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2 An information is but a formal method of accusing a person of a crime and is not of
3 itself any evidence of his guilt.

4 In this case, it is charged in an information that the said Defendant, on or about the
5 31st day of December, 2012, at and within the County of Clark, State of Nevada, contrary to
6 the form, force and effect of statutes in such cases made and provided, and against the peace
7 and dignity of the State of Nevada,

8 COUNT 1 - BURGLARY

9 did, then and there, willfully, unlawfully, and feloniously enter, with intent to commit
10 a felony, to-wit: kidnapping and/or sexual assault and/or lewdness with a minor and/or
11 sexually motivated coercion, that certain building occupied by ANKE DANG, located at
12 CIRCUS CIRCUS HOTEL & CASINO, 2880 South Las Vegas Boulevard, Room No. 631,
13 Las Vegas, Clark County, Nevada.

14 COUNT 2 - FIRST DEGREE KIDNAPPING

15 did, willfully, unlawfully, feloniously, and without authority of law, lead, take,
16 entice, carry away or kidnap ANKE DANG, a minor, with the intent to keep, imprison, or
17 confine said ANKE DANG, from his parents, guardians, or other person or person having
18 lawful custody of said minor, or with the intent to hold said minor to unlawful service, or
19 perpetrate upon the person of said minor, any unlawful act, to-wit: sexual assault and/or
20 lewdness.

21 COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
22 AGE

23 did, then and there, willfully, unlawfully, and feloniously sexually assault and subject
24 ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: anal
25 intercourse, by said Defendant inserting his penis into the anal opening of the said ANKE
26 DANG, against his will, or under conditions in which Defendant knew, or should have
27 known, that the said ANKE DANG was mentally or physically incapable of resisting or
28 understanding the nature of Defendant's conduct.

1 COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

2 did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or
3 lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE
4 DANG, said child being under the age of fourteen years, by said Defendant using his penis
5 to touch and/or rub and/or fondle the buttock(s) and/or anal area of the said ANKE DANG,
6 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of
7 said Defendant, or said child.

8 COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
9 AGE

10 did, then and there, willfully, unlawfully, and feloniously sexually assault and subject
11 ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: fellatio, by
12 said Defendant placing his penis on and/or into mouth of the said ANKE DANG, against his
13 will, or under conditions in which Defendant knew, or should have known, that the said
14 ANKE DANG was mentally or physically incapable of resisting or understanding the nature
15 of Defendant's conduct.

16 COUNT 6 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

17 did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or
18 lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE
19 DANG, said child being under the age of fourteen years, by said Defendant placing his penis
20 on and/or into mouth of the said ANKE DANG, with the intent of arousing, appealing to, or
21 gratifying the lust, passions, or sexual desires of said Defendant, or said child.

22 COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

23 did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or
24 lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE
25 DANG, said child being under the age of fourteen years, by said Defendant using his mouth
26 and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said
27 ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or
28 sexual desires of said Defendant, or said child.

1 COUNT 8 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

2 did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or
3 lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE
4 DANG, said child being under the age of fourteen years, by said Defendant using his mouth
5 and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said
6 ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or
7 sexual desires of said Defendant, or said child.

8 COUNT 9 - COERCION (Sexually Motivated)

9 did, then and there, willfully, unlawfully and feloniously use physical force, or the
10 immediate threat of such force, against ANKE DANG, with intent to compel him to do, or
11 abstain from doing, an act which he had a right to do, or abstain from doing, by said
12 Defendant said preventing the said ANKE DANG from leaving the presence of said
13 Defendant, the purpose for which the Defendant committing the offense being the sexual
14 gratification of said Defendant.

15 It is the duty of the jury to apply the rules of law contained in these instructions to the
16 facts of the case and determine whether or not the Defendant is guilty of one or more of the
17 offenses charged.

18 Each charge and the evidence pertaining to it should be considered separately. The
19 fact that you may find a defendant guilty or not guilty as to one of the offenses charged
20 should not control your verdict as to any other offense charged.

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INSTRUCTION NO. 4

Every person who, by day or night, enters any house, room, apartment, tenement, shop or other building, with the intent to commit assault, or any felony, on any person, is guilty of burglary.

Here you are instructed that Sexual Assault With a Minor Under Fourteen Years of Age, Lewdness With a Child Under the Age of Fourteen, and First Degree Kidnapping are felonies.

Every person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person:

- 1) For ransom, or reward; or
- 2) For the purpose of committing sexual assault, extortion or robbery upon or from the person; or
- 3) For the purpose of killing the person or inflicting substantial bodily harm upon him; or
- 4) To exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person; or
- 5) a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine him from his parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act, is guilty of Kidnapping in the First Degree.

The law does not require the person being kidnapped to be carried away for any minimal distance.

The term "inveigle" means to lead astray by trickery or deceitful persuasion.

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2 In order for you to find the Defendant guilty of both First Degree Kidnapping and an
3 associated offense of sexual assault with a minor under the age of fourteen and/or lewdness
4 with a minor under fourteen years of age, you must also find beyond a reasonable doubt
5 either:

6 (1) That the movement of the victim was not incidental to the sexual assault with a
7 minor under the age of fourteen and/or lewdness with a minor under fourteen years of age,
8 and that the movement of the victim substantially increased the risk of harm to the victim
9 over and above that necessarily present in the sexual assault with a minor under the age of
10 fourteen, or;

11 (2) That the victim was "physically restrained"; or

12 (3) That the victim was restrained and such restraint increased the risk of harm to the
13 victim or had an independent purpose or significance.

14 "Physically restrained" includes but is not limited to tying, binding, taping,
15 handcuffing, chaining, etc...

INSTRUCTION NO. 7

The consent of the person kidnapped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was above the age of 18 years, and that the person's consent was not extorted by threats, duress or fraud.

AA000922

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2 A person who subjects a minor under fourteen to sexual penetration against the
3 minor's will or under conditions in which the perpetrator knows or should know that the
4 minor is mentally or physically incapable of resisting or understanding the nature of his
5 conduct, is guilty of Sexual Assault with a Minor Under Fourteen Years of Age.

6 "Sexual penetration" includes fellatio, anal intercourse, or any intrusion, however
7 slight, of any part of a person's body or any object manipulated or inserted by a person into
8 the genital or anal openings of the body of another, including sexual intercourse in its
9 ordinary meaning. Evidence of ejaculation is not necessary.

10 Fellatio is a touching, however slight, of the penis by the mouth or tongue of another
11 person.

12 Anal intercourse is the intrusion, however slight, of the penis into the anal opening of
13 another person.

INSTRUCTION NO. 9

Physical force is not necessary in the commission of Sexual Assault. The crucial question is not whether a person was physically forced to engage in a Sexual Assault but whether the act was committed without his/her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving his/her consent or understanding the nature of the act.

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INSTRUCTION NO. 10

A person is not required to do more than his or her age, strength, surrounding facts and attending circumstances make it reasonable for him/her to do to manifest opposition to a Sexual Assault.

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INSTRUCTION NO. 11

Submission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent. Lack of protest by a victim is simply one among the totality of circumstances to be considered by the trier of fact.

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INSTRUCTION NO. 12

Voluntary use of drugs or alcohol is not a defense to a charge of Sexual assault.

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INSTRUCTION NO. 13

It is a defense to the charge of sexual assault that the defendant entertained a reasonable and good faith belief that the alleged victim consented to engage in sexual intercourse. If you find such reasonable, good faith belief, even if mistaken, you must give the defendant the benefit of the doubt and find him not guilty of sexual assault.

A belief that is based upon ambiguous conduct by the alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another is not a reasonable and good faith belief.

INSTRUCTION NO. 14

Any person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of Sexual Assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child is guilty of Lewdness with a Child Under the Age of 14.

To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.

INSTRUCTION NO. 15

Although an essential element of the crime of Lewdness with a Child Under the Age of 14 is an intent to arouse, appeal to or gratify the lust, passions, or sexual desires of either the person committing the acts or the child, the law does not require as an essential element of the crime that the lust, passions or sexual desires of either of the persons be actually aroused, appealed to, or gratified.

INSTRUCTION NO. 16

Consent in fact of a minor child under fourteen years of age to sexual activity is not a defense to a charge of Lewdness with a Child Under the Age of 14.

AA000931

INSTRUCTION NO. 17

There is no requirement that the testimony of a victim of Sexual Assault or Lewdness with a Child Under the Age of 14 be corroborated, and his/her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of Sexual Assault and/or Lewdness.

Where a defendant commits a specific type of act constituting Sexual Assault and/or Lewdness he may be found guilty of more than one count of that specific type of act of Sexual Assault if:

1. there is an interruption between the acts which are of the same specific type,
2. where the acts of the same specific type are interrupted by a different specific type of sexual assault or lewdness.

Only one Sexual Assault and/or Lewdness occurs when a defendant's actions were of one specific type of Sexual Assault and/or Lewdness and those acts were continuous and did not stop between the acts of that specific type.

INSTRUCTION NO. 19

Any person who uses violence upon another person or threatens violence or injury to another person with the specific intent to compel another to do or abstain from doing an act which such other person has a right to do or abstain from doing is guilty of Coercion.

AA000934

INSTRUCTION 20

It is unlawful for a person, with the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing, to:

(A) Use violence or inflict injury upon the person or any of his family, or upon his property, or threaten such violence or injury;

(B) Deprive the person of any tool, implement or clothing, or hinder him in the use thereof; or

(C) Attempt to intimidate the person by threats or force.

Where physical force or the immediate threat of physical force is used, the person has committed the offense of Coercion, a felony.

Where no physical force or immediate threat of physical force is used, the person has committed the offense of Coercion, a misdemeanor.

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2 If you find that the Defendant was intoxicated, you may consider this evidence in
3 determining whether he could form the specific intent to commit the crime for which he is
4 charged.

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

10 You are instructed that Burglary, First Degree Kidnapping, Lewdness With a Child
11 Under Fourteen Years of Age, and Coercion are specific intent crimes.

12 You are instructed that Sexual Assault With a Minor Under Fourteen Years of Age is
13 a general intent crime.
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The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence. This burden of proof should lead the trier of fact to find that the existence of the contested fact is more probable than its nonexistence.

Voluntariness is a question of fact to be determined from the totality of the circumstances on the will of the accused. An involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will. A voluntary statement must be the product of rational intellect and a free will.

INSTRUCTION NO. 24

Evidence which tends to show that the defendant committed offenses other than that for which he is on trial, if believed, may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the defendant's identity, motive, intent, preparation, opportunity, lack of mistake or accident, common scheme or plan. You must weigh this evidence in the same manner as you do all other evidence in the case.

INSTRUCTION NO. 25

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

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

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

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

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2 The Defendant is presumed innocent until the contrary is proved. This presumption
3 places upon the State the burden of proving beyond a reasonable doubt every material
4 element of the crime charged and that the Defendant is the person who committed the
5 offense.

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

12 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a
13 verdict of not guilty.
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2 You are here to determine the guilt or innocence of the Defendant from the evidence
3 in the case. You are not called upon to return a verdict as to the guilt or innocence of any
4 other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the
5 guilt of the Defendant, you should so find, even though you may believe one or more
6 persons are also guilty.
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The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

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

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

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

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

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

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

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

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

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

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 32

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the Defendant.

INSTRUCTION NO. 34

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

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

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

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2 If, during your deliberation, you should desire to be further informed on any point of
3 law or hear again portions of the testimony, you must reduce your request to writing signed
4 by the foreperson. The officer will then return you to court where the information sought
5 will be given you in the presence of, and after notice to, the district attorney and the
6 Defendant and his/her counsel.

7 Playbacks of testimony are time-consuming and are not encouraged unless you deem
8 it a necessity. Should you require a playback, you must carefully describe the testimony to
9 be played back so that the court recorder can arrange his/her notes. Remember, the court is
10 not at liberty to supplement the evidence.

INSTRUCTION NO. 36

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:


DISTRICT JUDGE

AA000951

OCT 23 2013 at 1:32pm

ORIGINAL

VER

DISTRICT COURT BY A. Naumec-Miller
ANNTOINETTE NAUMEC-MILLER, DEPUTY
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAZEN ALOTAIBI,

Defendant.

CASE NO: C-13-287173-1

DEPT NO: XXIII

VERDICT

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 1 - BURGLARY

(please check the appropriate box, select only one)

☒ Guilty of BURGLARY

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 2 - FIRST DEGREE KIDNAPPING

(please check the appropriate box, select only one)

☒ Guilty of FIRST DEGREE KIDNAPPING

☐ Not Guilty

1 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
2 follows:

3 **COUNT 3** - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
4 AGE

5 *(please check the appropriate box, select only one)*

6 ☒ Guilty of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN
7 YEARS OF AGE

8 ☐ Not Guilty
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10 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
11 follows:

12 **COUNT 4** - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

13 *(please check the appropriate box, select only one)*

14 ☐ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

15 ☒ Not Guilty
16

17 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
18 follows:

19 **COUNT 5** - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
20 AGE

21 *(please check the appropriate box, select only one)*

22 ☒ Guilty of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN
23 YEARS OF AGE

24 ☐ Not Guilty
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1 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
2 follows:

3 **COUNT 6** - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

4 *(please check the appropriate box, select only one)*

5 ☐ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

6 ☒ Not Guilty

7
8 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
9 follows:

10 **COUNT 7** - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

11 *(please check the appropriate box, select only one)*

12 ☒ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

13 ☐ Not Guilty

14
15 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
16 follows:

17 **COUNT 8** - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

18 *(please check the appropriate box, select only one)*

19 ☒ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

20 ☐ Not Guilty

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1 We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as
2 follows:

3 **COUNT 9** - COERCION (Sexually Motivated)

4 *(please check the appropriate box, select only one)*

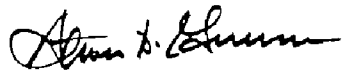
5 ☐ Guilty of COERCION (Sexually Motivated)

6 ☒ Guilty of COERCION (Misdemeanor)

7 ☐ Not Guilty

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10 DATED this 23 day of October, 2013

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13 FOREPERSON


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ALOTAIBI, MAZEN,

Defendant.

CASE NO. C287173-1

DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

FRIDAY, SEPTEMBER 12, 2014

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION FOR NEW TRIAL AND/OR FOR AN EVIDENTIARY
HEARING; STATUS CHECK: RESET SENTENCING

APPEARANCES:

For the State:

JACQUELINE M. BLUTH, ESQ.
Chief District Attorney
MARY KAY HOLTHUS, ESQ.
Chief District Attorney

For the Defendant:

DOMINIC P. GENTILE, ESQ.
ANJALI D. WEBSTER, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

1 Friday, September 12, 2014 at 9:35 a.m.

2
3 THE COURT: All right.

4 THE MARSHAL: Judge, this is page 1 --

5 THE COURT: Oh. I grabbed the wrong --

6 THE MARSHAL: -- C287173, Alotaibi.

7 THE COURT: I grabbed the wrong pile off my desk. It's a big pile on the -- on
8 my desk please.

9 Okay. Good morning everybody.

10 MR. GENTILE: Morning, Your Honor.

11 MS. BLUTH: Good morning, Your Honor.

12 THE COURT: Is there anything we need to -- it looks like counsel's here for
13 the State, counsel's here for Mr. Alotaibi. The interpreter is present.

14 Mr. Alotaibi, I know that you speak English, but sometimes the legal
15 terms are a little bit difficult for you. How do you want to -- do you just want the
16 interpreter to step in when you're having difficulty or do you want him to translate
17 simultaneously?

18 THE DEFENDANT: Just have him stand by for assistance.

19 THE COURT: Okay.

20 MR. GENTILE: Your Honor, we need to have some sort of a system so that
21 we can call a halt to things if he needs a translation.

22 THE COURT: That's --

23 MR. GENTILE: Whatever the Court --

24 THE COURT: It's whatever --

25 MR. GENTILE: -- prefers in terms of how we proceed in that fashion, but if

1 something's going on that he needs the interpreter for, obviously we can't be doing
2 two things at once. We kind of have to be able to stop it.

3 THE COURT: Well --

4 MR. GENTILE: Or at least pause. I don't --

5 THE COURT: That's fine. Do you want to just -- let your attorney know, tap
6 on the shoulder, let the Court know if you're having trouble understanding. I think
7 during the trial we did a mixture where you had the interpreter translating the entire
8 thing and then there's other portions where you just wanted him to stand by and you
9 would listen to English. It doesn't matter to me so long as you're understanding all
10 the proceedings. So whatever way you think is best.

11 Do you think it's easier, Mr. Gentile, just to have him translate
12 everything? That's fine too.

13 [Colloquy between Mr. Gentile and the Interpreter]

14 MR. GENTILE: Okay. I'm told by the interpreter that in the past in dealing
15 with Mr. Alotaibi, if Mr. Alotaibi raises his hand, then apparently the procedure
16 paused at that moment and the interpreter stepped in.

17 THE COURT: We've done that in the past.

18 Is that okay with you, Mr. Alotaibi?

19 THE DEFENDANT: Yes.

20 THE COURT: Okay, then that's what we'll do. But you need to make sure
21 that -- the responsibility's on you to let us know if you don't understand. If there's
22 something you miss, we will go over it again, okay?

23 THE DEFENDANT: All right. All right.

24 THE COURT: All right. Before we get started today, obviously this is
25 defendant's motion for a new trial. Is there any preliminary matters we need to

1 address?

2 MR. GENTILE: Only that I would like to introduce the Court and to the Court
3 Anjali Webster who is an associate in our firm in our Reno office --

4 THE COURT: Hi.

5 MR. GENTILE: -- who actually wrote this brief --

6 THE COURT: Okay.

7 MR. GENTILE: -- and that's all. That's the only --

8 THE COURT: Is she going to argue it or you?

9 MR. GENTILE: She will not. I will. But Ms. Webster is the person who -- Ms.
10 Webster has -- was Judge Hardesty's law clerk and she came to our office about
11 two years ago now, and whenever we have something that really requires pouring
12 through a record, we dump it on her. So she's here because she knows the record
13 better than I do.

14 THE COURT: That's fine. All right. I'm going to be taking notes on
15 everything so that's why I'm going to be typing. I will obviously be paying attention.
16 I have read everything that's been provided to me, as well as I've gone through
17 almost the entirety of the trial transcript.

18 MR. GENTILE: I saw that yesterday.

19 THE COURT: So Mr. Gentile, it is your underlying motion unless there's
20 something preliminarily we need to address by the State?

21 MR. GENTILE: No, Your Honor.

22 MS. BLUTH: Not on behalf of the State, Your Honor.

23 THE COURT: All right. Counsel, whenever you're ready, sir.

24 MR. GENTILE: Your Honor, I kind of want to almost go backwards from a
25 standpoint of the way the briefs are prepared, because we are here today asking for

1 a new trial -- we're asking for a new trial and we really urge several -- basically two,
2 two reasons that Mr. Alotaibi is entitled to a new trial. And we also urge in the
3 alternative because depending upon the decision that you make with respect to one
4 aspect of it, that pours over into a ineffective assistance of counsel issue.

5 THE COURT: Okay.

6 MR. GENTILE: And the State has raised, without support, without any kind of
7 case law, the position -- the State is taking the position that you cannot take a direct
8 appeal -- on direct appeal you cannot raise the question of ineffective assistance of
9 counsel.

10 Now I want to address that first because it seems to me, as we're going
11 through this, that's something that you have to have in mind. And I suggest to you
12 that especially in the State of Nevada where judicial efficiency and judicial economy
13 in the face of a clearly overburdened judicial system has put on the ballot for this fall
14 the creation of an intermediate appellate court because of the delays, that so long
15 as this Court has a record before it that would allow the Supreme Court, should you
16 deny our motion -- and I'm not presupposing that but as -- because it's going to go
17 up either way.

18 So so long as this Court has a record that it can hand over to the
19 Supreme Court wherein the question -- both questions are fully developed, there is
20 no reason why it cannot go up. As a matter of fact, in the case that we cite, the
21 Supreme Court of Nevada has said -- has implied that it will take cases so long as --
22 directly. It will allow the question of ineffective assistance to be raised directly so
23 long as the record is developed and there has been a hearing.

24 If you do not accept that there is a need for a hearing with respect to
25 the recanting on the issue to which only the recanting applies substantively in the

1 newly discovered evidence issue, then that implies with respect to the ineffective
2 assistance of counsel issue that that same hearing would be necessary on that
3 issue. And so I guess what I'm saying to you is that one way or another we ask you
4 -- because you do have discretion under the Nevada Supreme Court case, we ask
5 you to fully develop the record so that regardless of how you rule, whether it be in
6 favor of a new trial or whether it be to deny a new trial, and whether it be in favor of
7 a ineffective assistance of counsel issue or whether it be to deny that, that the
8 Supreme Court is able to take this up all at one time.

9 And there's not just judicial economy reasons for that. You know that if
10 it goes up piecemeal and there has to be subsequent post-conviction litigation on
11 the issue, it does nothing -- it does absolutely nothing to make the substance of it
12 better or the outcome of it better or more efficient and it absolutely puts one more
13 case on the docket, not only of this department but of this courthouse, for no good
14 reason. It also would delay because no matter what, I know that if you give him a
15 new trial, you're not going to release him on bail. I'm not a fool. Okay, I'm probably
16 going to file a motion to that effect but I -- but my hopes aren't real high; the man is a
17 foreign citizen. So he's going to be in custody. Even if we're waiting for a new trial,
18 he's going to be in custody.

19 If you impose a sentence on him and if you deny our motion for a new
20 trial, he's got a 35-year sentence wherein he might have had a five-year sentence or
21 a 10-year sentence. And in the course of the delays that can occur -- and you have
22 been on the bench long enough now so that you've seen them. In terms of the
23 delays that can occur, if at the end of the day the -- a court, a court, and particularly
24 our Supreme Court because I think it's safe to say it's going to be there one way or
25 another. If it finds that he is entitled to a new trial or somehow vacates an aspect of

1 his conviction, then he's going to be spending more time in prison than he needs to.
2 And the only reason that that would happen is because the direct appeal of the
3 ineffective assistance of counsel would be denied to him because you don't hold a
4 hearing. And so I wanted to cover that at the threshold, if for no other reason than
5 to make that record and to get you thinking that way.

6 Now as you know, we had a witness -- I guess we did get to stop him
7 by the way. And I think the record should reflect that the State and the -- and myself
8 and Mr. Kaplan on behalf of the defense and the Court did meet yesterday in
9 chambers which is the reason that I made the comment about I know that you've
10 read everything because it was all over your desk. And so what I would like to do is
11 I've made the argument at the front end in terms of why this should all be decided
12 and a hearing should take place, and now what I'd like to do -- because I do know
13 that you know the record and there's nothing better for an advocate than what we
14 call a hot court, a court that wants to ask questions. And so I don't --

15 THE COURT: I'm dying to ask a question right now actually.

16 MR. GENTILE: Go ahead.

17 THE COURT: I just want to make sure I'm clear. I understand that you've just
18 made the argument on judicial efficiency as far as dealing with the ineffective
19 assistance of counsel issue now, but it looks like it's also part and parcel of your
20 argument under the criteria set forth in the *Callier* case and the other *Sanborn*
21 case --

22 MR. GENTILE: We don't think *Sanborn* applies, but yes, we did put it forth.

23 THE COURT: *Callier* with the recanting of the witnesses.

24 MR. GENTILE: Right.

25 THE COURT: So as far as it looked like you were pointing it out that it applies

1 because it could not -- you were saying that it could not have been discovered with
2 exercise of reasonable diligence because Mr. Chairez failed to adequately prepare
3 for the case, but kind of -- it sounds like you're saying they kind of go hand in hand;
4 is that right?

5 MR. GENTILE: They're intertwined and I think that --

6 THE COURT: Okay.

7 MR. GENTILE: -- and -- you know, and when I deal with the recantation as
8 the reason for a new trial separate and apart from the adequacy of the -- or I guess
9 the effectiveness of the representation of Mr. Chairez, then I will focus in on that.

10 THE COURT: Okay.

11 MR. GENTILE: Okay? So the case of course that we believe although it's not
12 controlling it's certainly influential is *United States versus Steele*, the Ninth Circuit
13 case, and the case that we cite in our reply brief of the Supreme Court of Nevada
14 that indicates that it will take him up directly if the record's right.

15 Now, I first want to address Mr. Al Shehri's recantation and why it is -- it
16 was pivotal at the trial. I have a disadvantage. You were the trial judge and I was
17 not the trial counsel. And so to the extent that there is nuance that you took from
18 seeing the demeanor of Mr. Al Shehri on the stand as he testified, I was deprived of
19 that. But it's for that very same reason, because you will be able to compare his
20 demeanor at a post-trial hearing on this motion as compared to what you saw in
21 court, you will be able to get a fuller flavor for whether he in fact lied at trial or lied
22 now, and he had to do one.

23 It is my belief from reading the record and I -- I don't want to make it
24 sound like I didn't read the record. I read the record, but I didn't read it the way
25 Anjali did. It's clear that Mr. Al Shehri had no real prior relationship with Mr. Alotaibi.

1 He knew him for two days. And so there would be no motive on his part in terms of
2 a longstanding friendship, nothing that's apparent for him to be lying in his
3 recantation.

4 The State really did rely substantially on the fact that Mr. Alotaibi was
5 sober enough to drive, or saying it in the inverse, wasn't so drunk that he couldn't
6 drive. And so to the extent that you look at the record and you say that you have
7 read the trial record, it appears to me that all of the witnesses that were called by the
8 State who were percipient witnesses took the position that the man was not that
9 drunk. And I'm talking about called by the State in the sense that they were
10 identified with the State, law enforcement people. And some witnesses said that he
11 was that drunk or that he had blacked out or things of that nature, and so when
12 you're dealing with a jury being asked to make careful and close decisions in terms
13 of reasonable doubt or not, the testimony of Mr. Al Shehri at trial that has him driving
14 and driving good -- those were his words, not mine -- as compared to what he is
15 now saying that he didn't drive at all is exactly the kind of evidence that in a scale
16 can tip it.

17 And so we suggest that this recantation is not on an insignificant fact.
18 We do not dispute that there was a disparity in the testimony with respect to the
19 level of inebriation of Mr. Alotaibi. But given that this was a specific intent offense
20 that the charges here include -- in fact almost all of them except one, as I read it,
21 were specific intent offenses. That goes to the heart of it.

22 Mr. Al Shehri did not say -- and had he said it, I don't know that I would
23 have believed it. I probably would have had to have raised it, but I don't know that I
24 would have believed it. But he did not say that he was badgered or forced by a
25 prosecutor to testify the way that he did. Had he said that, given your knowledge of

1 the prosecutors in this case and the general ethics of the District Attorney's Office in
2 our county, you would really be and should really be hesitant to believe it. But he
3 did not say that.

4 What he said the State didn't even contest. Didn't say that law
5 enforcement told him that he'd be arrested, but it said that law enforcement had a
6 right to tell him that and we're not disputing that. It's not about what law
7 enforcement had a right to do, it's about the effect that it had on Mr. Al Shehri. And
8 we stated the reasons in our moving papers in terms of his background and why
9 somebody of his background would be afraid, and that is the reason that he put to it.

10 In terms of it being newly discovered, there is no way to discover -- no,
11 okay, here's where we get into that fork in the road. On one level we don't know
12 what Mr. Chairez would have discovered had he interviewed him. But given that Mr.
13 Chairez would have been unable to do anything to protect him from his fears, it
14 wouldn't surprise me if Mr. Al Shehri would not tell him that he told the prosecutor
15 something that wasn't true. But in fact we don't know what he would have told Mr.
16 Chairez because Mr. Chairez didn't take the time out to interview him.

17 On the other hand, with respect to the substance of the recantation
18 itself, as I said before, it is an important and a pivotal fact and he did not bring it up
19 until after conviction. I can't -- I have personally interviewed him. I interviewed him
20 in Houston, Texas. We had to fly there. We had to interview him at his consulate.
21 That was the only way that we could talk to him. But the bottom line to it is that
22 something prompted Mr. Al Shehri to come forward and put himself in harm's way
23 because he has done that.

24 THE COURT: Well that was my question. I read the affidavit. He said no
25 one contacted him, including the defendant or your office to speak about the trial or

1 his testimony. So how did he --

2 MR. GENTILE: No, that's not -- I don't know that --

3 THE COURT: Or maybe I misquote --

4 MR. GENTILE: I don't know that that's --

5 THE COURT: So how did he end up --

6 MR. GENTILE: That's certainly not the reading that should be taken. I can
7 tell you --

8 THE COURT: Then let me double check. And I could be misquoting. It's
9 been a couple days since I read it, but how did he end up coming forward is my
10 question.

11 MR. GENTILE: Okay. We started the ball rolling. We started the ball rolling.
12 I was in contact with Mr. Chairez -- actually he was in contact with me. And after we
13 became involved or -- you know, I honestly don't remember if it was before we
14 became involved officially by way of, you know, an appearance --

15 THE COURT: Well --

16 MR. GENTILE: -- or whether it was after. I don't recall --

17 THE COURT: Here it is. On the affidavit it says -- and it's on page 3 of 4 -- I
18 am recanting my testimony voluntarily and due to the fact that it was false. Prior to
19 the time I recanted my testimony I was not asked by Mazen Alotaibi, his attorney or
20 any other person to recant my testimony.

21 MR. GENTILE: That's true.

22 THE COURT: Was it just you went and were --

23 MR. GENTILE: No, we asked him if we could talk to him. We didn't ask him
24 to recant his testimony. All right, and we set the ball rolling through the Saudi
25 consulate in Los Angeles and then they found him, because we didn't even know

1 where he was, and he was going to school in Texas and we -- I wasn't even sure
2 that the man spoke English. He does. Not well but he does.

3 THE COURT: So was it just part of your reviewing this case after you were --

4 MR. GENTILE: Absolutely, and on the course of reading --

5 THE COURT: -- obtained -- retained?

6 MR. GENTILE: -- the transcript and learning what the trial was, we found this
7 testimony and Mr. Alotaibi -- now I'm running a risk of revealing a privileged
8 communication, but Mr. Alotaibi simply stated to us that he didn't drive; that he was
9 not the driver, okay? And so in doing our due diligence, we started hunting down
10 witnesses in terms of people that said that he was. We could not find Mr. Jafari.
11 He's back in Saudi Arabia. And so the only person that's in the United States that
12 was in that car that we could reach was Mr. Al Shehri and the good news for us is
13 that we were able to reach him.

14 THE COURT: So --

15 MR. GENTILE: He was represented when he was -- when he was at the
16 consulate, I brought with me a former assistant resident agent in charge of the Drug
17 Enforcement Administrative office in Irvine, California, who is -- does my
18 investigative work. In fact you met him, Anthony Ricevuto.

19 THE COURT: Okay.

20 MR. GENTILE: And the -- and so -- and mainly because I was coming into --
21 I'm saying foreign territory. I don't mean to use it as a pun. I was a little
22 uncomfortable in terms of walking into a consulate to be surrounded by counselor
23 people that I had never met before, to interview a person that I had never met
24 before, and I didn't want anybody saying that anything was said or done without me
25 having somebody to corroborate me. And so that's the reason I brought the person

1 that had the highest integrity I could find, because clearly a person who had that
2 position with the Drug Enforcement Administration should have good credibility.

3 THE COURT: Well I understand, but you know, we were at trial and the --
4 through the State's direct of Mr. Al Shehri came up who was driving and that's when
5 he testified that Mazen had been able to drive between the strip joint and the casino.

6 MR. GENTILE: I understand that.

7 THE COURT: And then Mr. Chairez got up and had a chance to cross-
8 examine. Why didn't he tell Mr. Chairez that that was incorrect?

9 MR. GENTILE: I don't know the answer to that. I don't know the answer to
10 that. I don't know that Mr. Chairez ever talked to him again after that trial. Ever
11 talked to him at all other than on the witness stand. I mean there's a lot of questions
12 that I have about why Mr. Chairez didn't do some things but I don't have an answer
13 to any of them.

14 THE COURT: Because, you know, you've done trials and you can usually
15 see the defendant, you know, tugging on their lawyer's sleeve if there's something
16 they don't disagree with, you know, or, you know, writing it down on a piece of paper
17 and to my knowledge -- well I don't know, but it doesn't seem like that happened
18 because there was no follow up on --

19 MR. GENTILE: We would have to have a hearing and ask Mr. Chairez that.

20 THE COURT: Okay.

21 MR. GENTILE: Okay?

22 THE COURT: Did he tell -- did Mr. Alotaibi tell you that he told Mr. Chairez
23 that?

24 MR. GENTILE: Well now you're getting into things that I may not be able to
25 reveal to you, you know?

1 THE COURT: Well and I know that I'm kind of walking the line on attorney-
2 client privilege. I'm just trying to figure out the whole scenario, you know, because I
3 know that he was sitting here during the course of the testimony --

4 MR. GENTILE: When I met Mr. Alotaibi, I would describe him as shell
5 shocked. I mean it took a while to --

6 [Note passed to Mr. Gentile by Ms. Webster]

7 MR. GENTILE: Well, I'm not so sure that -- I understand and thank you.

8 Let's say that the best thing -- to really get to the bottom line on that
9 question, I think we have to put Mr. Chairez on the stand.

10 THE COURT: Okay.

11 MR. GENTILE: Okay, because now at this stage we are talking about
12 memory. I don't have any memory because I don't know in the first place.

13 I digressed. So I guess what I'm getting at is that the pivotal issue is
14 the driving. I think that in a trial in which consent is an available defense -- although
15 not the way you instructed the jury, but I'll deal with that in a separate argument. In
16 a trial where consent is an available defense and in a trial in which a specific intent
17 is at issue, clearly intoxication -- and you're reading the record, I'm sure you're going
18 to read summation, or maybe you already have. I mean the State made a
19 significant effort in arguing the weight that should attach to the fact that Mr. Alotaibi
20 drove the car.

21 And so on a record such as that, if that was not true, if that was not
22 true, if it had not been brought out and the result was as it is, one could say that it
23 wouldn't have mattered. But that's not what happened. And so the real issue here
24 is how important was it and is there a reasonable probability that the verdict might
25 have been different.

1 And again, different doesn't mean an outright acquittal, Judge. Doesn't
2 mean that at all, but it does mean that on certain specific intent offenses, it might
3 have been different, if there was a reasonable probability.

4 Now, that's a difficult assessment to make because -- there's a couple
5 of reasons it's difficult and -- and it falls on you. And it falls on you for a good
6 reason. I'm an advocate and I'm going to stand up before you and I'm going to
7 advocate and I might absolutely truly believe in my heart of hearts that it would have
8 made a difference, but I can't prove that.

9 The same thing goes for my adversaries here. They are also
10 advocates and they're going to stand up here -- and they worked hard to get this
11 conviction and I appreciate that. And they're going to stand up here and they're
12 going to tell you that it wouldn't have mattered. But ultimately you have to decide
13 whether there was a reasonable probability that if this jury did not hear if it -- if it
14 heard that Mazen did not drive the car, that he was too drunk to drive the car, taken
15 in context with all of the other evidence in the case, it would have still proven that he
16 was intoxicated, but it would have weighed on the side of the scale that he was so
17 intoxicated that he could not have formed -- or there's a reasonable doubt as to
18 whether he formed the specific intent. And that's all it's got to do.

19 And so I say in the context of the way I read the record in this trial,
20 without the benefit of the ability to assess the demeanor of the witnesses on the
21 stand, it seems to me that this does result in the conclusion that there's a
22 reasonable probability that it would have resulted in a different verdict. It's not that
23 it's absolutely certain that it would have, but there's a reasonable probability that it
24 would have.

25 THE COURT: May I ask you -- okay, so I went back and read the testimony

1 of several people; Mohammed Jafari (phonetic), even Mr. Rashed Al Shehri. There
2 is -- as well as other individuals and Mazen himself when he gave a statement to the
3 police. I mean there's significant testimony that he was drinking and, you know,
4 there's -- I think there's evidence in the record that he was probably drinking heavily
5 and he was drinking substances straight -- I mean he was drinking liquor straight up,
6 you know, without any kind of mixer in it. I mean there is a lot of testimony in the
7 record that the jury could weigh and determine his level of intoxication and your brief
8 really focuses on the fact of the level of intoxication.

9 Now on the flip side, when you look at the cases that talk about the
10 recantation and whether -- and one thing the Supreme Court focused in on, and that
11 would be the *Callier* case, is the Supreme Court focused in on, you know, the
12 truthfulness aspect and they said -- they looked back at the record and said there
13 was sufficient evidence in the record that corroborated the testimony at the time of
14 trial.

15 So on the flip side, you know, so we have a lot of testimony that he was
16 very drunk and again he says he was drinking heavily. And then on the truthfulness
17 scale, you know, there's significant testimony also that he was, you know, walking
18 okay at least when the security guards detained him when they went up to the room,
19 that he was walking okay, he was understanding commands, he wasn't stumbling.
20 There was also a videotape introduced where -- you know, and it was several
21 minutes where the jury could visually observe the manner in which he was walking
22 and you can see from that videotape that he's not stumbling, he's not falling down or
23 anything else, he appears to walk just fine. So there seems to be a lot of evidence
24 in the record that the jury can weigh on that issue.

25 MR. GENTILE: Right, but if you take a look at the summation, the State put

1 very much emphasis on the driving and that was also weighed. And if it is not true,
2 then you might very well have a situation where you've got plenty of evidence, but it
3 doesn't amount to beyond a reasonable doubt. And that's the standard and, you
4 know, unfortunately, when you -- I shouldn't say unfortunately. I should say
5 fortunately. He had the benefit at that time of a beyond a reasonable doubt
6 standard. This evidence that we -- that has been recanted and that we asked you to
7 have a hearing on was used forcefully by the State to get over that beyond a
8 reasonable doubt standard. And while we admit that it was not the only evidence in
9 the case that he was drunk, it was evidence that not only was given emphasis by the
10 State -- and they even called a corroborating witness -- from my reading of the Al
11 Shehri testimony, he wasn't even impeached on that issue.

12 So candidly one of the things I'm wondering about Don Chairez is why
13 he didn't object to that corroborating witness since nobody impeached Mr. Al Shehri.
14 And the corroborating witness didn't corroborate that Mr. Alotaibi drove the car. He
15 just corroborated that Mr. Al Shehri said that before. And there was no
16 impeachment on that, so it wasn't -- there was no need for a prior inconsistent
17 statement.

18 And under Nevada law -- and this is important. Under Nevada law if --
19 and it's only under Nevada law that -- it's the only state in the Union -- and I say that
20 having done a lot of study on it and I -- I almost said a bad word. I complain about it
21 in my evidence class to my students. But Nevada is the only state in the country
22 where an unsworn prior inconsistent statement can be taken by the jury and used
23 substantively. It could be used to prove the truth of the assertion.

24 It's the only state, Judge. And so in a situation like this -- in the federal
25 system and in every other state, the prior inconsistent statement, if it -- the prior

1 consistent statement, prior consistent statement, and the prior inconsistent
2 statement come in differently.

3 All right, now she came in with a prior consistent statement with no prior
4 inconsistent statement having been brought in. So there was no reason for her
5 testimony but the State thought there was. And the -- and what that tells me, and I
6 hope it tells you, is that the State thought that that was a very important point that
7 the man was driving the car. And they referred to it twice during summation? Once
8 during summation, but twice during the actual case in chief. I -- during the evidence
9 aspect of the case.

10 Now the State notes in its opposition that the material issue was
11 whether or not the defendant was so intoxicated that he could not form the requisite
12 intent required by law. We agree. That was the issue. And that's exactly why this
13 testimony that has now been recanted has much greater impact than you might
14 think of it just standing alone. Okay, somebody was driving a car, somebody wasn't
15 driving a car. Ordinarily, I mean unless it was a hit and run or something that
16 involved the use of a car, it wouldn't be a determinative fact in any case. But in this
17 case, while it wasn't a determinative fact in the sense that it wasn't an element, it
18 was a very important fact on a central issue in the case.

19 Now, I would like to -- if you have more questions with respect to the
20 recantation --

21 THE COURT: I don't.

22 MR. GENTILE: -- I'm prepared to handle those now, but I'd like to move on to
23 the question of the failure of the lesser included offense instruction. First of all,
24 *Robinson versus State* which we cite in our brief, 110 Nevada 1137, which was an
25 en banc decision of the Nevada Supreme Court and has been the law now for 20

1 years, makes it clear that sexual seduction --

2 MS. BLUTH: Excuse me, I'm sorry. Mr. Gentile, I'm sorry.

3 Your Honor, at this point I'm going to object. This is a motion for a new
4 trial or evidentiary hearing based on newly discovered evidence. Their -- in the
5 defendant's original motion to the Court, I think the last two lines on the last page
6 said something about post-conviction relief. If they want to file a motion, you know,
7 discussing those issues, but today we're here for one thing and that's whether or not
8 a new trial is warranted based on the newly discovered evidence so I'd ask that we
9 keep the argument to that because that's what this argument is for.

10 THE COURT: I think he's also trying to supplement the record because he
11 wants to deal with the ineffective assistant (sic) claims --

12 MR. GENTILE: That's exactly right.

13 THE COURT: -- prior to sentencing.

14 MS. BLUTH: And I -- and that's fine, but I think that should be done in motion
15 work, not in the middle of our hearing for whether or not a new trial is warranted,
16 because the State then needs to address those -- or excuse me, the State then
17 needs to research those issues and address them, but that's not the purposes of
18 what we're here for today.

19 THE COURT: Well he did raise them in the motion and the State's position
20 was that it's -- the Court should not even deal with the ineffective issue -- assistance
21 of counsel issues prior to sentencing, that should be a post-conviction relief, and
22 that's -- what Mr. Gentile is arguing should not happen in this case is that I should
23 handle all of it prior to the time of sentencing if we get that far.

24 MS. BLUTH: No, and I do understand that, Your Honor, but what I'm saying is
25 in -- if you look at the defense's motion, it was one of the very last things brought up,

1 but it's not -- there weren't specific factors and arguments brought up, so I think
2 that's an issue that needs to be fully briefed. It's a separate issue. For specific
3 arguments, I understand the -- I'm understanding that Mr. Gentile is stating that in
4 certain situations, a court -- it's within the Court's discretion whether or not to decide
5 ineffective assistance claims at this level. I understand that argument and I'm
6 prepared to argue against it, but bringing up specific instructions and this and that, I
7 think that's a little bit different.

8 THE COURT: Mr. Gentile?

9 MR. GENTILE: Your Honor, we raised all these things in our moving papers.
10 I'm not going outside the moving papers.

11 THE COURT: You're not and that's true. So you'll be allowed to argue it.

12 MR. GENTILE: Thank you. Anyhow, I'm not going to read into the record
13 *Robinson*, but you don't need to get past the second paragraph to see that it's the
14 law of the State of Nevada that this is an included offense and it was not given.

15 THE COURT: Hold on a second. I think that -- when I looked back at
16 everything, I think there was a discussion and Mr. Chairez chose not to give it
17 because I believe I even said that I'd be inclined to give it -- I mean he'd be entitled
18 to it if it's a lesser included unless defense counsel wanted not to give it.

19 MR. GENTILE: Well and his response was we don't need it. It wasn't that
20 don't give it. His response was we don't need it.

21 THE COURT: I took that to mean he wasn't --

22 MR. GENTILE: I understand.

23 THE COURT: -- asking for it.

24 MR. GENTILE: I understand and Your Honor --

25 THE COURT: Was that --

1 MR. GENTILE: -- let me tell you some things that are not on those papers but
2 that are within it.

3 THE COURT: And the reason I make that -- I want to make sure the record's
4 clear is because there's obviously two separate issues. There's -- it's one issue if he
5 didn't ask for it for whatever reason.

6 MR. GENTILE: Right and he did.

7 THE COURT: It's a separate issue if he asked for it and the Court refused to
8 give it.

9 MR. GENTILE: Absolutely.

10 THE COURT: That would be reversible.

11 MR. GENTILE: You didn't -- okay, here's the issues as I see --

12 THE COURT: Because he's entitled to it from the court standpoint.

13 MR. GENTILE: Here's the issue as I see them. Here's the issues as I see
14 them. It may be that the Court has to give it regardless of whether it's requested or
15 not, because it is an included offense. And so whether Mr. Chairez asked for it or
16 not, the Court may have had a duty to give it. The State did argue against it. I do
17 not know why in light of *Robinson*, but the State did --

18 THE COURT: So what --

19 MR. GENTILE: -- and you didn't give it.

20 THE COURT: -- what legal authority do you cite for the fact that the Court sua
21 sponte has an obligation to give all lesser included offenses even if it's not request-
22 -- well would be sua sponte lesser included offenses.

23 MR. GENTILE: You know, I didn't cite anything in these moving papers and
24 frankly, what I'm saying to you now is honestly an afterthought and I would be very
25 appreciative of an opportunity to supplement on that issue because I think it is an

1 important issue.

2 THE COURT: Well the decision whether or not to allow you to supplement I'll
3 be frank with you is whether or not I decide to address the ineffective assistance of
4 counsel claims now versus potentially later.

5 MR. GENTILE: I understand.

6 THE COURT: Okay.

7 MR. GENTILE: All right, and I cannot say to you today that -- I cannot provide
8 you with a case that says that you had to give it no matter what. I can't provide you
9 with that, but I'll bet I find it.

10 THE COURT: Well it's in the record now.

11 MR. GENTILE: Yeah. Where was I?

12 THE COURT: You were telling me -- talking about failure to ask for the lesser
13 included offense of statutory -- I think statutory sexual seduction.

14 MR. GENTILE: No, I -- he didn't -- it's not that he didn't ask for it. I think he
15 did ask for it which is why the State argued against it. The question becomes did he
16 by saying we don't need it waive. Okay, that's the question and that in turn
17 becomes a question of whether you had to give it anyhow and whether his waiver
18 was ineffective assistance in light of the fact --

19 THE COURT: But he didn't proffer any jury instructions either.

20 MR. GENTILE: I understand that, which is again absolutely pointing to the
21 ineffective assistance. We have a couple of pretty meaty issues here when it comes
22 to ineffective assistance. The failure to investigate especially a percipient witness to
23 the -- you know, a really important event, that's one of them, and certainly this
24 included offense issue is another and it's a big one because the bottom line to it is
25 he held this man out to be convicted of a case -- of an offense that carries a 35 year

1 mandatory minimum when he had a right recognized by the Supreme Court of
2 Nevada to an included offense and the subject did come up. And had he had the
3 included offense instruction and if the jury did see this case as permitting the
4 included offense as opposed to the greater offense, it's a 30 year difference in real
5 time.

6 THE COURT: Wait. Oh the interpreter has to go real quick?

7 THE MARSHAL: Uh-huh.

8 THE COURT: I'm sorry, he has to go to the meter?

9 THE MARSHAL: Uh-huh. He does.

10 THE COURT: I'm sorry, Mr. Gentile. The interpreter has to run down to his
11 car apparently.

12 MR. GENTILE: Okay. Well we could take --

13 THE INTERPRETER: I paid for two hours and I'm short now. I don't want
14 to --

15 MR. GENTILE: We take 10 minutes?

16 THE COURT: Unless you want to fix his ticket. Yeah, just take a little break.
17 As soon as you're back --

18 MR. GENTILE: Okay.

19 THE COURT: -- then we'll go back on the record, okay?

20 MR. GENTILE: Thank you.

21 THE COURT: Thanks.

22 [Off the record at 10:18 a.m.]

23 [Proceedings resumed at 10:32 a.m.]

24 THE COURT: All right, Mr. Gentile, I don't -- let's see, you left off the
25 ineffective assistance issue.

1 MR. GENTILE: Okay. First of all, I want to thank the Court for the
2 adjournment and I want to thank the interpreter for the need for it because in that
3 short time frame --

4 THE COURT: Okay.

5 MR. GENTILE: -- Ms. Webster called to my attention that we do cite a case
6 that says that even without a request the instruction had to be given.

7 THE COURT: Give me the cite for that, please.

8 MR. GENTILE: And it is Rojas -- *Rosas*, R-o-s-a-s, *versus State*, 122 Nevada
9 1258, and I am reading --

10 THE COURT: Go pull that for me.

11 MR. GENTILE: -- from that case -- I think it's important to read this into the
12 record. *Rojas* (sic) was a battery case. The court read the charging document to
13 make the determination that because of the way the case was charged -- battery on
14 a police officer had included offenses because of the way it was charged, and it said
15 at page 1106: A defendant is entitled to such an instruction, meaning an included
16 offense instruction, because of the, quote, substantial risk, end quote, that a jury will
17 convict despite a failure to prove the charge offense if the defendant appears guilty
18 of some offense and then it goes to footnote 7.

19 And at footnote 7, it cites *Beck versus the United States* and *Hopper*
20 *versus Evans*, and then it goes on to quote: Another relevant consideration not in
21 dispute here is whether such an instruction is requested. Generally, a defendant or
22 the state must request an instruction. If there is any supporting evidence, the court
23 must, if requested, instruct on a lesser included offense, and it cites *Lisby versus*
24 *State of Nevada* case, 82 Nevada.

25 Goes on and it says: However, the instruct- -- and it's quoting: The

1 instruction is mandatory without request, end quote, if, quote, there is evidence
2 which would absolve the defendant from guilt of the greater offense but would
3 support a finding of guilt of the lesser offense, end quote. And that is *Lisby* as well
4 at page 187, so the State -- the instruction was mandatory here. *Robinson* makes it
5 an included offense. The State recognizes that consent was an issue. Consent is
6 an element of the included offense that consent -- that there was proof of consent.
7 They acknowledge all of those things.

8 And so on that set of facts, Your Honor, and this is certainly -- you
9 know, the problem here is that sometimes a court can make an error that nobody in
10 the courtroom knows it's making, including the adversaries, including the court itself.
11 But *Lisby* says that in this case that included offense instruction had to be given.

12 And so I submit to you that when you read *Robinson* and *Rosas*
13 together, and *Lisby*, and you look at the charging document here, although you don't
14 need to because of *Robinson*, but you look at the charging document here and you
15 look at the fact that there was evidence of consent, then in this instance there was a
16 substantial risk that a jury would convict despite a failure to prove the charge offense
17 if the defendant appeared guilty of something.

18 Now let's talk about the elephant in the room. Nobody that was
19 associated with this trial in the sense that the Court, the State or the defense did
20 anything other than their best efforts I think to give Mr. Alotaibi a fair trial. But we
21 deal with jurors and jurors might try to set aside biases and prejudices, but it would
22 be hard -- it would be really difficult -- what was that, 12 years, 12 years after
23 September 11th of 2001 and all that has happened in this country that has been
24 identified with some -- with people that share a culture that Mr. Alotaibi shares, it
25 would be difficult for them to sit in a trial where there is proof that the defendant did

1 something wrong, and there was here, and not be affected by this substantial risk to
2 convict despite a failure to prove the charge offense if the defendant appears guilty
3 of something. And I submit to you that in a case like this where those characteristics
4 pertain to the defendant in a case, the need to give this mandatory included
5 instruction is of the highest order.

6 I believe that at least in terms of what I wanted to put into the record
7 today to supplement the written papers I have concluded.

8 THE COURT: Okay.

9 MR. GENTILE: If you have any questions, I'm ready.

10 THE COURT: I don't as of now, sir. Thank you.

11 MR. GENTILE: Thank you.

12 THE COURT: Hi.

13 MS. BLUTH: Good morning, Judge.

14 THE COURT: Good morning.

15 MR. GENTILE: You know, Your Honor, just one thing if I may?

16 THE COURT: Yes.

17 MR. GENTILE: Because I alluded to something that everybody in the room
18 knows but the record won't know. Mr. Alotaibi is a Saudi National, a Muslim, and a
19 member of the Saudi Air Force. When I made allusions to those traits that created a
20 substantial risk, we all knew what I was talking about but the record didn't but now it
21 does.

22 THE COURT: Okay. Thank you.

23 Whenever you're ready, counsel.

24 MS. BLUTH: Thank you, Judge. I would like to say something about what
25 Mr. Gentile stated was the elephant in the room and I actually don't think that that

1 was the elephant in the room. Mr. Chairez, in going through the jury selection
2 process, discussed Mr. Alotaibi's ethnicity and all those factors and made sure that
3 the jury would not be swayed any way because of the way Mr. Alotaibi looks or his
4 belief system or where he's from, and it was actually described to the jury that -- or
5 explained to the jury that he was here in our country working with people in the
6 United States Air Force that were training him and he was working on our equipment
7 and then he was going to be able to go back to his own country. So there -- this
8 whole 9/11 issue is a nonissue and that was explained to the ladies and gentlemen
9 of the jury long before we ever started trial, so I do want to make sure -- and the
10 record will show that during the jury selection process.

11 Another thing before I get into my argument that has brought the State
12 great concern and it has done so for quite a while was when we were preparing for
13 sentencing eight, nine, 10 months ago, the defense asked for several continuances
14 and one of the last continuances that the defense asked for if Your Honor will
15 remember because it was somewhat of a heated argument was that before they
16 could go forward with a proper sentencing argument, Mr. Gentile needed to meet --
17 needed to have access to the defendant's phone in order to contact -- which Mr.
18 Gentile stated was in order to contact people that would have something to say in
19 regards to the sentencing.

20 The State made the phone available. We had SUV -- excuse me, an
21 SVU deputy go down to the computer forensics program. We had a detective who
22 deals with computer and phone forensics go and Mr. Gentile did not show up. He
23 wrote -- I think he wrote me on Monday I apologize, I had to leave town, and we've
24 never heard anything else about ever having that cell phone.

25 Now all of a sudden Mr. Al Shehri is found and nobody needs the cell

1 phone any more. So I do feel a little misguided and a little misled in regard to this
2 because there's no doubt in my mind the defense was trying to get to that phone to
3 get Mr. Al Shehri's information and there was never any intention of contacting
4 people for sentencing purposes. So I'd like to put that on the record.

5 Before I get started, Judge, because I actually would like to discuss
6 both *Sanborn* and *Callier* because I do think that they both apply, but I wanted to
7 ask Your Honor if you have any specific questions for me or if you do during my
8 argument, then obviously you can feel free to interrupt me but before I get started,
9 do you have anything specific?

10 THE COURT: I don't, and actually, as far as the analysis, I mean when I read
11 everything, it seems like *Callier* is a more applicable case, but I did see where you
12 did an analysis of both *Sanborn* and *Callier*.

13 MS. BLUTH: Would you like me to stick to *Callier* or --

14 THE COURT: No. You can --

15 MS. BLUTH: Okay. The reason why --

16 THE COURT: No, deal with what's in the brief.

17 MS. BLUTH: The reason, Your Honor, why I did go to both is because there
18 are -- there are two issues here and I'm going to -- I guess there's three, but I'm
19 going to leave post conviction out of it for a second and I'm just going to go to two
20 issues.

21 The first issue is, you know, whether or not this evidence is considered
22 newly discovered, and so that would be the *Sanborn* analysis which does have
23 several similar prongs to *Callier*, but *Callier* is dealing specifically with credibility of
24 recanted trial testimony and so that's why I wanted to make sure that I did a
25 thorough analysis under both because I do think -- even though the recanted trial

1 testimony is the new evidence, I do think that both analysis is still appropriate --

2 THE COURT: No, I understand and I understand if you're thinking it's going
3 to be looked at by the Supreme Court that in the off chance they decide that the
4 *Sanborn* is the applicable analysis versus the *Callier* analysis, at least you have both
5 on the record.

6 MS. BLUTH: Yeah.

7 THE COURT: I understand why you're doing it.

8 MS. BLUTH: So in regards to -- so I'd like to start with *Sanborn* which is the
9 newly discovered evidence. There are several prongs that you have to go through,
10 but the first one is whether or not the evidence is newly discovered, and this is
11 where -- I mean we disagree on several points, but the defense position is well, it is
12 new because how could we have known that he lied, you know, before he lied, but if
13 you look about it -- I mean if you look specifically, the small detail that the defendant
14 drove to Circus Circus, if we believe that that is new, that's one thing, but the
15 underlying importance of that issue has already been discussed.

16 The idea that the defendant was intoxicated was presented and argued
17 ad nauseum during the trial. I mean we saw video of him walking, we heard the
18 testimony of the victim, the testimony of Mr. Al Shehri, and the testimony of Jennifer
19 Melendez. So this is not some new key piece of evidence that the jury wasn't aware
20 of. The fact of whether or not he drove to Circus Circus is really inconsequential
21 when you look at all of the other evidence surrounding this case. This was
22 something that was brought up and argued constantly throughout the trial.

23 And then we obviously disagree with you could not -- this could not
24 have been discovered and produced for trial even with the exercise of reasonable
25 diligence. Mr. Al Shehri was here for a period of time in Las Vegas both before the

1 trial and during the trial. He sat outside the courtroom during recesses and before
2 trial on the day he testified so I disagree, I think reasonable diligence could have
3 found him and could have spoken to him.

4 But one of the most important, Your Honor -- well two of the most
5 important are must be material to the defense and it must indicate that a different
6 result is probable on trial. Basically the defense is asking for a new trial on a very
7 small detail, whether or not the defendant actually drove a vehicle from one place to
8 the other. The defense is missing the forest for the trees. Whether or not the
9 defendant drove on the Strip does not matter when you look at all of the other
10 evidence presented. The real issue is whether or not the defendant was so
11 intoxicated that he could not form the requisite intent.

12 So the fact that he drove or he didn't drive, that's a nonissue. You have
13 to look at everything else surrounding that to answer that one question, which is the
14 difference between lewdnesses or not. The sexual -- you have to -- it's a specific
15 intent crime, so if he was so drunk, he couldn't form the requisite intent.

16 So that's something that was presented by the defense and if you look
17 at the defense in this case, I mean that's kind of what the defense has to be, right,
18 because we have a child, we have a 13-year-old child, we have anal findings, we
19 have DNA, and we have him on video. So the only place the defense could go in
20 this case basically is intent.

21 So it's not that surprising that they are focusing on this very little detail,
22 but they still have to prove that it -- you must indicate that a different result is
23 probable on retrial and that's why I wanted Your Honor and I'm glad that you did go
24 through the briefs as well as the trial testimony in whole because when you do that,
25 you see everything that the jury saw and heard. I mean we had the video of the

1 defendant walking around the casino and going in and out of elevators for about a
2 40-minute time span. We also have the video and audio of his statement where we
3 could hear how he's speaking, we can see him. At times, he -- you know, his words
4 would be slurred. At times he would be tired and he would lay down. These are all
5 things that the jury decided -- excuse me, looked at when deciding.

6 I also wanted to point Your Honor to pages 6 through 10 of the State's
7 opposition to show exactly how much the defendant's intoxication level was
8 discussed, and I went through trial testimony of every witness and I'm not going to
9 go through all of them because I did that in my briefing, but I would just like to focus
10 on a few. The testimony of AJ was that the defendant smelled, he smelled of
11 marijuana as well as alcohol. His eyes were pink and he didn't speak right.

12 Mr. Al Shehri talked about seeing him drink and the fact that he drinks
13 Hennessy shots and black drinks. He drinks it straight. He talks about when they
14 were at the strip club, he knows that he saw him drink at least three drinks but it was
15 more than that. Mazen blacked out once they got to the hotel and they had to bring
16 Amad (phonetic) down to bring some -- to bring Amad down so that he could control
17 him because nobody else could. And then he states after we -- after we parking and
18 he started fighting with Mohammed, because Mohammed said give me the car, you
19 are drunk, and he just left the key in the car and he said do what you like to do, just
20 leave me alone, something like that.

21 And then Mr. Chairez said: But I want to make sure of one thing,
22 Rashed. In your mind, there's no question that when you came back from the strip
23 club Mazen was very drunk? And then Mazen says your question he was very
24 drunk? And then Mr. Chairez, yes, very drunk. And Mazen said -- excuse me, and
25 Mr. Al Shehri said yes.

1 So I mean -- and then we had Ms. Melendez who was three months
2 pregnant and walked up to the stand and went on and on and on about how much
3 the defendant drinks and how much he shoots liquor straight and all of these things
4 so this tiny little detail that he drove from the parking structure to the Circus Circus, I
5 mean we have pages and pages and pages and -- of testimony talking about the
6 amount of alcohol he drank, the fact that he blacked out, so I just think that there's
7 so much evidence that the jury was able to digest regarding the intoxication level.

8 So the fact that he drove would that really change that much in the
9 juror's mind when they already had so much evidence showing that the defendant
10 had drank so much alcohol at the time of the offense -- before the time of the
11 offense. I mean in conclusion, the -- I believe the defense has failed to prove the
12 necessary prongs and especially those of the fact that it must be material to the
13 defense and it must indicate that a different result is probable on retrial.

14 But when looking into *Callier*, there's a couple of things that I would like
15 to bring to the Court's attention, and this deals with the credibility of recanted trial
16 testimony. And one of the major prongs of that analysis is that the Court has to be
17 satisfied that the trial testimony is false. There is absolutely no way this Court will
18 ever be able to decide whether or not Mr. Al Shehri is being truthful. I mean short of
19 a video in the defendant's vehicle showing who drove that car, there is no way we
20 can trust Mr. Al Shehri. And no one can. The defense can't, the State can't, you
21 can't.

22 Let's look at what he gave us. First he had a statement to the police.
23 Then he had a statement to the prosecutors during a pretrial conference in which I
24 typed out basically every word that came out of his mouth. Then he has what he
25 testified to and then he later had to be impeached by our investigator and now we

1 have his affidavit.

2 THE COURT: Well he didn't testify -- I don't think he said anything in his
3 statement about who drove. He just said it on examination.

4 MS. BLUTH: Correct, but I'm talking --

5 THE COURT: Because I didn't see that in the statement that I read from the
6 police.

7 MS. BLUTH: I agree, but what I'm saying, Your Honor, is that we have four
8 different statements -- not even specifically on that statement, but we have four
9 statements that he has given in four -- during four different time periods that all are
10 inconsistent with one another. I mean the fact of the matter is Rashed Al Shehri is a
11 liar. He admits to being a liar.

12 THE COURT: Well I don't think in the police interview though he was ever
13 asked the question.

14 MS. BLUTH: I agree because he even says I was not asked this specific
15 question until later on like before trial. I think he says that in his affidavit. But my
16 point is he has given four different statements and he has admitted in an affidavit to
17 this Court that he lied.

18 THE COURT: Well other than what -- other than the issue about who drove,
19 what else was inconsistent in his statements?

20 MS. BLUTH: He said that he felt threatened by the District Attorney's Office
21 or by police and during -- obviously he lied because we had to impeach him with our
22 investigator. At trial, all of a sudden he was completely minimizing everything he
23 said in his pretrial conference. For instance, the biggest one and most shocking one
24 was this Mazen blacked out. When he uttered those words, every -- Ms. Holthus
25 and I looked at each other like blacked out? Which is why we had to bring Ms.

1 Leone (phonetic), not over Mr. Gentile stating oh the reason why we had to bring
2 Ruth Leone, our investigator, is so that she could say, you know, oh yeah, he was
3 clear, the defendant drove. That's not why --

4 THE COURT: I'm a little confused. Okay, so he tells you in pretrial --
5 obviously I don't know what happened in pretrial --

6 MS. BLUTH: Of course, of course.

7 THE COURT: -- because that doesn't come into evidence.

8 MS. BLUTH: Of course.

9 THE COURT: So he tells you in pretrial that Mazen drives and he also told
10 you that he was blacked out --

11 MS. BLUTH: No, he did not say that.

12 THE COURT: Well when did he tell you he was blacked out?

13 MS. BLUTH: On the stand on cross-examination. That was the first time we
14 had ever heard that --

15 THE COURT: Okay.

16 MS. BLUTH: -- which was quite shocking to the State which is why we had to
17 bring Ms. Leone in to say did he ever say anything to you about blacking out and
18 she said absolutely not.

19 And I kind of find it ironic that the -- he's saying that he felt so
20 threatened to tell the truth or to tell this one side of the story, but yet he came in here
21 under oath and told a completely different story. So it doesn't really lend a lot of
22 credence to his argument that he felt scared or threatened or whatever the words he
23 used in his affidavit because he actually came here under oath and said different
24 things than he had in the pretrial.

25 And if you look at what he said under oath about the key, that is

1 corroborated by the defendant's own statement about the fight over the key, et
2 cetera. So if you're going to believe any story, I would at least believe his trial
3 testimony which was under oath and which is independently corroborated by the
4 defendant's very own statement.

5 But at the end of the day, we cannot trust someone who has given four
6 different stories of all of the events and someone who has self-admittedly lied under
7 oath. So I -- I don't think that the State would ever be able to -- or excuse me, that
8 this Court would ever be able to make a finding that Mr. Al Shehri's testimony was
9 false, because how can anyone trust anything that comes out of his mouth?

10 In the defendant's reply, Your Honor, they say -- they basically are
11 alluding to the fact that the State is missing the ball and should be focusing on the
12 level of defendant's intoxication. Not whether or not he was intoxicated, but they
13 kept bolding the word level, level, level.

14 And so I'd ask, Your Honor, let's say that you actually do believe Ms. Al
15 -- Mr. Al Shehri and now he is in fact telling the truth. So if -- even if Mr. Alotaibi did
16 in fact drive to the Circus Circus, I pulled arguments by Ms. Holthus as well as
17 myself in closing and in rebuttal and I went through the following facts that the jury
18 considered during trial.

19 Number one, multiple security officers testified and they testified that
20 they had contact with the defendant. They said he was not drunk. Security Officer
21 Haros (phonetic) testified specifically that when the defendant got in the elevator, it
22 appeared to him that after being told specifically multiple times do not speak, the
23 defendant would put his head down and issue commands to the other individuals.

24 In the holding area, the defendant was able to give Metro his
25 identification and his personal identifying information. He was then had interaction

1 with a crime scene analysis who we called. He was able to follow commands. He
2 was able to speak when spoken to and listen to the crime scene analyst regarding
3 what she needed to be done.

4 And in the defendant's own statement where we had video and audio,
5 he was smart enough and lucid enough to at first deny, then minimize, and then
6 partially admit, and those are something that if you're so intoxicated, I don't think
7 you're going to be able to see that behavior that we normally see in defendant-type
8 interviews when certain interview techniques are used. He denied it altogether, then
9 he minimized his behavior, and then he partially admitted it.

10 And then also in looking at -- in going back through the defendant's
11 statement, I had forgotten all the particulars that he was able to give that night. I
12 mean he was able to discuss where he met AJ -- I mean he calls him the Chinese
13 boy but where he met him, when he met him, where they went, where his friends
14 were, the price that they -- that AJ was going to pay for things and he was able to
15 give very, very specifics on the amount of alcohol that he drank before the event. I
16 mean he's able to give facts before the event and during the event that were very
17 specific. I mean someone that inebriated as the defense is trying to make it seem
18 would not be able to make those types of assertions in their statements to police.

19 But then I focused on the rebuttal argument because the defense's
20 position oh well this was such a big deal the State kept arguing it, and so I looked
21 through our arguments and I think Mr. Gentile just said we talked about it once. So I
22 don't understand if the State -- if they're saying that the State made such a big deal
23 out of it. I went through my argument and I went through the slide on the
24 intoxication level and so I'd like to read that to Your Honor which it read: The
25 defendant was sober enough to wait until they were inside the elevator to kiss AJ.

1 He was sober enough to take AJ outside to smoke the marijuana. He was sober
2 enough to rush AJ into the hotel room bathroom before his friends could see, sober
3 enough to bargain with AJ regarding the price of the sex, sober enough to think of
4 lubrication on his penis before he penetrated AJ's butt, sober enough to get an
5 erection and the only thing I ever used about driving is a statement that Al Shehri
6 said defendant drove good.

7 So I mean the reason why the State had to focus so much on this point
8 is because the defense did such a good job of bringing it into the mix, the fact that
9 the defendant was so intoxicated and Mr. Chairez did do that and that's why the jury
10 has decided this issue.

11 The fact is at the end of the day the jury heard this. They weighed this
12 evidence. They heard the defendant's statement. They heard witnesses that
13 discussed his intoxication level. They saw video of him. They heard his own voice.
14 So this is something that is -- we don't need a hearing. Number one, we don't need
15 a hearing because Mr. Al Shehri already told us everything he was going to tell in
16 his affidavit. But number two, even if he's telling the truth now, the totality of all of
17 the evidence presented, the jury saw evidence that the defendant was drunk and
18 they heard evidence that he was able to do certain things while being drunk, so this
19 was already weighed by the jury and it was something that was -- and in speaking
20 with the jury as I know Your Honor did as well as Mr. Chairez and the State did as
21 well, I mean this is something that they obviously did weigh and they did consider
22 and they gave it the proper weight that it was worth.

23 But to now say oh we're going to have a new trial because the
24 defendant drove from a parking structure to the Circus Circus? I mean that -- I can't
25 -- that's such a tiny detail when presented with all of the other evidence, especially

1 pages 6 through 10 of my opposition where we talk about how much this jury heard
2 that the defendant was drunk to the point of blackout. I think it really doesn't matter
3 that if -- even if the defendant did drive from the hotel to Circus Circus, well now we
4 have him completely blacked out once he gets there.

5 So I just don't see a need for even a hearing at this point, and in
6 regards to the post-conviction issues, Your Honor, I do understand that in certain
7 situations you do have the discretion to grant the defense the right to argue that at
8 this level, but I don't understand why this case is getting any special treatment or
9 different treatment than any other case and I'm not --

10 THE COURT: I haven't made a decision.

11 MS. BLUTH: No, I know that, but the -- that's what the defense is requesting,
12 and so I don't understand why they believe that at this juncture in this courtroom
13 right now on this case it should be treated any differently than any other case that I
14 have tried in the past.

15 This family has waited a year now for the defendant to be held to
16 answer for the crimes that he committed and it's gone on long enough and I do not
17 think that the defense has met either the prongs of *Callier* or *Sanborn* and I think
18 that there's no reason we should have a hearing now that Mr. Al Shehri has put
19 everything in an affidavit and even if what he said is true, it does not matter.
20 Enough evidence was presented for the jury to decide whether or not the
21 defendant's intoxication level rose to the level of him not being able to form the
22 requisite intent. So I'd ask that Your Honor deny the defendant's motion for a new
23 trial and/or evidentiary hearing and in regard to the post-conviction issue, have that
24 be raised post conviction after defendant's sentenced and go down that route.

25 THE COURT: You mean including the issue of whether or not it was

1 mandatory that the lesser included instruction be given, right?

2 MS. BLUTH: Correct.

3 THE COURT: Okay. Is there anything else, ma'am?

4 MS. BLUTH: No. Thank you, Your Honor.

5 THE COURT: All right. Mr. Gentile?

6 MR. GENTILE: Lest silence be taken as a tacit admission. Ordinarily I
7 wouldn't dignify the ad hominem attack that was just made on my credibility about a
8 telephone, but I'm going to dignify it because I want to make it really clear that --

9 THE COURT: I don't think it has anything to do with my decision though.

10 MR. GENTILE: All right, well I -- but I want the record to be clear, because if I
11 don't say something, some time later on somebody reading this might take that as
12 an admission. I still need access to that telephone and I still need access to that
13 telephone for the exact same reasons that I needed it then, which was for
14 sentencing. I learned less than 24 hours before -- in fact I didn't really learn -- they
15 sent me an email one day before, one day before they were going to make the
16 phone available to me and I had to leave the jurisdiction and I -- it did fall through
17 the cracks at my office. Somebody else from the office should have been there and
18 not stood Mr. Sweetin up, but we weren't. And then we did try to reschedule that,
19 but other things came up. At some point in time I'm still going to need access to that
20 for the sentencing issues.

21 THE COURT: Okay, I didn't put any weight on it. In my opinion, whatever
22 transpired between the State and your office on that phone and the other issues,
23 that has to deal with interactions between counsel.

24 MR. GENTILE: I understand.

25 THE COURT: Legally it has no effect on my decision in this case.

1 MR. GENTILE: I know that -- I knew that before I said what I had to say.

2 THE COURT: Okay.

3 MR. GENTILE: Okay? Couple of things. The State acknowledges that there
4 was conflicting testimony with respect to the level of intoxication of Mr. Alotaibi. The
5 conflict between being blacked out and not being drunk at all, that's a pretty wide
6 spread. And so in situations like that, something such as was he capable of driving
7 can become the kind of thing that when put in the side of the scale of the State,
8 which is who put it in, can become very influential. And if a conviction resulted here
9 on a fact like that, that you now have reason to believe was not true, then that's
10 precisely what these kinds of hearings are about. And I suggest to you that
11 conducting a hearing and being able to see the demeanor of the witness, which is a
12 very important aspect of credibility, might be exactly what you should do here if this
13 is a close decision for you.

14 Now, there are -- the first and only time from what I can gather from
15 reading the record that Mr. Al Shehri was ever asked as to who drove was at least
16 nine months after the event. Nobody asked him contemporaneously with it and I
17 think that's a significant aspect of what you must focus on here as well.

18 So I submit, Your Honor, that anytime -- every single time a witness
19 recants his testimony, the argument can be made by the person who is resisting it
20 that he's a liar because he admits being a liar. And the question is was he lying then
21 or is he lying now and that is in fact true and that is exactly what you have to decide.

22 THE COURT: All right. Is there anything else, counsel?

23 Anything else by the State?

24 MS. BLUTH: No, Your Honor.

25 THE COURT: Okay. Counsel, I'm going to do a written decision and it will

1 probably take me a little while. So I will try to get the written decision done as
2 quickly as I can. If I deny your motion, then we'll set it for sentencing obviously and
3 if I grant it, then we'll set it for a trial, but --

4 MR. GENTILE: Well you --

5 THE COURT: -- please just give me a little bit of time.

6 MR. GENTILE: -- you also have the -- you also have another option and that
7 is the ineffective assistance of counsel.

8 THE COURT: Correct, and I did skip over that but yeah --

9 MR. GENTILE: And frankly, Your Honor, if I may address that just briefly.
10 You know, I don't know how often it's done or how often it's not done and I don't
11 think that matters. I think that if the record -- if somebody is prepared to make the
12 record, our Supreme Court has said that it can take it on direct appeal. We are
13 prepared to make the record and I think we've demonstrated that. And so it would
14 be certainly my request that even if you deny the motion for the new trial based on
15 the recanting, that you grant a hearing on the question of effective (sic) assistance
16 of counsel because there's really no reason that weighs against the judicial
17 efficiency that comes from doing that. Frankly, I would guess that the Supreme
18 Court would embrace and encourage that kind of a procedure. They have enough
19 to do too.

20 THE COURT: And I understand your reason timing the -- it affects the timing
21 and everything else. I understand. I just haven't made a decision at this point. So
22 unless there's anything else to add, I have all the documents you provided to me.
23 I've been taking notes during the course of the hearing. Is there anything to add
24 before we conclude?

25 MS. BLUTH: No, Your Honor.

1 THE COURT: By the defense?

2 MR. GENTILE: No, Your Honor.

3 THE COURT: All right. Thank you very much for your time. Have a
4 wonderful day.

5 MS. BLUTH: Thank you, Judge.

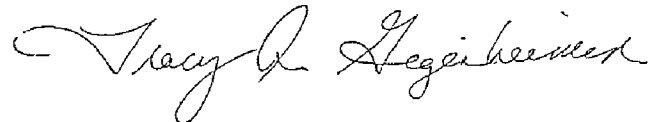
6 [Proceedings concluded at 11:08 a.m.]

7 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
8 proceedings in the above-entitled case to the best of my ability.

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Tracy A. Gegenheimer, CERT*D-282
Court Recorder/Transcriber

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IN THE IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI.

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 67380

District Court Case No. C-15-387173-1
DEPT. XXIII

Electronically Filed
Oct 26 2015 11:34 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX

VOLUME IV OF V

BATES NOS. AA000751 – AA000997

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APPELLANT'S APPENDIX

INDEX

DOCUMENT	DATE	VOL.	BATES NOS.
Information	02/04/13	I	AA000001- AA000005
Amended Information	10/14/13	I	AA000006– AA000009
Second Amended Information	10/18/13	I	AA000010- AA000013
Transcript of Proceedings Partial Jury Trial - Day 2	10/11/13	I	AA000014- AA000073
Transcript of Proceedings Jury Trial - Day 3	10/14/13	I	AA000074- AA000221
Transcript of Proceedings Jury Trial – Day 4	10/15/13	I	AA000222- AA000250
Transcript of Proceedings Jury Trial – Day 4	10/15/13	II	AA000251- AA000396
Transcript of Proceedings Jury Trial – Day 5	10/16/13	II	AA000397- AA000496
Transcript of Proceedings Jury Trial – Day 6	10/17/13	II	AA000497- AA000500
Transcript of Proceedings Jury Trial – Day 6	10/17/13	III	AA000501- AA000632
Transcript of Proceedings Jury Trial – Day 7	10/21/13	III	AA000633- AA000750
Transcript of Proceedings Jury Trial – Day 7	10/21/13	IV	AA000751- AA000830
Transcript of Proceedings Jury Trial – Day 8	10/22/13	IV	AA000831- AA00091
Transcript of Proceedings Jury Trial – Day 9	10/23/13	IV	AA000902- AA000913
Instructions to the Jury	10/23/13	IV	AA000914- AA000951
Verdict	10/23/13	IV	AA000952- AA000955

Transcript of Proceedings: Defendant's Motion for New Trial and/or for an Evidentiary Hearing	11/07/14	IV	AA000956-AA000997
Findings of Fact, Conclusions of Law and Order and Decision (Motion for New Trial)	11/18/14	V	AA000998-AA001012
Transcript of Proceedings: Sentencing	01/28/15	V	AA001013-AA001025
Judgment of Conviction	02/05/15	V	AA001026-AA001028
Defendant's Notice of Appeal	02/05/15	V	AA001029-AA001031

1 don't know him.

2 Q Rashed, does that sound familiar?

3 A Really, I don't know.

4 Q Was he -- was he with you that whole night?

5 A Yeah. There was -- one of their friends, but
6 like I said, I don't know him, so I didn't talk to him.

7 Q How many -- how big was this group?

8 A Wow. Let's see, I'm going to say at least more
9 than six. Okay. Emad, Adel, Saeed, and then Mazen was with
10 us, then Mohammed, and then their friend, oh, more than six.
11 And then Emad was there, so.

12 Q We counted Emad already.

13 A Oh, okay. Well, then there's seven.

14 Q So there's Jennifer, I got Emad, Adel, Saeed.

15 A Uh-huh.

16 Q Mazen, Mohammed, Jennifer --

17 A And then --

18 Q -- did you say Sam?

19 A Sam. Yeah, he was with us that night.

20 Q Was there another female?

21 A Not with us.

22 Q Okay. I thought --

23 A She did come in my group, but she didn't -- she
24 was not with us that night.

25 Q Okay. So, she came to Vegas in your group?

1 A Yeah. With Sam, Aziz, and then me and Serena.
2 Q Oh, Aziz.
3 A And Aziz wasn't with that that night, either.
4 He --
5 Q Mohammed is Mohammed Aziz, is that the same
6 person?
7 A No. It's a totally different Mohammed.
8 Q Mohammed Jafaari, or do you know?
9 A I don't know. I'd have to check.
10 Q Okay. This is a different Mohammed than your
11 boyfriend, though?
12 A Yes.
13 Q You didn't come with your boyfriend Mohammed?
14 A No. He was actually in Saudi Arabia. His
15 father passed away and him and his brother had to go back and
16 deal with the paperwork and all that.
17 Q Okay. So now I'm counting eight, does that
18 sound right?
19 A Like I said, there was a lot.
20 Q And you said you were staying with who?
21 A Sam, Aziz, and Serena.
22 Q Serena, was that the girl?
23 A Yes.
24 Q That wasn't with you?
25 A Yes.

1 Q Okay. So, the four of you had a place at
2 Harrah's?
3 A Harrah's.
4 Q And then it's your testimony that you hooked up
5 with who, when?
6 A Emad actually met me on the Strip, because I was
7 walking around by myself. The people I came with, they wanted
8 to go to a strip club and I didn't want to be a part of that.
9 So I went drinking by myself and I was texted.
10 Q And when was this?
11 A Pretty much all day. From --
12 Q When did they go to --
13 A -- after breakfast --
14 Q -- a strip club?
15 A Oh, they probably went around 4:00 or 5:00, they
16 were ready to leave me.
17 Q 4:00 or 5:00 in the evening?
18 A In the -- yeah, in the afternoon.
19 Q Okay. So 4:00 or 5:00 in the evening your
20 friends and --
21 A They -- they went their own way.
22 Q That's Aziz and Sam --
23 A And Serena.
24 Q -- and Serena.
25 A They had other friends there that they left

1 with.

2 Q So they went to the strip clubs and you went
3 around drinking on the Strip by yourself?

4 A By myself. And Emad met me out there so I
5 wouldn't be alone.

6 Q Okay. You knew Emad, though.

7 A Yes, from San Antonio.

8 Q And where did you meet -- I'm sorry. Where did
9 you meet up with Emad?

10 A Oh, Caesar's Palace, I believe. Or --

11 Q How many places were you --

12 A -- I don't know.

13 Q -- drinking that night?

14 A I went from the Harrah's, and I went towards
15 Circus Circus, because Emad was at Circus Circus. That's
16 where he was staying. And so we kind of met in the middle.

17 Q You met up with Emad?

18 A Yeah. I'm not sure where it was.

19 Q Did you have a plan, did you call him on his
20 phone? Or how did that work out?

21 A No. I was just drinking and we were texting
22 where are you at? And I told him, Well, I'm alone. And he
23 was like, Okay, well, I'm going to come meet you so you're not
24 alone. I was like, Thanks.

25 Q And -- and what were you drinking?

1 A I drank Crown and coke, and rum and coke. I
2 can't drink just straight liquor.

3 Q How many did you have before you met up with
4 Emad?

5 A Maybe two or three. I'm really slow.

6 Q And over what period of time was that?

7 A Well, from, like I said, we started early.
8 After we ate breakfast or lunch we started drinking.

9 Q Okay. Started drinking right after breakfast or
10 lunch?

11 A Uh-huh.

12 Q And then --

13 A Which was probably around 2:00 or 3:00.

14 Q Okay. And then your friends left you around
15 4:00 to go to the strip club?

16 A Well, to meet up with their friends and they
17 were going to get a limo and go to the strip club and --

18 Q And that's when you went off on your own?

19 A Yes.

20 Q And you left Harrah's?

21 A Yes. And I headed towards Circus Circus. So I
22 don't know what casino we met at, but it was in between.

23 Q But did you drink at -- did you stop at others?
24 You stopped at, you said, Caesar's?

25 A Well, I -- I pretty much went through the Strip.

1 Q Did you basically drink in every casino along
2 the way?

3 A Not every one. But whenever I decided to sit
4 down and take a break from all the walking, I got a drink.

5 Q Okay. And then at some point you hook up with
6 Emad?

7 A Yes.

8 Q And it's just the two of you then?

9 A It's just the two us.

10 Q How long did --

11 A And we were walking around. We went and met up
12 with his cousin, and then after that we went back to my hotel.
13 We met up with my group. But...

14 Q Is that your -- your group that had left you?

15 A Yeah.

16 Q Hooked back up with you now?

17 A Yes. But, like, Serena's not old enough to get
18 in the clubs. And that was my goal, to go to a club.

19 Q Okay. Now, earlier, we heard testimony that
20 Mazen and Rashed and Mohammed didn't get into town until 1:00
21 or 2:00 in the morning from California?

22 A Well, like I said, I was drunk.

23 Q Okay. So that could be?

24 A Yeah. I -- I didn't check my time on it. I
25 just know that I met -- they met me at my hotel.

1 Q Okay. At some point?

2 A Uh-huh.

3 Q Yes?

4 A Yes.

5 Q And that once they met you, you continued to

6 drink at your hotel?

7 A No. We actually went to another hotel. We went

8 to the Palms.

9 Q Okay.

10 A Me and Emad.

11 Q That's when you went to the Palms?

12 A And then they met us maybe a hour or so later

13 there.

14 Q At the Palms?

15 A Yes.

16 Q Okay. And the whole time you're drinking?

17 A Yes.

18 Q And that you get to the -- when you get to the

19 Palms and Mazen -- and for the record, you're identifying

20 somebody, you keep pointing at somebody saying Mazen.

21 A Mazen --

22 Q Do you see him here?

23 A -- the gentleman sitting in front of me.

24 MS. HOLTHUS: Record reflect identification of

25 defendant.

1 THE COURT: It will.

2 BY MS. HOLTHUS:

3 Q So, defendant meets you over at Palms with
4 Mohammed --

5 A Emad.

6 Q -- and some guy, you don't know his name?

7 A Yeah. Yeah. And at that time, Sam did
8 accompany us, the guy from my group.

9 Q Okay. So, then you guys -- you do or don't
10 drink at the Palms? I'm sorry.

11 A No, we did drink. We sat right at the bar. As
12 soon as you walk in the door there's a bar.

13 Q Okay.

14 A We sat right there, we waited for them to
15 accompany us.

16 Q All right. So, then they show up, and how many
17 drinks do you have there once the defendant and his friend
18 show up?

19 A I probably had two.

20 Q And how many did they have? How long were you
21 there?

22 A Oh, I don't know. They drink fast. So they had
23 at least more than two or three.

24 Q All right. And then from there you decided to
25 leave there -- is that where you're going clubbing? Because

1 now you're --

2 A Yeah. There, that's when I asked the gentleman
3 at the bar if he knew of a club I could go to, because the one
4 at the Palms they had just closed for a season, I guess.

5 Q All right.

6 A And so I asked him where we could go, I want to
7 dance. He gave me a name, he went outside to find a car to
8 fit our group. And that's when the lady was like, Okay, well,
9 I could fit your group.

10 Q So, how many -- how many in your group at this
11 point go?

12 A I think --

13 Q Do --

14 A -- there was eight of us at that time.

15 Q Did Serena go now?

16 A No. She's not old enough.

17 Q Okay. To go to any clubs? And what about -- I
18 thought Serena went to clubs before with Aziz and Sam earlier
19 in the day?

20 A She went to a strip club.

21 Q A strip club?

22 A You have to be only 18 to go to a strip club.

23 Q Okay. You're going -- night clubs are 21?

24 A Yes. I want to dance. I don't want to see
25 naked girls.

1 Q Okay. But you end up getting in a cab. Is it
2 just you then and -- and seven guys?

3 A Yes.

4 Q And you guys -- and you don't know which strip
5 club you went to, but you know it cost you 175 bucks to get
6 there?

7 A Yeah. Because the guys were upset. Once we got
8 there and the lady told us how much, they were kind of like,
9 Really? We wanted to go to a club. And what was funny about
10 that is the club I asked her to take me to was just across the
11 street, three casinos down.

12 Q Okay. And how long did it take you to get from
13 the Palms to the strip club?

14 A It took us a while. Like, I think we went
15 through a lot of back roads. Because when I actually saw
16 where it was and where everything else was, it was, like,
17 right there. And we --

18 Q Okay.

19 A -- went, like, down dark roads and everything.
20 So, it was like...

21 Q What time did you get to the strip club?

22 A I'm not sure.

23 Q Tell me approximately?

24 A I don't know. Like I said --

25 Q You have no idea?

1 A -- I was drunk, and since you said, they didn't
2 get there till 1:00 or 2:00, I don't want to be inaccurate.

3 Q Okay. So you really have absolutely no idea
4 what time anything --

5 A No.

6 Q You -- you were pretty drunk?

7 A I could still stand and dance, but I was drunk.

8 Q And you remember it, everything?

9 A Yeah. I -- like I said, I mix my drinks. I
10 didn't drink straight liquor.

11 Q Okay.

12 A So.

13 Q You mean, with coke or something nonalcoholic?

14 A Yes.

15 Q Not different kinds of alcohol --

16 A Yeah. Just one --

17 Q -- the same kind of alcohol?

18 A -- alcohol and -- and a coke.

19 Q Mixer. And you said you were dancing. What
20 kind of dancing? Were you on the dance floor? Were you --

21 A No. There's no dance floor at the strip club.
22 The stage right there was for the girls. And my friends, they
23 were all sitting down and I'm the only one standing up
24 dancing. Because the lady that drove us there actually said
25 it's okay, you could dance there. And turning out I couldn't

1 dance there. The girls actually got off stage and went and
2 complained. And one of the bouncers told me I need to sit
3 down or I need to leave.

4 Q So, you were just dancing at your seat, you
5 weren't, like, stripping or dancing at your --

6 A No, no, no.

7 Q You were just --

8 A God, no.

9 Q -- having a good time?

10 A Yeah. At that time I still had my boyfriend.
11 So, no stripping.

12 Q Okay. So did you -- you sat down when they told
13 you to sit?

14 A I actually went to where Mazen and Sam were and
15 I sat with them.

16 Q At the bar?

17 A Yeah. Because I was upset when they told me I
18 needed to sit down. I was, like, Are you serious.

19 Q You were upset?

20 A Yes. Because I -- I asked the girl to take me
21 somewhere I could dance. And she took me to a strip club
22 where I didn't want to go in the first place. And then I
23 couldn't even dance. So, of course I was upset.

24 Q So, did you just sit at the bar and -- and were
25 drinking?

1 A I actually sat behind the boys. They had a
2 cushion chair. And I sat there. And I was just like... And
3 later on, a girl asked the boys if they wanted a dance. And
4 they're like, No. So I told her, Wait a second, I'll get you
5 some money. And I asked them if they would pay for me a
6 dance. And they did. So I let her dance with me, but I was,
7 like, Okay, you could stop.

8 Q Okay.

9 A Because she got a little too close.

10 Q Okay. And then when you say dance, if you go
11 into a strip club, you can -- there's dancers on the stage for
12 everybody to watch, right?

13 A And there's dancers walking around for personal
14 dancers or a lap dance.

15 Q And then you pay extra money to have them dance
16 just --

17 A I think it was like \$25, the dance.

18 Q But then they dance --

19 A She didn't sit on me. I didn't let her touch
20 me.

21 Q Okay.

22 A I asked her, like, please don't touch me. This
23 is just so you could have money. Because I kind of felt bad
24 for her.

25 Q Okay. You didn't just give her the money and

1 say skip the dance?

2 A No. She -- she doesn't get that lucky.

3 Q Okay. So you -- you had -- so she -- she was

4 dancing, Mazen --

5 A In front of me. And Mazen --

6 Q -- in front of you --

7 A -- and Sam, they were still sitting at the bar.

8 Q Okay. But they had paid for that dance for you?

9 A Yes. Yes, they did.

10 Q All right. And that's what they call a lap

11 dance. It's one-on-one dancing, it's not supposed to be

12 touching, right?

13 A Not to me.

14 Q Okay. And then after she finished the dance,

15 then what happened, what did you do?

16 A Actually, that -- we left a little while after

17 that.

18 Q And how did you get home?

19 A Because, I mean, none of the guys were really

20 doing anything. They didn't want a dance from a girls. And

21 we just -- we were already pretty much drunk by then.

22 Especially me. So Sam and Emad, they escorted me to my room.

23 Q When you say escorted?

24 A Like, they took me to my room. Emad made sure I

25 laid --

1 Q How did they get you there? How did you get
2 there?

3 A -- down, and -- I don't know. I was drunk.
4 And, like, when I got to my room I laid on the bed. Emad was
5 like, Are you okay, do you need anything? And I was like, I'm
6 fine. And boom, I'm out.

7 Q Okay. So, from the time that you left the strip
8 club with them to the time you go back to your room, you don't
9 actually remember?

10 A No.

11 Q You have no idea whether you walk, drove, cab?

12 A No. But I'm sure we didn't walk. It was
13 probably a cab. I think we may have went separately, but I'm
14 not sure.

15 Q Okay. You have no recollection of it?

16 A Yes. I don't know.

17 Q And your best guess is that you got back to the
18 room somewhere around 6:00 or 7:00 a.m.?

19 A Yeah. That's my guess.

20 Q But it's --

21 A Well, it was still --

22 Q -- you've had a lot to drink kind of --

23 A -- dark outside, so I know it wasn't around
24 8:00, because the sun would have been out.

25 Q Okay. And then you said you slept through till

1 10:00 or 11:00?

2 A Yeah.

3 Q Does that mean three or four hours, or literally
4 24 hours till the next day?

5 A No, no, no. It's till 11:00 in the morning. I
6 have to eat.

7 Q Okay.

8 A So, I woke up --

9 Q So you got up a few hours later?

10 A -- at 8:00.

11 Q And then you -- you didn't -- you didn't see the
12 defendant and them again?

13 A I didn't see him again. I did see the other
14 guys.

15 Q Okay. And --

16 A That night on New Year's.

17 Q All right. And --

18 A And none of them spoke to me on what had
19 happened.

20 Q Okay. And the -- the last -- you said that you
21 thought the -- the defendant was drinking doubles, right?

22 A Yes.

23 Q And then isn't it true you said that he always
24 drank like that?

25 A Yes.

1 Q Nothing else. Thank you.

2 MS. HOLTHUS: Pass the witness.

3 MR. CHAIREZ: Nothing further.

4 THE COURT: Thank you, ma'am, for your time.

5 THE WITNESS: Okay.

6 THE COURT: Free to go.

7 THE WITNESS: Thank you.

8 THE MARSHAL: Remain standing and raise your right
9 hand to be sworn in by our clerk.

10 MONTE MILLER, DEFENDANT'S WITNESS, SWORN

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

13 THE WITNESS: My name is Dr. Monte Wayne Miller,
14 M-O-N-T-E M-I-L-L-E-R.

15 THE COURT: Whenever you're ready, Mr. Chairez.

16 DIRECT EXAMINATION

17 BY MR. CHAIREZ:

18 Q Dr. Miller, what kind of work do you do?

19 A I am a forensic scientist.

20 Q All right. And what is it that a forensic
21 scientist does?

22 A Excuse me?

23 Q What is it that a forensic scientist does?

24 A Well, we're mainly scientists involved with
25 issues that come before a court, evidence that's tested for

1 court proceedings, anything of that nature, really, is -- is
2 forensic science.

3 Q All right. And have you come to court today to
4 testify as an expert witness?

5 A I have.

6 Q And have you ever testified as an expert witness
7 before?

8 A Yes. Many times.

9 Q All right. In which courts?

10 A Military court, Federal Court, civil court,
11 state and district courts.

12 Q And have you ever testified as an expert witness
13 in the state of Nevada?

14 A I have not.

15 Q All right. Now, Dr. Miller, based upon your
16 education, training, and experience, do you feel you have
17 specialized knowledge that would assist the jury or the trier
18 of fact in reaching a conclusion with respect to the evidence
19 that's been presented at this trial?

20 A I think I can.

21 Q All right. And can you tell me a little bit
22 about your background? I mean, how many times have you
23 testified as an expert witness?

24 A I've probably testified 25 to 30 times,
25 somewhere in that range. I've worked on hundreds of cases. I

1 have about 15 years of DNA experience, either in a research
2 lab or in a forensics lab or working as a consultant for the
3 Texas Department of Public Safety. After I graduated and got
4 my Ph.D. in biochemistry where I did DNA research, I went to
5 the Texas Department of Public Safety where I worked for the
6 state crime lab. There, they trained me to do crime scene
7 investigation as well as work in the laboratory on biological
8 samples. Anything having to do with blood, semen, saliva,
9 DNA, processing evidence of that nature, or the types of
10 things that I did inside the laboratory.

11 Q All right. The Texas --

12 A I left there --

13 Q -- Crime Lab, were you working for the
14 prosecution?

15 A I generally testify for the prosecution, though
16 the lab is really independent. They're not really there to,
17 you know, put somebody in jail or get somebody out. They're
18 really independent scientists that are hired by the State of
19 Texas to process the evidence in criminal trials. So, I -- I
20 testified on behalf of the prosecution, because if somebody
21 was exonerated, I guess they let them go. But when, you know,
22 there were issues and somebody had to testify on behalf of the
23 State, then I would come in because I -- I work for the State.

24 Q Now, in your current profession, you -- do you
25 testify only for the defense or do you testify for the

1 prosecution, or do you -- does it depend?

2 A Generally I testify for the defense. Almost all
3 of my work comes from the defense. I do do other work, you
4 know, I've done some work for the New York Police Department,
5 NYPD, and -- and help them with some evidence things. I -- I
6 do do a number of things. I have been called in by the, you
7 know, US Department of Justice where they just, you know, ask
8 me questions. I've had judges call me during break just out
9 of the blue and ask me some questions because there were some
10 issues. So I get questions and I do a little bit of work, but
11 I would say primarily my work is -- is defense.

12 Q All right. And in preparation for your
13 testimony today, did you receive a package from me about the
14 evidence that had been gathered in this case?

15 A I did.

16 Q All right. And did you have an opportunity to
17 review it?

18 A I did.

19 Q And did you receive from me a couple of weeks
20 ago evidence that had been given to us by the Las Vegas Crime
21 Lab?

22 A I did.

23 Q And did you have a chance to evaluate and run
24 your test or whatever it is that you do?

25 A Yes.

1 Q All right. So, have you come to court today
2 prepared to offer an expert opinion as to the findings that
3 you found based upon the evidence that was gathered in this
4 case?

5 A Yes.

6 Q All right.

7 MR. CHAIREZ: I would tender him as an expert
8 witness, Your Honor. I don't know if the State wants to ask
9 him some questions or not.

10 MS. BLUTH: State's fine.

11 MR. CHAIREZ: Okay.

12 THE COURT: Okay. He'll be so qualified.

13 BY MR. CHAIREZ:

14 Q And prior to coming to court today, what did you
15 look at or what did you do in this case in an effort to
16 understand the facts?

17 A I was given a video from Circus Circus, for one,
18 which I looked at. Shows a lot of, you know, Mr. Dang walking
19 around. There are a lot of -- of gaps in it. But there are a
20 lot of -- of information there. Then I actually went to the
21 Circus Circus, stayed in Room 631, I took measurements of the
22 room, the bathroom, all of the places that on the video where
23 I saw people, all of the elevators, I walked through those, I
24 looked at those, I evaluated, you know, where did he actually
25 walk. And I went and re-did that again yesterday.

1 I was privy to some of the police reports. And then,
2 of course, a couple of weeks ago I was given the information
3 from the Las Vegas Metropolitan Police Department Crime
4 Laboratory where I looked through all of that. I looked
5 through all of their policies and procedures to see what it
6 was that they did, how did they do it, what were the results,
7 what kind of conclusions did they make. I looked at the DNA
8 printouts to try and compare those. I looked at the
9 concentrations of DNA that they got in different things.

10 So, I went through in -- in detail to look through
11 that report. And I think that's most of what I've had to
12 review.

13 Q So, based upon what you did, after you had all
14 this information and the stuff that you had recently, how did
15 you go about evaluating the case?

16 A I really try to look at it, the video and all
17 the other stuff, gives me, you know, some --

18 MS. BLUTH: Your Honor, I'm going to object at this
19 time and ask to approach.

20 THE COURT: Sure.

21 (Bench conference transcribed as follows.)

22 MS. BLUTH: I'm looking at the notice of when this
23 notice was provided by Mr. Chairez. And his notice
24 [indiscernible]. Get to the page. It states that Mr. Miller
25 is going to testify as an expert witness to the DNA findings

1 provided by the State.

2 MR. CHAIREZ: Right.

3 MS. BLUTH: So, I mean, he has to stay within that
4 scope. I don't know whether I'm talking about video and
5 walking --

6 MR. CHAIREZ: That's not [indiscernible].

7 MS. BLUTH: -- and measurements.

8 MR. CHAIREZ: I just --

9 MS. HOLTHUS: Evaluating the case.

10 MR. CHAIREZ: I'm not going to get -- when I -- but
11 that's -- we're not going to go into that. He's
12 [indiscernible]. I'm going to start right now on the DNA
13 report that was given him a couple of weeks ago. Yeah.

14 THE COURT: As long as you stay in those parameters.

15 MR. CHAIREZ: Yeah.

16 (End of bench conference.)

17 BY MR. CHAIREZ:

18 Q Dr. Miller, we basically just want to focus on
19 the work and evaluation you did in terms of evaluating the DNA
20 evidence and not the other stuff. Is that okay?

21 And so I guess the first question is with respect to
22 the DNA, how did you go about evaluating this case?

23 A What I do is I take the whole file and I
24 generally take the report. I start with that. Then I look
25 down, every test that they do, whether it turns out positive

1 or negative, no matter what they do should be and is generally
2 reflected on the report. So, if they look at a piece of
3 evidence and they do some testing on it, they may not say,
4 Well, I ran this particular test. But they will give you the
5 results of that test. We found semen or we didn't find semen.
6 And so the report is kind of a synopsis of all of their
7 findings. I looked at this, I looked for this, this is what I
8 found, this was the DNA results.

9 So, I start there and I use that as sort of my
10 template. I read through it and make sure that I understand
11 it, take notes on it. And then I go through all the
12 paperwork. And I look to see that the results that they're
13 reporting are accurate with the information that they
14 collected. In other words, if they say, Did I find semen? I
15 then go and look at what the results of their actual testing
16 were, well, did they find semen? Did they find sperm?

17 When I look at the DNA profiles, you know, I look at
18 those and compare them myself and say, Do I agree that this
19 matches this or that this matches that. So, I look at these
20 kinds of things, I look at the concentrations of DNA that they
21 got off of different things. There are places where, you
22 know, under certain circumstances I might expect there to be a
23 lot of DNA. And so I look at the concentrations that they
24 got, I look at the results that they got. And I compare those
25 all to the report to make sure that what they did and what

1 they said are accurate.

2 Q So, essentially, you don't go out and do any
3 independent testing, but you just rely upon the results that
4 are given to you by the Las Vegas Metro Crime Lab?

5 A Correct.

6 Q All right. And in a nutshell, do you -- do you
7 recall what it is that the Las Vegas Metro Crime Lab, what
8 tests they ran and -- and what objects they considered?

9 A Yeah. I can tell you off the top of my head all
10 the tests that they ran and what the results were.

11 Q Okay. What were the tests that they ran?

12 A They ran a number of tests. They tested a great
13 deal of things for semen. And then they ran the DNA on those
14 things on -- do you want me to list all of the things that
15 they tested?

16 Q Yes, please. Or do you want to list them just
17 one at a time? Okay.

18 A For Mr. Dang, they tested a -- a number of
19 things. They tested for semen his -- and they tested for
20 semen and it was positive on his testicles, on his penis, on
21 the boxers, on the rectal sample, on the anal sample, and on
22 the left hand. They also tested --

23 Q Okay. With respect to these five or six areas
24 that they tested on AJ Dang, you say they found semen on AJ
25 Dang's body and also upon his boxers?

1 A Yes.

2 Q Okay.

3 A In these six places. There were other places
4 they either didn't test or the tests were negative. But those
5 six places they got positive results showing semen, sperm, or
6 both.

7 Q All right. And the positive results that they
8 received, did they run a DNA sample to see whether or not
9 there was any DNA from Mazen Alotaibi upon these six spots
10 that they found on AJ Dang?

11 A They did on those semen spots, as well as some
12 other spots. They didn't test for semen.

13 Q All right. And with respect to the spots they
14 -- that they tested, did they find any DNA on AJ's body or
15 boxers that had semen DNA from Mazen Alotaibi?

16 A When they run a sample that has semen, what they
17 do is they separate the DNA. Sperm are pretty hardy, so
18 they're able to separate them from everything else. So, let's
19 just say that a man and a woman have -- have intercourse and
20 she pulls on her panties, walks around with them for a couple
21 of hours, you take them off, you cut a little spot out. What
22 you're able to do in the lab is separate out the sperm from
23 everything else.

24 And so you can take that little cutting of the
25 panties and you end up with two tubes of DNA from this one

1 piece of evidence. And in -- in this particular case, with a
2 man and a woman, it's possible that you can then get one DNA
3 profile that's him from the sperm, and another DNA profile
4 that's her from everything else.

5 This is, you know, a worldwide procedure. Every
6 crime lab in the world, as far as I know, uses it. It's
7 really good. It works really well in the right hands. You
8 know, there's a protocol for it. And if people follow it and
9 they're good scientists, you get good results. In this case,
10 it looked like their results were pretty consistent, so it
11 appears that they did do a good job.

12 So, they have this process where from one piece of
13 evidence -- and in this case, each one of these pieces of
14 evidence that they determined there was semen on -- they did
15 this procedure. So they have from, for example, the penis
16 swab, they have two DNA results. One from the sperm, one from
17 the nonsperm. And in this case, in all six cases where they
18 had semen or sperm on samples that were taken from either AJ
19 Dang's body or from his underwear, in every single case they
20 either got no results, results that weren't useful, or they
21 got the DNA profile from Mr. Dang himself, which, you know,
22 suggests that any semen or sperm that was found on him or his
23 body is from him.

24 Q Now, when you say it suggests that that semen or
25 sperm is from AJ, you're implying that none of it is from

1 Mazen Alotaibi, correct?

2 A That's the implication from the testing that --
3 that we saw. There's no -- nothing in the DNA from the sperm
4 portion of those profiles that were consistent with -- with
5 Mr. Alotaibi.

6 Q All right. Now, earlier, we had a nurse testify
7 that she believed AJ Dang was prepubescent. Okay. Meaning
8 that AJ Dang would be unable to generate any of his own semen,
9 or I guess she also was implying that maybe AJ Dang could not
10 ejaculate. Would you agree with her opinion, based upon the
11 DNA stuff that was discovered?

12 A Yeah, I'm not a medical doctor, so I can't speak
13 to, you know, any of that kind of stuff. But I can tell you
14 that the results from this, on more than one sample they got a
15 strong DNA profile or a good DNA profile from Mr. Dang. And
16 that doesn't usually happen without sperm. Because
17 essentially you -- you're using a chemical process that
18 dissolves everything that's not sperm, and then you wash that
19 away. And you're left with just sperm.

20 And so generally speaking, if there's no sperm there
21 at all, you won't get anything in that sperm cell fraction, is
22 what it's called. In this case, there were two samples that
23 -- and one of them was a very good sample that I would think
24 strongly suggests that there was his -- some of his sperm
25 there.

1 Q Some of AJ's sperm?

2 A Some of AJ's sperm.

3 Q All right. Or semen?

4 A It's kind of the same thing. If you find sperm,
5 you've found semen. Semen is the liquid ejaculate from the
6 male orgasm and the -- the sperm are the little swimmers that
7 get women pregnant. So, you know, the -- the semen is the
8 pool and the sperm are the swimmers. And so if you find
9 sperm, you've found semen.

10 Q All right. And what other spots did the Las
11 Vegas Crime Lab test where they found spots of semen upon AJ's
12 body?

13 A Those are -- in every case where they find semen
14 and sperm, they run -- they run this -- it's called a
15 differential. Because they have two different samples for
16 each one. In every single case where they find semen and
17 sperm, they run that.

18 Q All right. Well, let's talk about the nonsperm
19 DNA. Did they find some nonsperm DNA upon AJ's body?

20 A Yeah.

21 Q And where did they find it?

22 A Well, there's going to be nonsperm DNA
23 everywhere. Because we have DNA all over our bodies. So of
24 the samples that they took, in addition to those that I
25 mentioned, they also took ones from his neck, from his chest,

1 from his right hand. And they ran those, as well.

2 Q Did they also find any on his ear?

3 A They did find DNA on his ear.

4 Q Okay. And the DNA they found on these
5 particular parts of AJ's body were nonsperm DNA; is that
6 correct?

7 A That's the implication. If they didn't find
8 semen, they didn't run it to see if there was sperm DNA. So I
9 can't -- and I can't say whether there's sperm there or not.
10 But the implication is that -- that, you know, there's no
11 semen or sperm there.

12 Q So, with respect to the ear, if they found DNA
13 from Mazen Alotaibi on AJ, what would be the likely ways that
14 it could have been transferred from Mazen to AJ Dang? I mean,
15 could saliva transfer that type of DNA?

16 A Saliva would do it. There are a number of ways
17 you can transfer DNA. If two people shake hands and, you
18 know, real hardy handshake, where you grab them real good and
19 shake for a couple of seconds, you can transfer DNA. You can
20 swab one person's hand and you would get the other person's
21 DNA. Skin cells are not a great source. That's a good way to
22 do it.

23 But a much, much better way are bodily fluids.
24 Semen, saliva, blood, you know, anything from the internal
25 part of the body is -- is an exceptionally good source of DNA.

1 Q All right. And you mentioned that the right
2 hand also had nonsperm DNA; is that correct?

3 A The right hand had DNA that we assume was not
4 from sperm.

5 Q But it also came back to Mazen Alotaibi,
6 correct?

7 A The right hand, yes. The right hand did.

8 Q And --

9 A But the right hand also had -- was -- was a
10 sample that was identified as having semen on it.

11 Q On AJ's hand? I mean, on AJ's hand?

12 A On AJ's right hand, yes.

13 Q Okay.

14 A So this is one they would have split into two --
15 into two fractions.

16 Q But the semen was not from Mazen Alotaibi?

17 A The semen from the sperm cell fraction was not
18 from Mazen Alotaibi. In other words, they split it into these
19 two, and the sperm fraction on the right hand was not from
20 Mazen Alotaibi. But what was in the nonsperm fraction on the
21 right hand was from -- well, was consistent with the DNA
22 profile of Mazen Alotaibi.

23 Q And if, assuming hypothetically, AJ Dang was
24 sexually assaulted or had sex, voluntary sex with an
25 individual, and a lubricant, like shampoo, would have been

1 used, would you expect any kind of DNA to be left behind?

2 A So, we're talking about having anal sex --

3 Q Yes, sir.

4 A -- and a lubricant being used --

5 Q Yes, sir.

6 A -- and we're wondering where or not the DNA
7 would end up --

8 Q Correct.

9 A -- is that the question?

10 Q Right.

11 A The internal parts of the body are extremely
12 good sources of DNA. The mouth, for example. Saliva, for
13 example; if you cut yourself, blood; the inside of the rectum;
14 any of our internal parts are exceptionally good sources of
15 DNA. They're -- the skin there is just different than our
16 outer skin. Once a lubricant is used, what ends up happening
17 is because of the friction, a lot of the DNA then ends up in
18 this liquid.

19 So, imagine for a moment that the liquid is not
20 invisible, that it looks like red paint. Wherever you can
21 find the liquid, you're going to find DNA. So, if two people
22 have anal sex, they use some sort of lubricant, assuming that
23 it's not just some huge amount so it's not diluted everywhere,
24 but there's a significant amount, you would expect to find DNA
25 anyplace you would find that liquid.

1 Now, if we imagine that it's -- it's red paint, for
2 example, or, you know, it's red in color so we can see it, I
3 would imagine that two people have anal sex, the person who
4 was penetrating the person using his penis, I would imagine
5 that he would pull that out, pull up his underwear, an
6 enormous amount of easily detectable DNA would be found on his
7 penis and on his underwear. And it would be like a dump-truck
8 load of DNA. It would be easy to find and easy to detect.

9 You would also expect that some DNA from the penis penetrating
10 the rectum might be there. The -- the difference there is
11 that the penis, of course, is an exterior part of the body.

12 And so as the skin on the outside of our body just is
13 not a great source of DNA, the inside is. The potential
14 exists that the interior DNA from the rectum would just be in
15 such a high concentration that you wouldn't see the DNA from
16 the penis. So, I would expect on the penis there to be a
17 great deal of DNA. I would expect that the person who pulled
18 up their underwear over a penis like that would get it all
19 over them.

20 The person who was penetrated, I would expect there
21 to certainly be a potential for DNA from the penis to be on
22 them and on their rectum and on their underwear. But I
23 wouldn't necessarily go as far to say that I would expect it.

24 Q Now, in this particular case, did they find any
25 DNA around the buttocks area of AJ Dang from Mazen Alotaibi?

1 A On none of the samples from his rectum or his
2 anus did you get a profile. And they split it into the two
3 fractions. And you didn't get a profile from anybody but AJ
4 Dang from his rectum or his anus that you would expect at
5 least something.

6 Q All right. And with respect to the mouth of AJ
7 Dang, would you expect, if the penis of Mazen Alotaibi was in
8 the mouth of AJ Dang, or anybody's penis was in the mouth of
9 AJ Dang, would you expect to find some DNA from that person in
10 the mouth or around the mouth of AJ Dang?

11 A I wouldn't. The mouth has so much liquid in it
12 and it's constantly being swallowed and it's got a lot of
13 acids in it. And even from, you know, my experience running
14 hundreds of these cases, even when somebody has come to the
15 hospital two, three hours after an alleged ejaculation into
16 their mouth, you rarely will find semen or -- or sperm. Even
17 just a couple of hours later.

18 Now, certainly, I have seen cases where somebody, you
19 know, just a few minutes afterwards, went down and was tested,
20 I mean, just right after they had given somebody oral sex, and
21 it was detected. And I think to my knowledge that's the only
22 time I've ever seen somebody have their mouth come back
23 positive. So, I would not expect to find DNA, I wouldn't
24 expect to find sperm, I wouldn't expect to find anything
25 inside the mouth of somebody else.

1 Q With respect to Mazen Alotaibi's body, what
2 parts were tested on him and what tests were run?

3 A They took a swab of his penis and his boxers.

4 Q All right. And with respect to his penis, did
5 they find DNA -- what kind of DNA did they find?

6 A Well, again, they took the sample. They
7 detected semen and they split it into these two fractions.
8 They had the sperm cell fraction and the nonsperm fraction.
9 The sperm fraction here was consistent with -- with Mr.
10 Alotaibi and him alone. In fact, that -- and on the boxers,
11 the sperm cell fraction appeared to be him and him alone,
12 which strongly suggests that the semen found on both of those
13 samples is most likely his.

14 The nonsperm fraction on the penis was very low.
15 What was there possibly could have been Mr. Dang, but it was
16 so low, it would be difficult to really be sure. But if it
17 was Mr. Dang, there's also a third person there. So it's just
18 -- it's really low. You do see some mixtures. Could be Mr.
19 Dang, maybe not. It certainly isn't in the quantity that I
20 would expect from a sexual encounter. And a from a sexual
21 encounter from having some lubricants and anal sex, you would
22 expect there to be literally a dump load of -- a dump-truck
23 load of DNA there. And what you see are maybe a couple of
24 shovelfuls.

25 So, while there is some DNA there, it's really hard

1 to say what DNA is there that doesn't belong to Mr. Alotaibi.

2 Q And the DNA that you're referring to is nonsperm
3 DNA?

4 A Nonsperm DNA. The sperm DNA, all -- it appears
5 in this case, looking at all of the samples, that the semen
6 and sperm found on Mr. Dang is Mr. Dang's, and the semen and
7 sperm found on Mr. Alotaibi is Mr. Alotaibi's.

8 Q Now, with respect to the items that were found
9 inside of the bathroom, do you know what items were found and
10 what were tested?

11 A The only item that I'm aware of that was
12 collected actually out of the bathroom was a white towel.

13 Q And did they run a test on that white towel?

14 A They did a run a test on the white towel. I --
15 I assume that -- that they collected it to -- in case somebody
16 had cleaned themselves off, wiped themselves off or something of
17 that nature. And so a lot of times at a scene like this,
18 they'll collect something like a towel, a washcloth, whatever
19 looks like it potentially was used. And in this case they
20 tested it and they didn't find anything useful on it at all.

21 Q When you say they didn't find anything useful,
22 did they find any DNA that came back to AJ Dang?

23 A They didn't run any DNA. Basically, what they
24 did was they tested it to see if they could find anything on
25 it and they didn't find anything on it, so they didn't run any

1 DNA.

2 Q All right. Did they run a test on a condom that
3 was found in the bathroom?

4 A The condom I don't believe was found in the
5 bathroom. I believe the condom was found in the living area,
6 which was away from the bathroom. They did run DNA on that.
7 And all of the results that they got are not consistent with
8 either Mr. Dang or Mr. Alotaibi. So whatever it was, it
9 didn't seem to be connected directly to those two.

10 Q And one final area. Was there nonsperm DNA
11 found near the genital areas of Mr. Dang?

12 A There was. On his boxers, on his testicles, and
13 on his penis, they found DNA that was foreign to him in the
14 nonsperm part of the DNA that was consistent with Mr.
15 Alotaibi.

16 Q All right. And based upon everything that you
17 know about this case, the -- the samples that were tested, the
18 evidence that was gathered, how do you believe Mr. Alotaibi's
19 nonsperm DNA could have arrived or gotten onto this particular
20 part of Mr. Dang's body?

21 MS. BLUTH: Your Honor, I'm going to object as to
22 speculation: How do you believe it could have gotten there.

23 MR. CHAIREZ: Well, he's here to offer a scientific
24 opinion --

25 THE COURT: Let him offer an expert opinion.

1 MR. CHAIREZ: Okay.

2 THE COURT: Yes.

3 MR. CHAIREZ: Let me rephrase the question.

4 BY MR. CHAIREZ:

5 Q You mentioned you had an opportunity to read all
6 of the police reports?

7 A Yes.

8 Q Okay.

9 A Well, I don't know if I had all of them.

10 Q Well -- well, you read Mr. Dang's statements,
11 correct?

12 A I read some statements that they attributed to
13 Mr. Dang. I don't know that I actually read a statement that
14 he made. But there were statements or opinions of the
15 officers as to what may have happened based on statements that
16 he made.

17 Q Well, let's just focus on the DNA report. You
18 were able to see the four-page DNA profile, plus the
19 additional test or whatever that Metro Crime Lab ran, correct?

20 A Correct.

21 Q All right. And so with respect to the DNA
22 that's found on Mr. -- Mr. Dang, on the left ear, the left
23 neck, the chest, the right hand, and the genitals, would you
24 agree with the Metro Crime Lab that all of the DNA found there
25 is all nonsperm DNA?

1 A Yes.

2 Q Okay. So, you don't disagree with them?

3 A No. I -- they're -- the testing that they did
4 appeared to be accurate. The testing was -- was consistent,
5 it was consistent on this person, and it was consistent on
6 this other person and throughout the case. I -- I found the,
7 you know, the -- the procedures that they ran and the way that
8 they ran it and the reporting that they used, I found it to
9 all be accurate and -- and good. I don't really take issue
10 with anything that they did.

11 Q All right. And if, hypothetically speaking, if
12 two individuals are smoking a marijuana cigarette together,
13 would there be a possibility of transferring saliva DNA if
14 someone is sharing a marijuana cigarette?

15 A If someone were to walk up right after it was
16 lit, say, you know, when it's long, I would expect there to be
17 probably very little. But once it gets small and people are
18 passing it around in the area where they're holding it with
19 their mouth, I would expect there to be saliva transfer.

20 Q All right. And with this saliva transfer, would
21 this be on the hand of AJ Dang? Is it possible,
22 hypothetically speaking?

23 A Yeah. I mean if he's holding it and passing it
24 back and forth, that's where I would expect it to be.

25 Q All right. And it is possible -- what other

1 ways could AJ Dang get nonsperm DNA on his right hand from
2 Mazen Alotaibi?

3 A I don't know. I mean, there are --

4 Q For instance, if you --

5 A -- there are a million different ways you can
6 get your -- I mean, you can shake hands, you can give a
7 high-five, I mean, you get any bodily fluid onto your finger,
8 I mean, there's -- there's an innumerable number of ways where
9 you can get DNA.

10 Q All right.

11 A Two people that are sharing an area for even
12 more than a few minutes, if they come into contact, I would
13 expect there to be at least some transfer of DNA.

14 Q All right. And is it possible to transfer from
15 the right hand of AJ Dang to the testicle area of AJ Dang the
16 DNA of Mazen Alotaibi that has no sperm in it onto Mr. AJ
17 Dang's testicle or genital area?

18 A Again, I mean, if you treat saliva or something
19 like that as if it's not some clear liquid that you can't see,
20 but that it's bright red so you can see it, so the saliva gets
21 wherever the saliva gets. So let's just imagine that you have
22 some on your fingertips, you know, if you reach down to, you
23 know, touch your penis or you go to the bathroom, anyplace
24 that you would expect this red liquid that's now wherever it
25 is on your fingers, and if you're smoking a joint I would

1 expect it to be probably in this area of your fingers, you
2 know, imagine again that it looks like bright red paint.
3 Where would that get? You know, wherever you touch, you're
4 going to get some.

5 So, any method by which you touch that area, I mean,
6 if you go in and you go to the bathroom, let's say, and you
7 pull down your underwear and you touch your penis, well, you
8 just transferred some DNA there. And with something like
9 saliva, saliva's an excellent source of DNA. So, wherever
10 that, you know, red paint, whatever you want to call it,
11 wherever that saliva gets, if you swab that area, you're going
12 to get DNA.

13 Q Now, you mentioned -- you used earlier the
14 illustration of a dump truck versus a shovelful. The DNA that
15 they found on AJ Dang from Mr. Alotaibi, was it a -- more in
16 the nature of a shovelful or was it more in the nature of a
17 dump truck?

18 A Well, that depends on which sample you're
19 talking about. Some of those samples are -- are exceptionally
20 good samples. For example, the one on the ear, that's a
21 strong sample. There's a lot of DNA there. On the chest
22 swab, there's a lot of DNA there. On the hand there is less,
23 but if you imagine that the hand's touching things, it goes
24 away on the hands a lot quicker than it would on, say, your
25 ear, because it's going to slowly dissolve as you touch things

1 -- or not dissolve, but it's going to slowly water down as you
2 touch things and get it on other things.

3 There is a -- a significant amount on his boxers.
4 There is --

5 Q On whose boxers?

6 A On AJ's boxers there is a reasonably large
7 amount of DNA. Again, this isn't like a dump-truck load, but
8 there is a significant amount on his boxers, there is less on
9 his testicles, meaning that you don't even get a full DNA
10 profile. So there's, like, you know, a few shovelfuls on his
11 testicles and very little on his penis.

12 Q So, do you have an opinion that you hold to a
13 reasonable degree of scientific certainty whether or not there
14 is DNA evidence supporting whether Mr. Mazen Alotaibi had sex
15 anally with the victim, AJ Dang?

16 A At the end of the day what I try to do is just
17 understand the evidence and how it applies. And essentially
18 when you talk about a sexual assault of this case, you're
19 talking about anal sex. And the question is where do you see
20 the DNA and how much do you see and is it semen?

21 In this case, I see that the semen on Mr. Dang
22 appears to be his, and the semen on Mr. Alotaibi appears to be
23 his. The places on Mr. Dang I would most expect to see the
24 DNA of Mr. Alotaibi would be the rectum and the anus, and I
25 don't see his DNA there at all.

1 Where I do see his DNA are on the -- on the neck and
2 the ear, on the chest. And those are really not a concern.
3 Two people spend any time together it's not a surprise to see
4 your DNA on areas that are exposed. The areas here that are
5 of some concern are the fact that you find a reasonable amount
6 of his DNA on the boxers. But what you see is much less on
7 the testicles and much less even then on the penis. And so
8 while you see DNA in places that are questionable, you don't
9 see a lot.

10 On the other side of that, when you're talking about
11 anal sex, if you imagine that somebody doesn't take a shower,
12 that right after sex they pull their underwear up, you would
13 expect to find an enormous amount of DNA. And that's probably
14 the No. 1 place that I would expect there to be a lot of DNA
15 would be on Mr. Alotaibi's penis, as well as on his boxers.
16 And you just -- you don't see that here. In fact, you see,
17 you know, what could be somebody else's DNA on his boxers
18 mixed with his semen. And so I just -- I -- I really can't
19 say what happened.

20 But there are certain things that I look for. I look
21 for what type of DNA is on somebody, what are the
22 concentrations, where did it come from, where did it possibly
23 come from, and where are the places that I -- I most likely
24 would see it.

25 Q So, in your opinion, there's no question that

1 the DNA on AJ's ear is from Mazen Alotaibi?

2 A On the ear, I would see -- say, to a scientific
3 degree of certainty, I can say that Mr. Alotaibi's DNA is
4 found on Mr. Dang's ear.

5 Q And it's found on his neck and chest area?

6 A Yes, as well.

7 Q And it's found on his right hand?

8 A Based on the fact that the rest of the DNA that
9 I see I can say to a scientific degree of certainty came from
10 Mr. Alotaibi, the sample on his hand does not rise to the
11 level where I can say to a scientific degree of certainty
12 that's his DNA. I would say to an extremely high probability
13 the DNA found on his hand is from Mr. Alotaibi. And given the
14 fact that the other profiles are so high, I find it very
15 unlikely that it came from anywhere but Mr. Alotaibi.

16 Q The right hand?

17 A On the right hand.

18 Q Of AJ?

19 A Of Mr. Dang.

20 Q All right. And finally, with respect to Mr.
21 Alotaibi, the Metro Crime Lab found no DNA from AJ Dang upon
22 the body of Mazen Alotaibi?

23 A The only DNA that they found that had any
24 possibility of belonging to Mr. Dang was they found an
25 incredibly small amount -- I don't want to say incredibly

1 small amount; they found a very small amount on Mr. Alotaibi's
2 penis. Again, this is a place I would expect to find just a
3 -- a dump-truck full of DNA and we see just this tiny little
4 bit. In fact, it's so low it's difficult to connect it to --
5 to Mr. -- Mr. Dang.

6 You can say that there are striking similarities.
7 Imagine that you have a lottery ticket and you've matched,
8 say, 10 of the -- say there's -- you have a lottery ticket,
9 you've got to match 30 numbers. You can match maybe 10 of
10 them. But there are two or three numbers you can't account
11 for.

12 So there's this profile on his penis that has some
13 similarities to Mr. Dang. And if it is Mr. Dang's, there's at
14 least three people on that penis. So it's low enough that the
15 Las Vegas Metropolitan Police Department just said, We're not
16 going to compare it. But that's because that's what their
17 policy is and I'm not held to their policy, so I went ahead
18 and compared it anyways.

19 Q So, even though the Metro Crime Lab said it
20 wasn't from AJ Dang or they couldn't be sure, you at least are
21 throwing it out to be open with the jury that there is that
22 small possibility of trace amounts on the penis of Mazen
23 Alotaibi?

24 A Yes.

25 Q Okay. And you say there's another individual's

1 DNA also on the penis of AJ Dang? I mean, excuse me, Mazen
2 Alotaibi?

3 A It could just be that it's Mr. Alotaibi's DNA
4 and somebody else's. Again, your DNA profile is, like, 30
5 numbers long. Now, if you got, let's say, 12 numbers, 12, 13
6 numbers and 8 or 10 of them match Mr. Dang, it's, like, maybe
7 it's his and maybe there's a third person. But it could just
8 be somebody else altogether. Right. It might not be Mr.
9 Dang, it might just be another person. So there may not be
10 three people there. I don't know.

11 Q Well, can you tell whether or not it's from
12 another man or another woman? Or another --

13 A You really can't. Guy -- all men have a Y
14 chromosome. It's what turns you into a man. If you get the Y
15 chromosome, then when you're a fetus, you turn into a boy.
16 So, once you have the Y chromosome, you can't really tell
17 where the rest of the DNA came from. If you have, you know,
18 if you take an intimate sample from a woman's vagina after
19 she's had sex and you find a Y chromosome, you know there was
20 a boy there. But you can't really do it in reverse. Once you
21 have the Y chromosome, you really can't tell where the other
22 DNA came from.

23 Q And -- and lastly, Dr. Miller, from what was
24 gathered in the bathroom, can we tell whether or not somebody
25 took a shower based upon the evidence gathered by the Las

1 Vegas police?

2 MS. BLUTH: Your Honor, I'm going to object. This is
3 way outside the expertise of a DNA expert, whether or not
4 someone took a shower.

5 THE COURT: Why don't you perhaps ask it a different
6 way.

7 MR. CHAIREZ: Well, I'll -- I don't need to ask.

8 THE COURT: All right.

9 MR. CHAIREZ: That's fine.

10 THE COURT: Cross?

11 CROSS-EXAMINATION

12 BY MS. BLUTH:

13 Q Good afternoon, Doctor.

14 A Good afternoon.

15 Q And I want to be clear about a few things before
16 we get started. You're hired by Mr. Chairez, that's correct,
17 to testify in this case?

18 A Yes.

19 Q Okay. And so he has to pay a certain fee for
20 you to look at the materials?

21 A Correct.

22 Q And then he also has to pay a certain fee for
23 you to come in and testify over what you looked over?

24 A Correct.

25 Q Okay. And how much would he be paying you for

1 those two things?

2 A Generally speaking, I charge \$165 an hour and I
3 charge \$1,800 a day plus my travel costs. This one didn't
4 always work out that way, but that's basically what I charge.

5 Q So what is the total, as we sit here today?

6 A For this entire case?

7 Q Yes.

8 A Or for just coming here today?

9 Q For this entire case, please.

10 A We're probably looking at about \$12,000.

11 Q Okay. Thank you. Now, you've stated that you
12 worked for the State for a period of time?

13 A Correct.

14 Q And I was unclear, when you said you testified
15 about 25 to 30 times, how many of those were in a criminal
16 setting like we're in now?

17 A I think virtually all of them have been in a
18 criminal setting. There have been a couple of them that were,
19 like, lawsuits. I don't think I -- off the top of my head I'm
20 not sure if I ever testified that, but I -- I testified --
21 virtually every time is for a criminal case.

22 Q Okay. And since you quit working for the State
23 and you started working in the private sector, how many times
24 have you testified in a criminal trial like we're in now?

25 A Probably half the time, so maybe 15 to 20.

1 Q And so in any of those 15 to 20 times, have you
2 testified for the prosecution?

3 A I have not.

4 Q Okay. So, the last -- since you left working
5 for the State, you've testified about 20 times in the criminal
6 courtroom?

7 A Approximately, yeah.

8 Q Yeah. And all those times were for the defense?

9 A Correct.

10 Q Okay. When you have a sample left, and we
11 talked a lot about sperm fractions and fractions taken from
12 epithelial cells, so we -- we call them skin DNA and sperm
13 DNA, if we could do that, just to keep it a little bit easier.

14 A Sure.

15 Q Is it possible to find carryover from one to the
16 other?

17 A Yes.

18 Q Does that question make sense?

19 A Yes.

20 Q Okay. Can you explain that?

21 A It's an imperfect process. I mean, basically,
22 what happens is you take -- sperm are like little tanks.
23 They're -- they're pretty tough little things. They've got a
24 job to do and they have to swim upstream and -- and actually
25 do some work. And so these are a little different kind of a

1 cell than -- than the rest of our cells, whether it comes from
2 saliva, whether it comes from skin, no matter where it comes
3 from.

4 And so what the lab does is they take a sample, let's
5 just say it's -- it's a cutting from underwear. And what they
6 do is they will try to put some soft chemicals in there that
7 dissolves everything but the sperm. And then they try to wash
8 it. And they spin it down. And the -- and the sperm kind of
9 pellet to the bottom. And then they put harsher chemicals
10 that will dissolve the sperm. And so the plan is to dissolve
11 with something, you know, somewhat less harsh and try to
12 dissolve and clear everything else away, then wash it off.
13 And hopefully you have just sperm in the bottom and then you
14 dissolve that and hopefully get just a sperm cell fraction.

15 And what happens is sometimes it doesn't get washed
16 as well, and so you'll have carryover from the skin cell
17 fraction into the sperm cell fraction. And other times when
18 you're doing this process, some of the sperm cells will just
19 break open in the earlier procedure and you will get some of
20 the sperm carryover into the other.

21 Q And so would you agree -- Ms. Marschner
22 testified, the analyst who did the DNA in this case, and in
23 certain areas where she saw sperm fraction and it was
24 inconclusive, she testified that she believed that it was
25 actually carryover from the skin cells. So that is a

1 possibility, correct?

2 A It is a possibility. And certainly in -- in
3 some of those cases, in this particular case, you're talking
4 about the rectal and the anal sample. And those are excellent
5 sources of DNA. They have large quantities of DNA. And so
6 it's much more possible when you have a lot of DNA. The thing
7 is that it's much more likely for you to have sperm break open
8 and have carryover from the sperm into the nonsperm DNA. If
9 you do a really good job and you're a good scientist,
10 generally, you don't have much carryover from the skin cells
11 into the DNA, because -- or into the sperm, because you can
12 wash it off. You break everything open, you rinse it off, and
13 then you generally have just sperm left.

14 So a high enough concenage [phonetic] of DNA you
15 certainly can have carryover, though it's much less likely to
16 have it carry over in the other direction. And in this case,
17 just looking at the other profiles that she got, it looked
18 like the -- some labs have more carryover than others because
19 the scientists are just -- they're just better. In this case,
20 there were a number of samples where there wasn't any
21 carryover, leading me to believe that she's probably doing a
22 pretty good job. So --

23 Q I guess my question -- I'm sorry, we're getting
24 a little far. But my question was is it possible for skin
25 cells to carry over into the sperm fraction?

1 A It's possible, yes.

2 Q Thank you. I want to talk about the DNA on AJ's
3 ear. You stated this is -- this is a very good sample?

4 A It's a good sample, yes.

5 Q And you also talked about the strengths about
6 body fluids, saliva, blood, semen, that those leave stronger
7 traces of DNA than what you referred to as touch DNA?

8 A Yes.

9 Q And so this sample on AJ's ear would be
10 consistent with probably more of a body fluid?

11 A Yes.

12 Q And you saw the video from Circus Circus?

13 A Yes.

14 Q And so I'm sure you watched all of it?

15 A Yes.

16 Q And you saw the section where the defendant
17 leaned over and appears to be doing something to AJ's ear?

18 A Yes.

19 Q And that would be probably consistent with
20 leaving that body fluid on that ear?

21 A I mean, if he -- if he licked his ear, then --
22 then certainly that would be -- that would be consistent with
23 how that profile could get there.

24 Q Okay. The fact that someone uses a lubricant on
25 the penis would cause less friction between the penis and the

1 anus?

2 A Yes.

3 Q So, there's a less of a chance for skin-to-skin;
4 I'm not saying it's an impossibility, but there's less of a
5 chance?

6 A Okay. Less of a chance of skin-to-skin
7 friction, or less of a chance of DNA transfer.

8 Q Well, we know that the lubricant causes less
9 friction. So I'm asking, there's less of a chance for
10 cell-to-cell transfer, skin-to-skin transfer?

11 A Well, actually, what ends up happening is -- is
12 -- is there's a lot more DNA transferred to the liquid rather
13 than directly from one item to the other. And so the DNA gets
14 into the liquid, and then the DNA ends up wherever the liquid
15 is. So, if the DNA, like, for example, the DNA from the penis
16 and rectum end up getting into the liquid, and then the liquid
17 -- where does the liquid go, is really the question. There's
18 a significant amount of DNA transfer into the liquid. And
19 then where does the liquid go? Does the liquid stay on the
20 penis? Liquid get onto the underwear? Does the liquid stay
21 in the rectum? Wherever the liquid is, there's DNA and it's
22 significant. That's a significant amount.

23 Q And -- but what I'm asking you is the -- not
24 testing the liquid, testing the body parts. So, we have the
25 swab of the penis, swab of the anus.

1 A Right.

2 Q So, the -- using the lubricant would decrease
3 your chances of finding that in those places?

4 A It would increase it dramatically.

5 Q It would --

6 A Significantly.

7 Q It would decrease your ability to find it?

8 A No. It would -- it would increase the chance of
9 finding DNA dramatically.

10 Q Explain that.

11 A Liquids transfer DNA really well. They transfer
12 it into all the nooks and the crannies. If you just imagine,
13 for example, that my hand is dry and I put it into something
14 that, say, has a dry powder on it. Okay. And I would get
15 powder on it. But if I stick my finger into a liquid, that
16 liquid is going to not only soak into my hand, but it gets
17 into all the little nooks and crannies and all those little
18 other places.

19 Liquid is a far better way to transfer DNA and to
20 transfer cells and to have them stick and soak in than -- than
21 dry.

22 Q So, when --

23 A So --

24 Q -- when Mr. Chairez was asking you questions, I
25 believe you stated that it would decrease your likelihood of

1 finding DNA if someone used a lubricant on your -- on his
2 penis going into an anus. And so now you -- you are
3 changing --

4 A No. I -- I would --

5 Q -- and now you're --

6 A -- I would say the chances of finding the DNA
7 from the penis in the rectum is probably decreased. And the
8 reason for that is because if you imagine that this liquid is
9 taking in all the cells, and the rectal and anal cells are
10 going to be probably 100 times stronger, because they're just
11 so much better at transferring DNA, they come off a lot
12 easier, all of them have DNA. Skin cells, not all of them
13 have DNA. They don't come off easily.

14 And so if you just imagine that this liquid and this
15 friction, and then you realize that the anus and the rectum
16 are going to transfer a lot more DNA, then -- and on top of
17 that the penis has -- now has less friction, you're going to
18 transfer less penile DNA to the liquid. And so the penis is
19 going to be less likely to be visible when you run the DNA,
20 just because, numerically speaking, it's overwhelmed.

21 Q Okay. So, now you're saying that the use of a
22 lubricant would increase your chances of getting DNA? I mean,
23 it's a yes-or-no question.

24 A Okay.

25 Q So, are you -- lubricant --

1 A Okay. It's decreasing the chances of finding
2 the DNA from the penis and the rectum. It's increasing the
3 chances of finding the rectal DNA in the liquid and on the
4 penis.

5 Q Okay. Well, if you don't have the liquid, if
6 you don't have this lubricant to test, and so you're just left
7 with the penis and the rectum?

8 A Well, but -- but the liquid is -- has soaked
9 into the penis, is -- is on the penis. What I'm saying is you
10 pull your penis out, let's say you have sexual intercourse
11 with somebody who is using a lubricant. You pull your penis
12 out, that liquid is somewhere. It doesn't just magically go
13 away. It's either in the rectum, and that which is in the
14 rectum is probably now transferred less DNA from the penis
15 onto it. But as far as the cells from the rectum, that's not
16 increased on the penis, because that's where the liquid is.
17 It soaks in, gets in all the nooks and crannies.

18 Q So, if you have used lubricant, and on top of
19 that not only did you lubricant the penis, but you lubricant
20 -- lubricated the outside of the anus and the inside of the
21 anus, that would again decrease your likelihood of leaving the
22 DNA sample; yes or no?

23 A Wherever you put the lubricant --

24 Q Yes or no, please, Doctor.

25 A Okay. Wherever you put the lubricant --

1 Q No, Doctor. It's a yes or no. It's either a
2 yes or it's a no.

3 A Okay. So, ask me again.

4 Q Okay. So, if you use lubricant, not only on the
5 penis, but on the inside of the anus, so in -- in the
6 rectum --

7 A Uh-huh.

8 Q -- on the outside of the anus, that increases or
9 decreases --

10 A Which, decrease --

11 Q -- the likelihood of finding DNA?

12 A It will -- okay. Let's be specific. It
13 decreases the DNA from the penis being transferred into the
14 rectum. It increases the DNA from the rectum being
15 transferred onto the penis.

16 Q Even if the lubricant was inside of the rectum?

17 A Oh, sure. Wherever the liquid is, we've
18 increased the amount of DNA from the rectum. Wherever that
19 liquid now is, we have rectum liquid.

20 Q And --

21 A So, wherever that gets, it's going to be
22 stronger. And wherever it gets, the penis is going to be
23 lesser.

24 Q And if you add to the fact that the individual
25 did not ejaculate, that would also greatly decrease your

1 chances of finding DNA? Yes or no, please.

2 A You would detect an ejaculation.

3 Q Okay. But that wasn't my question. My question
4 is if the individual does not ejaculate inside of the rectum,
5 that would decrease your likelihood of finding DNA?

6 A Which DNA again, we -- are we talking about
7 penile DNA or are you talking about the ejaculate?

8 Q Yes.

9 A Yes. You would not detect the ejaculate if he
10 didn't ejaculate.

11 Q And on top of that, if the victim is bleeding so
12 much that they're passing blood clots afterwards, that would
13 also decrease your chances of finding DNA?

14 A Again, which DNA?

15 Q Well, both. I mean, the blood, you've said
16 yourself that bodily fluids leaves much stronger sources of
17 DNA. I mean, you used the mouth as an example, correct?

18 A Okay.

19 Q So if your anus is coated with lubricant, and on
20 top of that you have tears and you're bleeding so much that
21 you're blood-clotting, your sources would overtake that of the
22 other individual?

23 A Again, yes. The -- the rectal sample in that
24 case would overwhelm the penile sample on the rectum. And the
25 rectal sample would overwhelm the penile sample on the penis.

1 Either way you look at it, the rectal sample is overwhelming
2 the penile sample. No matter where it goes or which person
3 we're talking about, if you add lubricants or you add blood or
4 whatever, you've increased the amount of DNA from the rectum.
5 And so you have less chance of finding the penile sample on
6 any -- on any of those things, and you've increased the
7 chances of finding the rectal sample on any of those things.

8 Q Okay. And Mr. Chairez had asked you some
9 questions about, you know, how could the nonsperm DNA get on
10 AJ's right hand; do you remember?

11 A Yes.

12 Q And you said there's -- there's plenty of ways
13 that it could do that?

14 A Yes.

15 Q It could be transferred, I think you said, from
16 one area to another. It could also be consistent that the
17 victim was forced to hold the defendant's penis while being
18 forced to perform oral sex on him; that would be another way
19 that it would be possible?

20 A Yes.

21 Q The defendant's DNA was found on AJ's boxers,
22 and to be specific, that was on the inside of AJ's -- the
23 crotch of AJ's boxers; is that correct?

24 A I believe that's the spot that they cut out.
25 But once you cut out a piece of the boxers, whatever's on the

1 inside or the outside or -- or whatever, is going to end up in
2 that tube. So I believe that, generally speaking, when the
3 crime lab looks at a pair of underwear, they look at the
4 inside crotch area. That's where, you know...

5 Q I'm just asking you, is it clear from the report
6 that it states that the DNA profile obtained was from the
7 stain inside the crotch of the boxer shorts; is that what the
8 report states?

9 A Yeah. But they're not talking about the -- in
10 -- you cut a piece of fabric, you get the outside and the
11 inside.

12 Q Okay.

13 A But I think what they're talking about, at least
14 it was my interpretation at the time, they're just talking
15 about the inside of the crotch.

16 Q Did you speak to Ms. Marschner?

17 A I did not.

18 Q Okay. So when she references on boxer shorts,
19 "Stain, outside front left," that would probably be different
20 from when she references, "Stain, inside crotch"?

21 A Yes. But if you look at the pictures, we're
22 talking about the outer edge and the inner middle, as opposed
23 to outside of the underwear, inside of the underwear. At
24 least that was how I interpreted it at the time.

25 Q Was by pictures?

1 A I do have -- I do have some -- I did have some
2 pictures at the time. I don't have them with me.

3 Q But I'm asking if that's what your
4 interpretation came from, was from looking at the pictures?

5 A I can't say that I actually looked at the
6 pictures and said, well, where exactly was she talking about?
7 I mean, basically, when you cut a piece of cloth, you cut the
8 inside and the outside. So I wouldn't anticipate -- I mean, I
9 know on some women's underwear there's, like, an inner liner,
10 but generally on boxers there -- there isn't.

11 Q But, I -- you would agree with me that in her
12 report she delineates differences between outside and inside
13 when she did the testing --

14 A She does delineate --

15 Q -- that's all I'm asking.

16 A -- that specifically.

17 Q Thank you. And the -- that stain came back as
18 you said that it was consistent with the defendant, as well as
19 Ms. Marschner said it was consistent with the defendant. And
20 do you remember the frequency with which that identity was
21 made?

22 A Excuse me, can you repeat the question?

23 Q Do you remember the frequency with which she
24 noted?

25 A Which stain?

1 Q The boxer shorts, the inside of the victim's
2 boxer shorts?

3 A From AJ Dang?

4 Q Yes.

5 A The inside boxer shorts of AJ Dang, I believe
6 that was 700 billion to one.

7 Q Okay. So, identity is assumed pursuant to the
8 Las Vegas Metropolitan Police Department's standards?

9 A Yeah. Once you get to that number, yes.

10 Q Okay. And then in regards to the right hand, do
11 you remember the statistic with which that was --

12 A 95 billion.

13 Q Would you call that identity assumed?

14 A That does not rise to the level.

15 Q Okay. And how many people live on earth?

16 A Seven billion.

17 Q Okay. Was it important to you to know whether
18 or not AJ Dang was prepubescent at the time of you looking
19 through the materials?

20 A It was.

21 Q Okay. And why is that?

22 A Well, if a boy hasn't hit puberty, and then he
23 is not likely to be producing sperm. If he's to the point
24 where -- and he's young enough, he probably doesn't produce
25 semen, either. And so once you find semen and sperm on

1 somebody who doesn't produce it, it would make sense that it's
2 from the other person. It's sort of like finding semen or
3 sperm on a woman, you know it's not hers.

4 Q So, it was important to you to know whether or
5 not AJ Dang was prepubescent?

6 A It was important to me to know whether or not he
7 was capable of producing semen or sperm. And I -- to me, I'm
8 -- I'm not a medical doctor. I'm not really sure at what
9 point a young man can produce semen. I know that until he is
10 at least somewhere along in puberty, he can't produce sperm,
11 at least not viable sperm. But I'm not really sure at what
12 point he can produce what.

13 Q So --

14 A I did --

15 Q Sorry.

16 A I did --

17 Q Go ahead.

18 A I did ask at some point, you know, what's the
19 situation here with him? I mean, how old is he? You know,
20 what -- what is his -- his pubescent status? Because it is
21 important. If -- if he doesn't produce semen and he doesn't
22 produce sperm, then anyplace we find semen and sperm...

23 Q It's assumed to be the defendant?

24 A Well, it didn't come from him.

25 Q But it's -- I mean, it was important to you to

1 find out whether or not AJ was prepubescent, because if he is
2 prepubescent and he's not producing sperm or semen, then it
3 can be assumed that everywhere where we see that, it's the
4 defendant's?

5 A Well, doesn't necessarily that it came from --

6 Q It's yes or no.

7 A -- the defendant. No. That doesn't mean that.
8 What it means is that it didn't come from Mr. Dang. And it
9 could have come from the defendant or any other male. And
10 unless we can do the DNA profile and find out that it was
11 semen or sperm from this person, the results that the testing
12 -- that the lab got do not imply that the DNA or semen or
13 sperm was from anybody. If it's not from AJ Dang, then we
14 don't know who it's from.

15 Q So, in an e-mail dated to Mr. Chairez on
16 Tuesday, April 9th, at 6:17 a.m., you would agree with me that
17 you wrote, "I cannot overemphasize the importance of whether
18 or not AJ Dang is prepubescent. If he does not yet produce
19 semen or sperm, then all of the semen and sperm found is
20 assumed to originate from Mazen Alotaibi." Those are your
21 words?

22 A Those -- sounds like my words.

23 Q In regards to -- well, actually, let me ask you
24 this. When you get the materials from the Las Vegas
25 Metropolitan Police Department's DNA lab, they give you raw

1 data, or data, however you want to say it; is that correct?

2 A I think I had the FSA files.

3 Q You -- you receive a disc --

4 A Yes.

5 Q -- that shows the graphs that they use --

6 A Yes.

7 Q -- and all those types of techniques?

8 A Yes. I don't know if I got the actual raw data
9 from the computer. I didn't need those or I didn't use them
10 if I had them.

11 Q Okay.

12 A But otherwise I got most of the raw data, yes.

13 Q Okay. And that's how you knew that the victim's
14 DNA was found on several -- on those graphs. I think we -- we
15 showed the -- the jury the graphs when we were going over with
16 Ms. Marschner. That's where you had seen in several places
17 the victim's DNA on the defendant's penis?

18 A The electropherograms?

19 Q Yes.

20 A Yes. I compared those myself.

21 Q And you -- and you saw, you saw the markers, you
22 saw on several places where the victim's DNA could be found on
23 the defendant's penis?

24 A There were several -- yes. There are -- there
25 are indications on the penis that there's -- there are some

1 striking similarities.

2 Q Thank you.

3 MS. BLUTH: Nothing further.

4 THE COURT: Mr. Chairez, redirect?

5 MR. CHAIREZ: No, Your Honor.

6 THE COURT: All right. Is this gentleman free to go?

7 MR. CHAIREZ: He is free to go.

8 THE COURT: Thank you, Doctor. You're free to go,

9 sir.

10 All right. Mr. Chairez, any other witnesses today?

11 MR. CHAIREZ: No, Your Honor.

12 THE COURT: Can you come here for a sec?

13 (Bench conference transcribed as follows.)

14 THE COURT: Any further [indiscernible].

15 MR. CHAIREZ: [Indiscernible.]

16 THE COURT: That's right.

17 MR. CHAIREZ: Okay. And [indiscernible] sexual

18 assault.

19 THE COURT: Okay. [Indiscernible.]

20 MR. CHAIREZ: [Indiscernible.]

21 THE COURT: I haven't made a decision

22 [indiscernible].

23 MR. CHAIREZ: Okay.

24 MS. HOLTHUS: I want --

25 MR. CHAIREZ: Mazen doesn't want to give, and I do.

1 But he doesn't understand why [indiscernible]. So
2 [indiscernible] explain what happened.

3 MS. HOLTHUS: So when are you going to decide if he's
4 testifying? I thought we were closing everything tonight and
5 we were --

6 MR. CHAIREZ: I don't --

7 MS. HOLTHUS: -- coming back tomorrow and just
8 closing.

9 MR. CHAIREZ: -- I don't [indiscernible]. Yeah.
10 That's just -- I'd rather just do that. Then we can focus on
11 closing arguments tonight and --

12 THE COURT: Is he going testify?

13 MR. CHAIREZ: Well, I would say no.

14 MS. BLUTH: I'm uncomfortable with that
15 [indiscernible].

16 MR. CHAIREZ: [Indiscernible] rest and I tried to
17 rest --

18 MS. HOLTHUS: Have you talked to him about
19 testifying?

20 MR. CHAIREZ: Yeah, I have. And 90 percent of what
21 he wants to testify [indiscernible] issues blackout, I don't
22 [indiscernible].

23 MS. HOLTHUS: Selective memory, we're going to call
24 it.

25 MR. CHAIREZ: Well, I know. So, see, just like I'm

1 going to crucify AJ for all his inconsistencies, I don't want
2 you to be able to do that to him.

3 MS. HOLTHUS: I understand. I don't -- I don't care
4 what you do. I just want to make sure you've had enough time
5 to talk to him about it, consider it --

6 MR. CHAIREZ: [Indiscernible.]

7 MS. HOLTHUS: -- that's your decision. If that's the
8 case --

9 MR. CHAIREZ: Right.

10 MS. HOLTHUS: -- then I would prefer to close it
11 tonight so we know what we're doing tomorrow.

12 MR. CHAIREZ: Well, either we [indiscernible].

13 MS. BLUTH: You mean as it stands now?

14 MR. CHAIREZ: Now.

15 MS. BLUTH: No.

16 MR. CHAIREZ: Okay. Then I'll close it tomorrow.

17 THE COURT: So, will [indiscernible].

18 MR. CHAIREZ: Yeah. [Indiscernible.]

19 THE COURT: Okay.

20 MS. HOLTHUS: Do you want to speak to him?

21 MS. BLUTH: Yeah, do you want to -- do you want to
22 speak --

23 MR. CHAIREZ: No. [Indiscernible.]

24 MS. BLUTH: He's -- I'm sorry, what did you say?

25 MR. CHAIREZ: I mean, I'll -- I'm the lawyer.

1 MS. BLUTH: I --
2 MS. HOLTHUS: I know what you said, but you need to
3 speak to him, and you already know.
4 MR. CHAIREZ: Yeah.
5 MS. HOLTHUS: You want him to --
6 THE COURT: I'm going [indiscernible].
7 MS. HOLTHUS: -- [indiscernible] a while ago, right?
8 THE COURT: Thursday.
9 MR. CHAIREZ: Yeah. I understand.
10 MS. HOLTHUS: So, you -- you've been considering this
11 with him more?
12 MR. CHAIREZ: The last three or four days.
13 MS. HOLTHUS: Okay. And I just want -- I don't care.
14 I just want to know.
15 MR. CHAIREZ: Yeah. Yeah.
16 MS. HOLTHUS: That the record was...
17 THE COURT: You want [indiscernible] tomorrow, it
18 doesn't matter to me.
19 MR. CHAIREZ: I'm ready -- I'm ready. I'm ready to
20 argue. So, yeah, we'll rest.
21 THE COURT: Okay.
22 (End of bench conference.)
23 THE COURT: All right. Ladies and gentlemen of the
24 jury.
25 Mr. Chairez, sir, do you have any additional

1 witnesses at this time?

2 MR. CHAIREZ: Hold on, Your Honor. We're going to
3 rest, Your Honor.

4 THE COURT: All right. Ladies and gentlemen, we're
5 going to -- we're going to have to call it a night. But we'll
6 see you tomorrow at 1:00. Here's what's going to happen
7 tomorrow. When you come in tomorrow we're going to give you
8 the jury instructions. The jury instructions contain the law
9 that you're going to use to decide this case when you go back
10 to the jury room. After I give you the law in this case, the
11 State will have a chance to present its closing arguments.
12 The defense will have an opportunity to give you their closing
13 arguments. Then after that the State may have a rebuttal.
14 After that, we'll send you guys back into the jury room to
15 deliberate.

16 Ladies and gentlemen of the jury, until I see you
17 tomorrow, you're admonished not to converse amongst yourselves
18 or with anyone on any subject connected with the trial, or to
19 read, watch, or listen to any report of or commentary on the
20 trial by any medium of inform, including, without limitations,
21 television, newspaper, radio, Internet. Do not form or
22 express an opinion on this case until it's submitted to you.

23 Thank you. And I appreciate the people that act like
24 it's the first time they've heard this. All right. Have a
25 wonderful evening.

1 (Jury recessed at 4:52 p.m.)

2 MR. CHAIREZ: Is it agreed that I'm allowed to argue
3 consent and sexual assault -- consent as a defense to sexual
4 assault? I don't want them arguing that lewdness is a lesser
5 included of sexual assault.

6 THE COURT: But it's not.

7 MR. CHAIREZ: Well, but that's their position.

8 THE COURT: But you didn't say it's a lesser
9 included.

10 MS. HOLTHUS: What I'm going to argue is -- no, what
11 I'm going to say is even if you find there's consent or reason
12 to believe consent, that gives you a lewdness. Now, you still
13 have to meet the specific intent requirement, but it's not
14 like it's not guilty everything. On those two count for the
15 SA's, it's first the -- it's actually both. My -- I'm going
16 to argue both. That he -- he committed them both. One -- one
17 requiring consent, or one oblivious to consent and one
18 necessarily assumes not consent.

19 MR. CHAIREZ: I mean, we agree, Your Honor, consent
20 is not a defense to lewdness. That is our position. And so
21 what we intend to do is argue Mazen was intoxicated, the kiss
22 on the ear, the kiss on the neck, any of that, or the spitting
23 or saliva transfer, that's all based on the intoxication.

24 I mean, it's no secret that that's what our position
25 is. I just want to make sure that I'm not handcuffed, that

1 when I start arguing consent that AJ went up there, he can --
2 whatever sex may have happened, AJ consented to it. I don't
3 want them to say, Oh, he can't -- because the newspaper keeps
4 on getting it wrong. Consent is not a defense to sexual
5 assault. So, I'm getting these calls from all over the
6 country, Why are you going through the motions if consent is
7 not a defense to sexual assault? And I go, Because the
8 reporter doesn't sit through the courtroom and he doesn't know
9 the law. The judge, the DA, and I do.

10 THE COURT: I guess I'm still -- I'm sorry, I --
11 maybe I'm a little bit slow to follow. I just need to know --

12 MR. CHAIREZ: No, no, Your Honor. It's --

13 THE COURT: I understand what you guys are saying.

14 MR. CHAIREZ: Right.

15 THE COURT: I just need to know whether or not you're
16 going to ask for the statutory sexual seduction instruction so
17 I can do some more research. Or preferably the State provides
18 some really good research on the lewdness this afternoon --

19 MR. CHAIREZ: Well, to be honest with Your Honor --

20 THE COURT: -- towards the --

21 MS. HOLTHUS: Well, I mean --

22 MR. CHAIREZ: -- the state of the law in Nevada is
23 confusing. Okay. And I think the -- what was the case you
24 gave me?

25 MS. BLUTH: Cossack?

1 MR. CHAIREZ: Cossack -- Cossack?

2 MS. HOLTHUS: Cossack was more the alternate
3 theories, though.

4 MR. CHAIREZ: Right. But I think based upon the
5 evidence that we heard here is yes to the degree that the
6 State tries to prove sexual assault, the main issue will be
7 did penetration occur, and secondly, was it against the will
8 of AJ Dang? All right. But, you know, if I argue out of AJ
9 Dang's own mouth he said there was no fondling, he said there
10 was no foreplay, he said all of this, he basically just said
11 it was quick, violent, and etcetera, whatever he said. That
12 would be to me sexual assault. So they can't have both
13 theories if their own witness doesn't support it. And I think
14 that this is what these cases are arguing.

15 For instance, I cannot argue intoxication unless
16 there's some evidence -- I mean, intoxication as a defense to
17 lewdness unless we admit there was intoxication. So we're
18 forced to admit that in that kind of thing. So, it's -- don't
19 think you're slow, Your Honor. I go through this every day
20 and I'm trying to say am I missing something, and why isn't --
21 why -- where does lewdness come in relationship to sexual
22 assault, statutory sexual seduction, and I guess it's --

23 MS. HOLTHUS: It's a lesser -- on two of the counts,
24 as to the sexual assault with a minor, two of the lewdnesses
25 are lesser related counts. We have charged them to the extent

1 that they were defined for some reason, there was a consent
2 issue on the SA. We are then saying even if you find that AJ
3 consented or that defendant had a reasonable belief that AJ
4 consented, you still can look at lewdness. Lewdness, even if
5 he consented, would be -- would be the guilty verdict,
6 assuming you can find specific intent. Now, that's where your
7 intoxication argument --

8 MR. CHAIREZ: Right.

9 MS. HOLTHUS: -- comes in.

10 MR. CHAIREZ: Right.

11 MS. HOLTHUS: You would argue that, and then you say,
12 No, not guilty, lewdness, because he couldn't form a specific
13 intent.

14 THE COURT: Yeah. So basically, like, Count 5 and 6,
15 it's the same act, which is placing the penis into the mouth.

16 MS. HOLTHUS: Correct.

17 MR. CHAIREZ: Right.

18 THE COURT: It's going to be sexual assault, yes or
19 no, or lewdness, yes or no.

20 MS. HOLTHUS: Right.

21 THE COURT: Well, it'd be if no, then lewdness. But
22 again, my question is --

23 MS. HOLTHUS: I don't know how -- I don't know --
24 I --

25 MR. CHAIREZ: Well, see, is Ms. Holthus saying

1 statutory sexual seduction under no circumstances is a lesser
2 included --

3 MS. HOLTHUS: Yes.

4 MR. CHAIREZ: -- of sexual -- of sexual assault?

5 MS. HOLTHUS: Legally, yes. I mean, that's a total
6 legal argument, is it -- or is it not the same?

7 MR. CHAIREZ: Well, I think their own case, Cossack
8 says that it is.

9 MS. HOLTHUS: No. We chose to charge three --

10 MR. CHAIREZ: No, no. That you're allowed to --

11 MS. HOLTHUS: -- lesser-related offenses.

12 MR. CHAIREZ: You're allowed to charge in the
13 alternative --

14 THE COURT: Correct. They did.

15 MR. CHAIREZ: -- and I think that that's what Cossack
16 stands for.

17 MS. HOLTHUS: But if we came in and said we want it,
18 because it's a lesser-included, you'd be going no, and you'd
19 be right.

20 THE COURT: Okay. I guess I still need to --

21 MR. CHAIREZ: Why don't you -- I'm going to research
22 it, Your Honor. But right now, as long as I'm allowed to
23 argue consent, and as long as I'm allowed to argue
24 intoxication for lewdness and all the other charges, I think
25 we'll be okay. All right.

1 MS. BLUTH: So, you don't want it?

2 MR. CHAIREZ: Well.

3 MS. HOLTHUS: Do you want to meet at 10:00 and he
4 could say yea or nay?

5 MR. CHAIREZ: Let's --

6 THE COURT: I could do 10:30, because I have morning
7 calender. How about 11:00, so you don't have to wait at all?
8 Can you do that?

9 MS. HOLTHUS: Well, I mean, we're -- we're doing
10 Powerpoints, we're doing jury instructions, I'm fixing things
11 up so that we can get right to the jury tomorrow.

12 THE COURT: Okay. I have calender at 9:30. I can
13 either pitch in at 9:00, I don't know how much time I'll have
14 to read everything, or after.

15 THE MARSHAL: The interpreter's asking what time to
16 be back.

17 THE COURT: Hold on a second. I need to know. I
18 need to know what you want to do, please, the interpreter.

19 MR. CHAIREZ: Your Honor. Your Honor, as long as I
20 can argue consent and I'm not handcuffed, and as long as I can
21 argue intoxication, we don't need the statutory sexual
22 seduction.

23 THE COURT: Okay. And they've stipulated to you guys
24 work together on an instruction for consent and intoxication.

25 MS. HOLTHUS: Yes.

1 MR. CHAIREZ: Right.
2 THE COURT: So, we do have one in the instructions?
3 MS. HOLTHUS: That's correct.
4 MR. CHAIREZ: Right.
5 THE COURT: Okay.
6 MR. CHAIREZ: So we'll just show up at 1:00.
7 THE COURT: Show up a little bit before that.
8 MR. CHAIREZ: Okay.
9 THE COURT: Because you have get the final jury
10 instructions numbered.
11 MS. BLUTH: Want to meet us at 12:30 here?
12 MR. CHAIREZ: 12:30.
13 MS. BLUTH: Is that okay, Jason?
14 THE COURT: Yeah.
15 MR. CHAIREZ: Well, we can meet outside, Your Honor.
16 Or -- we want to walk in with agreement. Okay. We don't want
17 you to miss your lunch and I don't need Jason telling me he's
18 missing the World Series or something.
19 MS. HOLTHUS: Is this for jury -- do you want to come
20 over early, Don, in the morning --
21 MR. CHAIREZ: Yeah, I --
22 MS. HOLTHUS: -- like, at 10:00?
23 MR. CHAIREZ: Well, I have to drop off Jennifer at
24 the airport. So.
25 MS. HOLTHUS: No, we don't need to meet with her. We

1 can meet with the judge at, like, quarter to one. But we can
2 meet earlier [indiscernible] already, so that you
3 [indiscernible].

4 THE COURT: I'm not sure at this point what they're
5 saying. When do I -- when do you need to see me and when do
6 you need the defendant, please.

7 MS. HOLTHUS: Well, that's why I was --

8 MS. BLUTH: 12:30.

9 MR. CHAIREZ: Yeah. 12:30 or 1:00?

10 MS. BLUTH: Well, the jury's going to be here at
11 1:00.

12 THE COURT: 12:30 so you -- because you've got to
13 number the instructions and go through them.

14 MR. CHAIREZ: We'll meet beforehand.

15 MS. HOLTHUS: We'll meet at 12:30?

16 MS. BLUTH: Yeah. You and I will meet at 12:30,
17 we'll put them in order, and then we'll give them to Judge at
18 12:30.

19 MR. CHAIREZ: You have my cell number?

20 MS. BLUTH: Yeah.

21 MR. CHAIREZ: Okay.

22 MS. BLUTH: So, Judge, we'll see you at 12:30 and
23 I'll make sure we're all ready by 12:30 to meet with you.

24 THE COURT: Okay. The defendant, 12:30?

25 MS. BLUTH: Yes, please.

1 THE COURT: Okay. So you need the defendant and we
2 need an interpreter at 12:30.

3 MR. CHAIREZ: Okay.

4 (Court recessed for the evening at 5:01 p.m.)
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA,)	CASE NO. C287173-1
)	DEPT NO. XXIII
Plaintiff,)	
vs.)	
)	
MAZEN ALOTAIBI,)	TRANSCRIPT OF
)	PROCEEDINGS
Defendant.)	
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BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 8

TUESDAY, OCTOBER 22, 2013

APPEARANCES:

FOR THE STATE:	MARY KAY HOLTHUS, ESQ. Chief Deputy District Attorney JACQUELINE M. BLUTH, ESQ. Deputy District Attorney
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FOR THE DEFENDANT:	DON P. CHAIREZ, ESQ.
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Also Present:	Mohammad A. Taha, Interpreter
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I N D E X

CLOSING ARGUMENTS:

By Ms. Holthus	7
By Mr. Chairez	20
By Ms. Bluth	40

1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 22, 2013, 1:10 P.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Welcome everyone. The defendant's here
5 with counsel, the State's present. State of Nevada vs. Mazen
6 Alotaibi, Case C287173. I have an original set of jury
7 instruction -- jury instructions. Has everything been
8 settled?

9 MS. BLUTH: Yes, Your Honor.

10 THE COURT: All right. And before, while numbering
11 the jury instructions, did both counsel for the State, counsel
12 for the defendant, make sure that these instructions contain
13 the entirety of what was settled?

14 MS. BLUTH: Yes, Your Honor.

15 THE COURT: Mr. Chairez?

16 MR. CHAIREZ: Yes, Your Honor.

17 THE COURT: Okay. And then I also have an attached
18 verdict form. Mr. Chairez, did you look at the verdict form?

19 MR. CHAIREZ: I have. And basically, my client has
20 just informed me with respect to two of the counts to
21 lewdness, he believes I should make a motion to dismiss each
22 of those counts, because he -- based upon what AJ testified,
23 he felt there wasn't enough evidence of that. And at any
24 rate, it was something that he and I had discussed during the
25 weekend and discussed yesterday.

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1 And so, at any rate, we believe, based upon AJ's
2 testimony, it's not a lesser included to the sexual assault on
3 either of the counts, and it's something separate. I'm not
4 sure if we would have to change the verdict form or what we
5 would have to do, or -- but at any rate, just to -- I would be
6 making a -- the motion to dismiss those two particular counts.
7 I guess it's Count -- Count 4 and Count 6.

8 THE COURT: All right. Ms. Holthus or Ms. Bluth, you
9 want to respond?

10 MS. HOLTHUS: I believe we provided to the Court as
11 well as the defense the Cossack case. This clearly gives us
12 the ability to charge alternate theories, and that's
13 essentially what we've done. That'd be second -- the counts
14 of lewdness correspond to the sexual assault counts.
15 Obviously, in committing the sexual assault counts, they would
16 necessarily commit the lewdness counts, as well, since consent
17 is not an issue. But to the extent that they found that there
18 was consent for the sexual assault, it would be an alternative
19 count on the lewdness.

20 If the jury were to come back as to both counts,
21 ultimately it would be a sentencing decision by this Court
22 setting aside the lewdness and sentencing on the sexual
23 assault.

24 THE COURT: All right. I'm going to deny the
25 request. I do agree with the State that the -- the case law

1 does give them the ability to plead in the alternative. And
2 obviously, if he's sentenced on -- I mean, not sentenced, if
3 he is convicted on everything, it can be addressed at the time
4 of sentencing or prior to.

5 Is there anything else we need to address?

6 MS. BLUTH: No, Your Honor.

7 MR. CHAIREZ: Well, the only thing is I want to make
8 sure that when we're doing the closing argument, we will argue
9 consent is a defense to sexual assault. Okay. We will argue
10 intoxication is a defense to the lewdness with a minor. All
11 right. And I don't need them jumping up and complaining and
12 saying I'm doing --

13 THE COURT: Actually, I think Ms. Holthus actually
14 intellectually talked through this the other day --

15 MR. CHAIREZ: Right.

16 THE COURT: -- saying, you know, if they believe you
17 on --

18 MR. CHAIREZ: Right.

19 THE COURT: -- the consent, then it gets out of the
20 lewdness.

21 MR. CHAIREZ: Right.

22 THE COURT: If we believe you on the intoxication as
23 a defense, then you could potentially end up with a not
24 guilty.

25 MR. CHAIREZ: Correct.

1 THE COURT: So I think that she doesn't have -- well,
2 I don't want to put words in her mouth, but I don't think --

3 MS. HOLTHUS: But anyway.

4 THE COURT: -- she has any objection.

5 MS. HOLTHUS: That's exactly correct.

6 THE COURT: Okay. So, is there anything else we need
7 to address before I bring the jury back in?

8 MR. CHAIREZ: No, Your Honor.

9 THE COURT: All right. Please bring the jury in.

10 (Jury reconvened at 1:14 p.m.)

11 THE COURT: Okay. Welcome back, ladies and
12 gentlemen. Make yourself comfortable.

13 As we spoke about yesterday, what's going to happen
14 right now, I'm going to give you the law that applies in this
15 case. You'll take that law back with you to the jury room and
16 you'll use it to deliberate upon your verdict. Thereafter,
17 the State is going to present a closing argument. We'll
18 probably take a brief little break so you guys can stretch and
19 be comfortable before Mr. Chairez will have an opportunity to
20 do his closing argument. And then the State has a choice to
21 do a rebuttal.

22 Now, ladies and gentlemen of the jury, over the next
23 many minutes, I'm going to be reading you these jury
24 instructions. I would love to be able to just recite them to
25 you without having to look down, but I cannot. The reason is,

1 is everything that's said in these instructions is very, very
2 important.

3 (Jury instructions read.)

4 THE COURT: Counsel.

5 MS. HOLTHUS: Thank you.

6 THE COURT: Whenever you're ready.

7 STATE'S CLOSING ARGUMENT

8 MS. HOLTHUS: May it please the Court, counsel, and
9 ladies and gentlemen of the jury, thank you for your patience.
10 It's been a couple of weeks now out of your busy schedules and
11 we certainly appreciate your coming down.

12 As we told you in the beginning, we had two things to
13 prove to you. Was a crime committed and did the defendant
14 commit those crimes.

15 The who: Mazen Alotaibi. It's not a whodunit. We
16 know the victim said the defendant did this to him. The video
17 identified the defendant. DNA identified the defendant.
18 Rashed, the defendant's buddy, identified the defendant as
19 being the one in the bathroom. And the defendant told the
20 police essentially he was the one with the kid. Mazen
21 Alotaibi did whatever happened.

22 That leaves us with the what. We charged burglary,
23 first degree kidnapping, two counts of sexual assault with a
24 minor, four counts of lewdness, and one count of coercion.

25 Burglary, you have the jury instruction, every person

1 who by day or night enters any house, room, apartment,
2 tenement, shop, or other building with intent to commit a
3 felony on any person is guilty of burglary. You're further
4 instructed that sexual assault, lewdness, are all felonies.
5 And if he entered with intent to commit either of those, he
6 would be guilty of the burglary.

7 The evidence is clear that between 8:00 and 9:00 a.m.
8 on December 31st, the defendant entered Room 631 with the
9 child. And they entered the bathroom therein. And that was
10 with intent to have sex with that 13-year-old boy. AJ himself
11 says that the defendant was making sexual advances before
12 going to the room. That they had a plan, defendant entering
13 the room was for sex and marijuana with this 13-year-old boy,
14 whether going to have sex, either for money or marijuana. But
15 it was clear that the intent, when they crossed the threshold
16 of the room, when they crossed the threshold of the bathroom,
17 was sex with a 13-year-old boy, regardless of for money or
18 anything else.

19 The video corroborates everything. It shows the
20 defendant and AJ getting off the elevator of the sixth floor,
21 just enough time later to accomplish what we know was done
22 there. It shows AJ essentially running out of the sixth-floor
23 elevator alone thereafter.

24 Rashed Alshehri says it was a Chinese boy in the room
25 one minute, they told him to leave when he said he was 13.

1 Everybody in that room knew that kid was 13 years old. And
2 yet the boy came back with the defendant. Rashed tells you
3 they entered the bathroom together, that the door was locked,
4 that the defendant wouldn't answer the door in spite of the
5 knocking two or three times and shouting, Open the door and
6 let him go. Minutes later, the boy leaves. The defendant
7 comes out saying, Oh, the boy wanted money for weed.

8 The defendant himself says the boy was 11, 12, 13,
9 yes, the boy did it for money. He admits that the boy was on
10 the elevator, he admits that the boy was in the bathroom. He
11 admits that his penis was in the boy's mouth. And he admits
12 that his penis was in the boy's butt. The defendant is
13 clearly guilty of Count 1, burglary.

14 First-degree kidnapping, that's a person who leads,
15 entices or carries away or contains any minor with the intent
16 to keep, imprison or confine him from his parents, guardians,
17 or other person having lawful custody of the minor, or with
18 intent to hold the minor to unlawful service or perpetrate
19 upon the person of the minor any unlawful act is guilty of
20 kidnapping in the first degree.

21 In this case, the facts clearly establish that, as in
22 terms of leading, taking, enticing, or carrying away, the
23 video clearly shows it. You see the defendant leading --
24 leading him on the elevator, off the elevator, up to the point
25 where we know they disappeared. We know any minor -- we know

1 that AJ is 13. There is no dispute as to that.

2 With intent to keep him from his guardians or
3 perpetrate on him an unlawful act, he took AJ to his room. He
4 took him to his locked bathroom. Neither Mom nor Grandma gave
5 permission for AJ to be in the bathroom with the defendant, or
6 in his presence at all, for that matter. The unlawful act
7 being sexual assault or lewdness.

8 Again, the defendant knew AJ was 13 when he entered
9 the bathroom with him. The intent was obvious from the video.
10 AJ testified about the discussion for sex for weed or money.

11 The touching occurred outside. It was away from the
12 public, away from the camera when it happened in the alley,
13 taking him to a secret place, clearly his intent from that
14 point was obvious. And then, again, he admits his penis was
15 in his mouth, in his butt. The only thing the defendant
16 denies was the force. But you will notice that consent is not
17 a defense to kidnapping, because AJ's a minor. You have a
18 jury instruction that specifically says it's only a defense to
19 kidnapping if you're talking about an adult. So, on these
20 facts, consent of AJ would never be a -- a defense.

21 Movement of AJ is required not to be incidental.
22 There's another jury instruction that talks about -- what that
23 basically means is if -- if they were in the room and the
24 defendant took AJ and threw him down on the bed to rape him,
25 well, that movement of taking him from here and throwing him

1 to the bed is incidental. It's -- it's for the purpose of the
2 sexual assault. It doesn't in any way increase the harm to
3 the child, you know, falling on the bed.

4 But what we're talking about here is moving him from
5 the public place. Again, not required force, consent is not a
6 defense. But when he led that child through the public casino
7 where everything's being watched and people are monitoring and
8 maybe going to help him or -- or save him, when he moves him
9 to outside in an alley where there's no cameras, where there's
10 no public, where there's no security, when he moves him back
11 inside and he takes him up the elevator and down the hallway
12 where we know there are no cameras in the hallway, and into
13 his locked room where no public, no friends, no grandma,
14 nobody has access to that kid, and then one step further,
15 even, takes him into the locked bathroom, where even Rashed
16 and Mohammed knocking on the door are unable to come to that
17 boy's aid, that's substantially risk -- increases the risk of
18 harm to that child sufficient for the count of kidnapping.
19 And the defendant is guilty of Count 2, First Degree
20 Kidnapping.

21 Sexual Assault with a Minor Under 14. Person who
22 subjects a minor under 14 to sexual penetration against the
23 minor's will, or under conditions in which the perpetrator
24 knows or should know that the minor is mentally or physically
25 incapable of resisting or understanding the nature of his

1 conduct, is guilty of sexual assault.

2 Sexual penetration includes fellatio and intercourse,
3 anal intercourse. Anal intercourse is required to break the
4 plane of the anus, somehow inside, it's clear from the
5 findings here. Fellatio, it just required oral-genital
6 contact. Doesn't have to be all the way in the mouth. Once
7 the -- once the penis touches the mouth, you've got completed
8 count of fellatio.

9 In this case, every step of the way AJ has told you
10 that while he went along for a minute, he absolutely didn't
11 want what ultimately happened to him to happen to him. He
12 specifically told you, I did not consent. That is also seen
13 in -- under conditions in which the perpetrator knows or
14 should know that the minor is mentally or physically incapable
15 of resisting or understanding the nature of his conduct.

16 The defendant knew that this kid was 13 years old.
17 The defendant knew that the acts would be very violent and
18 very painful. To the extent that AJ didn't back up strong
19 enough or run away when he was being kissed or touched or
20 fondled, perhaps there's a belief that that would be
21 consensual on some level, even though it's a 13-year-old boy.
22 But it's patently unreasonable to think that this boy was
23 going to agree to the very violent way in which he forced his
24 penis down his throat, and the way that he forced it into his
25 rectum.

1 At 13 years old, AJ was not capable of resisting or
2 understanding the nature of defendant's conduct. It's clear
3 from the evidence, when AJ was walking around saying, I'll get
4 some weed for doing a little something-something, that's not
5 what he was talking about, and that's not what he expected,
6 and that is not what he understood to be the nature of the
7 conduct coming up.

8 AJ was in over his head. AJ was in a strange men's
9 room. He was locked in a bathroom. AJ told the defendant no,
10 he pushed the defendant away, the defendant blocked the door.
11 And again, several men were in the room outside the door.

12 Count 3, Sexual Assault Under 14, that's the anal.
13 AJ again says he felt he couldn't leave. The defendant was
14 blocking the door. AJ wanted to leave, he told him no. Then
15 he put him to the ground, put stuff on his penis, and put it
16 in AJ's butt. Pushed the penis in the butt, it was very
17 painful. AJ pushed him away and left.

18 Jeri Dermanelian told you she described the anal
19 penetration that AJ described, anal penetration with lotion,
20 that it was painful. She told you she observed glistening wet
21 regions in the mid-line, which would have been consistent with
22 the lotion or lubricant, that it was painful, very, very
23 painful even with light palpitation. That she saw multiple
24 lacerations, swelling, edema, erythema, ecchymosis,
25 contusions, and bleeding. You saw it yourself. All of those

1 injuries were consistent with blunt-force trauma. All of
2 those injuries would be painful.

3 The defendant himself admits that he put his penis in
4 AJ's butt "for a second." There is no time limit required to
5 be guilty. Defendant says, "Yeah, he backed his ass."
6 Defendant is guilty of Count 3, Sexual Assault, Victim Under
7 14. That's the anal count.

8 I'm going to do the other sexual assault, Count 5,
9 Sexual Assault with a Minor Under 14, Fellatio. Again, AJ's 5
10 -- 5'3", 108 pounds. He's a kid. He says, I didn't know what
11 to do, I knew something bad was going to happen, but this just
12 kept going. I was trying to back off, I was trying to step
13 away, trying to say no. Said he didn't want it, told him no.
14 That's when the defendant doubled the money. Defendant was
15 blocking the door. AJ felt he couldn't leave. He pulled AJ's
16 head toward his penis, put his penis into his mouth, his -- it
17 hurt his throat.

18 Jeri Dermanelian said he was small, immature for his
19 age, prepubescent. She -- he described the fellatio as being
20 painful, gagging and choking. Unreasonable to believe that he
21 would consent to that at 13.

22 He had a contusion to the soft pallet in the back of
23 his throat that was painful to even the lightest of palpation.
24 He was fragile, he was timid, and he was in pain. The
25 defendant himself says he knows he didn't ejaculate in AJ's

1 mouth, but he does admit he put his penis in AJ's mouth for
2 "just two seconds." Defendant is guilty of Count 5, Sexual
3 Assault, Fellatio.

4 The lewdness counts, Lewdness with a Minor Under 14,
5 Counts 4, 6, 7, and 8. A person who commits a lewd act or
6 lascivious act other than sexual assault upon or with a part
7 of a body of a child under 14, this does require the specific
8 intent of arousing, appealing to, or gratifying the lust or
9 passions of that -- that person or of the child. There is no
10 requirement for actual arousal.

11 Count 4. Count 4 is the defendant using his penis to
12 touch the anal area of the child. This is the count that goes
13 hand-in-hand with the sexual assault Count 3. In committing
14 the sexual assault, necessarily you would commit the lewdness
15 upon touching the -- the outside of the rectus. It's
16 complete. You don't need the penetration. It doesn't matter
17 whether there was consent or reason to believe the consent or
18 any other consent. Necessarily, if you commit sexual assault
19 anally, you're going to commit Count 4, Lewdness. Ultimately,
20 the -- the sentencing would be -- would -- would sort out the
21 difference. But he would be guilty of both counts. Consent
22 is not a defense to lewdness. And again, it's the same
23 evidence as a sexual assault, anal.

24 Where multiple sex acts occur as part of a single
25 sexual encounter, defendant may be found guilty for each

1 separate or different act of sexual assault and/or lewdness,
2 so that there's the -- the lewdness is complete upon touching,
3 with or without consent. And once it's -- the penis is forced
4 in, now we've got the sexual assault, assuming it's against
5 the consent of the child. Those are different acts, sexual
6 assault is different from lewdness. So you have two
7 convictions.

8 On the other hand, where you have, for example,
9 remember, AJ described he put -- pushed his penis in, pulled
10 it out a little bit, and then pushed it in again? Two same
11 acts. He's only charged with one count of sexual assault for
12 anal, because they're two same act, they're not -- there's no
13 interruption, it's -- it's just one -- one continuous of the
14 same act.

15 Count 6, again, this is the -- this is the count that
16 goes hand-in-hand with the Sexual Assault, Fellatio.
17 Necessarily, if you find him guilty of Sexual Assault,
18 Fellatio, against the consent, you have also found him guilty
19 of the lewdness, assuming you find it with intent to arouse or
20 gratify either the child or the -- the defendant. The
21 evidence is the same as Count 5, Sexual Assault, and consent
22 is not a defense.

23 Count 7, Lewdness. AJ says the defendant begins
24 talking to him about sexual things. Defendant begins touching
25 him. Defendant moves in on AJ in the elevator and kissed him

1 on the ear. Defendant took AJ to an alley off-camera where
2 he's touching and kissing. There's DNA of the defendant on
3 AJ's left ear. Julie Marschner, the scientist who did the
4 test, told you it was the defendant, and the defendant's
5 expert agrees. Just as the video shows, the DNA is on AJ's
6 ear.

7 Count 8, Lewdness Under 14. That's when AJ says he
8 was in the bathroom and it got weird. Weirder, I guess.
9 Defendant was touching and kissing on AJ. Defendant took off
10 his shirt. He continues to kiss and lick on the left chest
11 and face. And again, you have the DNA of the defendant on
12 AJ's chest, consistent with saliva. Julie Marschner told you
13 that, and the defendant's expert agrees. Remember, he said,
14 Good job, good sample. That -- that's a match.

15 As to the lewdnesses, it requires specific intent
16 again of arousing. The facts are clear that there's no other
17 reason any of these actions would be committed other than for
18 arousal. The defendant had been in a strip club earlier. Per
19 Rashed, defendant was excited. The defendant discusses sex
20 with AJ. Kissing, licking, touching, fondling, rubbing, this
21 is all with intent to arouse.

22 The injuries to the child's throat and his anus were
23 consistent with the defendant actually being aroused. Not
24 required, but the injuries are such that they are consistent
25 with an erect penis more so than with a flaccid penis.

1 Defendant is having sex, the purpose which obviously is to
2 gratify his own sexual desires. The sexual assault counts
3 really only causing pain to the child. Defendant is guilty of
4 Counts 4, 6, 7, and 8, Lewdness with a Child under the Age of
5 14.

6 Coercion. It's unlawful for a person with the intent
7 to compel another to do or abstain from doing an act which the
8 other person has the right to do or abstain from doing. Where
9 physical force or the immediate threat of physical force is
10 used, the person has committed the offense of coercion, a
11 felony.

12 Defendant leaves with AJ, keeps him in his sight. He
13 begins touching AJ. Defendant moves in on AJ in the elevator
14 and kissed him. AJ didn't know what to do. AJ knew something
15 bad was going to happen at the end, but he just kept going.
16 Defendant took AJ to an alley off-camera. AJ thinking
17 awkward, trying to back off, trying to step away, trying to
18 say no. As AJ stepped away, the defendant pulled him closer.

19 In the bathroom, AJ wanted to leave, he tried to back
20 away. AJ said he didn't want it anymore. AJ took off -- the
21 defendant took off his shirt and pulled down his pants,
22 kissing and licking AJ on the left chest and face. AJ told
23 him no. Defendant tried to double up the money. Defendant is
24 blocking the door. Defendant keeps AJ with him for the
25 defendant's own sexual gratification. Defendant is guilty of

1 Count 9, Felony Coercion.

2 Laws are created to protect children from themselves,
3 from others, from bad decisions. Assuming a risk doesn't mean
4 that you deserve the result. Did AJ make a bad choice that
5 day? Absolutely. Did he deserve the result? He didn't,
6 anymore than someone who smokes, they might assume the risk of
7 cancer. Do they deserve it? If you get into the car and your
8 kid forgets the seatbelt, does he deserve to be killed by the
9 drunk driver on the road? No. And that's why we have laws,
10 to protect us from ourselves and particularly children, who
11 need extra protection.

12 In this case, there are eyewitness testimony. The
13 defendant himself, AJ, and Rashed. There is video including
14 an actual count charge of lewdness where you can actually see
15 the defendant kiss that child in the ear. There is physical
16 evidence, both medical examination and documented injuries
17 that you can see with your own eyes for yourself. And there
18 is indisputable DNA. All of which prove the defendant is
19 guilty as charged.

20 And again, thank you.

21 THE COURT: All right. Actually, are you guys good
22 to go through the defense's closing or do you need a break? I
23 want to make sure that you're -- you're good? All right.

24 Mr. Chairez, if you're ready.

25 MR. CHAIREZ: Can I move the podium?

1 THE MARSHAL: Sure.

2 DEFENDANT'S CLOSING ARGUMENT

3 MR. CHAIREZ: There's really two issues in this case.
4 One, did AJ consent or was it reasonable for Mazen Alotaibi to
5 believe that he was consenting to these sexual acts? And two,
6 whether or not Mazen Alotaibi was intoxicated enough to where
7 he could not form the specific intent to commit burglary, that
8 he could not form the specific intent to commit kidnapping,
9 that he could not form the specific intent to commit coercion,
10 and that he could not form the specific intent to commit
11 lewdness with a minor.

12 And in order to find Mazen Alotaibi guilty, you have
13 to believe that AJ Dang is an honest person.

14 One of the jury instructions that you will get, and
15 I'm only going to focus on -- on four or five, is Jury
16 Instruction No. 30, the credibility of a witness. And so go
17 back, I mean, the judge already read it to you, but focus on
18 -- on Jury Instruction No. 30, because it'll say if you
19 believe that a witness has lied about one fact or a material
20 fact, you may disregard all of the testimony that that
21 particular witness has given. So, I will explain later on why
22 we believe that AJ Dang was not being totally candid with you.

23 Another instruction, and probably the most important
24 instruction, is Jury Instruction No. 21, What is Intoxication.
25 And intoxication in and of itself is not a defense to any of

1 these crimes. But intoxication is a factor to consider, Can I
2 form the intent to do something wrong? Now, I remember during
3 jury selection talking to some of the jurors, and one in
4 particular who said the reason that people in our church are
5 encouraged not to drink is because it causes you to lose your
6 ability to make sound decisions. We end up doing things that
7 we regret.

8 And so the issue here will be how much do you have to
9 drink before you lose your ability to think rationally? Is it
10 two drinks? Is it four drinks? Is it six drinks? Is it 10
11 drinks? And one of the things you didn't hear in Ms. Holthus'
12 presentation is anything about Mazen being intoxicated. And,
13 as a matter of fact, as you listen to all of the testimony
14 that took place last week, the State went to great pains to
15 make sure that all of their witnesses says Mazen Alotaibi was
16 not intoxicated.

17 It started with the security guards. No, he wasn't
18 intoxicated and he understood everything that was going on.
19 It started with the second security guard.

20 Yes, he understood everything that I was saying, no,
21 he wasn't intoxicated. I've seen people that are drunk before
22 and there's no way that he was drunk.

23 Okay. It went with the other detectives. And the
24 worst detective of all was Detective Pool, who plainly told
25 you, Nope, he wasn't drunk. And, of course, he has to say

1 that, because if Mazen Alotaibi was drunk, he had no right to
2 take his interrogation; he should have waited till he was
3 sober enough to understand what was happening.

4 Because drunks will say, you know, things that are
5 unreliable. You know, Detective Pool will say, He understood
6 English. And yet simple words like medical exam, prostitute,
7 trick roll, lubricant, these are words that Mazen Alotaibi did
8 not understand.

9 And so intoxication, they go to great extremes to say
10 Mazen isn't intoxicated. And why? Because they know if he's
11 intoxicated he cannot form the specific intent to commit seven
12 of the nine crimes of which he is charged.

13 Now, they sit there and say it's undisputed video
14 evidence that Mazen kissed AJ on the ear. And for that they
15 want you to find him guilty of lewdness with a minor. And if
16 you recall, when I asked AJ, How did you feel?

17 Well, I felt funny. Okay. Well, when the -- when
18 the elevator hit the ground floor, why didn't you take off if
19 you were feeling funny and you thought the guy was coming on
20 to you?

21 Oh, I wanted marijuana. You know. And that kind of
22 thing. So, how can you say that that was a sexual kiss if AJ
23 himself will sit there and say, I did not run away when I had
24 a chance to? And more importantly, you know, when you look at
25 that videotape -- and the State goes to great troubles to say,

1 Oh, look at Mazen, he's walking nice and stiff and rigid, like
2 a soldier. No; you know, Mazen is walking, not falling over
3 drunk, but he's walking where he's unsteady on his feet.

4 And so even his own friend Rashed will say, He was so
5 drunk when we left the night club we wanted to give him food
6 because we could tell that he was sick.

7 And more importantly, there's another jury
8 instructions about common sense. Don't leave your common
9 sense at the front of the courthouse door. When you look at
10 that videotape, I submit that all of you can tell that Mazen
11 Alotaibi is intoxicated, is wasted, doesn't understand
12 everything that's going on, and continues to talk and talk and
13 talk for an hour and a half, because it'll show that he's had
14 the 7 to 10 shots of Hennessy that he had talked about. And
15 remember, as Jennifer testified yesterday, these weren't just
16 simple shots. These weren't shots diluted with ice. These
17 were not shots diluted with water. These were straight double
18 shots, and -- and Mazen was drunk.

19 And so this is one of the big disputes in this
20 particular case. Because intoxication does go to state of
21 mind. And state of mind and specific intent are very, very,
22 very important issues with multiple counts in this particular
23 case.

24 And lastly, I want you to focus on Jury Instructions
25 13, A Good Faith Belief of Consent. Sexual assault means

1 against the will. Well, consent is one way to say it's not
2 against the will. And -- or it even goes further, if there is
3 a reasonable good faith belief of consent. And so assuming
4 everything that AJ says is true, you know, what is somebody
5 supposed to think if they go down with you and they smoke
6 marijuana because they want your marijuana? What are you
7 supposed to think? And you saw the video. AJ's walking four
8 or five feet behind Mazen. It's not Mazen dragging him. It's
9 -- it's not Mazen dragging him. It's AJ following willingly.
10 And it's AJ willingly going to the room. And you heard it out
11 of AJ's own voice, I was trying to trick him. I wanted to
12 steal his marijuana, I wanted to steal his money. So these
13 things are important.

14 And lastly, I want you to focus on the flight
15 instruction. Flight, generally speaking, is a consciousness
16 of guilt. When people do something wrong, they want to get
17 away. And what does Mazen Alotaibi do after AJ leaves the
18 room? He goes and sits in the corner and he starts drinking.

19 And so that alone is a factor that will let you know
20 my state of mind wasn't to have committed lewdness. My state
21 of mind wasn't to have committed kidnapping. My state of mind
22 was not to have committed coercion or burglary. Not realizing
23 that this was an important factor, what was going to happen.
24 I mean, he didn't realize the seriousness and the danger of
25 which he was about to face. Because he had 20 or 30 minutes

1 to get away if he really knew that he had done something
2 wrong. So, put all of those factors together and use your
3 common sense.

4 And so, what do we know and why should you not
5 believe AJ? Because AJ -- and the most important thing that
6 happened in this trial was last Tuesday when I had the mother
7 on the stand and I asked her, Do you realize that AJ went to
8 my client's room to buy marijuana?

9 And she looked at me like she was stunned. And she
10 goes, What?

11 I go, Yes, do you realize that AJ went to my client's
12 room to voluntarily buy marijuana?

13 And she said no. And what did that tell me?
14 Everything that AJ has been telling the State and everything
15 that AJ has been telling his mother has been a lie. Okay.
16 And I hate to call a young boy a liar, but this boy lied.

17 And he lied, because he admitted that he lied. He
18 lied the very first day that all of this happened. When he
19 exaggerated his story and made it sound as bad as possible.
20 He -- and he admitted on the stand, Yes, I said I was dragged
21 to the room. Yes, I said he was pulling me by the clothes.
22 Yes, I said, you know, this happened and that happened. Yes,
23 I tried to make the defendant look as bad as possible. These
24 are all admissions out of AJ's mouth.

25 But he never told his mother, even when we were here

1 in court last Tuesday. And so what is the truth? AJ didn't
2 make -- change his story a few weeks ago because he -- because
3 he was embarrassed originally about having sex. He lied to
4 the DA, he lied to the police, he lied to everybody, because
5 he did not want his mother to know what kind of person he was
6 who would go to somebody's room, voluntarily, a stranger's
7 room, in order to buy marijuana.

8 And so if he is still being dishonest with his
9 mother, you go back to Jury Instruction No. 30 and say if
10 somebody has lied about one material fact, you can disregard
11 all the other testimony. But -- and that's very, very
12 important to understand what happened.

13 Now, there's another mother of whom I'm concerned
14 about. And that's Mazen Alotaibi's mother. She doesn't know
15 that his -- that her son came to Las Vegas --

16 MS. BLUTH: Judge, I'm going to -- I'm sorry, Mr.
17 Chairez, to interrupt you. But I'm going to object to
18 anything in regards to Mr. Alotaibi's mother. I mean,
19 inciting compassion.

20 MR. CHAIREZ: No, I'm not, Your Honor. I'm just
21 going to talk about all of the bad things that Mazen did when
22 he came to Las Vegas.

23 MS. BLUTH: I'll just let it go for a little bit --

24 MR. CHAIREZ: Okay.

25 MS. BLUTH: -- and then if I have an issue, I'll

1 object again.

2 THE COURT: That's fine.

3 MR. CHAIREZ: Mazen's mother didn't know that Mazen
4 came to the United States and he would go drinking with
5 Jennifer --

6 MS. BLUTH: Objection. It's not --

7 MR. CHAIREZ: -- and the other Saudi guys.

8 MS. BLUTH: It's not in evidence what --

9 MR. CHAIREZ: Okay.

10 MS. BLUTH: -- the mother of Mazen Alotaibi knows,
11 she's not here.

12 THE COURT: Objection's sustained.

13 MR. CHAIREZ: Okay. There's no question that Mazen
14 Alotaibi, when he came to the United States, like all the
15 other Saudi guys, found themselves in a place where there were
16 no longer the restraints of their culture. And some of them,
17 in order to be American, will do the things that other
18 Americans do. On weekends, they would go out drinking. On
19 weekends, they would go out dancing. On weekends, they would
20 want to have fun.

21 And when it came around to New Year's, they wanted to
22 come and see the most exciting place to have the best weekend
23 possible, which is Las Vegas, Nevada.

24 So Mazen rents a car, he drives to Los Angeles, he
25 takes his friend Mohammed, and they give Rashed a ride,

1 because Rashed doesn't have a way to get out here, even though
2 it's his cousin that's renting a room here at Circus Circus.
3 And they come out to Los Angeles and spend a few days there
4 before they find themselves in Las Vegas, Nevada, at 2:00 in
5 the morning on December the 31st.

6 And so they meet up with Jennifer, they meet up with
7 some of the other Saudi guys. They go to the Palms Casino and
8 have drinks. And Jennifer remembers three double shots of
9 Hennessy. And from there they want to go to another club
10 where they can drink and dance. But the taxi driver takes
11 them to a strip club. And at the strip club, you know, Mazen
12 is there at the bar drinking and -- and whatever until, like,
13 6:00 or 7:00 in the morning, when they decide it's time to go
14 back to the room.

15 And only by chance and bad circumstances do Mazen and
16 AJ Dang happen to cross each other on the sixth floor when AJ
17 is leaving his friend's room, Mary's room, and Mazen and his
18 friends are coming back. Okay. And what did AJ say about the
19 story? AJ said, My friend Mary, we were going to have
20 breakfast and we couldn't have breakfast.

21 And, of course, when AJ first spoke to the cops, what
22 did he tell the police officers? Well, I didn't report it to
23 security, because I had to have breakfast with Mary first. Of
24 course, he now acknowledges that wasn't true. And you have to
25 determine whether the reason he wasn't honest with the police

1 was because he was embarrassed, or embarrassed because of the
2 sexual activities that took place, or he was embarrassed
3 because he didn't want his mother to know, I was up in a place
4 where I shouldn't have been trying to get marijuana off of
5 adult men.

6 Now, legally speaking, sexual assault is against the
7 will. Sexual assault is a completed act. So, and this is
8 tricky, and this is where you're going to put on your thinking
9 caps to understand the difference between lewdness and sexual
10 assault. Sexual assault, the defense is consent. Lewdness,
11 the defense is intoxication.

12 And so the State is walking a tightrope in charging
13 both of these counts. Because if you believe that Mazen
14 Alotaibi's penis went inside the boy's mouth, that is a
15 completed act, and it cannot be lewdness. If you believe
16 Mazen Alotaibi's penis went inside of the young boy's rectum,
17 that is a completed act and it cannot be lewdness, unless you
18 believe that there was foreplay that was taking place
19 beforehand.

20 But you remember when I had AJ on the stand and asked
21 him these questions, Did he fondle you with his penis around
22 your buttocks area? Did he rub and touch and do this and
23 that, etcetera, etcetera? AJ said no. It was quick, it was
24 forceful, and it was against my will. Then when it came to
25 the mouth, the same thing. AJ doesn't say there was any

1 rubbing or fondling.

2 So, to that degree, out of AJ's own mouth, even
3 though I don't believe everything that he says, that is one
4 part that you should disregard. Because AJ himself says it
5 didn't happen. Now, AJ will say he was kissed on the ear, and
6 AJ will say he was kissed on the neck or on the chest. So now
7 you have to go to not consent, but intoxication. When Mazen
8 leans over and is doing this, is he doing that with the
9 specific intent to commit lewdness? Is he trying to turn
10 himself on sexually? Because AJ says no, this wasn't done for
11 my sexual pleasure.

12 So, what is Mazen thinking, you know, when he's being
13 -- when he's there touching AJ's body? And we don't deny that
14 AJ's -- that AJ's body was touched with saliva or saliva from
15 Mazen Alotaibi. The DNA expert from the State, Julie
16 Marschner, says that it was found on the left ear, it's found
17 on the left neck, it's found on the chest, it's found on the
18 right hand, and it's found on the genital area of AJ Dang.

19 But she says all of this is saliva or skin DNA.
20 Nothing is DNA with semen in it. So, in that sense, their own
21 expert will say all of these spots where AJ was touched was
22 touched with saliva.

23 The other thing that Julie Marschner and the DNA
24 expert agree on is when Ms. Marschner ran the test on the
25 spots of semen from AJ, none of that came -- none of that came

1 from Mazen Alotaibi. And when she ran the DNA test looking
2 for sperm in Mazen Alotaibi's boxers or shorts or this and
3 that, it all came back to Mazen.

4 Now, I don't know when the last time was he washed
5 his boxers. But the bottom line is, you know, those semen
6 stains could have been left there from that morning, or it
7 could have been left there from the day before, or even the
8 day before. So, those spots inside of Mazen's underwear, you
9 know, came back to Mazen. But the spots on AJ's underwear
10 don't come back to Mazen.

11 One other thing to consider is -- use your common
12 sense -- burglary. Do you think -- when you think of a
13 burglary, normally when we think of somebody, you know,
14 breaking in at nighttime, coming in through a -- a store at
15 night or coming in through a house at night. But the way we
16 do it in Nevada is we make almost anytime you enter a
17 building, as long as you have the intent to commit a crime, we
18 make that burglary. And it's a specific intent crime. So,
19 intoxication is -- can be a defense.

20 So, was there any evidence presented that, while AJ
21 is outside smoking Mazen's marijuana, that Mazen has the
22 intent, I'm going -- I'm going to go inside the building and
23 commit a crime? No. There was no evidence of that. AJ
24 didn't testify to that, and nobody else testified to that.
25 And even Detective Pool, when he's talking to Mazen, Mazen

1 doesn't say, I entered Circus Circus with the intent to commit
2 burglary. So, on that count, you have to find him not guilty.

3 I mean, the other thing, kidnapping. We all
4 understand what kidnapping is. But the State, and I don't
5 want to say they're -- the State is going through these old
6 hyper-technical definitions to say kidnapping, as long as AJ's
7 there with the threat of force, then you can find him guilty
8 of kidnapping and you can find him guilty of coercion. But
9 when I asked AJ, Well, did he pull a knife? Did he force you?
10 Did he do this, did he do that? All of those things would
11 imply there's no force involved. So, in that sense, these are
12 almost nothing more than, metaphorically speaking, throwing
13 the book at Mazen Alotaibi to try to get all these extra
14 charges. So this is really about was there lewdness and was
15 there sexual assault.

16 Was there consent or reasonable mistake of consent or
17 was -- and if there was kissing on the neck and kissing on the
18 ear, was it done while Mazen was intoxicated? So, the
19 strongest evidence that you're going to look at here, because
20 I will contend AJ is unreliable. Okay. There's so much that
21 he has not been honest about, and more importantly, he hasn't
22 been honest with his mother to this day. So why should you
23 believe him? Okay.

24 So is the confession. And when you look at Mazen
25 talking to this detective, does he look drunk to you? And

1 we've all, ourselves, have seen people that have been under
2 the influence of alcohol. And I would submit, if this was
3 Mazen Alotaibi driving on the freeway, you would have heard
4 all the police officers talk about how he had pink eyes, you
5 know, his speech was slurred, this and that, etcetera,
6 etcetera. And don't -- I mean, Detective Pool said, Hey, I
7 thought he had a Saudi accent, that's why he had slurred
8 speech.

9 Well, the more logical conclusion is he had slurred
10 speech because he had these seven double shots of Hennessy
11 rather than his Saudi accent. And so that's where you need to
12 use your common sense when you go back to the jury room to
13 say, based upon the law that has been given to us, you know,
14 what can we find Mazen Alotaibi guilty of? All right.

15 And Ms. Holthus is correct. There's no question --
16 in a criminal case, there's usually two issues; who did it and
17 what happened. I mean, in the OJ Simpson case we know two
18 people were murdered. The only issue was who did it, OJ
19 Simpson or somebody else? And so that's what they call an
20 issue of identity.

21 Well, in this case, there's no issue of identity. We
22 believe whatever happened, happened between Mazen Alotaibi and
23 AJ Dang. So, identity -- and that was -- so, to many degrees,
24 the DNA is not that important, because it ties Mazen Alotaibi
25 to the crime, which we are not denying. The question is, was

1 there any criminal activity that occurred?

2 Now, if I'm in an elevator and I'm a little bit drunk
3 and I touch somebody, you know, am I guilty of lewdness? No.
4 Okay. But that's -- that's where you are going to have to
5 spend most of your time deliberating and deciding as to say at
6 what point do we as a community decide people who are
7 intoxicated should be held liable to the same degree that
8 people are -- who are totally untoxicated [sic]? And so
9 that's really a community standard that you, as the 12 people
10 on this jury, will have to decide.

11 Now, when we started this case, we talked about
12 fairness, we talked about our life experiences, we talked
13 about being mothers, we talked about being parents, we talked
14 about false accusations that had happened to people. Because
15 we wanted to get all of those things onto the table. And so
16 you were 12 different people who came, honored your duty, and
17 unfortunately you've been here almost three weeks, you know,
18 to hear this case, because this is an important case.

19 And you see reporters in the -- in the room, and one
20 of the reporters back there is with the Associated Press and
21 writing, and this is a story, and this is a case that's going
22 out there internationally. And so we expect your verdict to
23 be unanimous. And that's what the American system, based upon
24 the Anglo-Saxon system, started with 12 jurors hundreds of
25 years ago. And I assume, because we don't know for sure, I

1 think maybe the 12 -- the system of 12 goes back to the Twelve
2 Tribes of Israel or something magical in the old Anglo-Saxon
3 system to the -- where they thought there was something
4 reliable about the number 12.

5 But unanimous means, and it comes from the Latin word
6 unum, meaning one. So, you are 12 people, and now you're
7 going to have the opportunity to become of one mind. And it's
8 the same Latin root that we use for the word university, and
9 it's also in our American slogan e pluribus unum: Out of the
10 many, one. So you've all come here with your various life
11 experiences and you are going to be of one mind on each count.

12 So, in order to find Mazen Alotaibi guilty, all 12 of
13 you have to agree on Count 1. You know, all 12 of you have to
14 agree on Count 2. So if there's various mixtures, you know,
15 it cannot be a unanimous verdict for the State and it cannot
16 be a unanimous verdict for the -- for us. Okay.

17 And so, again, this case boils down to has AJ been
18 totally honest with you? That's the first issue that you need
19 to decide. Secondly, how intoxicated was Mazen Alotaibi? And
20 thirdly, you know, and with respect to the science, did the
21 science corroborate -- and there is a jury instruction, it
22 does not need to be corroborated, but for the sake of
23 argument, you know, what did the science show? It showed that
24 Mazen Alotaibi had no DNA on his body from AJ, but AJ had the
25 saliva DNA on the various parts of his body or the DNA from

1 Mazen on the various parts of his body.

2 So, you have the notes, you remember, I don't
3 remember everything, I don't think the State remembers
4 everything. So, you guys collectively go back and put your
5 heads together to decide what was testified to and what
6 happened.

7 About 50 years ago a movie was made by a British
8 producer by the name of David Lean. And David Lean had made
9 the movie The Bridge Over River Kwai, and David Lean would
10 also go on to make the movie Dr. Zhivago.

11 But the greatest movie that he made was a 1962, and
12 it was called Lawrence of Arabia. And in this story, it's the
13 story of a British officer who happens to go get assigned to
14 work with a bunch of bedouins, or a bunch of Saudis who are
15 all from these different tribes. And -- and the challenge for
16 Lawrence, who became Lawrence of Arabia, was, Can I get all
17 these tribes to work together, because we want to do an
18 important battle and fight the Ottoman Turks and attack the
19 seaport of Aqaba, which is on the Red Sea.

20 And so nobody thought that Lieutenant Lawrence would
21 be able to do this. You know, these were people that had not
22 gone to military school. They were essentially goat herders
23 and rode their camels and that kind of thing. And they're
24 going to go hundreds of miles across the desert of Saudi
25 Arabia to attack this particular seaport.

1 And so, the story is about the journey, all the
2 picturesque mountains that they saw, and it inspired many
3 Hollywood producers thereafter. And ultimately, they're
4 successful. They come in, there's problems along the way with
5 people fighting with each other. But when it comes the night
6 before the attack, they all get together and they attack Aqaba
7 the next day and they're successful.

8 And from there, Lawrence needs to go to Cairo, Egypt,
9 to meet with the -- the general to explain how he did this and
10 what can happen and can the Arabs be used to fight. Well,
11 this, of course, is a true story. And as a result of -- of
12 the work of the British Empire, right before they became not
13 so important, you know, Saudi Arabia became a powerful ally of
14 Great Britain and thereafter --

15 MS. BLUTH: Judge, at this point, I'm going to have
16 to object. I was trying to let it go. But I -- I'm just --
17 it's not argument, it's not facts in evidence. It's more just
18 a narrative on a movie.

19 THE COURT: Can you bring it back to the case,
20 please.

21 MR. CHAIREZ: Okay. So, at any rate, the story talks
22 about going into Egypt and one of the young boys falling into
23 a pit of quicksand. All right. And so Lawrence of Arabia and
24 another guy go and try to help this young man that's fallen
25 into the quicksand and pull him out.

1 And Mazen Alotaibi by analogy is that young man who's
2 fallen into the quicksand. He came to Las Vegas and
3 essentially, yes, he was with his friends, yes, his friends
4 tried to help him. But it was alcohol and the amount of
5 alcohol that they had that kept him from falling into that pit
6 and quicksand. You know, it was the bad circumstances of
7 running into AJ Dang on that sixth floor and AJ Dang smelling
8 the marijuana on him and his friends that caused him to fall
9 into that pit of quicksand.

10 And so you, ladies and gentlemen of the jury, you
11 know, we are throwing out this rope to you for you to do
12 justice, for you to evaluate the evidence and for you to apply
13 the facts to the law to decide was it reasonable for Mazen to
14 think that this young boy was coming to his room voluntarily?
15 Was it reasonable for Mazen, with all of the alcohol that he
16 had, to be able to form this issue of committing burglary, the
17 intent to commit kidnapping, the intent to commit coercion.
18 And most importantly, the intent to commit lewdness. I
19 mean... So, at any rate, use your common sense. That's why
20 we give that jury instruction.

21 So when you go back, take your time, deliberate,
22 think about what you saw, focus on the confession, and more
23 importantly, make your own evaluation. Why would four or five
24 security officers and police officers go to such trouble to
25 say, Oh, he wasn't drunk, he wasn't drunk, he understood

1 everything. It's simple. Because intoxication is important.
2 And so they want you to rely upon their badges and their
3 uniforms to say I understand when somebody's drunk and the
4 common people of the jury don't understand that.

5 So, use your common sense. And after you've had a
6 time to soberly -- no pun intended -- to consider all of the
7 evidence in this case, you will find that Mazen Alotaibi was
8 intoxicated. You will find that Mazen Alotaibi was
9 intoxicated to such a degree that he didn't have the good
10 judgment not to help his friends get rid of the boy when that
11 boy kept on coming back to their room.

12 Now, you will find it was reasonable for Mazen to
13 believe that that boy came to that room and he was looking for
14 trouble. And based on that, your verdict, because of that, if
15 there's a reasonable consent and if there's a belief that the
16 intoxication is to a degree, your verdict has to be not guilty
17 on both counts of sexual assault, on the four counts of
18 lewdness, two of those because AJ himself says they didn't
19 happen, and two of them because of the kissing on the ear and
20 on the neck or chest, you know, were done under the influence
21 of intoxication, and not guilty of burglary, kidnapping, and
22 coercion.

23 THE COURT: All right. Before the State does a
24 rebuttal, let's give the jury a brief break to use the
25 restroom, stretch, etcetera. Please come back about 2:45.

1 Until I see you at 2:45, you're admonished not to
2 converse amongst yourselves or with anyone on any subject
3 connected with the trial, or to read, watch, or listen to any
4 report of or commentary on the trial by any medium of inform,
5 including, without limitations, television, newspaper, radio,
6 Internet. I can't look at Ms. Dire. Please do not form or
7 express an opinion on this case until it's submitted to you.

8 You laugh at me every time.

9 (Court recessed at 2:33 p.m., until 2:49 p.m.)

10 (Outside the presence of the jury.)

11 THE COURT: Are you ready, Mr. Chairez?

12 MR. CHAIREZ: We're ready, Your Honor.

13 THE COURT: All right. Ms. Bluth, Ms. Holthus, are
14 you ready?

15 MS. BLUTH: Yes, Judge.

16 THE COURT: All right. Let's bring the jury in.

17 (Jury reconvenes at 2:50 p.m.)

18 THE COURT: All right. You ready?

19 MS. BLUTH: Yes, Your Honor.

20 STATE'S REBUTTAL ARGUMENT

21 MS. BLUTH: If you think back to almost two weeks ago
22 when we started this process, you heard opening statements
23 from both sides. And in Mr. Chairez's opening statement, he
24 kind of focused on this concept of 60 seconds and
25 happenstance. And he talked about it's kind of eerie to watch

1 AJ and the defendant before they ultimately meet up and meet
2 up. They're in that same area, they're going up the
3 elevators, down the elevators.

4 And he asked you what if, in those 60 seconds, they
5 had not have met? And what if, in those 60 seconds, AJ Dang
6 had not approached the defendant and asked him for marijuana?
7 And he told you. If AJ hadn't have done that, then the 14 of
8 you wouldn't be sitting where you're sitting, and Mazen
9 Alotaibi wouldn't be sitting where he's sitting.

10 The State sees it a little bit differently. What if,
11 when AJ Dang went to the defendant and said, Hey, man, do you
12 have some weed, Mazen Alotaibi was a responsible adult and
13 turned to that 13-year-old child and said, Go home. Go to
14 your parents. Go to your grandparents. You're 13. You
15 shouldn't be going out and looking for weed.

16 And what if the defendant didn't say, Yeah, man, come
17 with me? And what if he didn't take AJ down to the alley and
18 smoked him out and felt him up and felt his groin? And then,
19 what if he didn't take AJ Dang up to Room 631 and force him to
20 perform oral sex on him and sodomize him for a period of 33
21 minutes?

22 This isn't about AJ Dang. This is about Mazen
23 Alotaibi. And those are the decisions he made because of what
24 he wanted. He wanted sex. He wasn't taking no for an answer.
25 And that's why he sits there and you sit there. And he can't

1 hide behind this cloak of the victim wanted it, he consented
2 to it, or he was drunk. Because the facts and the evidence
3 presented simply show you that he wasn't.

4 And the intoxication instruction is an important one.
5 And it says that, "No act committed by a person while in a
6 state of voluntary intoxication shall be deemed less criminal
7 by reason of his or her condition. But whenever the actual
8 existence of any particular purpose, motive, or intent is a
9 necessary element to constitute a particular species or degree
10 of crime, the fact of the person's intoxication may be taken
11 into consideration in determining the purposes, motive, or
12 intent."

13 So that's a lot of legal jargon. But what that
14 really means is if a crime is what's called a specific intent
15 crime, it means you had to -- have to have that specific
16 intent to commit that crime. And so then you have to focus on
17 an individual's intent. If they're so drunk that you find
18 they can't form that intent, then they can be found not
19 guilty.

20 And in this case, you have several charges. Sexual
21 assault is what's called a general intent crime. So it
22 doesn't matter if you're drunk. You don't -- there's no
23 intent there. So that's not a defense in any way, shape, or
24 form to sexual assault. The rest of the crimes, burglary,
25 kidnapping, lewdness, and coercion, those are specific intent

1 crimes. And so those are the crimes where you can look at the
2 defendant, his actions, the evidence, and consider his
3 intoxication level.

4 Now, this doesn't mean, Hey, I'm drunk, so I'm not
5 guilty. It's -- it doesn't matter if you're drunk. You have
6 to consider -- you can consider it when forming your opinion.
7 So, if you find that he was so drunk that he can't form the
8 intent to commit those crimes, that is when you find him not
9 guilty. It's not just merely being drunk.

10 But the State's position is that the defendant was
11 not intoxicated. And let's look at the evidence that we have
12 to support that. Number 1, Security Officer Dennis Duran,
13 he's the first security officer you heard from and he's been
14 at -- working security at the Circus Circus for over 30 years.
15 And he was one of the individuals that was assisting Manager
16 Daniel Goodwin outside of the room. And you heard from both
17 of them.

18 And both of them I asked, Any problems walking?
19 Nope, no problems walking. Any problems talking? Nope. Was
20 he able to follow commands? Yes, he was able to follow
21 commands. Was he having any problems communicating? Nope.
22 No problems communicating. Was he having any problems sitting
23 up? Nope. Was he having any problems sitting down? No.
24 Those are what those security officers told you. Then you
25 heard from Security Officer Haros.

1 And he told you about he knocked on the door. And
2 when he knocks on the door, he can hear the people inside.
3 And he can hear them rummaging around and speaking, but
4 they're not coming to the door to answer. And he's identified
5 in security. He has his Bike uniform on. Yellow shirt that
6 says security. And he's knocking and he told you what he did.
7 He showed you how loud he pounding.

8 He was pounding, Security, open up. Security, open
9 up. And he could hear that rummaging, but no one's coming.
10 So he has to use his own personal key to enter into that door.
11 And when he does, he makes contact with the defendant, Mazen
12 Alotaibi. And he tells -- and he told you that the defendant
13 was repeatedly fidgeting in his pockets.

14 And he says to the defendant, Get your hands out of
15 your pockets.

16 He still does it. Get your hands out of your
17 pockets. So Officer Haros approaches the defendant. He pats
18 him down. He told you he did not smell any alcohol on the
19 defendant when he was patting him down. He did not appear to
20 be drunk. He was able to follow the directions. Besides the
21 first one of, you know, put your hands up, besides that, he
22 was able to follow directions.

23 He -- Officer Haros was the individual who walked the
24 defendant to the elevator. He was able to stand upright, he
25 had no problems walking, he had no problems talking to Officer

1 Haros.

2 Officer Haros was also the individual who took the
3 defendant in the elevator with some of the other males. And
4 he told you that he told all of the individuals to get into
5 the elevator and put their faces against the wall. He told
6 the defendant that, and immediately the defendant began
7 speaking quickly, as if he was issuing commands. And Security
8 Officer Haros, he doesn't speak Arabic. And he did his own
9 little rendition of if he did speak Arabic, what it would
10 sound like.

11 But he said that the tone and how quickly he was
12 speaking, he felt like the defendant was issuing commands to
13 the others, and the others kind of just kept their heads down
14 and nodded. And he told the defendant, Knock it off, there's
15 no talking. Defendant shook his head like he understood. And
16 immediately, right afterwards, again starts issuing -- starts
17 issuing the commands, starts speaking loudly and quickly to
18 the others. He tells him again, Hey, knock it off. So, he
19 obviously has the intent to -- that he needs to get what he
20 needs to say out to those guys, and he continues to do it.

21 And Security Officer Haros also talked to you that he
22 felt that the defendant was the alpha male of the group. He
23 felt like he was telling the others what to do.

24 And I asked Security Haros, Well, do you think that
25 the defendant was drunk? And he said no.

1 Did it seem like he had been up all night and out all
2 night?

3 Yes. Did it seem like he had been drinking? That he
4 had drank a little? Yes. But at the end of the day, he was
5 completely fine.

6 He was not drunk, he was able to walk, able to talk,
7 able to communicate.

8 You also heard that when the defendant got to the
9 holding area of the security room, he was able to do several
10 things. He was able to give them his name, he was able to
11 provide them his date of birth, where he's from, he was able
12 to sit upright, and he was able to communicate not only with
13 the security officers, but he was also able to communicate
14 with Detective Williams when Detective Williams got to the
15 holding area. There was no problems.

16 The defendant was also taken down to headquarters.
17 And you heard from Kristen Tucker, who's the crime scene
18 analyst. And she had a lot of contact with the defendant,
19 because she had to go in his mouth and get the buccal swab
20 that we heard her talk about. She also took photos of the
21 defendant, both with clothes on and without clothes on. She
22 had absolutely no problems communicating with him. And she
23 had no problems with him following her commands while she was
24 taking the photos.

25 When you're thinking about whether or not the

1 defendant was intoxicated, the State would ask that you also
2 look at the defendant's statement and look at all of the
3 particulars with which he can remember. He can remember how
4 many drinks he had. When he talks about the strip club, not
5 only can he tell you how much money he paid to get into the
6 strip club, he can tell you how long he was there for. He
7 paid \$30, and he was there for an hour and 20 minutes. And he
8 even remembers losing his key and the fact that it was
9 actually that he left the key in the car. These are all
10 things that he remembers.

11 He also remembers meeting the Asian boy outside of
12 the elevators. And he remembers the amount of money which he
13 negotiated with AJ, which AJ told you was \$150. And the
14 defendant tells you \$150. So, he remembers all of this. And
15 he also remembers that the boy was adamant that he wanted the
16 weed first. Before they went any further, the victim wanted
17 the weed.

18 He also remembers details of the assault, it happened
19 in the bathroom. He states, No, I just touched him, I didn't
20 put my dick in. And then he says yeah, he did put it in, in
21 his mouth, and the boy wanted it, it's crazy. And then he
22 stated that he sucked his penis first and he trusted him. And
23 after he trusted him, that's when they moved into the anal.
24 And he states that AJ was standing up when it happened, it
25 went in for a second, it slipped in. And then he said, Well,

1 maybe he wanted it, he was just chilling, he backed his ass
2 up.

3 These are all things that the defendant, this person
4 who was so drunk, remembers all of these little details, from
5 the amount he pays at a strip club, for how long he was there.
6 He can tell you how much he negotiated with AJ. He can tell
7 you what happened when he went in the room.

8 People get drunk all the time. No matter how drunk
9 you are, if you didn't sodomize a little boy, would you say
10 it? People are drunk all the time. They don't do things like
11 this. They don't say things like this. He said these things
12 because he remembers them, because he did them.

13 Instead of focusing on the defendant's words, actions
14 speak louder than words in some situations. I'd like you to
15 consider some of the things he was sober enough to do during
16 this time period. He was sober enough to wait until they were
17 inside the elevator to kiss AJ. And you'll have the video.
18 And what I think the video says and what Mr. Chairez thinks
19 the video says, it doesn't matter. The video is its own best
20 evidence. You'll have that in evidence to go back and look
21 at. And we invite you to do so. Because how you interpret
22 the video is most important.

23 But right before you see the defendant lean in and
24 kiss AJ in that elevator, right before he does that, you see
25 him look up. What's he looking for? Is he looking for a

1 camera? Because it's clear as day, he goes in, looks up over
2 his shoulder, and then goes in for that kiss. He's sober
3 enough to wait until he does all that stuff, until he gets
4 into an elevator where nobody's going to see.

5 He's also sober enough to take AJ outside to smoke
6 the marijuana. He knows his friends aren't going to tolerate
7 it in the room. They've already kicked the 13-year-old out.
8 So, he's smart enough to walk all the way downstairs, all the
9 way through the casino to find an exit, and to go in the alley
10 where he and AJ can be alone.

11 Once they get back in, he's sober enough to rush AJ
12 into the bathroom so that his friends can't stop it. He's
13 also sober enough to bargain with the money. Because, like AJ
14 tells you, AJ told him -- AJ's plan was to go in, get the
15 weed, which is why he wanted the weed first -- he was adamant
16 he wanted the weed first -- and then get the heck out of
17 there.

18 And when AJ -- when the defendant comes in and AJ
19 sees he's over his head, he's clear, like, I don't want any
20 more of this, man. I'm out of here. And the defendant
21 bargains with him. I mean, he's of clear enough mind to up
22 the money, to bargain with him, to double it up. AJ said he
23 doubled the money.

24 He's sober enough to remember lubrication. Not only
25 did he lubricate his own penis -- he found something within

1 the bathroom to lubricate his own penis -- he also lubricated
2 AJ's butt. So, he's of enough clarity that he's thinking how
3 to make this process easier.

4 And he's sober enough to get an erection. And Ms.
5 Dermanelian, the SANE nurse, talked to you about the effects
6 that alcohol and things like marijuana can have on the ability
7 of a man to get an erection. And he was able to get an
8 erection, he was sober enough to do that.

9 You also heard from Rasheed or Rashed Alshehri. And
10 the defendant drove good. He drove from where they were at
11 the strip club, or where they had parked their car, all the
12 way back to the Circus Circus. And he believed that drive was
13 somewhere to amount of 30 minutes. And he didn't have any
14 issues with that.

15 He also talked to you about how the door was locked,
16 the defendant was sober enough that he knew to lock the door.
17 And he wouldn't let them in, even though they were loudly
18 banging. And then, after the boy left and his friends were,
19 like, what was all that about? The defendant walked out and
20 just calmly said to them, Oh, he wanted some weed and money.
21 He didn't come out -- Rashed didn't say he came out stumbling
22 and like he didn't know what happened. He came out and said,
23 Oh, it was nothing, the boy just wanted some weed and money.

24 Mr. Chairez talked to you about Jennifer and what she
25 remembered. And when you're thinking about what Jennifer

1 remembered, first of all, she thinks that the defendant got
2 there at 6:00 or 8:00 p.m. the night before. We know that's
3 not true, because the defendant, in his statement, says that
4 they got to Circus Circus in the early morning hours. And
5 Rashed tells you that they got to Circus Circus in the early
6 morning hours.

7 And Mary -- Ms. Holthus said, Well, would it surprise
8 you if they actually got to town early -- earlier that
9 morning? And she's like, No, like I told you, man, I was
10 drunk. Like, I was drunk.

11 So, in one way she wants to not be able to answer the
12 questions by hiding behind, Oh, I was drunk. But in other
13 areas she wants to tell you, you know, how drunk the defendant
14 was. She can't tell you how many drinks she had, or how many
15 places she drank, because she was drinking all day, and as she
16 was working herself down the Strip she was continuously
17 drinking in multiple locations. But she can tell you how many
18 drinks she had. I mean, this is a girl who doesn't even know
19 how she got home that night. She just remembers someone
20 pouring her in her bed and then waking up at 11:00 in the
21 morning.

22 She's his friend. It's understandable. But when you
23 look at it, her testimony does not add up, when she can't
24 remember how much she drank, but she can tell you how much the
25 defendant drank.

1 Mr. Chairez talked a little bit about the defendant
2 might not be able to understand some of the concepts or some
3 of the words that were used during his interview. But you
4 heard from Laura MacKenzie, and she -- she was the director at
5 the Department of Defense Language Institute. And she stated
6 that when he came over, he came over with some limited
7 language -- English language skills. But he took a year-long
8 program. And during that year-long program, only English was
9 allowed to be spoken in that classroom. And he was in that
10 classroom five to six hours every day for one year.

11 They additionally had two hours of homework each
12 night. And she said that the defendant was a very good
13 student and that his scores showed his aptitude, show that he
14 was developing the language skills that he needed. And he
15 actually graduated. And after graduating this year-long
16 class, he then took nine additional weeks of specialized
17 training.

18 And she talked about the things that he would be able
19 to do. He could function in an English-only academic or
20 highly technical environment. He could read authentic
21 military and semi-technical reading materials. He could
22 accurately transcribe from dictation. And with this type of
23 English training, he could go if he wanted to, to go into an
24 undergraduate pilot training, and he could also go to
25 professional military educations -- education courses, such as

1 those at a university.

2 The defendant understood English. I mean, even
3 Rashed, who English is not his first language, and he has been
4 going to the -- to school here for about a year, you saw how
5 much that he understood, and he didn't need any help or any --
6 there was a few things, like blackout, couple of things that
7 he had questions over. But he was able to carry on a
8 conversation just fine.

9 And look at the questions that were asked in the
10 interview. They're not complex questions. They're as simple
11 as:

12 "You didn't put your dick in him?"

13 Answer, "No. Just -- I just touched him."

14 "Well, did you put your penis in his mouth?"

15 "Yeah, he put it in his mouth. He wanted it. It's
16 crazy."

17 "Well, how long was your penis in his mouth?"

18 "Two seconds."

19 "Well, how long did you put your penis in his butt?"

20 "Just for a second." He has answers for those
21 questions. And his answers are appropriate. When it's how
22 long, he demonstrates he understands by telling them how long
23 it happened. There was nothing wrong -- when the defendant
24 was telling the detective that he did these things, he
25 understood and he was answering.

1 Another thing that can be considered is the
2 voluntariness of what he said. And the voluntariness is a
3 question of fact to be determined from the totality of the
4 circumstances on the will of the accused. An involuntary
5 statement is one made under circumstances in which the accused
6 clearly had no opportunity to exercise a free and
7 unconstrained will. A voluntary statement must be the product
8 of rational intellect and a free will.

9 If you look at the tone of the interview, the
10 detective was not threatening at all, he was never yelling, he
11 never raised his voice at the defendant, he even tried to
12 minimize the defendant's involvement by trying to put more
13 blame on AJ, like, That kid was trying to take your money,
14 huh? I know he was trying to steal from you.

15 He spoke -- he's -- the defendant told -- or, excuse
16 me, the detective told you he wanted to speak to the defendant
17 man to man, and he recognized that the defendant was
18 uncomfortable with the female detective being in the room.
19 And so he asked the female detective to leave so defendant
20 could be more comfortable. So the State would submit to you
21 this was a very voluntary type of environment and he
22 voluntarily gave that confession that he gave.

23 DNA. You heard from Ms. Marschner, the forensic
24 scientist, and she talked to you about touch DNA and -- and
25 the other types of DNA that come from bodily fluids and how

1 the bodily fluid DNA is much stronger. Blood, semen, saliva;
2 that leaves a much stronger trace of DNA than simple touch
3 DNA, otherwise referred to as skin DNA.

4 And in the defendant's interview, the detective, as a
5 tactic, asked him, Well, in regards to DNA, if they find that
6 on that boy, that means you did it, right? So, if they find
7 your DNA on that boy, that means you did it, right?

8 And the defendant says, Yeah. Yeah, right. But I
9 don't. Meaning, but I didn't.

10 And they found it. And they found it in multiple
11 places. And I'm not going to go through all of these, because
12 Ms. Holthus did. But they found it on AJ's testicle swabs,
13 they found it on AJ's penis swabs, they found it on the stain
14 on the inside crotch of AJ's boxers. They found it on AJ's
15 left ear, they found it on AJ's left chest, they found it on
16 AJ's right hand.

17 And yesterday Dr. Miller came in and testified, and
18 if you remember, this is the individual that's paid by the
19 defense, and his current bill is up to \$12,000. And Mr.
20 Miller said that the -- the Metro -- the Las Vegas
21 Metropolitan Police Department, they did a fine job. He
22 doesn't disagree with any of the findings that Ms. Marschner
23 listed in her report.

24 And I asked him, Well, is it important to you to know
25 whether or not AJ was prepubescent? And his response was,

1 Well, yeah, it's -- it's pretty important.

2 And my question was, Well, because if AJ is
3 prepubescent, and he can't produce semen or sperm, then it can
4 be assumed that any of the semen or sperm found would be the
5 defendant's, right?

6 And he kind of waffled, and he said, Well, no, no.
7 You can't assume it would be the defendant's.

8 And I said, Well, really? Because I have an e-mail
9 here from you dated last week at 6:17 in the morning, and in
10 underline and bold, it states, "I cannot overemphasize the
11 importance of whether or not AJ Dang is prepubescent. Because
12 if he does not yet produce semen or sperm, then all of the
13 semen and sperm found is assumed to originate from Mazen
14 Alotaibi."

15 And you heard from Ms. Dermanelian, and she told you
16 that she believes through her assessment that AJ was
17 prepubescent. She said he was small, he was young, he had not
18 filled out, he didn't have any chest muscles, no arm muscles,
19 his Adam's apple was not yet protruding. His voice was still
20 that of a child. And she said that he had very little or no
21 pubic hair.

22 So, if you follow the defense expert's line of
23 reasoning, if AJ Dang is prepubescent and he doesn't produce
24 semen and sperm, then everywhere they found semen -- and
25 you'll have the DNA report -- per the DNA -- the defense's DNA

1 expert, that belongs to the defendant.

2 Another thing that Dr. Miller couldn't quite wiggle
3 out of was the question Mr. Chairez actually asked him on
4 direct examination:

5 Well, AJ's DNA was not found anywhere on the
6 defendant's penis? AJ Dang's DNA was not found on the
7 defendant's penis?

8 And again, he kind of waffled. Well, and he said --
9 stopped for a second, he thought about it, and he said, I
10 actually can't say that. And he told you that actually he
11 received the raw data and in that raw data it shows you that
12 there is DNA consistent with AJ on several places of the
13 defendant's penis. It's just at low levels, so it's not --
14 they can't scientifically state it with certainty. But it is
15 not true that AJ's DNA was not found on the defendant's penis.
16 It was on several places. It just doesn't rise to the level
17 where they can scientifically state it.

18 Ms. Marschner also talked to you about the findings
19 on the anus. And if there was no ejaculation, if the
20 defendant did not ejaculate into AJ's anus or rectum, then
21 there would be no DNA through what's called the sperm
22 fraction, because there was no sperm. Additionally, if there
23 was a use of a lubricant, it greatly decreases the likelihood
24 of recovering DNA, because, like we said, if you have two
25 hands and you rub them together, there's no lubricant, there's

1 a -- more of a likelihood of a cell-to-cell transfer. But if
2 I have a bunch of lotion or shampoo and I put it in my hands,
3 there's less friction, so there's less skin-to-skin contact,
4 which reduces the amount of skin transfer that could happen.

5 She also told you that the blood of the victim, if
6 the victim was bleeding, that's such a good amount of that
7 victim's DNA that it would likely override any of the other
8 DNA that was found.

9 In regards to the mouth, she told you, and Dr. Miller
10 told you, too, it's very hard to find DNA of another
11 individual inside another person's mouth, because the saliva
12 is such a strong trace -- it leaves such a strong trace of the
13 own individual's DNA that it's very hard to find.

14 You heard the credibility instruction by the Court,
15 and then I think both the previous attorneys talked to you
16 about it, so I'm not going to go into the instruction. But
17 just when you're looking at that, take into consideration
18 someone's motives, their manner on the stand and, you know,
19 your opportunity to observe them when you're thinking about
20 it. And when you're thinking about credibility, I'd like you
21 to think of the similarities between AJ's -- what he told you
22 happened, and then several pieces of evidence.

23 And the first piece of evidence is AJ and the DNA.
24 AJ told you that the defendant licked and kissed on his ear.
25 And the DNA results show you that the defendant's saliva was

1 on AJ's ear. And how do we know that it was the defendant's
2 saliva? Because it was one in 700 billion. There was such a
3 strong trace of DNA found in that area, Ms. Marschner told you
4 it's more likely that it was saliva.

5 Same thing with the -- AJ told you that the defendant
6 licked his chest. Again, the DNA showed that the defendant's
7 saliva was on AJ's chest. It was one in 700 billion, as well.

8 AJ also stated, and he told you that, The defendant
9 touched me all over my body. And the DNA shows the
10 defendant's touch DNA was on the inside of the stain of AJ's
11 boxers, as well as he -- the defendant cannot be excluded from
12 AJ's testicles, penis, and his right hand.

13 Again, the defendant not ejaculating would lead to no
14 sperm being found, but as I previously stated, we have the DNA
15 in the other areas in regards to the saliva.

16 Think of what AJ told the sexual assault nurse
17 examiner and how that matches up to her findings. He told the
18 sexual assault nurse examiner that the defendant forced him to
19 have oral sex, and it hurt. And when she looked in his
20 throat, she could see that there was a bruise on the back
21 right side of AJ's throat.

22 He also told her that he -- the defendant forcefully
23 anally raped him. When she looked and she pulled back and did
24 his exam, she could see not only was there swelling and
25 redness, but there was tearing and even a blood clot.

1 He also told the nurse that the defendant punched him
2 a couple of times in the butt. When she looked at AJ's butt,
3 she could see there was a pattern bruise on his left butt
4 cheek.

5 And AJ also told her that during the assault the
6 defendant used a lubricant. And she showed you the picture
7 where she could tell that there was some type of glistening
8 substance in AJ's butt crack that she found to be consistent
9 with a lubricant.

10 And then think of what AJ stated that happened in the
11 bathroom and the evidence that can be found there in regards
12 to what the crime scene analyst found -- found. AJ told --
13 talked about that he believed that a lotion or a shampoo was
14 used. So when the crime scene analyst went in there, she
15 looked on the counter, she saw that there was a shampoo that
16 was recently opened. But when AJ was going through and -- and
17 telling the State what happened to him, he said it was a
18 shampoo.

19 And, Well, what did it look like? It was green. Oh,
20 it wasn't a little white one? No, it was a green one. Go
21 back through the pictures and you see that there is a green
22 shampoo bottle in the trash in the bathroom.

23 AJ and the video. He told you that he woke up at
24 7:30 and he went to go and see Mary. The video shows at 7:43
25 he exits and goes to Mary on the sixth floor. Mary wasn't

1 awake. And so he tells you that he then decided to walk
2 around the casino. And the video shows you that for about 10
3 minutes that's what he did.

4 He then goes back to the sixth floor and sits on that
5 couch. There shows a -- there's a picture in evidence of the
6 couches right outside the sixth floor where he tries to pass
7 some time. And that's when the video shows the defendant
8 getting on the elevator about seven to eight minutes later and
9 he exits the sixth floor.

10 AJ talks about it was on the way to the elevator that
11 the defendant starts making sexual advancements on him. And
12 the video shows the defendant coming onto AJ and licking his
13 ear once he's in the elevator. And when you have the video
14 out there, as a point of reference, it's at 8:15 in the
15 morning, and 38 seconds. And that's during that time period
16 when that conduct is shown.

17 AJ also told you that they went to the back alley to
18 smoke marijuana and the video clearly shows them going towards
19 the exit that would lead that way. He then says that he went
20 back upstairs where the assault took place. And the video
21 shows them take the elevator back up to the sixth floor, and
22 they're in that room for a period of 33 minutes.

23 AJ then states he runs to the elevator and goes to
24 security and the video, if you watch it, will show AJ -- the
25 doors are open, you'll see AJ run in. He hits the door. He

1 goes down a couple floors. The doors open. He slams the door
2 shut, door shut. And then he goes to security. And then you
3 see him telling security what happened.

4 There's also a lot of similarities between what AJ
5 says and what the defendant says, especially AJ approached him
6 about marijuana, and the defendant agrees with that, AJ
7 approached him about marijuana.

8 They both tell you that touching took place first.
9 They both tell you that there was oral sex after the touching
10 in the bathroom. And they both tell you that the defendant
11 then placed his penis in the butt of the -- in -- while they
12 were in the bathroom.

13 And then lastly, and the State would submit to you,
14 most importantly, is AJ told you that his whole plan -- his
15 whole plan was to go and get that weed. He made an agreement
16 and he said, Yeah, I'll do this with you if you give me some
17 weed first. And his whole plan was to go up into that room,
18 get that weed, and run out.

19 And he told you that that was his plan. And the
20 defendant even confirms that in his statement by saying he
21 wanted to smoke first. The kid was adamant he wanted to smoke
22 first. And that's important. Because AJ did not consent to
23 any of this. He went there with a plan. When that plan
24 wasn't working, he tried to back out. And he was adamant, I
25 want that weed first, I want that weed first. Because when he

1 wanted that weed, he wanted to get the weed and get out.

2 And the defendant confirms that by telling you in his
3 statement, and you'll have it in the video, that the kid
4 wanted that weed first. He kept saying he wanted the weed
5 first.

6 When you're looking at the video and considering
7 whether or not the defendant committed the crime of burglary,
8 you have -- the State has to show you that the defendant, when
9 he walked in the room, he had the intent to commit a felony
10 therein. Consider his conduct before that. He was kissing
11 and licking in the elevator. Down in the alley he was kissing
12 and touching AJ. He told AJ, Hey, man, I want to have sex
13 with you. I'll pay you this, or I'll give you some weed. So,
14 obviously he has the intent to touch, kiss, lick, have sex
15 with this child when he enters that room. That's burglary.

16 If you find that when Mazen Alotaibi walked into Room
17 631, if he was thinking in his head, I'm going to kiss this
18 kid, I'm going to lick this kid, and I'm going to do it to
19 gratify myself, that's burglary. He committed that crime.
20 Because it's clear what his intent was. And the fact that he
21 had an erection, and was able to have an erection so strong
22 that it bruised the back of that child's throat, shows you
23 what his intent was. He had lust, he had passions, he wanted
24 to gratify those.

25 Also, the kidnapping, you know, everybody has this

1 idea of a kidnapping being your child -- it's your worst
2 nightmare, your child's walking down the street and he's going
3 to the bus stop, and someone grabs him, puts him in the car,
4 and drives off. And that can be a form of kidnapping.

5 But there are other forms of kidnapping. And that's
6 what we have here. The first part of the statute, any --
7 every person who wilfully confines, inveigles, entices,
8 decoys, abducts, conceals, kidnaps, or carries away any person
9 by any means whatsoever with the intent to hold or detain or
10 who holds or detains the person for the purposes of committing
11 sexual assault is guilty of kidnapping. So if you find that
12 the defendant confined him, kept him in the bathroom, and he
13 did so with the intent to hold or detain him there for the
14 purpose of committing a sexual assault, he is guilty of
15 kidnapping.

16 And that's not the only way you can get there.
17 There's a second part of the statute that states if he leads,
18 takes, entices, or carries away or detains the minor with the
19 intent to keep him or imprison him or confine him from his
20 parents, who have lawful custody of him, or with the intent to
21 hold the minor to an unlawful service or perpetrate upon the
22 person any unlawful act, is guilty of kidnapping in the first
23 degree.

24 So, if you find that he led AJ or he took AJ and he
25 didn't ask permission from AJ's parents, or he did so with the

1 intent to commit an unlawful act on AJ, he is guilty of
2 kidnapping.

3 Lastly, I just want to talk to you about this idea
4 that AJ consented to these acts, that he consented to the
5 defendant doing these things to him. And if you think about
6 one thing, one thing, the State would ask, What is his motive
7 to lie about it? It would be one thing if AJ was caught with
8 marijuana on the way out. So, he has sex with the defendant,
9 he's walking out, he gets caught with marijuana, security
10 approaches him, he said, Oh, man, so I was raped, the
11 defendant gave me his marijuana, I was raped. That didn't
12 happen.

13 AJ wasn't caught in anything. This happened to him.
14 He went downstairs, got scared, and he said what happened to
15 him. There's no motive for him to make up this lie. He -- if
16 he willingly had sex with the defendant, he could have walked
17 out that room and gone about his day and no one would have
18 ever known. No one would have ever known what he did. That
19 shows you it wasn't consensual. There's no motive for him to
20 go through all of this. If he had consensual sex with Mazen
21 Alotaibi, then why tell anybody? It's probably embarrassing
22 for a 13-year-old boy.

23 And think of why would he go through everything he's
24 gone through? Number one, he had to risk his mother and
25 grandmother knowing he smoked weed or was trying to find weed.

1 He has to tell multiple people that the defendant forced him
2 to perform oral sex on him. And he has to tell multiple
3 people that the defendant forced him -- forced his penis in
4 his anus. How embarrassing must that be for a 13-year-old
5 child? Think about when you -- before you were going through
6 puberty or while you were going through puberty, and how
7 embarrassing these types of subject are: Sex and being naked
8 and pubic hair. And he has to talk about all of that in front
9 of all of these people that he doesn't even know. Why go
10 through those things if this didn't happen to you?

11 Think of the SANE exam and how mortifying that must
12 have been. And Ms. Dermanelian told you that when he sat down
13 she has to go through all of these things with him. And she
14 has to tell him, These are all the things I have to do. I
15 have to take your blood to make sure you don't have any STDs,
16 I have to give you a shot, I have to take pictures, not only
17 of your penis, but of your butt hole. I have to look at your
18 penis and examine it. I have to look at your butt, not only
19 of the outside, but the inside. We have to talk about
20 personal things, like how often and how much you poop. And I
21 have to report it to the police.

22 And he sat down with her and he's still wanting to go
23 through this, all of this, because this happened to him. And
24 he wants people to know about it. Because it's not right.

25 And she talked about his demeanor. He was shy. He

1 was quiet. He was very timid. She said that he got
2 embarrassed multiple times and his face became flushed,
3 because this was embarrassing for him to talk about. And he
4 even became teary-eyed when she was -- when he was talking
5 about some of the pain that was going on during the assault.
6 And she told you.

7 Oh, and lastly, he -- he has to come in front of a
8 jury, people -- 14 people he doesn't know. He has to come in
9 front of the defendant. And he has to come in front of the
10 media. If you remember, when AJ Dang testified, that entire
11 side of the courtroom was filled with cameras and reporters.
12 You don't think that's intimidating, talking about someone
13 shoving their penis in your mouth and in your butt? How
14 embarrassing and intimidating that must have been for a
15 13-year-old child. But he did it. He did it because it
16 happened to him and he has to do something about it.

17 At the end of the day, you know, Mr. Chairez wants to
18 talk about AJ's a liar and he -- he lied and he told all these
19 different stories. One thing. He lied about one thing. He
20 told -- he originally said that the defendant drug him into
21 that room, to detectives. And the truth is, is he went
22 willingly into that room to get marijuana. 13-year-olds make
23 bad decisions. 13-year-olds make bad decisions. Teenagers
24 make bad decisions.

25 And he told you why he did that. He didn't want to

1 get in trouble, he didn't think anybody would believe him. He
2 was ashamed, he was scared, and he was embarrassed. So he
3 made up that lie.

4 But most importantly, he -- when he very first told
5 security, when he went down and told Mr. Laskin with security,
6 and he told Jefferson and Goodwin, he told them the truth. It
7 was when his grandma was involved with the investigation and
8 the detectives were telling him that he makes up this lie.
9 But when he first comes down and he goes down those stairs and
10 he's talking on his mom, and you -- with his mom on the phone,
11 and you see him pacing back and forth, and then you see a
12 little 5'3" 108-pound kid waiting at security, waiting until
13 everybody is gone, to tell his story, he tells them. Hey, we
14 were talking about weed and I went in there willingly.

15 Children do not like pain. People in general do not
16 like pain. Ms. Dermanelian told you that only 1 percent of
17 all of the people she's ever seen like pain. But children,
18 they have an aversion to pain. This was painful. To have a
19 bruise on the back of your throat from a penis, an erect penis
20 going in and slamming the back of your throat, that's painful.
21 When she looked in there and saw that bruise, she told you
22 that would have hurt. It's consistent with blunt-force
23 trauma. He didn't consent to that.

24 And even if you buy, Oh, he consented to it, and he
25 went through all that pain, do you really think he would

1 consent to that? A child doesn't consent to getting blood
2 clots.

3 And all of these findings: 11:00, blood clot; 12:00;
4 12:30; 1:00; 2:00, lacerations; 4:00, contusion; 5:00 and
5 5:30, laceration; 6:00, laceration and swelling; 7:00, two
6 lacerations. For 33 minutes.

7 Mr. Chairez tells you that you can't find him guilty
8 of both lewdness and sexual assault, and the law says that you
9 can. And when you go through those instructions, you can see,
10 for instance, when he was putting his penis and it touched the
11 outside of the anus, that is lewdness if you find that he did
12 it with lust, with intent. And when it goes into that anus,
13 like AJ told you, when it shoved into that anus, that is
14 sexual assault. You can find the defendant guilty of both of
15 those crimes.

16 What today comes down to is the concept of
17 accountability. In the early morning hours of December 31st,
18 2012, Mazen Alotaibi made decisions. He made a decision to
19 sexually assault a 13-year-old child, not because he was
20 drunk, not because that child consented, but because he wanted
21 sex and he wasn't going to take no for an answer. And for
22 those decisions, he has to pay. And he needs to pay today.

23 And the only 14 people, the only 14 people who can
24 tell him what he did was wrong are you. As a community. Tell
25 him that what he did to that child is not going to be

1 tolerated. And the only way you do that is if you go into
2 that room, you consider the evidence, and you come back in
3 here and you find him guilty of those crimes. And that's what
4 the State is asking you to do now. Thank you.

5 THE COURT: All right. Jason. And who's taking the
6 alternate? Will you swear them in.

7 (Officers sworn.)

8 (Jury recessed for deliberation at 3:35 p.m.)

9 THE COURT: All right. Counsel, please leave us
10 numbers where you can be reached. The jury will not
11 deliberate beyond 5:00 tonight. So if you don't hear from us
12 before 5:00, assume that they are not finished. Okay.

13 MS. BLUTH: Thank you, Judge. Judge, I'm going to
14 clean off my computer and -- and leave it. So --

15 THE COURT: That's fine.

16 MS. BLUTH: -- unless they need to look at the
17 evidence. Are you okay with that, Mr. Chairez?

18 MR. CHAIREZ: What is it? What are you doing?

19 MS. BLUTH: In case they need to watch the video,
20 they have to be provided with a computer.

21 MR. CHAIREZ: Oh, okay.

22 MS. BLUTH: So I was going to clean mine.

23 MR. CHAIREZ: Okay.

24 MS. BLUTH: You know, erase everything on there.

25 (Court recessed for the evening at 3:36 p.m.)

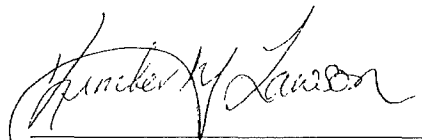
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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(COPY

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA,)	CASE NO. C287173-1
)	DEPT NO. XXIII
Plaintiff,)	
vs.)	
)	
MAZEN ALOTAIBI,)	TRANSCRIPT OF
)	PROCEEDINGS
Defendant.)	
<hr/>		

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 9

WEDNESDAY, OCTOBER 23, 2013

APPEARANCES:

FOR THE STATE:

MARY KAY HOLTHUS, ESQ.
Chief Deputy District Attorney
JACQUELINE M. BLUTH, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

DON P. CHAIREZ, ESQ.

Also Present:

Mohammad A. Taha, Interpreter

RECORDED BY MARIA GARIBAY, COURT RECORDER
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AA000902

1 LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 23, 2013, 12:26 P.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Okay. The reason everyone has been
5 called back -- the State's present, Mr. Chairez and his
6 client, Mr. Alotaibi are present, the interpreter is here, as
7 well.

8 The reason you've been called back is we have a jury
9 question. This is the jury question: What is the difference
10 between coercion sexually motivated and coercion a
11 misdemeanor? That's the question for the jury.

12 MS. BLUTH: Did you bring the jury instructions, Mr.
13 Chairez? I've seen them right there, those?

14 MR. CHAIREZ: Yeah. Here.

15 MS. BLUTH: May I see it?

16 MR. CHAIREZ: Yeah.

17 THE COURT: Did -- I don't think we gave them an
18 instruction on coercion, a misdemeanor coercion.

19 MS. HOLTHUS: We gave a lesser --

20 THE COURT: Did we? I don't remember.

21 MS. HOLTHUS: We did. Because coercion without
22 physical force is only a misdemeanor. So we did put that in
23 there. We added it to the verdict form, as well, and gave
24 them the option.

25 What I don't know that was included -- because I --

1 as I understand it, the way I was reading the statute is the
2 sexually motivated portion is really something to be
3 determined by the Court. Which doesn't really make sense.

4 MR. CHAIREZ: That's correct.

5 MS. HOLTHUS: But -- but it's kind of been my way of
6 hearing it and it arguably didn't need to be in there at all.

7 MS. BLUTH: So, the -- on line 9, Your Honor, of
8 Instruction 20, it says, "Where physical force or the
9 immediate threat of physical force is used, the person has
10 committed the offense of coercion, a felony." And then lines
11 11 and 12 discuss, "Where no physical force or immediate
12 threat of physical force is used, the person has committed the
13 offense with coercion, a misdemeanor." So I don't --

14 THE COURT: Just tell them to look at Instruction No.
15 20?

16 MS. BLUTH: Instruction No. 20, lines 9 through 12 is
17 the specific answer to that question.

18 THE COURT: Okay. Well, let's just bring the jury in
19 real quick to tell them that.

20 This will be made a court's exhibit.

21 (Pause in proceedings.)

22 THE MARSHAL: Jury is present.

23 (Jury reconvened at 12:29 p.m.)

24 THE COURT: Everyone knows to go to their exact
25 seats. All right.

1 All right. Ladies and gentlemen, the reason we're
2 here is I have a jury question. The jury question is as
3 follows.

4 What is the difference between coercion sexually
5 motivated and coercion a misdemeanor?

6 All right. The answer to that, ladies and gentlemen,
7 is on Jury Instruction No. 20. You need to go back and look
8 at Jury Instruction No. 20. Okay. It will discuss both types
9 of coercion.

10 So, we're going to -- with that being said, we're
11 going to send you back into the jury room. Are there any
12 other questions you have before I send you back in there that
13 you guys have written down? No?

14 All right. Well, then I'll send you back. I think
15 the trip in here was longer than the answer. So we'll send
16 you back to deliberate. Okay. Thank you very much.

17 (Jury recessed at 12:30 p.m.)

18 THE COURT: Okay. Everyone, Mr. Alotaibi is going to
19 go down and get a bite to eat. I think we're going to have a
20 verdict within the next hour.

21 MS. HOLTHUS: Okay.

22 THE COURT: So please stay downtown.

23 MS. HOLTHUS: Okay.

24 THE COURT: Thanks.

25 MS. HOLTHUS: That was signed by the foreperson,

1 correct?

2 THE COURT: Yes.

3 MS. HOLTHUS: Who is that, if we can ask.

4 THE COURT: Number 9, Nicole Catello.

5 MS. HOLTHUS: Thanks.

6 THE COURT: Jason thinks that we'll be -- hold on.

7 Jason thinks it'll be soon.

8 MR. CHAIREZ: Jason needs to leave?

9 THE COURT: I don't know. Jason thinks the verdict
10 is actually going to be --

11 MR. CHAIREZ: Oh. Okay.

12 THE COURT: -- very soon. Like in the next few
13 minutes. You know, Jason, we've got a lot of calls.

14 (Court recessed at 12:32 p.m., until 1:30 p.m.)

15 (Outside the presence of the jury.)

16 THE COURT: All right. The record is going to
17 reflect the presence of the district attorneys on this case,
18 as well as Mr. Chairez and his client, Mr. Alotaibi.

19 Counsel, if there's nothing to add right now, we have
20 a verdict. Are you ready for the jury?

21 MS. BLUTH: Yes, Your Honor.

22 THE COURT: All right.

23 MR. CHAIREZ: We are, Your Honor.

24 THE COURT: Please stand for the jury. Also, the
25 Court's going to note that the translator is present.

1 THE MARSHAL: Jury is present.

2 (Jury reconvened at 1:32 p.m.)

3 THE COURT: All right. Everyone can sit down.
4 Ladies and gentlemen of the jury, the record is going to
5 reflect the presence of all the jurors. Ladies and gentlemen,
6 did you select a foreperson? Who's my foreperson?

7 JUROR NO. 9: I am.

8 THE COURT: All right. Madam Foreperson, did you
9 reach a verdict?

10 JUROR NO. 9: Yes, we did.

11 THE COURT: Would you please give it to Jason. All
12 right. The clerk is now going to read the verdict and inquire
13 if it is, in fact, the verdict of the jury.

14 THE CLERK: District Court, Clark County, Nevada, the
15 State of Nevada, Plaintiff, vs. Mazen Alotaibi, Defendant,
16 Case No. C-13-287173-1, Department No. 23, verdict.

17 We, the jury in the above entitled case, find the
18 Defendant, Mazen Alotaibi, as follows:

19 Count 1, burglary; guilty of burglary.

20 We, the jury in the above entitled case, find the
21 Defendant, Mazen Alotaibi, as follows:

22 Count 2, First Degree Kidnapping; guilty of first
23 degree kidnapping.

24 We, the jury in the above entitled case, find the
25 Defendant, Mazen Alotaibi, as follows:

1 Count 3, Sexual Assault with a Minor Under 14 years
2 of Age; guilty of sexual assault with a minor under 14 years
3 of age.

4 We, the jury in the above entitled case, find the
5 Defendant, Mazen Alotaibi, as follows:

6 Count 4, Lewdness with a Child Under the Age of 14;
7 not guilty.

8 We, the jury in the above entitled case, find the
9 Defendant, Mazen Alotaibi, as follows:

10 Count 5, Sexual Assault with a Minor Under 14 Years
11 of Age; guilty of sexual assault with a minor under 14 years
12 of age.

13 We, the jury in the above entitled case, find the
14 Defendant, Mazen Alotaibi, as follows:

15 Count 6, Lewdness with a Child Under the Age of 14;
16 not guilty.

17 We, the jury in the above entitled case, find the
18 Defendant, Mazen Alotaibi, as follows:

19 Count 7, Lewdness with a Child Under the Age of 14;
20 guilty of lewdness with a child under the age of 14.

21 We, the jury in the above entitled case, find the
22 Defendant, Mazen Alotaibi, as follows:

23 Count 8, Lewdness with a Child Under the Age of 14;
24 guilty of lewdness with a Child under the Age of 14.

25 We, the jury in the above entitled case, find the

1 Defendant, Mazen Alotaibi, as follows:

2 Count 9, Coercion Sexually Motivated; guilty of
3 coercion misdemeanor.

4 Dated this 23rd day of October 2013, signed Nicole
5 Catello, Jury Foreperson.

6 Ladies and gentlemen of the jury, is this your
7 verdict as read, so say you one, so say you all?

8 THE JURY: Yes.

9 THE COURT: Does either side wish to have the jury
10 polled before the verdict's recorded?

11 MS. BLUTH: The State does not, Your Honor.

12 MR. CHAIREZ: The defense does, Your Honor.

13 THE CLERK: Ms. Kawi, is this your verdict as read?

14 JUROR NO. 1: Yes.

15 THE CLERK: Ms. Young, is this your verdict as read?

16 JUROR NO. 2: Yes.

17 THE CLERK: Mr. Flores, is this your verdict as read?

18 JUROR NO. 3: Yes.

19 THE CLERK: Mr. Morgan, is this your verdict as read?

20 JUROR NO. 4: Yes.

21 THE CLERK: Ms. Styilanou, is this your verdict as
22 read?

23 JUROR NO. 5: Yes.

24 THE CLERK: Ms. Mosquera, is this your verdict as
25 read?

1 JUROR NO. 6: Yes.

2 THE CLERK: Ms. Romero, is this your verdict as read?

3 JUROR NO. 7: Yes.

4 THE CLERK: Ms. Metzner, is this your verdict as
5 read?

6 JUROR NO. 8: Yes.

7 THE CLERK: Ms. Catello, is this your verdict as
8 read?

9 JUROR NO. 9: Yes.

10 THE CLERK: Ms. Faehling, is this your verdict as
11 read?

12 JUROR NO. 10: Yes.

13 THE CLERK: Mr. Collins, is this your verdict as
14 read?

15 JUROR NO. 11: Yes.

16 THE CLERK: Ms. Dyer, is this your verdict as read?

17 JUROR NO. 12: Yes.

18 THE COURT: All right. The verdict is now going to
19 be recorded.

20 Ladies and gentlemen of the jury, I want to thank you
21 very much for your time and your service. You are now going
22 to be discharged as jurors. I've watched you guys over the
23 last several weeks and that you've been very diligent in this
24 case.

25 Now that you've been discharged as jurors, you're

1 free to talk about this case with whomever you would like to
2 talk with. You are not under any obligation to talk with
3 anyone if you don't want to. I know that at the conclusion of
4 most cases, both the attorney for the State and the attorney
5 for the defendant, they do like -- like to have the chance to
6 talk to the jury. It's very insightful as lawyers to kind of
7 see things from the jury's perspective, because ultimately
8 that's what's important, is how everyone sitting in that box
9 perceives the evidence and perceives everything that went on
10 during the course of the trial.

11 So, if you would be so amenable, I'm sure they would
12 love to talk to you. If you don't want to talk and you just
13 want to go, make sure you go downstairs to jury services and
14 check out before you leave the building. As you've seen,
15 there is media involved in this case. Again, you are --
16 you've been released as jurors, so you can talk about the
17 case.

18 Thank you very much. If any of you need notes for
19 your work, let Jason know, we'll get those for you before you
20 leave the courthouse. Thank you.

21 (Jury adjourned at 1:37 p.m.)

22 THE COURT: Counsel, if you want to stay around, my
23 inclination is probably that you'll have at least a few jurors
24 who would like to speak with you, if you guys want to speak
25 with them, as well. Right now we need to give the defendant a

1 date for sentencing. He has no -- he has bail set at this
2 point, but given the fact of he was convicted on almost all
3 the charges, the nature of the charges, and the potential
4 sentence address charges, he will be remanded to the detention
5 center pending sentencing without bail.

6 Let's give him a date, please.

7 THE CLERK: December 16th, 9:30.

8 MS. HOLTHUS: Judge, I'll -- I'll come back. I have
9 a -- a victim waiting at a prelim downstairs. I'm going to
10 put her on. If I can get back, I'll get back. But...

11 THE COURT: Okay. Is Ms. Bluth going to go in?

12 MS. BLUTH: Yes, Your Honor.

13 THE COURT: Mr. Chairez, do you wish to speak to the
14 jurors if they want to talk?

15 MR. CHAIREZ: Yes, Your Honor.

16 THE COURT: Okay. So, thank you very much.

17 MS. HOLTHUS: Thank you.

18 MS. BLUTH: Thank you, Your Honor.

19 THE COURT: Let's go back and thank the jurors. All
20 right. We'll come and get you when they're ready.

21 MS. BLUTH: Okay. Thanks, Judge.

22 (Court adjourned at 1:38 p.m.)

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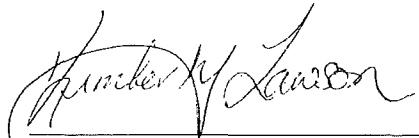
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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1 INST

2 ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

OCT 23 2013 at 1:32 pm

BY, *A. Naumec-Miller*
ANTOINETTE NAUMEC-MILLER, DEPUTY

5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 MAZEN ALOTAIBI,

12 Defendant.

CASE NO: C-13-287173-1

DEPT NO: XXIII

14 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

15 MEMBERS OF THE JURY:

16 It is now my duty as judge to instruct you in the law that applies to this case. It is
17 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
18 you find them from the evidence.

19 You must not be concerned with the wisdom of any rule of law stated in these
20 instructions. Regardless of any opinion you may have as to what the law ought to be, it
21 would be a violation of your oath to base a verdict upon any other view of the law than that
22 given in the instructions of the Court.

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INSTRUCTION NO. 2

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

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

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