the jury.

25 Mr. Coffee, have you had an opportunity to discuss with your client

1 whether he's going to testify or not?

2 MR. COFFEE: I have.

3 THE COURT: All right. And have you reached a decision?

4 MR. COFFEE: We have.

5 THE COURT: And what do you intend to do?

6 MR. COFFEE: Mr. Newell wants to testify.

7 THE COURT: All right. Mr. Newell, just for the record, couple things. You  
8 remember a couple days ago I went through a list of questions with you. Do you  
9 remember those questions?

10 THE DEFENDANT: Yes.

11 THE COURT: All right. Do you need of them repeated?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: Okay. So have you had a discussion about the possible risks  
14 of you testifying versus not testifying?

15 THE DEFENDANT: Yes.

16 THE COURT: Okay. It's my understanding that you do wish to testify; is that  
17 correct?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Now without getting into detail about your -- I want to make  
20 sure this -- of this. The decision to testify is yours. You are making that decision  
21 freely of your own -- voluntarily of your own free will. Is that correct?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: All right. No one, including your attorney's forcing you to  
24 testify; right?

25 THE DEFENDANT: That's correct, Your Honor.

1 THE COURT: Okay. This is always a tough question to ask. I think it helps  
2 the record, but I just want to make sure -- without getting into the substance of any  
3 privileged conversations that you and your attorney had. Without getting into the  
4 specifics, any advice, are you and your attorney in agreement as to your decision to  
5 testify?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Okay. So in other words you're not doing this over Mr.  
8 Coffee's vociferous objection; is that correct?

9 THE DEFENDANT: That's correct.

10 THE COURT: Okay. All right. Let's go ahead and for -- just so I know, is he  
11 the last witness that you're going to call?

12 MR. COFFEE: He is.

13 THE COURT: All right. State, do you intend to call any rebuttal witnesses?

14 MS. WONG: Probably not.

15 THE COURT: Okay. Let's go ahead and bring the jury in then.

16 [In the presence of the jury]

17 THE COURT: All right. Before we begin, one of the jurors, I believe Juror  
18 Number 12, during the break asked my marshal what is the process for asking  
19 questions of any witnesses. Who's Juror Number 12? That would be -- is that the  
20 question that you asked my marshal?

21 JUROR NUMBER 12: Yeah. I just wanted to know if we just have a  
22 particular question that hadn't been answered.

23 THE COURT: Okay. Well, here's the process. I know that they were -- it was  
24 one of the instructions given to you the first day, but that was, you know, three days  
25 ago and all that. Here's the process. If there's a question that you want asked that

1 wasn't asked, or if you want clarification of any answer given by any witness, what  
2 you need to do is write down the question on a clean sheet of paper in your  
3 notebook, put your juror number on the top of that sheet of paper and then raise  
4 your hand real high so that Randy knows that there are question -- there's a  
5 questions so he can come and get it to you, and then he'll bring your question to me  
6 and I'll look at it and make sure that it's a question that is actually a proper question  
7 that meets the rule of evidence.

8           The problem is I don't which witness you had in mind, and I don't want  
9 you to tell me. That obviously needs to be done before the witness leaves the  
10 courtroom because once they leave the courtroom they're getting in a car and  
11 driving home and getting them back here is a whole thing. But if there's a question  
12 that you want asked of a witness who is in the courtroom you can do that, but just  
13 make sure you raise your hand real high. And the thing you can do is if the -- for  
14 example, at the end of questioning the witness is on his way out of the courtroom,  
15 raise your hand real high so that Randy sees it and I'll ask the witness to stay for a  
16 second, but once they're gone the problem is they're gone; okay. Any other  
17 questions about the procedure?

18           JUROR NUMBER 12: [Indiscernible.]

19           THE COURT: All right. Mr. Coffee, any other witnesses or evidence that you  
20 wish to introduce?

21           MR. COFFEE: Defense calls Patrick Newell.

22           THE COURT: All right. Mr. Newell, let's have you come up and stand and  
23 raise your right hand.

24           THE MARSHAL: Please step here on the witness stand. Remain standing  
25 and raise your right hand and face the clerk.

**PATRICK NEWELL**

[having been called as a witness and being first duly sworn, testified as follows:]

THE COURT CLERK: Please be seated. Please state your name and spell your first and last name for the record.

THE DEFENDANT: Patrick Newell, P-A-T-R-I-C-K, N-E-W-E-L-L.

THE COURT: All right. You may proceed, counsel.

MR. COFFEE: Thank you.

**DIRECT EXAMINATION**

BY MR. COFFEE:

Q How old are you, Patrick?

A I'll be 63 in August.

Q And before this event -- and you know the event that I'm referring to?

A I do.

Q What did you do for a living?

A For 28 years I was in real estate, new home construction. Specifically new homes sales, sales management. I was disabled in an accident in 2006 and couldn't continue in my career, so my wife and I started our own business, which was a reproduction antique furniture business. We did some work for Paramount Studios and Disney and a few others.

Q And were you in that self-employed business at the time of the event?

A Yes, I was.

Q I want to ask you about your past and I want to specifically focus on violent -- have you ever been convicted of anything violent?

A No, sir.

Q Have you ever been arrested for anything violent before this?



1 MS. WONG: Judge, I'm going to object to this.

2 A No, sir.

3 THE COURT: Hang on for a second. I'm sorry.

4 MS. WONG: I'm going to object to this. This is really irrelevant.

5 THE COURT: All right. Can I get counsel to approach.

6 MR. COFFEE: Sure.

7 [Bench conference -- not transcribed]

8 BY MR. COFFEE:

9 Q Okay. And just so the last question was clear. Before this have you  
10 ever been arrested for anything violent?

11 A No, I have not.

12 Q You went to --

13 MR. COFFEE: And, counsel, is it okay if I -- I don't mean to lead, but I'm  
14 going to include [indiscernible] when and that kind of things to --

15 MS. WONG: That's fine.

16 MR. COFFEE: -- move things along.

17 BY MR. COFFEE:

18 Q You went to a Circle K on October the 10<sup>th</sup>, I believe it was?

19 A That's correct.

20 Q Or maybe -- was it the evening of the 9<sup>th</sup>?

21 A It was actually the morning the 10<sup>th</sup>. I got there about 12:30 in the  
22 morning.

23 Q Okay. Why did you go to Circle K?

24 A I ran out to get some candy for my wife and some candy for myself and  
25 I wanted to get back as quickly as possible because it was the first time -- excuse

1 me. The first time we had a chance to spend with each other --

2 Q It's okay, Mr. Newell.

3 A -- in a long time. We were gonna watch a movie --

4 Q All right.

5 A -- which was starting in 15 minutes, so I was anxious to get back.

6 Q Okay. And what happened when you went to the Circle K? Was there  
7 anything unusual, out of the ordinary when you got to the Circle K, for example?

8 A Nothing, nothing. I've been there many times before and there was  
9 nothing unusual.

10 Q Okay. Did you purchase the items you spoke about?

11 A Yes, I did.

12 Q Did you go back in the store after that?

13 A Yes, I did.

14 Q Why?

15 A Because I wanted to get some gasoline because the truck was almost  
16 on empty and I figured I'm gonna need it the following morning anyways, so I figured  
17 I'd put some in the gas tank and avoid having to stop in the morning.

18 Q Okay. Did you notice anything when you were in the Circle K or  
19 anyone, let me put it that way?

20 A The only one I really noticed was a gentleman who was in front of me in  
21 line.

22 Q Okay. Describe him for me.

23 A He was about 5'8", probably about 240 pounds, male, Hispanic.

24 Q Older than you or younger?

25 A Younger than me.

1 Q Heavier?

2 A Oh, quite a bit.

3 Q What did you notice about him?

4 A I noticed he smelled of alcohol and he was trying to purchase  
5 something from the -- from the cashier and I -- I didn't see what it was, but I know  
6 that he was short money or the clerk said he wasn't gonna sell it to him, and I was  
7 about ready to dig in my pocket. I think he was 13 cents short and I was about  
8 ready to dig in my pocket and give him the 13 cents but he was out the door.

9 Q Okay. Do you remember what it was exactly or the exact amount?

10 A I don't remember. I remember he was counting out 87 cents and I think  
11 whatever it was was a dollar.

12 Q Okay. Did he leave the store before or after you?

13 A Before I did.

14 Q When you walked outside where were you going?

15 A I was going back to my truck to pump the gas that I purchased.

16 Q Okay. Hold on for me. I want to show you State's 6. Is that a picture of  
17 the back of your truck?

18 A Yes, it is.

19 Q And I want to show you Defendant's B. Is that a picture of the front of  
20 your truck?

21 A Yes, it is.

22 Q Is that the location it was in that evening?

23 A Yes, it is.

24 Q I noticed there are some grab bars on the bed of the truck; is that right?

25 A That's correct.

1 Q And there's a placard hanging from the rearview mirror?

2 A Yes.

3 Q What sort of placard is that?

4 A It's a permanent disability placard.

5 Q Whose is that? Is that yours or your wife's or someone else?

6 A It's mine.

7 Q Why do you have that?

8 A Because I was disabled in an automobile accident in 2006.

9 Q How were you disabled?

10 A I've got two herniated discs between L3 and L4, and L4 and L5 in my  
11 lower back. There's a 11 millimeter herniation in one and 9 millimeter in the other.  
12 The 9 millimeter's a real bad one 'cause you can only go 11 and you don't have a  
13 disc anymore.

14 Q Okay. Was that accident your fault when it happened?

15 A I was -- my son had just gotten a new car and he came over to our  
16 house and said, hey, dad, mom, let's go up to LA. And we drove up there and went  
17 to a restaurant, went to a park, came back and we were about five minutes from the  
18 house. I was driving because he insisted I drive his new car, against my wishes.  
19 Anyways, I pulled off the freeway ramp and I was at a stoplight and this was a major  
20 thoroughfare. It was Highway 76 in North San Diego County. And as I was stopped  
21 at the light I was rear ended from behind by someone who was -- the police said  
22 was doing about 60 or 65 miles an hour.

23 Q And we don't want to get into the details other than someone rear  
24 ended you and you were injured?

25 A That's correct.

1 Q Taken to the hospital at that point?

2 A Yes.

3 Q And as a result you had a permanent disability -- you have that  
4 permanent disability placard?

5 A That is correct.

6 Q Do you have any other medical issues?

7 A I'm a diabetic.

8 Q Diabetic. There was some discussion of gummy bears earlier in the  
9 trial. Sounded like you were nonchalantly eating gummy bears or gummy worms.

10 Can you tell us why you might've had gummy bear or gummy worms?

11 A I purchased gummy bears and gummy worms because they have a  
12 glucose content. It's not high like a typical candy bar. But my blood sugar gets low.  
13 And when my blood sugar gets low I can pass out and I always try to keep some  
14 with me so if I feel like I'm getting faint or something's going on I can start eating  
15 some.

16 Q Now the officers at some point put you in cuffs after the incident?

17 A Correct.

18 Q And they -- I think we've had testimony that they took what you had in  
19 your pockets and that kind of thing?

20 A That's correct.

21 Q Did they allow you to keep the gummy bears or the gummy worms?

22 A Yes.

23 Q Did you tell someone that you were diabetic or why you needed to do  
24 it?

25 A No.

1 Q Okay. They just allowed you to do it?

2 A There was no reason to bring it up.

3 Q Okay. Going back to the gentleman that was in front of you that you  
4 said was inebriated -- I mean, he was drunk. That's easier for me. Did he appear  
5 drunk?

6 A Yes. He smelled drunk.

7 Q Okay. The gentleman that was drunk, when you walked out of the store  
8 where was he at?

9 A He was looking through the side -- the passenger door of my truck,  
10 looking at it like this.

11 Q Had he offered -- had he asked you anything in the store? Was there  
12 any conversation in the store?

13 A No, there was no conversation; no.

14 Q What did that make you think when he was looking in your truck?

15 A Well, the first thing I thought was why is he looking in my truck?

16 Q Okay. Did you see him reaching any place?

17 A No, he was just looking in the front seat. But I had remembered I left  
18 my keys in the ignition, so I kind of got worried that, you know, maybe he was  
19 looking in there at the keys.

20 Q Okay. What did you do?

21 A I approached the rear of my truck and I asked him can I help you.

22 Q What was his response?

23 A He said homie, I need a ride.

24 Q All right. What did you tell him?

25 A I said I'm sorry I can't give you a ride.

1 Q Did you make an excuse?

2 A Well, after about the third or fourth time he asked me I said it was a  
3 company truck, which wasn't entirely the truth. It was actually my personal truck,  
4 but I did use it for business, so it was a company truck in a way.

5 Q And was there a comment I can't use a company truck because of --

6 A I can't take anybody in my truck.

7 Q Okay. There's an insurance issue or something --

8 A Correct.

9 Q -- is that right? Okay. But that's what you told him anyway?

10 A Correct.

11 Q How did he take that?

12 A He didn't. He just kept pestering me.

13 Q How long did this go on?

14 A Quite some time.

15 Q Did you feel like you were being pressured?

16 A Yeah, I was being coerced by him to give him a ride. But what really --  
17 what I -- the part I didn't understand was when he told me he lived two blocks away.  
18 And then as he went on he said he lived two miles away. And then he said he lived  
19 a half a mile away. And I'm just thinking this guy doesn't even know where he lives.

20 Q Did those different descriptions cause you some concern?

21 A Yeah. Yes.

22 Q What happens next?

23 A Well, he offered me 75 cents to give him a ride and I told him -- I said  
24 look, I don't want your money. I just can't give you a ride. You know, why don't you  
25 just move away from my vehicle and just move away.

1 Q Now, is there a time you walk from -- and I think we've seen it on the  
2 video, walked from the driver's side of the vehicle to the passenger's side?

3 A Yes.

4 Q What does he do?

5 A Well, he was hanging on the sidebar of the truck. And I had noticed  
6 that he had a -- it looked like some kind of a belt or metal something object. And the  
7 way he was hanging on the truck I was concerned that maybe he was scratching it.  
8 In all honestly, it's kind of my wife's baby and I didn't wanna -- I didn't want anything  
9 to happen to it.

10 Q Okay. Did you ask him to get away from the truck?

11 A Oh, yeah.

12 Q Did he listen?

13 A No, he did not.

14 Q Now looking at the tape it appears there's a point that you're on the  
15 same side and he will back away from the truck and then you go to the other side  
16 and he goes back to the truck?

17 A Yes.

18 Q Does a back and forth like that take place?

19 A Yes.

20 Q Several times?

21 A Yes.

22 Q Okay. At this point are you angry at him?

23 A Not angry, I'm confused; I'm concerned. There's a lot of feelings going  
24 through my head. I'm wondering if he's -- if he's gonna take the truck, if he's gonna  
25 rob me, if he's -- you know, everything's going through my mind.



1 Q Okay. This back and forth continues for a time; yeah?

2 A Yes.

3 Q Does there come a time that he circles from the passenger side of the  
4 truck to the driver's side of the truck?

5 A Yes.

6 Q What goes through your head then?

7 A I couldn't understand why he kept coming up on me when all I asked  
8 him to do was leave, but he wouldn't leave.

9 Q Okay.

10 A And I've been in this situation probably a couple hundred times in my  
11 life somebody's come up to me at a convenience store asked me for money, asked  
12 for a ride, asked me for this, asked for that. If I could help 'em; I'd help 'em. If I  
13 couldn't help 'em they would just say, hey, thanks a lot and walk away. This guy  
14 wasn't gonna leave.

15 Q Okay. Did you think you had the right to hurt him to make him leave?

16 A I wasn't thinking in those terms, no.

17 Q Okay. Were you afraid?

18 A Yes.

19 Q Why?

20 A Because I was afraid that I couldn't fight back because of my injury.

21 Q You're older than the man?

22 A Yeah.

23 Q Smaller?

24 A I'm sorry?

25 Q Smaller?

1 A Yeah.

2 Q Did -- I don't want to put words in your mouth. We've heard various  
3 terms around the courtroom, erratic, unfocused, unusual. Can you describe how the  
4 man was -- how the man was acting?

5 A He wasn't acting normally like a human being would act. If you asked  
6 them to leave they typically -- I know if somebody asked me to leave I would leave.  
7 I just couldn't understand why he kept persisting.

8 Q Did he become belligerent at any point?

9 A Yes.

10 Q Tell me about that?

11 A He said, homie, you're gonna give me a ride. I know you're gonna give  
12 me a ride home, homie. You're gonna give me a ride; right, homie? And he just kept  
13 this up over and over and over again.

14 Q Okay. Did you feel like it was a demand?

15 A Yes.

16 Q Did you ever say yes?

17 A No.

18 Q Did there come a point where you leave the scene of your vehicle?

19 A Yes.

20 Q Why?

21 A Because it was escalating.

22 Q Okay. What did you do?

23 A I went inside the Circle K and told the clerk to call the police. That this  
24 guy was out there, it was escalating and he needed to call the police as soon as  
25 possible. And I made it very clear that he needed to call the police right then.

1 Q Why not just stay at the Circle K?

2 A In hindsight, that would've been a great idea. At the time I wasn't  
3 thinking.

4 Q Okay. Did you go back intending to engage in a fight?

5 A Absolutely not. I don't do that.

6 Q Did you go back intending to light the man on fire?

7 A No, absolutely not.

8 Q What happened when you went back?

9 A He was still there. He was still persistent. I went around the side of the  
10 truck to finish pumping my gasoline and the door of the truck was open. I was  
11 standing next to the gas tank pumping my gas and he kept coming around the side.  
12 He came around the side of the truck while I was pumping the gas. I asked him to  
13 leave.

14 Q Did you say anything about the conversation that you had with the  
15 clerk?

16 A Yes. When I -- actually, when I came out of the Circle K I said to him,  
17 look, I just went inside and asked the clerk to call the police. If you leave right now  
18 I'm not even gonna tell 'em which way you went, which was the truth because I  
19 didn't want to get anybody in trouble and I didn't want to get involved.

20 Q Did he leave?

21 A No, he did not.

22 Q You said you walked to the side of your truck, the door was door.

23 A [Nodding head in the affirmative.]

24 Q Yes?

25 A Yes.

1 Q And I am facing -- so we can put this in perspective. If I am facing the  
2 front of your truck, the gas pump would be on the left, the truck be on the right?

3 A Yes.

4 Q Did you have a easy means of exit going out around the front of the  
5 truck. Do you understand what I mean?

6 A No. No, I did not.

7 Q Did the man approach around the back of the truck?

8 A Yes.

9 Q What did that make you feel?

10 A I made me feel like I was trapped.

11 Q What did you do?

12 A I asked him to leave again and he wouldn't leave, so I pulled the nozzle  
13 out of my truck and I was gonna hit him with it, but I didn't and sprayed him with  
14 gasoline.

15 Q How did he react?

16 A He backed off and went over to the next island over and started  
17 screaming at me that I ruined his shirt he had gotten, I guess as a gift. My wife gave  
18 me this shirt. You ruined my clothes. You ruined my shirt. He was angry.

19 Q Did it seem that things were spinning out of control at that point?

20 A Yeah.

21 Q The man has moved away though from the pump that you were at to  
22 the second pump. You sprayed him with gas, what are you hoping happens?

23 A I just hope he leaves.

24 Q Did you hear security -- we've heard testimony from a security guard.

25 Did you hear security guard telling him to leave also?

1 A Yes.

2 Q Did the man leave?

3 A No, he did not.

4 Q What did he do?

5 A He came back to me again.

6 Q And you're still in that tight space that we talked about?

7 A That's correct.

8 Q What did you do?

9 A I sprayed him a second time with gasoline.

10 Q Why?

11 A Because the first time got him to back off.

12 Q Did he back away as far the second time?

13 A If I recall correctly I think I pushed him away?

14 Q Describe his demeanor at this point?

15 A He was angry. He didn't seem to have a pleasant look on his face. He

16 was threatening.

17 Q Did you think -- you said -- you mentioned something about hindsight

18 and staying at the store. Spraying him with gasoline did that make the situation

19 worse?

20 A Yes.

21 Q Were you trying to make it worse when you did that?

22 A Absolutely not.

23 Q What happened?

24 A He came at me again and I remembered that I had a lighter in my

25 pocket. I light my wife's cigarettes all the time just to be polite. I remember it was in

1 there and I pulled it out and I flicked it and said, listen, back off man. Just please  
2 back off. And he wouldn't do and I flicked it again and I said, come on, come on,  
3 back off.

4 Q Did you threaten to light him on fire?

5 A No, I did not.

6 Q Are you sure about that?

7 A I may have said, hey, I'm gonna light you up. Yes, yes. When I flicked  
8 the lighter I said, come on, man, back off, back off.

9 Q Were you trying to threaten him to get him to back off?

10 A Yes.

11 Q Did you feel you had any other choices at that point?

12 A No.

13 Q What happens next?

14 A He came up about three feet from me. At this point I was frantic; okay.  
15 I couldn't understand why the security guard, which I thought initially was the police,  
16 because I thought the clerk had called the police and I'm not familiar with the  
17 uniforms the police wear here. I thought he might've been an officer. I couldn't  
18 understand why he wasn't intervening. And I flicked the lighter and I lit him up.

19 Q Did you mean to light him on fire?

20 A Absolutely not.

21 Q Pretty dangerous, pretty reckless, pretty -- you have to understand with  
22 fire that there was a possibility that he could -- he could go up?

23 A Absolutely. I wasn't thinking in those terms. I wasn't thinking about  
24 anything. I could've blown myself and everybody else.

25 Q Did you think you had a choice?

1 A No.

2 Q Were you afraid you were going to be injured?

3 A Yes.

4 Q What did you think he might do?

5 A I thought he might start beating on me.

6 Q Why not engage him fist to cuffs?

7 A I'm not in the physical condition to do that. A few years ago I might've

8 been able to, but not -- not then.

9 Q There is a large flame that happens immediately after the man's ignited.

10 Do you remember that?

11 A Yes.

12 Q Do you charge the man after that?

13 A No.

14 Q Do you attack the man after that?

15 A No.

16 Q Do you throw punches at the man after that?

17 A No.

18 Q Do you kick him?

19 A No.

20 Q Try to run over him with your truck?

21 A No.

22 Q Any of those sorts of things?

23 A No.

24 Q What happens after the fire?

25 A After the fire?

1 Q After the fire.

2 A He -- the security guard took his clothes off. And I tried to help the  
3 security guard; the security guard told me to back away. And then I remember him  
4 sitting on the center island.

5 Q Do you remember saying anything to him afterwards?

6 A Yes.

7 Q What did you say?

8 A I was very angry because of what I had been forced to do. And I told  
9 him not to go anywhere and I'd cut his dick off if he got up.

10 Q Okay. You told him not to go anywhere; you'd cut his dick off --

11 A Yes.

12 Q -- if he got up?

13 A That's correct.

14 Q Why?

15 A Because I knew the police would be there and I didn't -- I wanted to  
16 make sure that they knew what happened.

17 Q Did you try to run?

18 A No, absolutely not.

19 Q Did you try to hide?

20 A No.

21 Q Did you refuse to speak with the police?

22 A No.

23 Q You have a college education; right?

24 A Yes, post-graduate work.

25 Q You understood the *Miranda* rights when they were read to you?



1 A Yes.

2 Q You understood you could have somebody like me present if you  
3 wanted somebody like me present?

4 A Yes.

5 Q Did you ask for that?

6 A No.

7 Q How do you feel about having lit this man on fire?

8 A I feel terrible about it. Words can't even describe how I feel.

9 Q You've listened to the tape. In the tape you say something like it  
10 doesn't look like he was burned that bad or I didn't think he was burnt. Did you hear  
11 that?

12 A Yes.

13 Q What did you think at the time?

14 A At the time I didn't see that he had any apparent injuries. He was  
15 getting up and walking around and I thought he was fine.

16 Q When you learned that he'd been placed in the hospital in a medical  
17 coma how did you feel?

18 A I just kept beating myself up day after day.

19 Q At the time and at the place -- [indiscernible] hindsight, did you feel you  
20 had any choice?

21 A No, I did not.

22 Q Were you protecting yourself?

23 A Yes.

24 Q Were you doing what you thought was necessary to protect yourself?

25 A Yes.

1 Q When it started were you looking for a fight?

2 A Absolutely not.

3 Q Where you trying to keep the man away from your vehicle?

4 A I was trying to keep the man away from my vehicle and then trying to  
5 keep him away from me.

6 Q Did it seem that everything you did turned wrong one way or another?

7 A Sure did.

8 Q Were you ever asked by the police whether you were afraid?

9 A No.

10 Q Were you ever asked by the police how you -- let's leave it at that.

11 MR. COFFEE: Court's indulgence.

12 Thank you, Mr. Newell. The district attorney's going to have some  
13 questions for you now.

14 THE DEFENDANT: Yes.

15 THE COURT: Cross-examination?

16 MS. WONG: Thank you, Your Honor.

17 **CROSS-EXAMINATION**

18 BY MS. WONG:

19 Q Mr. Newell, you mentioned your disability with the herniated discs.

20 A Yes.

21 Q And that's what you were afraid of when you encountered the  
22 Defendant that perhaps you couldn't defend yourself?

23 A Yes.

24 Q Okay. So why didn't you volunteer this information to the police and  
25 explain to them why you were so afraid that you had to light a man on fire?

1 A I didn't think it was important. I try to downplay my disability. I don't  
2 even talk about it with people.

3 Q Did you also try to downplay how fearful you were?

4 A No.

5 Q Is that because you weren't afraid?

6 A That's not correct, I was afraid. Very afraid.

7 Q You said in your interview with the police that you were gonna teach  
8 somebody a lesson. They're not gonna do it again, and maybe they'll tell their  
9 friends and their friends won't do it again. You were trying to teach the victim a  
10 lesson; correct?

11 A I wouldn't call it that, but --

12 Q That's what you said.

13 A That's what I said, yes.

14 Q I mean, the victim was annoying. I think we can all admit that. He was  
15 annoying; right?

16 A He was more than annoying.

17 Q But he wasn't threatening?

18 A That's not correct.

19 Q How was he threatening?

20 A By his demeanor and by his vocalization. The way he was verbalizing  
21 things to me.

22 Q He never lunged at you; right?

23 A No.

24 Q Never postured at you?

25 A No.

1 Q Never took a swing at you?

2 A No.

3 Q Never even said he was going to do any of those things?

4 A Correct.

5 Q All he said was give me a ride?

6 A That's not all he said.

7 Q What else did he say?

8 A He said, homie, you're gonna give me a ride. Homie, I know you're

9 gonna give me a ride. You're gonna give me a ride; right, homie.

10 Q Okay. Now that's what you're saying today that he said. You never

11 told the police the victim was saying, homie, give me a ride. Homie, you're gonna

12 give me a ride. That's not what you told the police the victim said.

13 A The police never asked me that question.

14 Q Well, but you already told the police the victim kept asking you for a

15 ride.

16 A That's correct.

17 Q Give me a ride. Give me a ride.

18 A I didn't get into specifics.

19 Q You wanted to make the statement to the police; right?

20 A That is correct.

21 Q And so this was your time to tell them your story. And so as you're

22 telling them, hey, this guy's telling me to give him a ride, wouldn't you have

23 volunteered that information to the police. He's demanding a ride from you saying

24 give me ride, homie, give me a ride. You didn't tell them that.

25 A No, I did not.

1 Q You said you felt you were coerced by the victim; right? What do you  
2 mean by you felt coerced by the victim?

3 A Well, he kept asking me over and over and over again. At one point he  
4 made me feel like I was obligated to give him a ride.

5 Q Based upon the number of times he kept repeating the same question?

6 A No, he asked me a question, where am I supposed to go.

7 Q Okay. So you felt coerced because the victim asked you where he was  
8 supposed to go or you felt obligated to give him a ride because --

9 A I didn't feel obligated. If I --

10 Q But you said he made --

11 A -- felt obligated I would've given him a ride.

12 Q You said he made you feel obligated; right?

13 A No, I didn't say that.

14 Q Okay. So when the victim said give me a ride, where am I supposed to  
15 go, how does that make you feel?

16 A I couldn't give him a ride.

17 Q That wasn't my question. How did it make you feel?

18 A How did it make me feel?

19 Q Yeah.

20 A At that point when he asked -- when he told me that it didn't make me  
21 feel one way or the other.

22 Q Okay. So when you say --

23 A Probably a little sorry for him.

24 Q So when you say the victim coerced you, what do you mean by  
25 coerced?

1 A I mean he demanded at one point saying that I'm gonna give him a ride.  
2 Q Okay.  
3 A It escalated to that point.  
4 Q And when the victim says you're gonna give me a ride, did he do  
5 anything physically to you?  
6 A No, he did not.  
7 Q So he didn't grab you by your collar and say you're gonna give me a  
8 ride?  
9 A No.  
10 Q He just stood there and said you're gonna give me a ride?  
11 A Yes.  
12 Q But he never got physical?  
13 A No, he did not.  
14 Q He never advanced towards you?  
15 A No, he did not.  
16 Q He never made any threats that if you didn't give him a ride X, Y and Z  
17 would happen?  
18 A No, he did not.  
19 Q Now you said that when you took out the nozzle out of your gas tank  
20 you were going to hit the victim with it; right?  
21 A Yes.  
22 Q But then you changed your mind and you sprayed him with it?  
23 A No. When I pulled it out it kept on going. The gas was spewing out of  
24 the nozzle. It didn't stop.  
25 Q Okay. So you had no intent -- your testimony today is you had no

1 intentions of actually spraying him with gas?

2 A No. When I pulled it out the first time, okay, I had no intention of  
3 spraying him with gas.

4 Q Okay. And that's not -- but that's not what you told the police in your  
5 initial interview; right. That's not what you told them in your initial interview?

6 A I don't know.

7 Q Okay. So did you not tell the police that I said get the fuck -- excuse  
8 me. Get the F out of here, okay. Get the F out of here. He wouldn't leave. I pulled  
9 the pump out of my tank and I sprayed him with it. That's what you told the police;  
10 right?

11 A Yes.

12 Q Okay. So you didn't tell them, well, I pulled the nozzle out and gas  
13 accidentally came out. You didn't tell them that?

14 A No, I didn't put it in those words. No, I did not.

15 Q Okay. But today you're saying it was accidental?

16 A That I sprayed him with it?

17 Q Yes

18 A The first time when I pulled out, yes. I wasn't intending on gas coming  
19 out of it.

20 Q Now I was unclear. Was lighting him on fire accidental or not?

21 A I didn't want to light him on fire.

22 Q So you meant to light him on fire?

23 A No, I did not mean to light him on fire.

24 Q So when you flicked your lighter once, twice, three times and put it up  
25 by his shirt what did you think was going to happen?

1 A I was just trying to get him to leave.

2 Q By lighting him on fire?

3 A If you want to put it that way, okay. My intention was not to light him on  
4 fire.

5 Q Okay. Your intention was not to light him on fire. So why do you keep  
6 saying I had no other choice? You had no other choice but to light him on fire, but  
7 you didn't mean --

8 A I was hoping to scare --

9 Q -- to light him on fire.

10 A -- him away.

11 Q By lighting him on fire?

12 A Not by lighting him on fire. By flicking my lighter; that's why I flicked it.

13 Q On his shirt?

14 A No, I flicked it away from his shirt.

15 Q All right. Let's cue the video.

16 [Pause in proceedings]

17 BY MS. WONG:

18 Q Okay. So, Mr. Newell, your testimony is that you flicked the lighter  
19 away from his shirt; right?

20 A The first couple of times, yes.

21 Q But then the last time you actual -- you walked up to him and flicked the  
22 lighter on his shirt, right, intending to light him on fire?

23 A I did not intend to light him on fire.

24 Q But you intended to put the lighter on his shirt --

25 A I intend --



1 Q -- and walked towards him?  
2 A I intended to scare him away.  
3 Q Now the victim wasn't approaching you at this time; right?  
4 A No, he was not.  
5 Q In fact, the only person walking forward is you?  
6 A That is correct.  
7 Q Now you said the reason you told the victim you were going to cut his  
8 dick off was because you didn't want him to leave?  
9 A I didn't want him to leave before the police got there.  
10 Q The victim never attempted to run, did he?  
11 A I didn't see him attempt to run. He was up and moving around.  
12 Q Correct. In fact, when you pointed the knife at his penis he was  
13 standing up?  
14 A I remember him sitting down.  
15 Q But when you pointed -- oh, you remember when you pointed the knife  
16 at his penis he was sitting down?  
17 A He was sitting down. I said don't go anywhere; don't dare get up.  
18 Q But he was already sitting down?  
19 A That's correct.  
20 Q Okay. So why do you specifically talk about his penis. Why can't you  
21 just say don't get up?  
22 A I don't know.  
23 Q You were mocking him.  
24 A I wasn't mocking him.  
25 Q You were still angry with him.

1 A I was not angry with him. I was angry with what happened.  
2 Q So you made fun of the size of his penis and --  
3 A No, I did not.  
4 Q You didn't call him a pencil dick or --  
5 A I may have said it.  
6 Q Okay. You were mocking him.  
7 A I wasn't mocking him.  
8 Q Now you said earlier that if you had thought about it or you had a  
9 chance to do over again you would've just stayed inside the store when you called  
10 9-1-1 -- or had the store clerk call 9-1-1?  
11 A Yes.  
12 Q Okay. Here's my -- would you have gotten into your truck and just  
13 driven away in hindsight?  
14 A In hindsight, if I could've gotten into my truck quickly enough I would  
15 have, yes.  
16 Q Okay. Let's go back for a second here. So you're saying you never  
17 had time to get into your truck?  
18 A I would've had to turn my back on him when he was between the pump  
19 and the truck.  
20 Q So you see where the victim is wiping himself off at gas pump -- at the  
21 other gas pump?  
22 A Yes.  
23 Q And you're by your truck?  
24 A That is correct.  
25 Q You had no time to get into your truck?

1 A I don't know. I wasn't thinking in those terms. I --

2 Q Because you were so focused on making the victim go away. You  
3 weren't so much concerned for your safety; you were more concerned about  
4 making him leave, make him listen to you; right?

5 A No.

6 Q Now going back to when you waived the knife at the victim's penis.  
7 You remembered that fact about waving the knife at his penis to make sure he didn't  
8 go anywhere. You remembered that, what, months after this incident; right?

9 A Not vividly.

10 Q Because when the police asked you -- when Detective Kevin Johnson  
11 asked you if you had threatened to cut the victim after you lit him on fire, do you  
12 recall what your response was?

13 A I don't recall.

14 Q So the detective asks, after you lit him on fire did you again threaten to  
15 cut him with your knife? Your response, I don't remember, but I don't believe so.  
16 So, after this incident, after you gave this interview to the police you know remember  
17 that the reason you took out your knife and threatened to cut his penis is so that he  
18 wouldn't go anywhere?

19 A I wasn't going to cut him. I couldn't do that to somebody.

20 Q But several hours after you lit him on fire you didn't even recall whether  
21 or not you threatened to cut him?

22 A No, I didn't.

23 Q At least you didn't admit it to the police?

24 A Admit?

25 Q You didn't admit to the police that you threatened to cut him?

1 A I -- my frame of mind was such that I gave the best rendition of what the  
2 facts were that I could. That's all I could do.

3 Q So your memory now is better almost two years later than it was two,  
4 three hours --

5 A Oh, no.

6 Q -- after the incident?

7 A No, Ms. Wong. My memory was better even a week after, not two  
8 years after.

9 Q Mr. Newell, if you had to do over would you light the victim on fire?

10 A No.

11 Q Why not?

12 A Because I don't want to hurt another human being, that's why.

13 Q Even if it meant you would be hurt?

14 A If it meant that I would be hurt? I don't know. I don't know.

15 Q In hindsight, Mr. Newell, you will admit you overreacted?

16 A I don't know -- think I overreacted. If -- if you could've stepped inside  
17 my shoes at the time maybe you would think a little bit differently.

18 Q If I were in your shoes, Mr. Newell, I would've gone into my truck and  
19 drove away.

20 A Getting into --

21 MR. COFFEE: Objection; move to strike.

22 A -- my truck wasn't quite that easy.

23 THE COURT: Hang on. Hang on. Hang on.

24 What's the objection? I didn't --

25 MR. COFFEE: Move to strike. She's paraphrasing. She said if I were in your

1 shoes. She's testifying.

2 THE COURT: Yeah. I mean, it's not really a question, Ms. Wong, so maybe  
3 -- do you have a question for the witness?

4 BY MS. WONG:

5 Q Did you overreact?

6 MR. COFFEE: Asked and answered.

7 MS. WONG: Will you admit that you overreacted?

8 Well, he was finishing his answer.

9 THE COURT: Yeah. Hang on.

10 MR. COFFEE: Sure.

11 THE COURT: I'll let her ask it because we did kind of jump in there and  
12 interrupt him, so -- answer the question, sir.

13 THE DEFENDANT: In hindsight, I may have overreacted, yes. At the time,  
14 no.

15 MS. WONG: No further questions.

16 THE COURT: Any redirect?

17 Hang on. Randy -- where'd Randy go? We have a question from one  
18 of the jurors? Are there any other questions? We might as well gather them all  
19 while we're here. Okay. Can I get counsel to approach?

20 [Bench conference -- not transcribed]

21 **QUESTIONS OF THE JURORS**

22 THE COURT: We have two questions from members of the jury here. The  
23 first question was from Juror Number 11. Here's -- Juror Number -- who's Juror  
24 Number 11? I just want to make sure. Juror Number 11, here's the situation. Your  
25 -- you've asked kind of a complicated question. There's a lot of factual stuff. The

1 problem here is -- this is the reason for the lengthy discussion. Mr. Newell's a  
2 layman. What you're talking about here is things like operation of gas pumps, which  
3 Mr. Newell doesn't have the training, or the expertise, or the experience to know.  
4 Now, if we had an expert on things like this that would be a valid question to ask  
5 him, but for those reasons this question is not something that a layperson would  
6 know. And even if they do happen to know it, it's not because they have training or  
7 expertise in it, they probably stumbled on it on the internet or something like that. It  
8 appears that you know about it, but the problem is it's not a question that Mr. Newell  
9 as a layperson would necessarily have any factual basis for knowing, so that  
10 question is not going to be asked.

11 I have another question from Juror Number 10. The question -- this  
12 one I am going to ask. Mr. Newell, here's the question; all right. Did Mr. Newell  
13 start filling his gas tank before he went into Circle K the second time?

14 THE DEFENDANT: No.

15 THE COURT: Okay. Does anyone have any follow-ups to that answer or do  
16 counsel have any follow -- you have another follow -- you need to write it down; all  
17 right. Everything needs to be written down on your notepads so there's a record of  
18 it; all right. And while he's writing it down I don't if counsel -- if either counsel has  
19 any follow-up to that particular answer before we get the next question from the  
20 juror.

21 MR. COFFEE: Just quickly, if I might.

22 **IN RESPONSE TO THE QUESTIONS OF THE JURORS**

23 **EXAMINATION BY THE DEFENSE**

24 BY MR. COFFEE:

25 Q You actually went into Circle K three times; is that right?

1 A That is correct.

2 MR. COFFEE: Okay. And maybe that will help with the follow-up.

3 THE COURT: And for the record, the two questions that I just mentioned  
4 we're going to mark these as Court's exhibits --

5 THE COURT CLERK: One and two.

6 THE COURT: They will be Court's Exhibits 1 and 2 and we're waiting on the  
7 follow-up question from the other juror.

8 MS. WONG: If I may just follow-up --

9 THE COURT: Sure.

10 MS. WONG: -- on Mr. Coffee's question.

11 **IN RESPONSE TO THE QUESTIONS OF THE JURORS**  
12 **EXAMINATION BY THE STATE**

13 BY MS. WONG:

14 Q So after which time going into Circle K did you actually start filling up  
15 your gas tank?

16 A After I paid for my gas.

17 Q Which was the first, second or third time?

18 A Second time.

19 Q So the second time you went -- second time you went in and then came  
20 back out you filled up your gas tank?

21 A That's correct.

22 Q Okay. Now when you drove your truck to the Circle K was it on empty?

23 A Probably below empty.

24 Q Okay. Could you have driven your truck maybe a block or two?

25 A I'm sorry.

1 Q Could you have driven your truck a block or two without it running out of  
2 gas?

3 A Yeah.

4 THE COURT: Anybody else?

5 All right. Can I get counsel to approach?

6 MR. GUTIERREZ: I think we had one more hand, Your Honor.

7 THE COURT: Is there another hand?

8 UNIDENTIFIED SPEAKER: Yes.

9 THE COURT: Oh. Well, let's get counsel to approach anyway since there's  
10 another note coming.

11 [Bench conference -- not transcribed]

12 **QUESTIONS OF THE JURORS**

13 THE COURT: All right. We have two additional questions from the jurors. I  
14 have a question from Juror Number 10, which it might overlap with the question that  
15 was just asked. I'm guessing that he -- what was going on as well when he was  
16 finishing up writing this question down that's when that other question was asked,  
17 but I'll ask it anyway.

18 Did he, meaning you, Mr. Newell, start filling his gas tank after second  
19 entry into Circle K? And then there's a sequence here. I'm assuming the question  
20 is, is this correct, that the first time you went in to buy candy, the second time you  
21 went in to pay for gas, and the third time you went in to call the police?

22 THE DEFENDANT: Correct.

23 THE COURT: All right. That's Juror Number 10. We're going to mark that as  
24 a Court's exhibit. I also have a question from Juror Number 14. The question is,  
25 why didn't Mr. Newell ask for anyone else, parenthesis, witnesses, to call the police



1 since the clerk's call was not responsive enough in a timely manner since he  
2 needed?

3 THE DEFENDANT: I did. I did.

4 THE COURT: Any other follow-ups by counsel along those lines?

5 MS. WONG: Your Honor, can we approach?

6 THE COURT: Sure.

7 [Bench conference -- not transcribed]

8 THE COURT: All right. We have some additional questions here. We have a  
9 question from Juror Number 14. Mr. Newell, since you asked for help, no one else  
10 helped or responded, question mark, which ultimately made you go inside the store  
11 shortly after?

12 THE DEFENDANT: I asked the security guard -- I shouldn't say I asked the  
13 security guard. But when I was behind the pump, I initially thought when the  
14 security guard pulled up because of the uniform he was a police officer. I realized  
15 he wasn't a police officer. I yelled over to him and told him that I had -- I yelled at  
16 him saying I asked the clerk to call the police. Can you please go inside and ask the  
17 clerk if they've called the police.

18 THE COURT: All right. Then I have --

19 THE DEFENDANT: I kept looking up and down the boulevard for the lights,  
20 but nothing was coming.

21 THE COURT: All right. We have another question here. This is from Juror  
22 Number 10. Was gas being pumped into truck prior to third entry into Circle K to call  
23 police?

24 THE DEFENDANT: Before calling the police, yes.

25 THE COURT: All right. Then I have two other notes here. I have a note from

1 Juror Number 11. Juror Number 11, who are you again? Yeah, this is not a  
2 question. The purpose of this is if you have a question for the witness you can ask a  
3 question. This is not actually a question here. It's sort of a statement. I'm not even  
4 sure what this is. It's obviously not going to be read because it's not something that  
5 concerns Mr. Newell who's the one sitting up here under oath.

6 I also have a question from Juror Number 6. Who's Juror Number 6?  
7 One, two, three, four, five, six. All right. Ma'am, here's the thing. On this particular  
8 question -- we're going to this as a Court's exhibit. That's a question that under the  
9 rules of evidence can't be asked during this kind of proceeding; all right. So it's not  
10 going to be asked, but we'll mark it as a Court's exhibit.

11 All right. Any -- do counsel have any follow-up on the questions that  
12 were just asked? I know we're not on your redirect yet, but any follow-ups on those  
13 questions?

14 MR. COFFEE: I think I can take care of everything unless the State has some  
15 follow-up on just my redirect. And the State --

16 MS. WONG: No.

17 THE COURT: Okay. Let's just go --

18 MR. COFFEE: One recross just to [indiscernible].

19 THE COURT: -- to his redirect then. All right. You may proceed.

20 MR. COFFEE: Okay.

21 **REDIRECT EXAMINATION**

22 BY MR. COFFEE:

23 Q Mr. Newell, it's not the first time you've pumped gas, I'd imagine?

24 A No.

25 Q You're familiar with how gas pumps work in general?

1 A Yes.

2 Q Did it surprise you when gas squirted out of the hose when you've  
3 taken it out of the truck?

4 A Yes.

5 Q Why?

6 A Because normally when you break a vacuum the gas stops. I'm sure  
7 we've all had that problem where the vacuum wasn't right and keep pressing the  
8 handle and it's not working.

9 Q Initially when you were doing the spraying or looking like you're going to  
10 spray, are you doing it to frighten him?

11 A Yes.

12 Q You were asked whether you overreacted in hindsight. Do you  
13 remember that question?

14 A Yes.

15 Q I want to take you back to October 10<sup>th</sup> a couple years ago at two  
16 o'clock in the morning. At that time did you overreact?

17 A No.

18 Q Did you think you had any other choice?

19 A I did not.

20 Q Were you acting on the situation as it appeared to you?

21 A Yes.

22 Q Staying inside and getting a scratched up vehicle probably a lot less  
23 significant than what has happened as a result of this I would imagine?

24 A Yes.

25 Q Hindsight, you have to consider a lot of things; is that fair?

1 A Yes.

2 Q A man was injured?

3 A Yes.

4 Q More than you expected him to be?

5 A Yes.

6 Q You were placed in custody for a year.

7 A Yes.

8 Q There were some question from the district attorney about the first time  
9 you talked about wanting the man not to leave the gas station; do you remember  
10 that?

11 A Yes.

12 Q And there was an implication that you just made that up or that was  
13 something new; do you remember that?

14 A Yes.

15 Q Is that what it felt like, there was some kind of implication --

16 A Yes.

17 Q -- that you were just making it up? You filled out shortly after the  
18 incident -- let me get the date here. And, counsel, you got this I'm sure. January  
19 15<sup>th</sup>, 2013 a complaint with the citizens review board?

20 A Yes.

21 Q In that complaint did you say the following, and this is over a year ago:  
22 I pulled out my pocket knife and told him not to move or I would cut him. I did this to  
23 make sure that he didn't try to run from the police who were almost there. Did you  
24 say that a year and a half ago?

25 A Yes.

1 Q Okay.

2 MR. COFFEE: Nothing further.

3 THE COURT: Any recross?

4 MS. WONG: Yes, Your Honor.

5 **RECROSS EXAMINATION**

6 BY MS. WONG:

7 Q Mr. Newell, what you actually wrote in that -- in the complaint to the  
8 review board -- citizens review board was, I pulled out my pocket knife and told him  
9 not to move or I would cut him. I did this to make sure he didn't try to run from the  
10 police who were almost there. Next paragraph. When the police arrived I believe  
11 there were two cars initially. I explained to them exactly what had taken place. So  
12 how long did it take for the police to arrive after you waived the knife at the  
13 Defendant -- at the victim?

14 A I don't recall.

15 Q You don't recall. Do you recall what you wrote in your complaint to the  
16 review board?

17 A I don't recall.

18 Q Okay. Do would it refresh your recollection if I showed you a copy of  
19 your complaint?

20 A Yes.

21 Q Okay.

22 MR. COFFEE: No objection if you'd like to admit the whole complaint.

23 MS. WONG: I'm not trying to admit the whole complaint.

24 MR. COFFEE: Okay.

25 THE COURT: All right. You can approach.

1 BY MS. WONG:

2 Q On page 6 of the complaint, I want to direct you to the second  
3 paragraph here. Can you read that to yourself and let me know when you're ready.

4 A Down to what point? This point?

5 Q Yes. All the way up to --

6 A Okay.

7 MR. COFFEE: Counsel, can I keep up where -- which part of page 6? I'm  
8 sorry.

9 MS. WONG: The first -- well, second paragraph. First full paragraph, second  
10 [indiscernible].

11 MR. COFFEE: It starts with, at this point?

12 MS. WONG: At this point; that's correct.

13 MR. COFFEE: Okay. Good.

14 BY MS. WONG:

15 Q Now do you recall how -- when you pointed the knife at the victim how  
16 far the police were away from you?

17 A I --

18 Q I'm sorry. You know what, let me rephrase my question. After you lit  
19 the victim on fire how far away was the police -- were the police according to your  
20 statement in your complaint?

21 A I saw lights all the way down by South Point Casino. I'm guessing  
22 maybe a mile away?

23 Q Well, you wrote half a mile away when --

24 A Half a mile; okay.

25 Q Half a mile; okay. So after you lit the victim on fire and tried to pat out

1 the fire, which now you know did not happen; right?

2 A If you look at the video you'll see I tried to pat him out.

3 Q You tried to pat him out?

4 A The security guard told me to back off.

5 Q Okay. And so as you're patting him out you see the police half a mile  
6 away; right?

7 A Correct.

8 Q Okay. And then it's at that point that you then take out your pocket  
9 knife to wave it at the victim's penis and told him not to leave because you knew the  
10 police were on their way; right?

11 A Yes.

12 Q How fast do you think the police -- how long do you think it would take  
13 the police to drive half a mile?

14 A I don't know. At that point in time it seemed like forever.

15 Q Now I'm not saying in actuality. I'm saying how long do you think it  
16 would take the police to drive half a mile with their lights and sirens?

17 A I saw lights, I didn't hear sirens. I don't know.

18 Q So isn't it true it took almost ten minutes for the police to arrive after you  
19 tried to pat out the victim's fire?

20 A I'm sorry, I didn't understand the question.

21 Q [Indiscernible] put this way. You claim that you took out the knife and  
22 waved it at the victim's penis because you saw the police half a mile away?

23 A I may have seen the police.

24 MR. COFFEE: Objection; misstates evidence. I don't think he said that's why  
25 he took out the knife that he saw the police nearby.

1 THE DEFENDANT: No.

2 THE COURT: All right.

3 BY MS. WONG:

4 Q Okay. You say a few seconds later I saw the lights of the police car  
5 approximately a mile -- a half mile away; right?

6 A Yes.

7 Q I pulled out my pocket knife and told him not to move or I would cut him.  
8 I did this to make sure he didn't try to run from the police who were almost there;  
9 right?

10 A Yes.

11 Q So you took out the knife, waved it at the victim's penis, and at the time  
12 you did that you saw the police. You saw their lights; you heard their sirens; right?

13 A Yes.

14 Q Okay.

15 A I knew they were coming.

16 Q So you're saying that it took --

17 A I didn't hear their sirens.

18 Q -- the police ten minutes to get -- to drive half a mile with their lights and  
19 sirens?

20 A I don't know.

21 Q You saw the video.

22 A Yes.

23 Q It took them ten minutes to get to your location.

24 MR. COFFEE: Objection; assumes facts not in evidence.

25 MS. WONG: We all saw it on the video.



1 THE COURT: Right. I mean, I'm not sure that -- everybody seen the video.  
2 Here's what I'm going to do is -- you know, the jury can actually go look at the  
3 timestamps if they wanted to, but if they [indiscernible] --

4 MR. COFFEE: Sidebar, please.

5 THE COURT: You can approach.

6 [Bench conference -- not transcribed]

7 BY MS. WONG:

8 Q So, Mr. Newell, let me go back. You saw lights and you heard sirens;  
9 right?

10 A Yes.

11 Q And they were about a half a mile away?

12 A I didn't hear sirens, no.

13 Q You did not hear sirens. You saw the lights?

14 A Yes.

15 Q Okay. And then those same lights did you -- eventually you saw them  
16 -- those lights were at Circle K?

17 A I don't know.

18 Q Okay. So you lost track of those lights?

19 A I didn't keep looking down the boulevard.

20 Q Okay. And how did it take for the police to respond?

21 A I don't know.

22 Q Oh, did you use the auto fill lever on the pump?

23 A The auto fill level [sic]?

24 Q Yes.

25 A I don't recall.

1 Q Okay. So you weren't standing there holding the gas pump pumping  
2 gas into your tank?

3 A I believe I was holding it, yes.

4 Q You were holding it?

5 A I don't know if I was holding the lever or holding the nozzle.

6 Q So you had one hand on the nozzle or --

7 A Yes.

8 Q -- the pump; okay. So while you're in imminent danger, or you feel  
9 threatened by this victim, you have one hand on the nozzle pumping gas?

10 A Yes.

11 Q Thought you were -- but even though you were afraid of the victim you  
12 put an object in your hand that would prevent you from defending yourself?

13 A I wasn't thinking in those terms.

14 Q Because you we're afraid?

15 A At certain points I was very afraid. Maybe when I had my hand on -- I  
16 don't know. I don't know how to answer that, Ms. Wong; I really don't.

17 MS. WONG: Pass the witness.

18 **FURTHER REDIRECT EXAMINATION**

19 BY MR. COFFEE:

20 Q How much does a nozzle of a gas pump weight; do you know?

21 A I would guess probably ten or 15 pounds.

22 Q It is made out of cotton candy?

23 A No.

24 Q Smoke, balloons, anything like that?

25 A No.

1 Q When someone says you got your hand on a nozzle so you don't have  
2 weapon that's not necessarily accurate, is it?

3 A No.

4 Q In fact, I think what you told us before was I had the nozzle and I was  
5 thinking about hitting him with it?

6 A Yes.

7 Q I want to put into context because we left out one sentence -- it's in the  
8 plea, if I might. It's page 6.

9 MS. WONG: Okay.

10 BY MR. COFFEE:

11 Q It's about these lights; okay. And we talked about the first sentence,  
12 that a few seconds later I saw the lights of a police car approximately half a mile  
13 away. Now the police arrive some time later -- six, ten minutes, whatever it is?

14 A Yeah, seemed like an eternity.

15 Q Okay. Do you know if the lights that you saw were the same lights that  
16 came to the Circle K?

17 A No.

18 Q Just didn't track that?

19 A No.

20 Q Do you know what happened to the lights that were a half a mile away?  
21 Well, we don't even know if they're the same lights; you just don't know?

22 A No.

23 Q The next line -- and this is the one that was left out. I was never so  
24 happy to see help arrive as I was then. Do you remember saying that?

25 A Yes.

1 Q I thought they would take the man into custody and the incident would  
2 be over. Do you remember saying that?

3 A Yes.

4 Q I went over to the man and told him the police were almost there. I  
5 pulled out my pocket knife and told him not to move or I would cut him. I did this to  
6 make sure he didn't try to run from the police who were almost there. Do you  
7 remember saying that?

8 A Yes.

9 Q Was it your intention to cut the man after the incident where he was set  
10 on fire?

11 A No.

12 Q Did you ever make any motions to cut the man after the incident where  
13 he was set on fire?

14 A I may have waved a knife, but --

15 Q Any lunges, anything?

16 A No.

17 MR. COFFEE: Okay. Thank you, Mr. Newell.

18 THE COURT: Anything further, State.

19 MS. WONG: Yes, Your Honor.

20 **FURTHER RECROSS EXAMINATION**

21 BY MS. WONG:

22 Q Mr. Newell, you started to say, yeah, I may have waved the knife. How  
23 were you waving that knife?

24 A I don't exactly recall. If I was waving it, I said I may have waved it.

25 Q All right. But you did threaten to cut the victim with it?

1 A Yes.

2 Q Only to hold him there until the police arrived?

3 A That's correct.

4 Q So why did you threaten to cut Adam Carlos with it?

5 A I didn't threaten to cut Adam Carlos. Wasn't he the security guard?

6 Q Adam Carlos is the individual who confronted you about lighting a

7 human being on fire at a gas station.

8 A I didn't threaten to cut him.

9 Q Did you put a knife at him?

10 A I may of had a knife in my hand, but I certainly wouldn't cut him.

11 Q Okay. But you did get into a slight confrontation with Adam?

12 A No.

13 Q No?

14 A No.

15 Q You didn't have any -- did you have a conversation with Adam?

16 A I didn't have a conversation with him, no.

17 Q Okay. So he did not confront you about lighting a human being on fire?

18 A Yes, he yelled at me from the sidewalk.

19 Q And you ignored him?

20 A No. I told him he didn't know what he was talking about.

21 Q You advanced towards him and told him he didn't know what he was

22 talking about?

23 A I don't recall advancing towards him. I just yelled back at him and

24 saying you don't know, and he didn't know what had happened.

25 Q So you did have a slight altercation with him?

1 A I didn't have any altercation with him.

2 MS. WONG: No further questions.

3 **FURTHER REDIRECT EXAMINATION**

4 BY MR. COFFEE:

5 Q No one knows but you what happened; right?

6 A That's correct.

7 MR. COFFEE: Thank you, Mr. Newell.

8 THE COURT: State, anything further?

9 MS. WONG: No further questions.

10 THE COURT: All right. Mr. Newell, go ahead and take your seat.

11 Mr. Coffee, do you have any other witnesses or evidence to introduce?

12 MR. COFFEE: No, Judge. The defense rests.

13 THE COURT: All right. State, do you have any rebuttal evidence or  
14 testimony you wish to introduce?

15 MS. WONG: No, Your Honor.

16 THE COURT: All right. Ladies and gentlemen, here's what we're going to do.  
17 You've now heard all the evidence in this case; however, the case is still not being  
18 submitted to you because you still have not heard the instructions on the law or the  
19 closing arguments. It's now five o'clock, so my thinking is, you know, why even start  
20 with the jury instructions right now. Why don't we just come back tomorrow morning  
21 and do it all at once.

22 So for tonight you are admonished that until you begin deliberations you  
23 are still under oath and have not been discharged. Do not reach any conclusions  
24 about this case as you've not heard -- well, you have heard all the evidence, but the  
25 case has not been submitted to you yet. Do not talk to anyone about this case. Do

1 not investigate any facts of this case on your own. Do not view any media press or  
2 internet reports about this case. Do not talk to anyone who may be involved in any  
3 way with this case. Do not discuss the facts of this case with each other.  
4 Remember to wear your badge at all times in the courthouse. Please leave your  
5 notebooks on your chairs.

6 Here's what I'm going to do. Originally I told you that we were going to  
7 start tomorrow at ten o'clock. Since we're pretty close to the end of the case --

8 MR. COFFEE: Judge, can we approach for a moment.

9 [Bench conference -- not transcribed]

10 MR. COFFEE: All right. Ladies and gentlemen, here's what we're going to  
11 do. After that, you know, unfortunately kind of lengthy discussion, here's what we  
12 were discussing. I was thinking of having you come back at 11. The problem with  
13 coming back at 11 is you go for an hour; you take a lunch break, which is an hour.  
14 So let me see if this is okay with you guys. Instead of having you come back at 11,  
15 go for an hour, then break for an hour and you sort of wasted two hours and spent  
16 one hour, what about the idea of taking an early lunch and having you guys come  
17 back at 12 and then just go straight through with our, you know, regular hour breaks.  
18 Is there any objection to doing that? That way we're not sort of, like I said, wasting  
19 an extra hour for no purpose whatsoever. If that's okay with you guys let's go ahead  
20 and do that. We'll have you guys come back at 12 o'clock tomorrow. Eat an early  
21 lunch; bring snacks if you want to and we'll from there. And then for tonight all the  
22 admonishments that I just read to you apply and we'll see you guys at 12 o'clock  
23 tomorrow then. Thanks.

24 [Outside the presence of the jury]

25 THE COURT: All right. We're still on the record outside the presence of the

1 jury. There's a few things that we need to memorialize. Do you guys want to take a  
2 quick break before we do that?

3 MR. COFFEE: We can --

4 MR. STEPHENS: I'm good.

5 MR. COFFEE: Either way I'm good.

6 THE COURT: All right. There's a couple things going on here. First of all,  
7 there was a sidebar objection here. Ms. Wong was cross examining Mr. Newell.  
8 And I don't remember the exact question, but it was along the lines of he indicated  
9 that -- Mr. Newell said that he saw sirens and police officers and that's why he told  
10 the Defendant to stay because he knew the police were on their way. And the  
11 question related to why would the police take ten minutes to drive half a mile. Mr.  
12 Coffee asked for a sidebar and made an objection, well, that assumes certain facts  
13 not in evidence. That assumes that it is the same police officer that -- it assumes  
14 the police didn't stop anywhere else, those kinds of things.

15 So what -- at the sidebar what I did is I -- we had a discussion about  
16 that. I asked Ms. Wong that -- well, I guess technically speaking I did sustain the  
17 objection because your question did sort of incorporate some facts which we don't  
18 necessarily know to be true, but I indicated that she was welcome to rephrase the  
19 question along the lines of -- I'm sorry. To rephrase the question sort of limiting it to  
20 what Mr. Newell saw and experienced rather than what the police may or may not  
21 have done because that's something that's not actually within Mr. Newell's  
22 knowledge nor obviously wouldn't be. I know that's a very truncated version of the  
23 discussion, so if you guys want to add to that record you're very welcome to.

24 MS. WONG: Actually, Your Honor, my recollection is my question was, so it  
25 took the police ten minutes to get to that location. I didn't ask the witness why it took



1 the police ten minutes to get to Circle K. I simply said, okay, so you're saying you  
2 saw lights half a mile away and yet it took the police ten minutes to get the Circle K,  
3 so that was actually my question. I didn't -- I didn't realize the Court was mistaken  
4 as to what my question actually was, but I just want --

5 THE COURT: Okay. You know, I guess --

6 MR. COFFEE: It was clear --

7 THE COURT: Mr. Coffee, anything you want to add to that?

8 MR. COFFEE: The only this is it was cleared up. She asked if it was the  
9 same lights that you saw that arrived at Circle K and he said I don't know.

10 MS. WONG: Correct.

11 MR. COFFEE: I think it cleared up the issue.

12 THE COURT: Yeah. I'm not sure --

13 MR. COFFEE: That was the only concern that I had.

14 THE COURT: Yeah. I'm not sure this is a big deal anyway because, you  
15 know, in my personal opinion Ms. Wong kind of made her point anyway, so I'm not  
16 sure this really matters to the jury's decision, but nonetheless, we have to  
17 memorialize what the sidebar was so that if there's an issue on that particular ruling,  
18 which again I can't image there would be, but you never know, right, there's at least  
19 a record as to what we discussed at the sidebar. In -- go ahead.

20 MR. COFFEE: Are those not recorded at all?

21 THE COURT: They're not recorded at all. This microphone is off when we're  
22 doing sidebars.

23 MR. COFFEE: If I could just quickly --

24 THE COURT: Sure.

25 MR. COFFEE: The objection was assumes facts not in evidence that we

1 didn't know it was the same cars -- the lights that he saw were the same cars that  
2 arrived at the Circle K and that was the objection to the question.

3 THE COURT: Right. Then we also had a couple sidebars. The jurors had a  
4 series of questions, some of which were deemed objectionable -- some of which  
5 were asked, some which were not asked. We might as well read those into the  
6 record. There was a question submitted by Juror Number 6, which was not asked,  
7 and that is currently marked as Court's Exhibit Number 8. The question was have  
8 you made restitution. For obvious reasons that was not asked.

9 Oh, Juror Number 11 submitted two questions, which I'm going to put to  
10 the side for this -- for the moment just to make sure everything else is in the right --  
11 because that one I think we need to spend some time on.

12 THE COURT CLERK: Everything else was asked.

13 THE COURT: Yeah, everything else I believe was asked. Those are now all  
14 marked as Court's exhibits.

15 All right. With Juror Number 11 a couple things happened. Juror  
16 Number 11 initially asked a question while Mr. Newell was on the stand, which I'm  
17 now going to read into the record in its entirety and it raises a whole bunch of  
18 problems here. But I'm just going to read it into the record now and then I'm also  
19 going to read his follow-up question to that. Juror Number 11 asked the following  
20 question which I'm reading literally. How does someone spray gasoline from a  
21 hose, question mark. Since self-serve was established thirty years ago the oil and  
22 gas industry has spent hundreds of millions in technology that is designed to prevent  
23 spilling gasoline. The hose will not work until it is vacuumed pressure sealed and  
24 loss of this seal provides an automatic cutoff when released. Was the gasoline  
25 pump not operating correctly, Circle K negligent, question mark. I tried it this

1 morning and couldn't make a spray. It cut off before I got it out.

2           That question I did not ask, nor did I let the jury know what the contents  
3 were because it contains a lot of factual information which may or may not be true,  
4 and I so instructed Juror Number 11. In response, Juror Number 11 made the  
5 following note, which is currently marked as Court's Exhibit Number 7. And for the  
6 record, the one that I just read into the record was Court's Exhibit Number 1. But in  
7 response to that comment Juror Number 11 made the following note, which is  
8 currently marked as Court's Exhibit Number 7. Everyone who has ever pumped  
9 gasoline is a layman and knows how it is supposed to work. On that one I instructed  
10 Juror Number 11 that's not a question -- that's not a question that Mr. Newell -- it's  
11 not a question -- it's certainly not a question directed towards Mr. Newell. So those  
12 two things were not asked of Mr. Newell.

13           Here's my concern. On Court's Exhibit Number 1, at the bottom, Juror  
14 Number 11 says, I tried it this morning and couldn't make a spray. It cut off before I  
15 got it out. That obviously raises the concern that Juror Number 11 may have been  
16 doing some experimenting on his own in uncontrolled conditions with a completely  
17 different gas pump, which may or may not even had been working properly. It's sort  
18 of an uncontrolled experiment and so there are obvious concerns there.

19           The second concern, which I didn't necessarily articulate to you guys at  
20 the sidebar, but it was in my mind. I don't know that this is a thing that is as  
21 important, but it certainly raises a question in my mind. I'm not sure where he's  
22 going with that, but at least -- based on what I've heard so and based on Mr.  
23 Coffee's opening, I gather that the defense is not even contesting that gasoline was  
24 actually sprayed from this hose. That's not even a fact in contention, and so I have  
25 the question of why is he even going down these lines when that's not a fact in

1 contention; is he not going to follow a stipulation. Now I don't know that that  
2 disqualifies him a juror, but it certainly raises a question in my mind about what he's  
3 -- where this is all going in his mind.

4 MR. COFFEE: And if I might, I think I know why we got the question. We had  
5 somebody in the panel that spent 30 years in the oil and gas industry. I think it's this  
6 gentleman.

7 MS. WONG: Yeah.

8 THE COURT: Yeah.

9 MR. COFFEE: And --

10 THE COURT: Right.

11 MR. COFFEE: I think it's almost a -- it's not our industry's fault that this --

12 MS. WONG: No. Yeah.

13 MR. COFFEE: -- guy's able to spray somebody with gas. I don't know that  
14 the experiment to be quite honest means anything one way or the other. My  
15 preference is to leave him. I waive any objection to an outside experiment or  
16 anything else. I just don't think it makes any difference at the end of the day. It's  
17 clear the gas is sprayed.

18 THE COURT: Well, there's two things wrong here. One is that he did the  
19 uncontrolled experiment. And number two, that question is loaded with facts that  
20 are not actually in evidence --

21 MR. COFFEE: Sure.

22 THE COURT: -- about how gas pumps work. So that's a second concern is  
23 that we leave him on the jury. He's going to go there and start talking about all this  
24 stuff that's not in evidence because he -- I don't exactly remember what his job title  
25 is. I do remember during voir dire there was a guy in the oil and gas industry. The

1 problem is he's not actually been qualified as an expert. We don't know what he  
2 knows versus what he just thinks he knows that's not true just because he's in the  
3 industry. That's a second concern that I obviously have.

4 MR. COFFEE: There's a case that talks about jurors acting as experts. It  
5 involved a nurse and I want to say the name is *Miller*. I don't have it at my fingertips  
6 because obviously I wasn't expecting this -- that talks about jurors acting as experts  
7 and basically sitting on other jurors heads about this kind of thing. You see it with  
8 doctors, lawyers if somebody leaves those on. This case involved a nurse. My  
9 recollection is that -- obviously people can bring their common, everyday experience  
10 to the jury pool. Now if he tries to go beyond that it could create a problem, but I  
11 think that's terrible with an instruction. I think it was a foregone conclusion with his  
12 gas industry background that he might -- if we decided to make this a big debate  
13 whether he'd sprayed him or not might come to this conclusion. We all knew what  
14 his background was. But if the Court was inclined to have an instruction that says  
15 you are to limit your discussion to your common sense and -- I think there is an  
16 instruction on that and what the testimony is. It's not been read yet, but I think  
17 there's an instruction that talks about limiting consideration to those sorts of things. I  
18 think that cures the problem.

19 THE COURT: Well, here's just -- you know, I don't exactly know the case that  
20 you're talking about, but here's the concern if I could just sort of further articulate --

21 MR. COFFEE: Sure.

22 THE COURT: -- and then hear from both of you. You know, leaving anybody  
23 with any kind of expertise on the panel is always an issue. For example, you leave  
24 a lawyer on there; he's going to have opinions about the law. He's going to -- he  
25 may have opinions about credibility. For example, let's say he's a criminal defense

1 attorney; he deals with a lot of people who are accused of crimes, and he deals with  
2 a lot of people who probably lie to him all the time, that's just a fact of life. And so  
3 having him sit in there and say, look, I see a lot of people; I have this instinct for  
4 people who are telling the truth; I deal with liars all the time; I believe this guy's not  
5 telling the truth. That's not necessarily -- at one level that expertise because he's  
6 saying I deal with these people all the time; I have an opinion that is arguably more  
7 valuable than that of other people as to whether this person's telling the truth or not.  
8 That's always a risk you run with people who have any kind of training or education  
9 in anything that relates to the case.

10           The problem -- the concern that I have here is this is a little bit different  
11 in my mind from that because it's not that this guy is saying, look, I have experience  
12 with angry people, the way a psychologist would. I have experience with -- you  
13 know, it's more like I have facts. I know how the oil and gas industry works. We  
14 spent hundreds of millions of dollars on this stuff. Those are facts as opposed to I  
15 deal with this thing all the time and I believe I have a stronger opinion as to  
16 someone's credibility or believability, those kinds of things. That's my concern.

17           MR. COFFEE: And understood. And if the issue was whether or not it was  
18 accidentally or intentionally sprayed, whether the gas pump was not operational, if it  
19 was a civil suit against Circle K I would understand the concern. There's no  
20 question that Mr. Newell sprayed him. There's no question that he sprayed him a  
21 second time, that's been admitted to too. With those things in mind, I just don't  
22 know how this -- it affects the jury necessarily. We go through great pains when we  
23 pick juries, obviously, and I don't know that we have an absolute right to have jurors  
24 picked when they get involved in misconduct. The Court has the right to remove  
25 them in certain instances. I just don't believe that we've raised to that level. I don't

1 think there's any prejudice to the defense. I don't think there's any prejudice to the  
2 State in leaving him on and for that reason would object to moving him to the  
3 alternate.

4 It's also going to change the makeup of the panel. We've got about  
5 split men and women on the panel. I noticed when we went through peremptory  
6 challenges the State struck a lot of men; I struck a lot of women. That's how this --

7 MS. WONG: You struck all women.

8 MR. COFFEE: And you struck all but one man -- we start changing the  
9 balance of things too. And all those things --

10 MS. WONG: Well --

11 MR. COFFEE: -- go into consideration when we pick a jury, Judge, obviously.

12 THE COURT: Well -- I mean, I'll just be blunt with you. I'm not in love with  
13 that argument because part of the --

14 MR. COFFEE: I know.

15 THE COURT: -- because the possibility to have to drag in an alternate is  
16 something that you should've been thinking of all along. I don't --

17 MR. COFFEE: Understood.

18 THE COURT: -- that that's a -- you know, all I'm saying is I'm not -- you know,  
19 that particular argument I'm not really in love with. But anyway, State, anything you  
20 want to add to that?

21 MS. WONG: Your Honor, I guess -- I mean, Mr. Stephens and I don't really  
22 have a problem keeping this particular juror. Our concern is really more so for  
23 appellate purposes. This particular juror has now done an experiment outside of the  
24 courtroom. If he shares that information with the rest of the jurors and somehow the  
25 Defendant's convicted of these charges and it goes up on appeal, well now they're

1 going to say that the jury was tainted. Whether they find that is a reversible error, I  
2 don't know, but maybe they'll come back and find Mr. Coffee ineffective, so that's  
3 more my concern. I don't have a problem with this juror.

4 THE COURT: Yeah. Honestly, based on what Mr. Coffee said, I'm pretty  
5 sure that for purposes of direct appeal because he's the one opposing getting rid of  
6 this guy that wouldn't be an issue. But the issue is more along the lines of were you  
7 ineffective in opposing this guy being moved.

8 MR. COFFEE: And I can also -- Mr. Newell at this point -- give me two  
9 second. I guarantee Mr. Newell will get up and say he waives any challenge and  
10 any post-convictions rights in that regard. I don't know how effective it is, but the  
11 point is I'm sure Mr. Newell's in agreement with me. Are you Mr. Newell?

12 THE DEFENDANT: I'm in agreement with both the gentlemen. Both of --

13 MR. COFFEE: And you have no problem with the gentleman in seat -- which  
14 juror was it?

15 THE COURT: Juror 11.

16 MR. COFFEE: Juror Number 11, the fact that he knows how a gas pump  
17 operates and played with a gas pump this morning, you have no problem leaving  
18 him on the jury?

19 THE DEFENDANT: I wouldn't think there'd be a problem.

20 MR. COFFEE: Okay.

21 THE COURT: Well -- I mean -- again -- yeah, I don't know how  
22 [indiscernible] it is because --

23 MR. COFFEE: I don't know.

24 THE COURT: -- Mr. Newell as he sits here now isn't, you know, actually in  
25 prison. Things look a little bit different in there --



1 MR. COFFEE: I --

2 THE COURT: -- as I'm sure you know, Mr. Coffee.

3 MR. COFFEE: I understand, Judge, but we reserve waivers. And the  
4 Supreme Court --

5 THE COURT: Right.

6 MR. COFFEE: -- does take them seriously.

7 THE COURT: Well -- I mean -- all right. Let me -- the panel's not here.  
8 There's not a lot we can do. Let me at least think about this because the concern is  
9 -- I mean -- look, obviously part of my job is to think about preserving the record,  
10 what's going to happen in appeal, what's going to happen in post-conviction. But,  
11 you know, in my opinion judges shouldn't live their lives worrying about being  
12 reserved on appeal because sometimes you're just going to be reversed because  
13 the Supreme Court decided to just change the law and you can't control that.

14 My job here -- yeah, partly it's to protect the record for appellate  
15 purposes, but the other bigger part of my job is I have to do what I think is right. I  
16 have concerns about this guy. Is it fair to everybody? To you -- you know, you may  
17 be waiving it, but if I think it's going to jeopardize your client then, you know, I at  
18 least arguably have an independent duty to make sure this guy's not going to screw  
19 your client.

20 MR. COFFEE: Understood.

21 THE COURT: And so let me -- since we can't do anything tonight since the  
22 jury's home, let me think about that a little bit and whether or not -- I mean,  
23 obviously, I have some concerns about the fact that he apparently didn't understand  
24 my instruction that you're not supposed to go out and do all this stuff on your own.  
25 That -- it's twofold. Number one, the fact that he did the experiment, and number

1 two, apparently he's not following instructions; that's the other concern that I have.  
2 And the problem is we don't which way that's going to go in the jury room. Is it  
3 going to help you or is it going to hurt your client. And so independently of what  
4 your client wants to do on appeal, if there's an appeal, or wants to do on post-  
5 conviction, if there's a post-conviction proceeding, I still have to do what I think is the  
6 right thing to do and the fair thing to do to everybody.

7 MR. COFFEE: Absolutely. The only other point that I would make, Judge, is  
8 what he's talking about doing isn't, for example, putting ice in a freezer to figure out  
9 how long it takes to freeze, something that we might not know regularly. This is a  
10 pretty common thing. If he had pumped his gas two days beforehand and the  
11 question he said, I pumped gas two days beforehand the pump didn't stop, nobody  
12 would have an issue with it. So the experiment -- when we're talking about  
13 experimenting and things it's something in the common, I don't know if it's fair to  
14 even call it an experiment. It's something in the common [indiscernible] I pumped  
15 gas and it didn't stop. He did say I tried it, so I guess maybe that makes it an  
16 experiment, but it's not something that uncommon. Does the Court understand my  
17 -- what my point --

18 THE COURT: No, I understand exactly what you're saying because we all -- I  
19 guess here's where I --

20 MR. COFFEE: We all do it.

21 THE COURT: -- here's where my concern is, and I'm not -- I'm not trying to  
22 argue with you or anything like that.

23 MR. COFFEE: Right.

24 THE COURT: I just wanted to make that clear. I'm just expressing my  
25 concerns because I understand where your argument -- I guess my -- maybe -- I

1 don't know if I'm articulating my concern all that clearly, maybe that's the problem.  
2 Everybody pumps gas. Everybody kind of knows that sometimes pumps, you know,  
3 they shut off when the seal is broken. And sometimes it's aggravating because you  
4 want to do the auto fill thing and you have to keep looking at it because it keeps  
5 shutting off and you're like what the hell I -- you know --

6 MR. COFFEE: Right.

7 THE COURT: -- you know, everybody's got that experience. I guess my -- I  
8 guess the concern, even with the statement you made, is this. I mean, the missing  
9 pieces -- we don't know -- exactly know what he did, but let's assume the worst case  
10 scenario. We've all had the experience of having the aggravating thing where we all  
11 pump gas into the tank, but what most people probably don't do is what this -- what  
12 I'm concerned about what this guy did is hole the pump not anywhere near the car  
13 and just see if it sprays out. That's an experience I can tell you I personally don't  
14 have. I've never tried it. I don't know --

15 MR. COFFEE: I have.

16 THE COURT: -- if you've tried it. Have you really; okay. But I would guess  
17 most people haven't. I don't know that that particular thing is within the common  
18 knowledge of just everybody because I can tell you I've never tried it and I've  
19 pumped gas thousands of times. I wouldn't do it because it's dangerous. And so  
20 it's -- I'm not so sure that you're right that that is particularly in everybody's  
21 experience, but let me think about it. I mean, I've expressed my concerns. I'm not  
22 making a ruling, but it -- the whole thing's just a little bit troubling to me, obviously.  
23 And my concern is, you know, it could hurt the State, but my other concern is it --  
24 maybe it hurts Mr. Newell. Maybe he regrets this whole thing. He's like, crap, we  
25 should've kicked his guy off the jury. You know, we don't know that, but let me chew

1 on that. I don't honestly want to waste a whole bunch more time on this. Let me  
2 just think about that a little bit, chew on it a little bit and -- all right.

3 MR. COFFEE: Fair enough.

4 THE COURT: Is there something you want to add to that?

5 MR. COFFEE: And, Judge, if you do decide to remove him I would ask that  
6 we voir dire him as to actually what the experiment before you remove him.

7 THE COURT: Yeah. I mean, because that's what the problem is. I guess, I  
8 have this assumption about what he did.

9 MR. COFFEE: Yeah.

10 THE COURT: You know, I'm assuming he's pulled out of the tank and, you  
11 know, poked it in the air. Maybe he -- on the other hand, maybe he's just observing.  
12 He happened to get gas, maybe he's observing, I don't know. But let me think about  
13 whether we even need to do that. At the very least I think what we might want to  
14 think about doing because I'm a little bit -- this may be an unfounded concern, but I  
15 guess I'm a little bit concerned with the thrust of all this which it seems to be he's  
16 trying to revisit something that's been stipulated to. So I'm wondering if we should --  
17 if we leave him on there, throw in an instruction that you are instructed the parties  
18 have stipulated that gas was sprayed from this pump so that he's not in there talking  
19 about, well, how do we know that gas even came out of there. How do we know  
20 what -- you know, that kind of thing.

21 MR. COFFEE: Sure.

22 THE COURT: Are you guys okay with at least doing that?

23 MR. COFFEE: Sure.

24 THE COURT: Because clearly that's a stipulation you're making, but I'm not  
25 sure he caught that.

1 MR. COFFEE: Sure.

2 THE COURT: All right. Well, let me chew on that.

3 Anything else you guys want to address while we're here?

4 MR. COFFEE: No.

5 THE COURT: And, Mr. Coffee, did you have a copy of your proposed  
6 instructions so I can at least take a look of them tonight if you got any cases that you  
7 want me to look at.

8 MR. COFFEE: I did. Hold on.

9 UNIDENTIFIED SPEAKER: What time is counsel coming back tomorrow?

10 THE COURT: I told them to come back after the morning calendar because  
11 they said they might spend a couple hours on the jury instructions, so I told them to  
12 come back 9:30ish because it's such a short calendar.

13 UNIDENTIFIED SPEAKER: The Defendant [indiscernible].

14 THE COURT: Yeah, we probably need the Defendant 9:30 then as well.

15 MR. COFFEE: If it's easier for the transport, let me talk to Mr. Newell  
16 because I don't know if he needs to be up to settle instructions. He's probably  
17 willing to waive --

18 THE COURT: Oh, okay, ask him that.

19 MR. COFFEE: -- being here.

20 THE COURT: That'd make it easier for the officers, I'm sure. Yeah.

21 [Colloquy between defense counsel and Defendant]

22 MR. COFFEE: Mr. Newell's willing to waive his presence for settling jury  
23 instructions.

24 THE COURT: Okay. Then we don't need him here until -- do you want him  
25 here a little bit earlier to talk with him or not?

1 MR. COFFEE: Yes.

2 THE COURT: So what time, 11:30ish?

3 MR. COFFEE: 11:45 even, so --

4 THE COURT: All right. So we'll put him down as 11:45. We don't need him  
5 for the 9:30 session then. All right. Excellent.

6 MR. COFFEE: Very good.

7 THE COURT: Makes it easier.

8 Anything else you guys want to address tonight or not?

9 MR. COFFEE: No, Judge. I was just going to give you instructions. My  
10 understanding is one through six the State's not going to object to, so I wouldn't  
11 spend too much --

12 THE COURT: Are they numbered?

13 MR. COFFEE: Yeah. I've got -- Ms. Wong did it this way and it's a good  
14 idea, put page numbers on it.

15 THE COURT: Yeah.

16 MR. COFFEE: Through page six is not objected to. I think starting at page  
17 seven's where we're going to be --

18 THE COURT: Okay.

19 MR. COFFEE: -- disagreeing about some things.

20 THE COURT: Here's what I would ask. If you can also email that to Paula.

21 MR. COFFEE: Sure.

22 THE COURT: That way when they're settled she can just cut and paste them  
23 into the whole thing and we can get them started then; all right.

24 MR. COFFEE: Sure. And we've already talked about where we're going to  
25 put the instructions in the State's copy and all that sort of things --

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THE COURT: Okay.

MR. COFFEE: -- so we're a step ahead.

THE COURT: All right. Excellent.

All right. See you guys tomorrow morning then.

MR. COFFEE: Thank you, Judge.

MR. STEPHENS: Thanks, Your Honor.

[Jury trial - Day 3 concluded at 5:28 p.m.]

\* \* \* \* \*

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

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