

1 THE WITNESS: Yes, I'm sorry.

2 BY MS. GRAHAM:

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

8 A Yes.

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

12 A Yes.

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

17 A Yes.

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

20 A I believe he did.

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

24 A I was a therapist from the MINES facility.

25 Q I'm sorry?

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1 A I was a therapist from the MINES facility.

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

4 A Yes.

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

8 A Yes.

9 MS. GRAHAM: May I approach the witness?

10 THE COURT: Yes.

11 MS. PALM: Can I see it?

12 MS. GRAHAM: Oh, sure.

13 (Pause in the proceedings).

14 MS. GRAHAM: May I approach, Judge?

15 THE COURT: Yes.

16 BY MS. GRAHAM:

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

19 A Looks like a release form.

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

23 A Yes.

24 Q And that would include his medical records?

25 A No.

ROUGH DRAFT TRANSCRIPT

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1 Q Or his records from MINES.

2 A Right.

3 Q Okay.

4 A Yeah.

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

9 A Yes.

10 Q Okay.

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

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

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

17 THE COURT: Did you generate that document?

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

20 BY MS. GRAHAM:

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

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

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

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

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

8 BY MS. GRAHAM:

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

11 A Okay.

12 Q Were those records from MINES?

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

15 Q Okay. And what is MINES, then?

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

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

20 A I'm a contractor with MINES.

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

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

25 Q Is that typically something that they would do?

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

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

7 A Who -- who treats the person?

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

9 A Yes.

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

12 A I have --

13 Q -- O'Keefe?

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

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

19 A Yes.

20 Q -- the evaluations?

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

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

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1 persons?

2 A The -- the patient.

3 Q The patient?

4 A Um-h'm.

5 Q So that would be Brian O'Keefe?

6 A Right.

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

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

14 THE COURT: Ms. Graham.

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

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

18 MS. GRAHAM: State does.

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

22 THE COURT: Okay.

23 MS. PALM: -- on the document.

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

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

3 MS. PALM: Well --

4 MS. GRAHAM: -- (indiscernible).

5 THE COURT: Do we have a clean copy?

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

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

10 (Exhibit CCCCCC admitted).

11 MS. GRAHAM: No objection.

12 BY MS. GRAHAM:

13 Q You heard of the term tolerance, sir?

14 A Yes.

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

21 A Yes.

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

24 A Yes, that's (indiscernible).

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

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

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

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

9 A Yes.

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

13 MS. PALM: Page number?

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

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

16 BY MS. GRAHAM:

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

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

21 Q Okay.

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

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

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1 A Yes.

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

4 A No, I do not.

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

6 A I do not have that either.

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

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

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

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

14 Q Um-h'm.

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

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

19 A Yes, I've heard of it.

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

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

24 Q Okay. Thank you, sir.

25 THE COURT: Any redirect?

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REDIRECT EXAMINATION

1
2 BY MS. PALM:

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

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

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

10 A Yes.

11 MS. PALM: May I approach the witness?

12 THE COURT: Yes.

13 MS. PALM: Same Page 41.

14 BY MS. PALM:

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

16 A Yes.

17 Q Does that help you recall?

18 A Yes.

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

21 A According to that statement, yes.

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

25 A Yes.

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

2 A Yes.

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

6 A Yes.

7 Q (Indiscernible) records?

8 MS. PALM: May I approach?

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

10 BY MS. PALM:

11 Q Okay.

12 A -- saw him.

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

15 A Yes.

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

17 A Yes.

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

20 A Yes.

21 Q And is alcoholism considered a disease?

22 A Yes, it is.

23 Q Why?

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

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1 Medical Association in 1954.

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

4 A Yes.

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

7 A Yes.

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

9 THE COURT: Any recross?

10 MS. GRAHAM: No, Judge.

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

14 THE WITNESS: Thank you.

15 THE COURT: Next witness for the defense.

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

18 THE COURT: All right.

19 MS. PALM: May we approach?

20 THE COURT: Yes.

21 (Off-record bench conference).

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

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

8 (Outside the presence of the jury).

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

12 MS. PALM: Well --

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

15 MS. PALM: The involuntary manslaughter.

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

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

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

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

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1 the jury can consider alcohol intoxication or not.

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

4 MR. LALLI: The voluntariness?

5 THE COURT: Involuntary.

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

10 THE COURT: Yes, I do have those.

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

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

15 MR. LALLI: I do.

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

18 MR. LALLI: Yes.

19 THE COURT: Okay.

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

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1 involuntary manslaughter.

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

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

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

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

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

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

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

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

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

1 involuntary. That's hour theory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 assessing the various degrees of those types of crimes.

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

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

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

17 THE COURT: Yes.

18 MR. LALLI: Thank you.

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

23 MS. GRAHAM: We changed the sentence.

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

25 MS. PALM: (Indiscernible).

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

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

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

8 MS. PALM: Yes.

9 THE COURT: All right.

10 MS. PALM: Can we go outside?

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

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

14 (Outside the presence of the jury).

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

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

17 THE CLERK: He's coming.

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

20 (Pause in the proceedings).

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

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

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

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

7 MR. LALLI: Nope.

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

13 MR. LALLI: Very good.

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

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

17 MS. PALM: Okay.

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

20 MS. PALM: All right.

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

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1 MR. LALLI: Yes, now --

2 THE COURT: Copy.

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

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

6 MR. LALLI: Okay.

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

9 (In the presence of the jury).

10 THE MARSHAL: Please be seated.

11 (Pause in the proceedings).

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

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

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

3 (Outside the presence of the jury).

4 (Pause in the proceedings).

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

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

12 THE COURT: Okay.

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

15 THE COURT: Yes.

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

17 MS. PALM: And -- and --

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

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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

3 MR. LALLI: I was going to --

4 THE COURT: Can you get --

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

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

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

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

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

13 MS. PALM: It was --

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

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

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

20 THE COURT: Okay.

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

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

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

ROUGH DRAFT TRANSCRIPT

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

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

4 MR. LALLI: Okay.

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

7 MR. LALLI: Okay.

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

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

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

13 MR. LALLI: Thank you.

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

15 (Outside the presence of the jury).

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

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

24 THE COURT: Well, I --

25 MS. PALM: Okay.

ROUGH DRAFT TRANSCRIPT

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

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

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

6 MS. PALM: Oh, additional, yes.

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

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

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

12 MS. PALM: Fourth one in.

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

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

24 We are entitled to negatively phrased instructions
25 under Crawford (phonetic), and that's cited in my instructions.

ROUGH DRAFT TRANSCRIPT

002577

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

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

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

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

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

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

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

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

17 THE COURT: Do you have that?

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

23 The other one is on Page 10.

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

25 MS. PALM: Okay.

ROUGH DRAFT TRANSCRIPT

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

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

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

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

18 THE COURT: Okay.

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

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

ROUGH DRAFT TRANSCRIPT

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

2 (Pause in the proceedings).

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

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

5 MS. GRAHAM: It's Page 10.

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

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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

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

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

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

17 MS. PALM: Yeah.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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1 THE COURT: Thank you.

2 MR. LALLI: Can I have the one you just throw away?

3 I'm just going to put it in my packet and just make the
4 amendment to it. Thank you.

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

7 MR. LALLI: Yes, your Honor.

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

10 MR. LALLI: No.

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

13 MR. LALLI: No.

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

16 MR. LALLI: I do not.

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

19 MS. PALM: Yes.

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

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

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

ROUGH DRAFT TRANSCRIPT

002582

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

ROUGH DRAFT TRANSCRIPT

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

6 THE COURT: Okay, Mr. Lalli.

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

12 THE COURT: All right, so --

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

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

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

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

ROUGH DRAFT TRANSCRIPT

002584

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

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

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

8 MS. PALM: No.

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

12 MS. PALM: No.

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

15 MS. PALM: No.

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

21 MS. PALM: Okay.

22 THE COURT: Well, jury instructions.

23 MR. LALLI: Okay.

24 THE COURT: All right.

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

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1 after reading to go into closing?

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

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

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

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

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

8 MS. GRAHAM: Okay. All right.

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

11 MS. GRAHAM: How -- show me.

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

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

15 (Pause in the proceedings).

16 MR. LALLI: Are we --

17 MS. PALM: Found the culprit.

18 MR. LALLI: Are we turned over?

19 THE CLERK: Yes.

20 (Pause in the proceedings).

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

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

24 THE COURT: Okay.

25 MR. LALLI: -- reboot it.

ROUGH DRAFT TRANSCRIPT

002586

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

3 MR. LALLI: Well --

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

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

6 THE COURT: Okay.

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

8 THE COURT: All right.

9 (Pause in the proceedings).

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

11 (Pause in the proceedings).

12 (In the presence of the jury).

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

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

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

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

23 MR. LALLI: No objection.

24 THE COURT: Okay, it will be admitted.

25 (Exhibit K admitted).

ROUGH DRAFT TRANSCRIPT

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

2 THE CLERK: E's already admitted.

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

5 THE CLERK: I have K and M.

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

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

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

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

12 (Exhibit DDDDD admitted).

13 MS. PALM: Thank you.

14 THE COURT: Any other exhibits or --

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

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

17 MR. LALLI: No, your Honor.

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

21 (Jury instructions; not be transcribed).

22 THE COURT: State, your closing, please.

23 STATE'S CLOSING ARGUMENT

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

ROUGH DRAFT TRANSCRIPT

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

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

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

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

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

ROUGH DRAFT TRANSCRIPT

np2589

1 (Off-record bench conference)

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

3 MS. PALM: Thank you.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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1 readily capable of causing substantial bodily harm or death.

2 The weapon in this case, a knife.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

002591

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

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

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

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

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

21 MS. GRAHAM: Thank you, your Honor.

22 THE COURT: It's closing argument.

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

ROUGH DRAFT TRANSCRIPT

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

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

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

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

ROUGH DRAFT TRANSCRIPT

002593

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

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

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

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

ROUGH DRAFT TRANSCRIPT

002594

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

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

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

ROUGH DRAFT TRANSCRIPT

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

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

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

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

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

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

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

23 MS. PALM: Your Honor --

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

25 MS. PALM: -- may we approach?

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1 THE COURT: All right.

2 (Off-record bench conference).

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

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

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

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

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

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

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

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

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1 THE COURT: All right.

2 (Off-record bench conference)

3 MS. PALM: Okay.

4 BY MS. PALM:

5 Q So when -- for the three months or so that you lived
6 with Brian and Cheryl, you saw them every day?

7 A Oh, yes.

8 Q Okay. And did you ever hear Brian say that he wanted
9 to kill Victoria?

10 A Never.

11 Q Okay. Did you ever see Brian demonstrate how he
12 would kill somebody with knives?

13 A No. Not at all.

14 Q Okay. Did you want -- did you ever tell Brian you
15 wanted him out of the house?

16 A No.

17 Q Did you ever tell Cheryl you wanted Brian out of the
18 house?

19 A No, I didn't.

20 Q When Brian actually moved out of the house and got
21 the apartment, did he do that on his own?

22 A Yes.

23 Q And then did Cheryl follow him to the apartment?

24 A Well she -- they went together, as far as I can
25 remember.

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1 Q Okay. Did you ever come to know Victoria Whitmarsh?

2 A I met her twice.

3 Q Okay. What were the circumstances of that?

4 A Well one day -- I think it was twice. They came
5 over, and Brian washed clothes all day. And I visited with
6 Victoria. And I can't remember the other time. But I think it
7 was twice that they were over there.

8 Q Okay. From the time that you spent with her, would
9 you consider her to be a meek person?

10 A Not at all.

11 Q Did you have -- were you able to form an opinion
12 whether she was a submissive person?

13 A Definitely not.

14 Q Did you ever see Brian threaten her when she was with
15 him.

16 A No, he treated her --

17 Q No --

18 A -- great.

19 Q Okay. Are you still friends with Brian today?

20 A Yes.

21 Q Thank you, Dorothy.

22 MS. PALM: No more questions.

23 THE WITNESS: That's all?

24 THE COURT: Oh, just --

25 MS. PALM: That's all for me.

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1 THE COURT: -- hang on, ma'am.

2 THE WITNESS: Oh.

3 THE COURT: The district attorney may have -- the
4 deputy district attorney --

5 THE WITNESS: Okay.

6 THE COURT: -- may have some questions for you.

7 THE WITNESS: Okay.

8 CROSS-EXAMINATION

9 BY MR. LALLI:

10 Q Ms. Robe, just one question. Were you aware that Mr.
11 O'Keefe actually was convicted and sent to prison for battering
12 Victoria? Did you know that? And just --

13 A Yes.

14 Q -- yes or no. Okay. Does that --

15 A Yes.

16 Q Does that change your opinion about how he treated
17 her?

18 A No.

19 Q Okay, thank you.

20 MR. LALLI: Nothing else.

21 THE COURT: Any redirect?

22 MS. PALM: No.

23 THE COURT: Any questions from any of the jurors? No
24 questions. All right. Thank you, ma'am. You are excused.

25 THE WITNESS: Okay.

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1 THE COURT: Thank you very much.

2 THE WITNESS: Now can I be in the audience?

3 THE COURT: No, you need to --

4 THE WITNESS: Oh.

5 THE COURT: -- leave the courtroom.

6 THE WITNESS: Okay. And sit out there

7 (indiscernible).

8 THE COURT: Be careful.

9 THE WITNESS: Okay. (Indiscernible) very shaky
10 today.

11 (Pause in proceedings)

12 THE COURT: Do you have any other witnesses for
13 today, Ms. Palm?

14 MS. PALM: I do not, Your Honor. My witnesses -- the
15 rest of them are lined up for tomorrow morning.

16 THE COURT: Okay. Ladies and gentlemen, I've been
17 advised by the attorneys that they will complete the
18 evidentiary portion of this trial tomorrow. We will have
19 deliberation tomorrow as well. But there are a couple -- some
20 more evidence that will be presented to you as part of this
21 trial.

22 Because of your service last week and this week, and
23 we should be getting into closing arguments tomorrow, the Court
24 will provide your lunch for tomorrow. Okay.

25 During this evening recess, it is your duty not to

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1 converse among yourselves, or with anyone else on any subject
2 connected with this trial. Or to read, watch or listen to any
3 report of or commentary on the trial by any person connected
4 with the trial, or by any medium of information, including
5 without limitation, newspaper, television, radio, or the
6 internet. You are not to form or express an opinion on any
7 subject connected with this case until this matter is submitted
8 to you.

9 Before I give you the exact time, can I have counsel
10 approach, please?

11 (Off-record bench conference)

12 THE COURT: All right. Ladies and gentlemen, we'll
13 resume tomorrow at 9:45. I do have a lengthy calendar
14 tomorrow, and I hope to be able to get it through for a -- we
15 may be a few minutes late. But I'm shooting for 9:45 tomorrow.
16 So we'll see you back 9:45. Please have a safe drive home.

17 (Outside the presence of the jury)

18 THE COURT: All right. We're outside the presence of
19 the jury panel. And State, I think you say you just need to go
20 run back to your office to get your jury instructions?

21 MR. LALLI: Yes, sir.

22 THE COURT: And Ms. Palm, do you have those with you
23 today?

24 MS. PALM: I do, Your Honor.

25 THE COURT: All right. As soon as everyone's ready,

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1 we can hash out the instructions.

2 MR. LALLI: Thank you. You want to do that in
3 chambers first? Or how does -- I'm not sure how --

4 THE COURT: Yeah, let's do that.

5 MR. LALLI: -- the Court does that.

6 THE COURT: And we can --

7 MS. PALM: I'm sorry, how much time do we have before
8 we do that?

9 THE COURT: Whatever you need. Whatever --

10 MS. PALM: No, I mean --

11 THE COURT: -- both sides need.

12 MS. PALM: I'm just going to talk to her for a minute
13 outside.

14 THE COURT: How long will it take you?

15 MS. PALM: He has to go get his instructions, right?

16 THE COURT: About ten minutes, Mr. Lalli?

17 MR. LALLI: Yeah, at the most.

18 MS. PALM: Okay.

19 THE COURT: All right.

20 (Court recessed at 5:27 p.m., until Tuesday,

21 August 31, 2010)

22

23

24

25

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INDEXWITNESSES

NAME	DIRECT	CROSS	REDIRECT	RECROSS
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PLAINTIFF'S WITNESSES:

Daniel Ford	8	24	34/37	
Jocelyn Maldonado	38	47	67/68/69	68
Robbie Dahn	71	88		
Edward Guenther	93	115	126/127	126
Jennifer Bas	129	155	159	
Marti Wildemann	166	182	210	

DEFENSE'S WITNESS:

Dorothy Robe	216	221		
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* * *

EXHIBITS

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ACKNOWLEDGMENT

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

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Julie Lord
JULIE LORD, TRANSCRIBER

11-15-10
DATE

ROUGH DRAFT TRANSCRIPT

002507

ORIGINAL

FILED

Nov 23 10 24 AM '10

DISTRICT COURT
CLARK COUNTY, NEVADA

John B. Blum
CLERK OF THE COURT

THE STATE OF NEVADA,
Plaintiff,
vs.
BRIAN KERRY O'KEEFE,
Defendant.

CASE NO. C-250630

DEPT. NO. 17

Transcript of
Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 7

TUESDAY, AUGUST 31, 2010

080250630
TRANS
Transcript of Proceedings
1070260



APPEARANCES:

FOR THE PLAINTIFF:

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Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

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PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
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Proceedings recorded by audio-visual recording, transcript
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NOV 23 2010

CLERK OF THE COURT

002508

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

2 (Outside the presence of the jury).

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

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

7 THE COURT RECORDER: Yes, we are.

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

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

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

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

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

15 THE COURT: Right.

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

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

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

23 THE COURT: Yeah.

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

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

3 MS. PALM: Yes, no --

4 THE COURT: All right.

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

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

8 THE MARSHAL: No. 6, Ratanapool.

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

11 JUROR NO. 6: Good morning.

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

14 JUROR NO. 6: Okay.

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

18 JUROR NO. 6: (Indiscernible).

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

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

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

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

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

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

16 JUROR NO. 6: No.

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

19 JUROR NO. 6: No.

20 THE COURT: Did you hear anyone --

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

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

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

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

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

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

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

8 JUROR NO. 6: Okay.

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

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

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

15 JUROR NO. 6: No.

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

18 MR. LALLI: No questions.

19 THE COURT: Ms. Palm?

20 MS. PALM: None, thanks.

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

25 JUROR NO. 6: Okay.

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

3 JUROR NO. 6: All right.

4 THE COURT: Okay, thank you.

5 JUROR NO. 6: Thank you.

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

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

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

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

13 MS. PALM: No, your Honor.

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

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

22 THE DEFENDANT: Yes, your Honor.

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

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

6 THE DEFENDANT: Yes, your Honor.

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

11 THE DEFENDANT: Yes, your Honor.

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

19 THE DEFENDANT: Yes, your Honor.

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

22 THE DEFENDANT: No, your Honor.

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

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

3 THE DEFENDANT: Yes, your Honor.

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

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

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

10 MS. PALM: No.

11 THE COURT: By the State?

12 MR. LALLI: No, your Honor.

13 THE COURT: All right.

14 MR. LALLI: Thank you.

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

17 MS. PALM: Mr. Burger.

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

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

24 THE COURT: Okay.

25 THE CLERK: (Indiscernible).

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1 MS. PALM: Paisano.

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

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

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

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

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

17 THE CORRECTIONS OFFICER: (Indiscernible).

18 THE COURT: Yeah.

19 (Pause in the proceedings).

20 THE COURT: Are we ready, Cliff?

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

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

24 MS. PALM: Can we approach --

25 THE COURT: All right.

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

2 (Off-record bench conference).

3 (In the presence of the jury).

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

6 (Off-record bench conference).

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

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

11 MS. PALM: Tracy Burger.

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

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

16 TRACY BURGER, DEFENDANT'S WITNESS, SWORN

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

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

21 THE COURT: Go ahead, Ms. Palm.

22 MS. PALM: Thank you.

23 DIRECT EXAMINATION

24 BY MS. PALM:

25 Q Good morning, Mr. Burger.

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1 A Morning.

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

3 A Well, presently I'm unemployed.

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

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

7 Q Okay. And where is that company located?

8 A Las Vegas, Nevada.

9 Q And do you know Brian O'Keefe?

10 A I do.

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

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

15 Q Thank you.

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

17 THE COURT: Yes, it will.

18 MS. PALM: Thank you.

19 BY MS. PALM:

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

21 A Yes, he did.

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

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

24 Q What labor's union is that?

25 A Local 872.

ROUGH DRAFT TRANSCRIPT

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1 Q Okay. Was he an apprentice?
2 A At that time, he was, yes.
3 Q Okay. Are all your employees union members?
4 A Yes, yes.
5 Q And did he work for you from about November 2007 to
6 July 2008?
7 A Yes, he did.
8 Q Okay. Was it full time?
9 A Yes, it was.
10 Q Do you recall November 5th of 2008 speaking with Mr.
11 O'Keefe?
12 A I do.
13 Q Okay. Was -- what kind of -- was that a telephone
14 call, in person, what?
15 A Yeah, Brian it telephoned me.
16 Q Okay. Do you recall what time?
17 A It was in -- in the afternoon around 3:00 o'clock or
18 so, maybe a few minutes after. 3:00, 3:15, somewhere in that
19 area.
20 Q Okay. Do you know what he wanted?
21 A He was --
22 MS. GRAHAM: Objection. Hearsay.
23 THE COURT: Sustained.
24 BY MS. PALM:
25 Q Do you know what the purpose of his phone call was?

ROUGH DRAFT TRANSCRIPT

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

2 --

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

4 THE COURT: Sustained.

5 BY MS. PALM:

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

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

8 Q What was it?

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

11 Q Okay.

12 A Yeah, I assumed he was unemployed.

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

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

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

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

20 Q Okay.

21 A Had been downsized.

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

24 A Yeah, yeah Brian was eligible for rehire.

25 Q Okay.

ROUGH DRAFT TRANSCRIPT

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

2 THE WITNESS: Um-h'm.

3 THE COURT: Any cross-examination?

4 MS. GRAHAM: No, Judge.

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

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

8 THE WITNESS: All right.

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

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

13 THE COURT: All right.

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

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

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

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

4 (Outside the presence of the jury).

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

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

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

11 THE COURT: You did?

12 MR. LALLI: Yeah, I --

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

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

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

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

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

19 MS. PALM: A copy.

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

22 MS. PALM: Okay, thank you.

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

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

25 (Outside the presence of the jury).

ROUGH DRAFT TRANSCRIPT

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

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

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

7 THE COURT: Yes.

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

12 THE COURT: Okay.

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

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

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

22 THE COURT: Oh, maybe --

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

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

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

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

9 THE COURT: I'm sorry?

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

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

14 MS. PALM: No.

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

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

21 MS. PALM: No, your Honor.

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

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

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1 instructions. I object to State's instruction. It does not
2 include the language about voluntariness requires a act be a
3 product of rational intellect and free will. That's been the
4 case law for a long time in Nevada. That's under Passima
5 (phonetic), and it's -- I believe that's also cited in the
6 Rosky case, which I have on my instruction.
7 In addition, they don't mention intoxication at all.
8 And there's plenty of case law on intoxication effecting
9 somebody's ability to give a voluntary statement. And the
10 second paragraph of my proposed instruction talks about that a
11 defendant's intoxication will make a statement inadmissible
12 only if the accused is intoxicated to the extent of being
13 incapable of understanding of the meaning of his comments.
14 That is the case law in Nevada.

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

17 THE COURT: All right.

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

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

21 (Pause in the proceedings).

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

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

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

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

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

25 So that is verbatim the instruction that we're

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

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

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

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

24 THE COURT: Anything further, Ms. Palm?

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

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

7 MR. LALLI: Here.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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

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

9 MS. PALM: Well, I --

10 MR. LALLI: -- I --

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

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

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

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

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

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

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1 rational and intellect and of free will.

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

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

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

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

12 MS. PALM: Just a minute.

13 THE COURT: Or which head note?

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

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

19 MR. LALLI: I do.

20 THE COURT: It cites to Kirskey.

21 THE MARSHAL: (Indiscernible).

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

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

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

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

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

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

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

24 THE COURT: Yes.

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

1 THE COURT: Yes.

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

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

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

10 MR. LALLI: Right.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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1 MS. PALM: Well --

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

8 THE COURT: And is it paragraph three?

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

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

13 MS. PALM: Yes.

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

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

19 MS. PALM: Yes.

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

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

22 MR. LALLI: Yes.

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

25 (Pause in the proceedings).

ROUGH DRAFT TRANSCRIPT

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1 (In the presence of the jury).

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

5 THE COURT: The next witness is Chelsea Collins.

6 MS. PALM: Yes, your Honor.

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

10 CHELSEA COLLINS, DEFENDANT'S WITNESS, SWORN

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

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

15 THE COURT: Go ahead, Ms. Palm.

16 MS. PALM: Thank you.

17 DIRECT EXAMINATION

18 BY MS. PALM:

19 Q Good morning, Ms. Collins.

20 A Good morning.

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

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

24 Q And how long have you had that position?

25 A Four and a half years.

ROUGH DRAFT TRANSCRIPT

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

3 A I was.

4 Q Did you respond to 5001 El Parque?

5 A Yes.

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

8 A Yes.

9 Q Who was that?

10 A Jocelyn Maldonado.

11 Q Can you explain your respective roles that morning.

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

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

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

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

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

ROUGH DRAFT TRANSCRIPT

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

3 A Yes, they did.

4 MS. PALM: May I approach the witness?

5 THE COURT: Yes.

6 MS. PALM: Have you seen this already?

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

8 BY MS. PALM:

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

13 A Yes, I do.

14 Q Is that the car that you photographed --

15 A Yes, it is.

16 Q -- that morning?

17 A Yes.

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

20 MR. LALLI: No objection.

21 THE COURT: They'll be admitted.

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

23 BY MS. PALM:

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

ROUGH DRAFT TRANSCRIPT

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

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

5 A Yes, it was.

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

8 A Yes.

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

11 A I did not open the vehicle.

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

14 A That's correct.

15 Q Did you check them from outside the vehicle.

16 A Yes.

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

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

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

22 A Yes, it is.

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

24 A The exterior of the vehicle.

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

ROUGH DRAFT TRANSCRIPT

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1 MS. PALM: Court's indulgence.

2 THE COURT: All right.

3 (Pause in the proceedings).

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

6 BY MS. PALM:

7 Q Do you recognize this?

8 A Yes, I do.

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

11 A Yes.

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

13 EEEEE.

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

15 MS. PALM: Five Es.

16 THE COURT: All right.

17 MR. LALLI: No objection.

18 THE COURT: It will be admitted.

19 (Exhibit EEEEE admitted).

20 BY MS. PALM:

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

22 A Yes.

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

25 A No, I cannot.

ROUGH DRAFT TRANSCRIPT

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

3 A At 12:34 a.m.

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

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

8 Q Yes.

9 A The -- the --

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

12 THE COURT: Sustained.

13 BY MS. PALM:

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

16 A That's correct, I was not.

17 Q Okay.

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

19 THE COURT: Cross-examination?

20 MR. LALLI: No, your Honor.

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

24 THE WITNESS: Thank you.

25 THE COURT: Next witness for the defense.

ROUGH DRAFT TRANSCRIPT

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1 MS. PALM: That would be Bob Paisano.

2 (Pause in the proceedings).

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

5 ROBERT FRANCIS PAISANO, DEFENDANT'S WITNESS, SWORN

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

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

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

10 THE COURT: Yes.

11 DIRECT EXAMINATION

12 BY MS. PALM:

13 Q Good morning, Mr. Paisano.

14 A Good morning.

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

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

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

20 A Yes.

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

23 A Yes, I did.

24 Q Is he in the courtroom today?

25 A Yes, he is.

ROUGH DRAFT TRANSCRIPT

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

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

5 Q Thank you.

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

8 THE COURT: Yes, it will.

9 MS. PALM: Thank you.

10 BY MS. PALM:

11 Q How did Brian end up coming to you?

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

14 Q What does that mean self-referral?

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

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

18 A Yes, I did --

19 Q -- at that time?

20 A Yes, I did.

21 Q What were the results of that?

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

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

ROUGH DRAFT TRANSCRIPT

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1 A Yes, I did.

2 Q Okay. And where did he go?

3 A Went to the Las Vegas Recovery Center.

4 Q Okay. What happens after detox then?

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

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

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

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

15 A Yes.

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

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

21 Q And do you have those things?

22 A Yes.

23 Q And you're licensed?

24 A Yes, I am.

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

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

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

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

7 A Yes, he did.

8 Q Who was that?

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

11 Q Would it be Victoria Whitmarsh?

12 A Yes.

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

14 A Briefly.

15 Q Okay. Did she attend with Brian?

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

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

22 A Yes.

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

25 A No, I did not.

ROUGH DRAFT TRANSCRIPT

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

2 A Yes.

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

5 A Yes.

6 Q Okay.

7 MS. GRAHAM: Objection. Relevance.

8 THE COURT: Overruled --

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

10 THE COURT: -- at this point.

11 BY MS. PALM:

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

14 A No, it's not recommended.

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

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

18 Q Can you name those?

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

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

22 A Yes.

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

24 A No.

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

ROUGH DRAFT TRANSCRIPT

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1 future?

2 MS. GRAHAM: Objection. Speculation.

3 THE COURT: Sustained.

4 BY MS. PALM:

5 Q Were they affectionate with each other?

6 A Yes.

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

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

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

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

16 Q Do you know whether he suffered from blackouts?

17 A I believe --

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

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

22 MS. PALM: Court's indulgence.

23 BY MS. PALM:

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

ROUGH DRAFT TRANSCRIPT

002546

1 A Yes.

2 Q Do they often minimize their use of alcohol?

3 A Yes.

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

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

8 Q Is denial part of being an alcoholic?

9 A Yes.

10 Q And is alcoholism a chronic disease?

11 A Yes, it is.

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

13 THE WITNESS: Thank you.

14 THE COURT: Cross-examination.

15 MS. GRAHAM: Thank you, Judge.

16 CROSS-EXAMINATION

17 BY MS. GRAHAM:

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

19 A Yes, he is.

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

22 A Yes.

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

24 A I have no recollection of the date.

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

ROUGH DRAFT TRANSCRIPT

002547

1 self-referral; isn't that right?

2 A Yes.

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

6 A I'm not aware of that.

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

9 A Yes.

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

14 MS. PALM: Page number?

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

16 BY MS. GRAHAM:

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

18 A No, I do not.

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

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

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

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

ROUGH DRAFT TRANSCRIPT

002548

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

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

5 A Yes.

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

7 A Yes.

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

10 A Yes.

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

13 A Yes.

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

17 A Yes.

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

20 A Um-h'm.

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

24 A Um-h'm.

25 THE COURT: Is that a yes?

ROUGH DRAFT TRANSCRIPT

002549

1 MS. PALM: No objection.

2 THE COURT: It will be admitted.

3 (Exhibit 133 admitted)

4 BY MR. LALLI:

5 Q Who is the person who is the subject of that
6 conviction?

7 A Brian Kerry O'Keefe.

8 Q And what is the conviction for?

9 A Battery, (indiscernible) or --

10 Q Constituting?

11 A Constituting, sorry, domestic violence, a category C
12 felony.

13 Q What was the date that the document was filed?

14 A March 9th, 2006.

15 Q And was that conviction pursuant to a jury trial?

16 A Yes.

17 Q And did you learn who the victim in that case was?

18 A Yes, I did.

19 Q Who was that?

20 A Victoria Whitmarsh.

21 Q Was that the same person you investigated as a victim
22 as least in the homicide that you're here to testify about?

23 A Yes, sir.

24 Q When you investigate a homicide case, do you do that
25 alone, or do you have a partner?

ROUGH DRAFT TRANSCRIPT

002450

1 A I have a partner assigned with me.

2 Q Who was your partner on this day?

3 A On this day it was Detective Christopher Bunn.

4 Q And is it uncommon for detectives to divide
5 responsibilities with respect to an investigation?

6 A Not at all.

7 Q How were responsibilities divided in this case?

8 A Detective Bunn worked the actual scene itself with
9 crime scene analysts, and I was assigned to interview Mr.
10 O'Keefe.

11 Q What would the responsibilities be associated with
12 investigating a scene?

13 A He would go through, they would investigate the
14 scene. They would make sure that the proper evidence was
15 collected, photographed, preserved, and work hand in hand with
16 the crime scene analyst.

17 Q In this particular case, that was not your primary
18 responsibility, true?

19 A No, sir.

20 Q You indicated that your's was to interview the
21 suspect?

22 A Yes.

23 Q Okay. Did you in fact interview him?

24 A Yes, I did.

25 Q Where did that interview occur?

ROUGH DRAFT TRANSCRIPT

002451

1 A It took place at the homicide offices located at
2 Oakey (phonetic) and Decatur.

3 Q So at some point obviously, you left the crime scene
4 and traveled to the homicide office?

5 A Yes.

6 Q How was the defendant brought to the homicide office?

7 A He was transported by a patrolman in a black and
8 white patrol vehicle.

9 Q Okay. While you were at the scene and perhaps again
10 at the homicide office, did you notice any cut marks on the
11 defendant's hand?

12 A Yes, I did.

13 Q I'm going to show you what we've marked and admitted
14 as State's Exhibit 62. Does that appear to you to be the
15 defendant's -- believe it's his right hand?

16 A Yes.

17 Q What are we seeing there?

18 A You're seeing a cut on the meaty part of the right
19 index finger.

20 Q You mentioned that about 25 percent of the 200 or so
21 cases you've investigated were stabbing cases?

22 A Yes, sir.

23 Q Is it uncommon for people to get cut while stabbing
24 others?

25 A No, it's not uncommon.

ROUGH DRAFT TRANSCRIPT

002452

1 Q How does that happen?

2 A It occurs when -- depending on their grip of the
3 knife and how they're gripping it. But usually they encounter
4 some sort of resistance when the knife hits the body, and their
5 fingers will slide up the handle and hit the blade.

6 Q Okay. Now I want to talk to you a little more about
7 your interview of the defendant. Specifically where in the
8 homicide office was the interview conducted?

9 A We have interview rooms that are equipped for doing
10 such interviews as we did.

11 Q And you said that they're equipped?

12 A Yes.

13 Q How are they equipped?

14 A They're equipped with audio and video equipment for
15 taping, and for restraints if necessary.

16 Q Was Mr. O'Keefe in restraints?

17 A Yes.

18 Q Why?

19 A He was combative at the scene, is what I was told
20 before I arrived, and then at my briefing. And he was placed
21 in restraints, it was (sic) in restraints the whole time, and
22 left in restraints when we got to the homicide office.

23 Q And was this interview videotaped?

24 A Yes.

25 Q And does the video also contain audio?

ROUGH DRAFT TRANSCRIPT

002453

1 A Yes.

2 Q In addition to the video and the audio, do you also
3 have a separate recorder?

4 A I do, yes.

5 Q And why the redundancy?

6 A Just as a back up, just in case we have some sort of
7 an electronic failure.

8 Q Okay. And in the videotape, are you able to see the
9 defendant restrained?

10 A Yes.

11 Q Okay, what does that look like?

12 A He's seated at a table. Along the wall is a bar, in
13 which his right hand is handcuffed to that bar.

14 Q Okay. Is that uncommon?

15 A No.

16 Q All right. Now at some point, you begin your
17 recording of your statement with the defendant; is that true?

18 A Yes.

19 Q But obviously you had been in the room with him a
20 time before that your recorder actually clicked on?

21 A Yes.

22 Q Can you please describe for us his demeanor before
23 your recorder clicked on?

24 A He was extremely argumentative, sarcastic,
25 unconcerned.

ROUGH DRAFT TRANSCRIPT

002454

1 Q Okay. Were you assisting him in some regard? Or
2 were you offering items that would assist in -- specifically
3 with regard to his hand?

4 A I provided him with some medical wipes for his hand
5 to stop the blood.

6 Q Okay. Prior to the tape coming on, did you ever make
7 any threats to him?

8 A No.

9 Q Any physical or verbal threats or gestures in any
10 way?

11 A None.

12 Q Did you ever pull your gun on the defendant to force
13 him to speak to you?

14 A No.

15 Q Did you advise him of his rights pursuant to Miranda
16 vs. Arizona (phonetic)?

17 A Yes, I did.

18 Q And was that done on recording?

19 A Yes.

20 Q Did the defendant eventually acknowledge that he
21 understood those rights?

22 A Eventually, yes.

23 Q Okay. Now during the course of your interview with
24 the defendant, did it ever appear to you that he had consumed
25 alcohol at some point earlier in the evening?

ROUGH DRAFT TRANSCRIPT

002455

1 A Yes.

2 Q Can you describe what you saw for us?

3 A He smelled of alcohol. He -- his eyes were
4 bloodshot. He was comprehending what I was saying, but I could
5 smell an overall odor of alcohol about his person.

6 Q Was the alcohol that you smelled, based upon your own
7 observations, something that prevented him from understanding
8 his Miranda warnings?

9 A No.

10 Q Let me ask you this. Did you ever collect a sample
11 of his blood?

12 A No.

13 Q Why not?

14 A During the course of the interview, it became
15 apparent that he was in full comprehension of what I was asking
16 and talking about. He was able to answer questions about prior
17 events to the event in detail. He was able to recall names of
18 people who called him and he called during that day, phone
19 numbers. He was able to also limit his answers at times that
20 he needed to.

21 Q Okay. And what do you mean, at times that he needed
22 to?

23 A When it was during recollection of like I said,
24 events prior to the day, he was very detailed. But when it
25 came time to --

ROUGH DRAFT TRANSCRIPT

002456

1 MS. PALM: And Your Honor, I'm going to object to the
2 detective's opinion on what the meaning of his statements was.
3 I think the jury can watch the video and determine for
4 themselves.

5 MR. LALLI: Well he was there, Your Honor. I think
6 he can --

7 MS. PALM: That's opinion testimony.

8 MR. LALLI: It's consciousness of guilt.

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

10 MR. LALLI: Okay.

11 BY MR. LALLI:

12 Q Continue with your answer, please.

13 A When we spoke specifically about the murder, the
14 defendant would not speak and answer questions. He would go
15 off on tangents not related, or step back to events that were
16 prior in the day.

17 Q Okay. You mentioned that you have a partner,
18 Detective Bunn, who was responsible for the scene.

19 A Yes, sir.

20 Q Did someone else assist you with the interview of the
21 defendant?

22 A Yes.

23 Q Who was that?

24 A Detective Kyger is another detective who is on my
25 squad who -- we have two detectives present on suspect

ROUGH DRAFT TRANSCRIPT

002457

1 interviews, and who assisted me.

2 Q Is Detective Kyger depicted in the video?

3 A Yes, she is. It's the other female in the room.

4 Q Okay. And you just anticipated my next question.
5 She is a female detective?

6 A Yes, sir.

7 Q Can you describe if you would the treatment that she
8 received by the defendant during the course of the interview?

9 MS. PALM: I'm going to object again, Your Honor, to
10 opinion testimony. The jury can watch the video and determine
11 themselves how he's treating her.

12 BY MR. LALLI:

13 Q Well I'm not asking for your opinion. I'm asking
14 specifically, how did he address her?

15 THE COURT: Well that's a different question. So --

16 MR. LALLI: Yeah. So I'll withdraw that question.

17 THE COURT: Okay.

18 BY MR. LALLI:

19 Q I'll ask, how did he address her?

20 A As, young lady.

21 Q Would he direct her to do things?

22 A Yes, frequently.

23 Q Can you give us an example?

24 A Ask for coffee, ask her to write things down as he
25 was talking.

ROUGH DRAFT TRANSCRIPT

002458

1 Q Okay. I take it during the course of your interview
2 with him you spoke about Victoria Whitmarsh?

3 A Yes.

4 Q Did he, meaning the defendant, refer to her by a
5 certain name?

6 A Yes, he would call her V as a short name for her.

7 Q And did you at one point during the course of your
8 interview attempt to refer to her as, V?

9 A Yes.

10 Q And was that acceptable to him?

11 A No.

12 Q What happened?

13 A He stated that he was the only one that was able to
14 call her V.

15 Q During the course of the interview, does the
16 discussion of the defendant having placed a phone call to 9-11
17 arise?

18 A Yes.

19 Q You discussed that with him?

20 A Yes.

21 Q And what did he tell you?

22 A Eventually he says that he did call 9-11.

23 Q He did call 9-11?

24 A That's what he says.

25 Q During the course of your interview?

ROUGH DRAFT TRANSCRIPT

002459

1 A Yes.

2 Q At some point during the course of the interview, did
3 the defendant say something to the effect of, I've given you
4 enough information?

5 A Yes.

6 Q Is that common?

7 A Not very, no.

8 Q Okay.

9 A Depends on the circumstances of the interview.

10 Q Okay. Is it uncommon for defendants to try to
11 control interviews?

12 A No, that is not uncommon.

13 Q Okay. Did you experience that during the course of
14 this interview.

15 A Several times. He would try to over-speak me, or use
16 his volume over mine, kind of a bully tactic.

17 Q Okay. During the course of your interview with him,
18 did the notion or the subject of Victoria Whitmarsh being
19 deceased come up?

20 A Yes.

21 Q Can you tell us about that?

22 A He asked me I believe three times during the course
23 of the interview the status of Ms. Whitmarsh.

24 Q And what happened?

25 A The first two times, I told him that we were -- that

ROUGH DRAFT TRANSCRIPT

002460

1 she was being worked on. And I believe the second time I said
2 she was in extremely bad shape. And then I told him that she
3 was deceased.

4 Q And what was his response to being informed that she
5 was deceased?

6 A A short pause, and then he asked for a cup of coffee.
7 And then he went about some rantings.

8 Q Okay.

9 MR. LALLI: Your Honor, I've marked a copy of the
10 videotape as State's proposed 134 for identification purposes.
11 I'd move for it's admission.

12 MS. PALM: No objection.

13 THE COURT: All right. 134 will be admitted, and you
14 can play it.

15 (Exhibit 134 admitted)

16 MR. LALLI: Okay.

17 (Video of defendant's statement played for jury, not
18 transcribed)

19 BY MR. LALLI:

20 Q Now Detective Wildemann, at some point during the
21 video that we just saw, kind of a black screen comes up almost
22 in the middle of what we saw?

23 A Yes.

24 Q Do you have any idea what that is? Not the black
25 screen, but what occurs during that period of time?

ROUGH DRAFT TRANSCRIPT

002461

1 A We took a break. I think we were out of the room for
2 approximately an hour.

3 Q Okay. During the course -- particularly in the
4 second half of the video, the defendant is making noises as
5 though he's crying. Can you tell us what you saw?

6 A I saw him doing exactly that, making noises like he
7 was crying. To me it didn't look sincere, there was no tears,
8 there was no runny nose. Kind of came on and off with -- when
9 he wanted it to.

10 Q Earlier in the interview, we talked about how he had
11 indicated that he had called 9-11. And at the end of the
12 interview, he is informed by Detective Kyger that you had
13 checked, the two of -- either she or you, or you collectively
14 had checked, and there was no 9-11 call made by him?

15 A That's correct.

16 Q What did you do to ascertain whether he had ever
17 called 9-11?

18 A Detective Bunn at the scene looked at his phone at
19 the outgoing, incoming calls. There was no calls to 9-11.

20 Q His phone, meaning who's his?

21 A I'm sorry. Brian O'Keefe's phone.

22 Q Okay. We checked the Cad (phonetic) system, which is
23 a computer assisted dispatch which logs all the calls coming in
24 from your persons reporting of crimes. And there was no phone
25 number or name of Brian O'Keefe there.

ROUGH DRAFT TRANSCRIPT

002462

1 Q Were you aware of any neighbor who indicated that the
2 defendant had told them to call 9-11?

3 A No, I was not aware.

4 MR. LALLI: Your Honor, that concludes direct
5 examination.

6 THE COURT: All right. Ms. Palm?

7 MS. PALM: Thank you.

8 CROSS-EXAMINATION

9 BY MS. PALM:

10 Q Good afternoon, Detective.

11 A Good afternoon.

12 Q Your Mirandized (phonetic) interview starts about
13 1:45 in the morning? Do you agree with that?

14 A Approximately?

15 Q Okay. It's about two hours, 45 minutes or so after
16 the incident's reported, --

17 A Yes.

18 Q -- does that sound about right?

19 A Yes.

20 Q Okay. And then it continues until approximately 2:01
21 a.m., which would be the first break?

22 A Yes.

23 Q Or the break?

24 A Yes.

25 Q Okay. So about 15 minutes, the first section of it?

ROUGH DRAFT TRANSCRIPT

002463

1 A Correct.

2 Q Then you take an hour-long break?

3 A Correct.

4 Q And then it goes from 3:06 to 3:28 a.m., about you
5 know, roughly 20 minutes?

6 A Correct.

7 Q Okay. And when you come back in later on, do you
8 come back in with CSA Dan Ford?

9 A After the interviews, I do come back in with Dan
10 Ford, yes.

11 Q Okay. Do you know how much later that was?

12 A I don't know off-hand.

13 Q Okay. If I told you it was about 3:55, would that
14 sound about right to you?

15 A Yes.

16 Q Okay. If I understood your testimony, you were
17 saying before the video that Brian O'Keefe was kind of bossing
18 Detective Kyger around?

19 A Yes.

20 Q Okay. Detective Kyger is a pretty experienced
21 detective, isn't she?

22 A Yes.

23 Q Can she handle her own?

24 A Yes.

25 Q Okay. And when you say he's bossing her around, he's

ROUGH DRAFT TRANSCRIPT

002464

1 really saying, please, please write this down?

2 A He's making commands that she write things down, yes.

3 Q Okay. But she's the one sitting there with a
4 notepad?

5 A Yes.

6 Q Okay. She is the one writing things down?

7 A I had a notepad in front of me, but he keeps
8 referring to her, yes.

9 Q Okay. But at one point, he says, you wouldn't
10 understand, she does; is that correct?

11 A Yes.

12 Q Okay. And do you ever find that it's not uncommon
13 with a male interviewee that he might not want to cry in front
14 of a female detective?

15 A I don't know that I could answer that. I don't find
16 that uncommon.

17 Q Okay. Well it seemed like you were implying
18 something by the fact that Mr. O'Keefe asked for a coffee,
19 sending Detective Kyger out of the room before he broke down
20 crying when you told him Ms. Whitmarsh was dead.

21 A Yes.

22 Q Okay. Can you understand a situation where a male, a
23 middle-aged male might not be comfortable crying in front of a
24 female?

25 A He cried several times in front of her.

ROUGH DRAFT TRANSCRIPT

002465

1 Q Okay. So you don't understand that situation ever?

2 A I'm not understanding it in this situation, because
3 he did cry in front of her before, he whimpered before. And at
4 that time, he wanted a cup of coffee.

5 Q Okay. And that would be your interpretation of it?

6 A Yes.

7 Q Now if I understand your testimony on the, it's no
8 uncommon to have wounds on a hand because a hand slides on a
9 blade when it's wet?

10 A Could be when it's wet. It could be --

11 Q Or --

12 A -- because you encounter resistance. There's several
13 reasons why that could happen.

14 Q In this case, are you aware that the knife did not
15 hit any bones?

16 A I am aware of that, yes.

17 Q Okay. And is there any evidence that it would have
18 been wet before Ms. Whitmarsh was cut?

19 A I have no idea of the status of the knife, or the
20 status of his hands as sweating. I have no idea.

21 Q Do you have nay forensic training? Are you trained
22 in forensic sciences?

23 A I've attended classes.

24 Q Okay, how many?

25 A I don't know. It's been a long career, several.

ROUGH DRAFT TRANSCRIPT

002466

1 Q Okay. Well can you identify any forensic classes
2 you've attended?

3 A Crime scene preservation. I'd have to pull up my
4 resume.

5 Q But right now you can't recall any specific class?

6 A Crime scene preservation.

7 Q When was that class?

8 A Oh, years ago. I don't know.

9 Q Okay. And you're not a medical doctor?

10 A No.

11 Q When you were in the room directing Mr. Ford to
12 document my client's hand injury?

13 A Yes.

14 Q Okay. And you only pointed out to him a injury to
15 the finger at the time; is that correct?

16 A Correct.

17 Q Okay. Then how is it that you are able to look at
18 the injuries and determine what they mean if you didn't even
19 see the thumb injury at the time?

20 A I saw the finger injury, and that's the injury that I
21 was interpreting.

22 Q Okay. So you didn't personally examine the thumb
23 injury?

24 A I didn't.

25 Q Okay. And Mr. O'Keefe told you he's right-handed?

ROUGH DRAFT TRANSCRIPT

002467

1 A I don't recall.

2 Q And at the time of the interview, you were a homicide
3 detective for about seven years?

4 A Yes.

5 Q Okay. And when you got Mr. O'Keefe's telephone
6 records, did they show that he had made roughly 30 calls the
7 day before the incident?

8 A I didn't look at his telephone records.

9 Q Okay. You didn't subpoena them?

10 A No.

11 Q Was that Detective Bunn?

12 A Detective Bunn looked at his phone. And I don't know
13 if he -- I don't believe that he subpoenaed the records.

14 Q Okay. If I show you some phone records, would you
15 recognize whether they came from your detective's file?

16 A Yes. I -- well, I don't know. If they're marked.

17 MS. PALM: May I approach the witness?

18 THE COURT: Yes.

19 MS. PALM: I'm sorry (indiscernible).

20 BY MS. PALM:

21 Q Does that look familiar to you?

22 A It doesn't look familiar to me, no. But I do
23 recognize it as a call detail record.

24 Q Okay.

25 A If that's what you're asking.

ROUGH DRAFT TRANSCRIPT

002468

1 Q And does it look like calls dialed out from a certain
2 number, and in?

3 A Yes.

4 Q Okay, and what is the number that's in common?

5 A 702-6958.

6 Q Okay. And --

7 A I'm not sure how to interpret these records here
8 though, but -- because (indiscernible) seem to have a standard
9 number, destination number, number dialed. So I'm not sure how
10 to interpret that.

11 Q Okay. Can you tell the date of the phone calls?

12 A 11-5 through 11-5.

13 Q Okay. And can you tell about how many calls there
14 are there?

15 A There's several. There's a page-full.

16 Q Okay, thank you. Did you happen to follow up on the
17 information about the Paris Motel?

18 A No.

19 Q Okay. So you never attempted to obtain a video from
20 Paris (phonetic)?

21 A No.

22 Q Now do you recall testifying previously in this case
23 that you had never heard of a homicide investigation where
24 blood or breath alcohol tests were taken from a suspect?

25 A Yes, I do recall that.

ROUGH DRAFT TRANSCRIPT

002469

1 Q Okay. And are you aware of any cases at this time?

2 A There is a single case that I'm aware of, yes.

3 Q Okay. And it was one that occurred before Mr.
4 O'Keefe's case?

5 MR. LALLI: I'm going to object, Your Honor, as to
6 relevance.

7 THE COURT: Counsel approach, please.

8 (Off-record bench conference)

9 THE COURT: I'm going to sustain the objection by the
10 State.

11 (Pause in proceedings)

12 BY MS. PALM:

13 Q And Detective, you also testified previously in this
14 case that there's no protocol with the Metropolitan Police
15 Department for taking blood or breath tests from a suspect?

16 A Protocol is different than policy. So I don't know
17 what you're asking.

18 Q Well I'm asking if you testified that there was no
19 protocol.

20 A I believe I testified there was no protocol.

21 Q Okay. So are you familiar with Metro -- that Las
22 Vegas Metropolitan Department manual, section 52221?

23 A Yes, I am.

24 Q Okay. And are familiar with the document to the
25 extent that it allows non-consensual searches in a felony case

ROUGH DRAFT TRANSCRIPT

002470

1 that is being investigated where there is probable cause to
2 believe that a felony has been committed?

3 A I'm familiar that that's a part of it, yes.

4 Q Okay. And are you familiar that it gives example
5 where a homicide suspect is arrested on probable cause
6 immediately after their crime, appears slightly intoxicated; a
7 blood sample can be taken to show the degree of intoxication,
8 which may become an important issue for the State or the
9 defense?

10 MR. LALLI: Is this a question? I object to the form
11 of the question, Your Honor.

12 THE COURT: Is there?

13 MS. PALM: Well Your Honor --

14 THE COURT: What's the question?

15 MS. PALM: -- I've marked this is defendant's
16 proposed Exhibit L, and I would move to admit it. Do you want
17 to see it?

18 MR. LALLI: I've seen it.

19 MS. PALM: It's a certified record from the Las Vegas
20 Metropolitan Police Department.

21 MR. LALLI: No objection.

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

23 (Exhibit L admitted)

24 MS. PALM: Okay.

25 THE COURT: I'm sorry, was that L?

ROUGH DRAFT TRANSCRIPT

002471

1 MS. PALM: L.

2 THE COURT: Okay.

3 MS. PALM: Yes.

4 BY MS. PALM:

5 Q Are you familiar with that policy?

6 A I'm familiar -- you've left out some words, but I am
7 familiar with it.

8 Q Okay. What have I left out?

9 A You left out I believe a "can," you've left out an
10 "if," and a couple other words that I can't recall.

11 Q Okay. Would you like to show me where I left it out?

12 A Sure.

13 MS. PALM: May I approach?

14 THE COURT: Yes.

15 THE WITNESS: "Can," right there. "Can." And I
16 thought there was an "if." I don't see an "if," but two
17 "can's."

18 BY MS. PALM:

19 Q Okay. So this section actually tells you that when
20 you're doing an investigation, you can collect a blood sample,
21 and that it may be an important issue for the State or the
22 defense?

23 A Yes. It says, "I can." Yes.

24 Q Okay. And that policy was in existence at the time
25 of my clients interview with you?

ROUGH DRAFT TRANSCRIPT

002472

1 A I believe so.

2 Q And so when I -- if I'm understanding you right
3 today, you're saying that you testified there was no protocol
4 earlier because you considered that a policy?

5 A Correct.

6 Q Okay. So that's not a protocol, it's a policy?

7 A Correct.

8 Q And did the district attorney tell you I had
9 subpoenaed that document?

10 A I believe so, yes.

11 Q There's a nurse maintained at the jail 24 hours a day
12 to collect blood?

13 A Yes.

14 Q So you could have done it in Mr. O'Keefe's case?

15 A I could have, yes.

16 Q Okay. And you never offered Mr. O'Keefe the choice?

17 A No.

18 Q And Mr. O'Keefe smelled heavily of alcohol?

19 A Yes.

20 Q He was slurring his speech?

21 A Slightly.

22 Q It was pretty obvious he had been drinking?

23 A I could tell that he had been drinking.

24 Q You testified before it was obvious, would you
25 dispute that now?

ROUGH DRAFT TRANSCRIPT

002473

1 A No.

2 Q Okay. And you're aware during your investigation
3 there was a possibility that an arresting officer stepped on
4 the bed at the scene?

5 A I was aware that -- in our initial briefing, that a
6 struggle had occurred in that room. I thought that that could
7 have been a possibility, but I learned throughout the
8 investigation that that hadn't happened.

9 Q Okay. But early on you were aware it was a
10 possibility?

11 A At the initial briefing, at the scene shortly after
12 the crime.

13 Q Okay.

14 MS. PALM: Court's indulgence.

15 BY MS. PALM:

16 Q Do you recall that early on in this case, I had
17 asked for the use of force report prepared by Officer Ballejos?

18 A Yes.

19 Q Okay. Do you recall the existence of the document
20 being denied?

21 A I recall Detective Bunn had testified regarding that,
22 yes.

23 Q Okay. And said basically there is no such document?

24 A At the time, we didn't know about any such document.

25 Q Okay. But it was -- it's existence was denied at one

ROUGH DRAFT TRANSCRIPT

002474

1 point?

2 A Yes.

3 Q Okay. And then ultimately, it was turned over?

4 A Not by ourselves, we're allowed no access to those
5 documents.

6 Q Okay.

7 A So it was turned over, not by us.

8 Q Okay. Do you know that was pursuant to court order?

9 A I believe it was, but I'm not sure on that.

10 Q Okay. Would you agree that it's the only written
11 documentation in this entire case that shows Mr. O'Keefe was
12 extremely intoxicated?

13 MR. LALLI: Objection, assumes facts not in evidence,
14 and it misstates the testimony. This detective has already
15 testified numerous times that he knew he was intoxicated, and
16 he preserved it on the video.

17 MS. PALM: And Your Honor, my question was extremely
18 intoxicated. And this detective is familiar with the use of
19 force report, because he's testified about it before.

20 THE COURT: Well is your question is if the word
21 "extremely" is in the report? Or if this officer has prepared
22 a report with the word "extremely" in it?

23 MS. PALM: My question was, is he aware that that's
24 the only document in the entire case that shows that Mr.
25 O'Keefe was extremely intoxicated.

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1 MR. LALLI: I object, that misstates the evidence.

2 THE COURT: Counsel approach, please.

3 (Off-record bench conference)

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

5 MS. PALM: Thank you.

6 BY MS. PALM:

7 Q Detective, are you aware that the report, the use of
8 force report is the only document that states that Mr. O'Keefe
9 is extremely intoxicated?

10 A I've never seen that document.

11 Q You haven't seen it yourself?

12 A No.

13 Q All right. Is there another document that states
14 that Mr. O'Keefe is extremely intoxicated?

15 A I don't know of one.

16 Q So none of the police reports state that issue?

17 A No.

18 Q State that he's extremely intoxicated?

19 A Not one that I've seen.

20 Q Okay. In fact, do any of them even say he's
21 intoxicated?

22 A There's several reports. I'm not sure on that.

23 Q You're not aware of one that does though, are you?

24 A No.

25 Q And it's not mentioned in your officer's report or

ROUGH DRAFT TRANSCRIPT

002476

1 arrest report, is it?

2 A I don't believe so, no.

3 Q Are you familiar with coroner investigator Staling's
4 (phonetic) report?

5 A I have not looked at that in years.

6 Q Okay. Is it part of your case file in the homicide
7 files?

8 A I believe so, yes.

9 Q Okay. Did you -- do you recall his notation that Ms.
10 Whitmarsh --

11 MR. LALLI: I'm going to object as to hearsay.

12 MS. PALM: Well --

13 THE COURT: Sustained.

14 MS. PALM: It's not offered for the truth of the
15 matter. It's offered for the thoroughness of the
16 investigation, Your Honor.

17 MR. LALLI: It's hearsay.

18 THE COURT: Counsel, approach again.

19 (Off-record bench conference)

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

21 BY MS. PALM:

22 Q Did you personally look into whether Ms. Whitmarsh
23 was taking her meds or not?

24 A I didn't personally look into that, no.

25 Q Okay. Did you recall any information that made that

ROUGH DRAFT TRANSCRIPT

002477

1 relevant to you?

2 A I don't know of any information at this point that
3 made that relevant at the time.

4 Q Okay. Would you consider that a relevant issue in a
5 homicide investigation?

6 A If she was taking her meds?

7 Q Yes.

8 A It could be.

9 Q Okay. Did you look into Ms. Whitmarsh's mental
10 health history?

11 A I did not personally, no.

12 Q Okay. Mr. O'Keefe pointed you towards Monte Vista
13 (phonetic) though, did he not?

14 A Yes.

15 Q Okay. Did you just not consider that relevant
16 information?

17 A I believe that detective Bunn documented all the
18 meds, and everything that went on with that. And I'm not sure
19 if he pulled up information regarding Monte Vista.

20 Q Okay. In determining whether to proceed with the
21 charges or not, then you did not know Ms. Whitmarsh's
22 psychiatric history?

23 A No.

24 Q Okay. When you're doing the video of the interview,
25 there's a camera in the room?

ROUGH DRAFT TRANSCRIPT

062478

1 A Yes.

2 Q Is it an obvious camera?

3 A No.

4 Q All right. So going back to the -- where you say my
5 client was ordering Detective Kyger around, and I guess you
6 didn't like it that he was calling her young lady either?

7 A That's how he addressed her.

8 Q Okay. He also addressed her as ma'am at one point;
9 is that correct?

10 A I believe so.

11 Q Okay. And he also apologized and said, I'm sorry,
12 Detective, when he said young lady one time; is that correct?

13 A Yes.

14 Q Okay. And so the ordering her around was saying,
15 please, please, write this down, write this down, please write
16 this down?

17 A Pretty sure there wasn't a "please" every time.

18 Q Okay. Would you dispute if there's only one time he
19 didn't say, "please?"

20 A I have no idea, we would have to go through the thing
21 again. I'd gladly count them with you.

22 Q Would you like to?

23 A We could.

24 MS. PALM: May I approach the witness?

25 THE COURT: Yes.

ROUGH DRAFT TRANSCRIPT

062479

1 BY MS. PALM:

2 Q Do you remember where they were?

3 A Where every one is that he asked to --

4 Q Where he was asking to do something?

5 A Oh, no I don't.

6 Q It's relatively short.

7 MR. LALLI: I'm sorry. I can't hear the question,
8 Your Honor.

9 MS. PALM: I asked him if he recalled which pages he
10 asked her to do something (indiscernible).

11 THE WITNESS: Please can I start over?

12 MS. PALM: Sure. (Indiscernible).

13 THE COURT: Ms. Palm, is there a question? Because
14 it's not being picked up by the microphone.

15 MS. PALM: No, it was just --

16 MR. LALLI: Your Honor, I'm not sure what we're doing
17 here. But unless there's an --

18 MS. PALM: Do you want to come and join us? I'm just
19 asking him to look at --

20 MR. LALLI: No.

21 THE COURT: No, I mean what --

22 MR. LALLI: I just would respectfully ask that
23 counsel be directed to ask a question.

24 MS. PALM: Well, he's looking through the statement
25 at this point.

ROUGH DRAFT TRANSCRIPT

702480

1 THE COURT: Okay. So you've asked the -- asked
2 Detective Wildemann to look for what specifically?

3 MS. PALM: Places where Mr. O'Keefe orders Detective
4 Kyger around without saying please.

5 THE COURT: Okay. All right.

6 THE WITNESS: If I miss one, can you let me know?

7 MS. PALM: I will.

8 MR. LALLI: Your Honor, again, I'm going to interpose
9 an objection. I think this is a waste of the Court's time.
10 The video is in evidence. The jury can clearly see if he says
11 please or not. Counsel certainly has the right to argue this
12 in summation. I'm just not sure this is the best use of our
13 time, so I would object.

14 MS. PALM: Well --

15 THE COURT: Ms. Palm?

16 MS. PALM: -- I'm sorry to take up the Court's time.
17 But this is Mr. O'Keefe's trial, and it's very important they
18 characterized him as ordering somebody around. And I have
19 every right to say, where did he order her around, can you show
20 me where he ordered her around.

21 THE COURT: Okay. Why don't we take a -- just a
22 quick break for the officer to review the report.

23 Ladies and gentlemen, during this recess, it is your
24 duty not to converse among yourselves, or with anyone else on
25 any subject connected with the trial. Or to read, watch or

ROUGH DRAFT TRANSCRIPT

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1 listen to any report of or commentary on the case by any person
2 connected with the trial, or by any medium of information,
3 including without limitation, newspaper, television, radio, or
4 the internet. You are not to form or express an opinion on any
5 subject connected with this case until this matter is submitted
6 to you.

7 We'll see you in approximately five or ten minutes.
8 The marshal will escort you out.

9 (Outside the presence of the jury)

10 THE COURT: All right, we're outside the presence of
11 the jury panel. Detective, here's some post-it's if you --

12 THE WITNESS: Thank you.

13 THE COURT: -- (indiscernible).

14 (Pause in proceedings)

15 (Court recessed at 4:45 p.m. until 4:58 p.m.)

16 (In the presence of the jury)

17 THE MARSHAL: Please be seated.

18 THE COURT: Detective Wildemann, do you understand
19 you're still under oath?

20 THE WITNESS: Yes, sir.

21 THE COURT: All right. Go ahead, Ms. Palm.

22 MS. PALM: Thank you.

23 BY MS. PALM:

24 Q Detective Wildemann, did you have a chance to look
25 through the transcript of Mr. O'Keefe's statement?

ROUGH DRAFT TRANSCRIPT

002482

1 A Yes, I did.

2 Q Okay. And you flagged four areas that you thought
3 were statements of Mr. O'Keefe directed to Detective Kyger that
4 were commands?

5 A Yes.

6 Q And the first one, would you agree was, "Why didn't
7 you call 9-11?" And he response (sic), "Check the phone."

8 A Yes.

9 Q Okay. And the second one is when you say, "Where
10 were the stab wounds? No, look at me." And he says, "Monte
11 Vista. Write this down, Monte Vista." And you say, "No, she's
12 not writing it down." That's the second one?

13 A Yes.

14 Q Okay.

15 THE COURT: Which page is that so the State can
16 follow along?

17 MS. PALM: I'm sorry, State. It is --

18 MR. LALLI: I've got it, Your Honor. Thank you.

19 THE COURT: Okay.

20 MS. PALM: Page 20.

21 BY MS. PALM:

22 Q The third one is when you tell him that she's passed
23 away, and he says, "Could I have some coffee?"

24 A Yes.

25 Q And then the final one is, you say, "And you said,

ROUGH DRAFT TRANSCRIPT

002483

1 yes, you didn't." And he says, "Listen to me?" Do you recall
2 flagging that? I think that's --

3 A I don't know. I don't know if that's --

4 MS. PALM: May I approach?

5 THE WITNESS: -- my flag or your flag.

6 MS. PALM: May I approach?

7 THE COURT: Yes.

8 MS. PALM: Thank you.

9 BY MS. PALM:

10 Q I thought that you had put this here (indiscernible).
11 This is not you?

12 A No, that's not me. I didn't (indiscernible) --

13 Q Oh, okay.

14 A -- that color.

15 Q Okay. So there's basically three of them, and those
16 are the three?

17 A I thought there were four yellow ones on there.

18 Q Did I miss something? Oh, you know what? Well,
19 you're correct. You did have two yellows ones on the same
20 page, so -- on the page (indiscernible) the Monte Vista. You
21 said, "You were with her, where were the stab wounds?" And he
22 said, "Do me a favor." That was one?

23 A Okay. Yes.

24 Q Do you recall that?

25 A Yes.

ROUGH DRAFT TRANSCRIPT

002484

1 Q Okay. So those are the four commands. And was Mr.
2 O'Keefe talking to both of you, or just Kyger during those?

3 A I believe he's directed at Kyger.

4 Q Okay. Did you have it in your mind when you said,
5 "Don't order her around," that you were trying to document
6 somehow that my client was being domineering?

7 A Not at all. I was trying to control the interview.

8 Q Okay. But he was saying the same things to you, and
9 you didn't tell him, don't order me around.

10 A He didn't say it so much to me. Everything that he
11 wanted written, or requested to drink or whatever was directed
12 at Detective Kyger.

13 Q Okay.

14 A I was the one asking the questions at the time, and
15 that was him deflecting to her. And that's why I said, don't
16 order her around. I was trying to control the interview, and
17 get him to answer my questions.

18 Q Okay. But he had told you, you don't understand
19 also, right?

20 A Way back, yes.

21 Q Okay. Have you had any classes on how alcohol --
22 excuse me, affects a person's emotions?

23 A I haven't had a formal class, no.

24 Q Okay. So you don't know whether it affects a
25 person's ability to tear up?

ROUGH DRAFT TRANSCRIPT

002485

1 A No, I never heard that.

2 Q Are you familiar with the documents that were
3 obtained during the search warrant by doctor -- or by Officer
4 Shoemaker?

5 A I'm not familiar with all the papers that were
6 recovered, no.

7 Q Okay. Well --

8 A I wasn't there for that.

9 Q Are all those -- are all the -- is the paperwork in
10 your detective's file?

11 A I would -- yes, I would believe so.

12 Q Are you familiar with your detective's file?

13 A Yes.

14 Q Okay. I'm going to show you what's been marked as
15 defendant's ZZ.

16 MS. PALM: May I approach?

17 THE COURT: Yes.

18 BY MS. PALM:

19 Q Do you recognize what these items are?

20 A I'm sorry. This is a contact information thing for
21 incase of emergency. And this looks like a sales receipt from
22 Al Vacuum and Sewing.

23 Q Okay. And those -- do you recognize those from your
24 detective's file?

25 A Yes.

ROUGH DRAFT TRANSCRIPT

002486

1 Q Okay. And does the vacuum receipt indicate a time on
2 it of a sale?

3 A 5:46 p.m.

4 Q Thank you.

5 MS. PALM: Your Honor, I'm going to move to admit
6 defense Exhibit ZZ.

7 MR. LALLI: Can I just see it one more time, please?

8 BY MS. PALM:

9 Q And Detective --

10 THE COURT: Hang on. Any objection by the State?

11 MR. LALLI: No.

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

13 (Exhibit ZZ admitted)

14 MR. LALLI: There's been -- Your Honor, I would just
15 note there's been now no foundation for it, and it's hearsay.
16 But I don't oppose it being admitted.

17 THE COURT: All right.

18 BY MS. PALM:

19 Q Detective, is it your understanding that those
20 documents came from the search of my client's apartment?

21 A I can't be positive on that. I haven't looked at
22 that section of the file in quite some time. But that's -- I
23 believe it to be, yes.

24 Q Okay. Thank you. And did you check the DMV
25 registration on the Hyundai that was allegedly driven by Ms.

ROUGH DRAFT TRANSCRIPT

002487

1 Whitmarsh and my client?

2 A I believe that I did.

3 Q Okay. Is a registration part of your detective's
4 file in this case?

5 A I'm not sure. I'd have to look through. I don't
6 recall seeing it in quite some time.

7 Q Do you have it with you?

8 A I have it right here.

9 Q If I show you the document, could you check if it's
10 in there?

11 A Sure.

12 MS. PALM: Do you want to look at it before I show it
13 to him?

14 MR. LALLI: No, I've seen it.

15 MS. PALM: May I approach?

16 THE COURT: Yes.

17 THE WITNESS: Okay.

18 BY MS. PALM:

19 Q Do you recognize that?

20 A Yes.

21 Q Does it indicate when the car was registered?

22 A Oh, this is different type of registration from
23 (indiscernible). One second. That's when it was ran. No. Is
24 that it? Okay. It has an effective date of the plates, and
25 plates listed. And it shows an effective date of 3-8-2008.

ROUGH DRAFT TRANSCRIPT

002488

1 Q Okay. And who was it registered to?

2 A Cheryl Morris and Brian O'Keefe.

3 Q Thank you. Detective, do you know how the police
4 responding to the scene learned of Ms. Whitmarsh's hepatitis C?

5 A No, I don't.

6 Q Were you aware that they had learned of it?

7 A I believe it came out at our briefing, so I would
8 think that they knew about it. But I'm not sure how.

9 Q Okay. Did you write the officer's report in this
10 case?

11 A No.

12 Q Do you contribute to it?

13 A Yes.

14 Q Do you review it?

15 A Yes.

16 Q Okay. Do you recall that it was documented in the
17 report that --

18 MR. LALLI: Your Honor, I'm sorry. I object to --
19 we're reading reports. I mean, we've got information coming
20 off of a DMV record. I would object to all of this hearsay
21 without any foundation coming in. I think that the --
22 respectfully, counsel can just ask the question, did you learn
23 this, did you learn that, without eliciting the hearsay. It's
24 not -- we're not making a clean record.

25 THE COURT: Because if he didn't -- I mean, well the

ROUGH DRAFT TRANSCRIPT

002489

1 report is hearsay document, isn't it?

2 MS. PALM: Well he contributes to it, and he reviews
3 it. And it's his and Bunn's collaborative effort as far as my
4 understanding.

5 THE COURT: Well if someone tells someone else
6 something, they put it in the report, it's still hearsay. So
7 I'm going to sustain the objection. You can ask some
8 specifics, but.

9 MS. PALM: Okay.

10 BY MS. PALM:

11 Q Detective, did you have information that Mr.
12 O'Keefe, when officers responding, demanded that officers enter
13 to help her?

14 A Did I have information about that?

15 Q Yes.

16 A I believe so.

17 Q Okay. And did you have information that he complied
18 with officers after the second tase?

19 A Yes.

20 Q And did you have information that the noises didn't
21 begin until 10:00 --

22 A I believe so.

23 Q -- at the apartment?

24 A Yes.

25 Q And did you have information at some point that Mr.

ROUGH DRAFT TRANSCRIPT

002490

1 O'Keefe was attempting to lift Ms. Whitmarsh around the waist?

2 A I'm sorry, I missed part of that. That he was
3 attempting to lift her?

4 Q From the waist.

5 A From the waist. I believe so, yes.

6 MR. LALLI: Your Honor, again, this is all -- this is
7 all hearsay. I would object. We've had testimony about all of
8 this.

9 THE COURT: I'm waiting for the objection. I'm going
10 to sustain the objection.

11 MS. PALM: I'm just about done. Court's indulgence.
12 Okay. No more questions. Thank you, Detective.

13 THE WITNESS: You're welcome.

14 THE COURT: Any redirect?

15 MR. LALLI: Yes.

16 REDIRECT EXAMINATION

17 BY MR. LALLI:

18 Q Detective, Ms. Palm asked you whether you obtained
19 video from the Paris?

20 A Yes.

21 Q And you indicated that you didn't?

22 A No.

23 Q Why not?

24 A I didn't think it was relevant or important to obtain
25 video footage of them walking through the Paris.

ROUGH DRAFT TRANSCRIPT

002491

1 Q Why?

2 A It wasn't really part of the crime that I was
3 investigating, and I believed what he said.

4 Q Okay. Would the fact that the defendant went to the
5 Paris make it any less or more likely that he murdered Victoria
6 Whitmarsh?

7 A No.

8 Q During the interview, at about the time you're
9 advising the defendant of his Miranda rights, do you make a
10 comment about his intoxication?

11 A I believe I asked him, have you been drinking.

12 Q Did you give him the opportunity -- did you give him
13 the opportunity to say something about that while on the
14 recording?

15 A Yes.

16 Q Were you trying to hide the fact that he had been
17 drinking that day?

18 A No.

19 Q Were you trying to suppress the fact that you
20 believed he had been drinking that day?

21 A No.

22 Q Did you try to make it so that defense counsel could
23 not learn that in any way?

24 A No.

25 Q Ms. Palm asked you whether you checked into

ROUGH DRAFT TRANSCRIPT

002492

1 Victoria's Medical history before you decided to proceed with
2 charges. Do you remember that question?

3 A Yes.

4 Q Tell us why you decided to proceed with charges
5 against Mr. O'Keefe.

6 A I believed that there was probable cause to arrest
7 him for the murder of Victoria Whitmarsh at the end of the --
8 conclusion of the interview.

9 Q Okay.

10 MR. LALLI: Your Honor, that concludes redirect.

11 THE COURT: All right. Any recross?

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

13 THE COURT: All right. Any questions from any of the
14 jurors? No questions. Thank you, Detective. You are excused.

15 THE WITNESS: Thank you.

16 THE COURT: Next witness for the State?

17 MR. LALLI: Your Honor, at this point the State and
18 the defense have entered into a stipulation with respect to
19 certain records with respect to Ms. Whitmarsh. And I'd ask
20 that that stipulation be placed on the record.

21 THE COURT: You are stipulating, Ms. Palm?

22 MS. PALM: We are, Your Honor.

23 THE COURT: All right.

24 MS. PALM: Thank you.

25 THE COURT: Ladies and gentlemen, the parties have

ROUGH DRAFT TRANSCRIPT

002493

1 prepared a stipulation. I'm going to read this into the
2 record. An instruction will tell you that if the parties
3 stipulate to a particular fact, you are to accept that fact as
4 true.

5 "Records from October 2001, admission to Monte Vista
6 Hospital show that Victoria Whitmarsh was admitted," in quotes,
7 "because she had tried to cut her wrist in an attempt to hurt
8 herself," close quote. "When Victoria Whitmarsh was brought to
9 Sunrise Hospital prior to transfer to Monte Vista, documents
10 indicate," in quotes, "patient comes in by EMS with bilateral
11 wrist cuts.

12 "Patient states, had fight with husband, got
13 depressed, and tried to cut wrist with a knife. Patient
14 stated, was trying to kill myself," close quote. It's from the
15 triage nursing assessment sheet. "She was diagnosed with
16 laceration on both wrists. Psychiatric evaluation by Dr.
17 Dakay," D-A-K-A-Y, "shows, the patient was brought in after she
18 tried to cut her wrist in an attempted suicide. This has been
19 her fourth suicide attempt, and I was just recently made aware
20 of this."

21 "Records from September 2006, admission to Monta
22 Vista Hospital show that Victoria Whitmarsh has self-inflicted
23 wrist laceration. Admission certification by Dr. Slagel
24 (phonetic) reports, Ms. Whitmarsh had made at least three
25 suicide attempts. Recent attempt could have been lethal."

ROUGH DRAFT TRANSCRIPT

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1 This is the emergency admission form.

2 "Discharge summary by Dr." -- I'll spell this, A-D-
3 E-K-U-N-I, (indiscernible), A-J-A-Y-A, MD, states, "She had to
4 be intubated after she overdosed with morphine after an
5 argument with her estranged husband. She has been self-
6 mutilating for the past 15 years, and stated that she cuts
7 herself when she is angry. And the last time she cut her left
8 wrist was with a pair of scissors on September 22nd, 2008. She
9 complained" --

10 MS. PALM: Your Honor, I'm sorry. It was 2006.

11 THE COURT: 2006. That's correct, Ms. Palm. Thank
12 you. "She complained of irritability, mood swings, difficulty
13 sleeping at night because of racing thoughts, poor appetite,
14 anxiety, low energy, and difficulty sleeping, and difficulty
15 concentrating. She also reports episodic euphoria, anger
16 outbursts, and decreased need for sleep."

17 Discharge summary. "Victoria Whitmarsh reported that
18 in October 2001, admission to Monte Vista Hospital occurred
19 because she was angry, screaming, and she went berserk after an
20 argument with her husband, and overdosed on pills and cut her
21 wrist." "Doctor" --- do you know how to pronounce that, Ms.
22 Palm? Or anyone know how to pronounce that? It's the same Dr.
23 --

24 MS. PALM: I do not, Your Honor.

25 THE COURT: -- (indiscernible), MD, "evaluated

ROUGH DRAFT TRANSCRIPT

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1 Whitmarsh, and noted that she has a long history of poor anger
2 management, and very impulsive behavior. That's from a
3 discharge summary.

4 *Monte Vista Hospital assessment and referral
5 screening, dated October 29, 2006, indicates, chief complaint
6 in patients own words, why are you here today? Answer, I've
7 been depressed. I cut myself when I am depressed. I also got
8 angry with my husband. That is why I took the pills. Under
9 heading of precipitating events which occurred in previous 72
10 hours which prompted assessment."

11 This is in quotes, "Patient also admits to a history
12 of self-mutilation. Most recently, she stabbed herself on her
13 hands, October 22nd, 2006, because I am not happy with myself.
14 Patient admits poor impulse control as evidenced by, cuts self
15 when angry." And that's the extent of the stipulation.

16 MS. PALM: Thank you.

17 THE COURT: And the State has rested, correct?

18 MR. LALLI: Your Honor, we now rest.

19 THE COURT: Okay. And Ms. Palm, I believe you have a
20 witness this afternoon?

21 MS. PALM: I do have one witness.

22 THE COURT: All right.

23 MS. PALM: I will make sure she's out there, Your
24 Honor.

25 THE COURT: Okay.

ROUGH DRAFT TRANSCRIPT

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1 MS. PALM: Your Honor, the defense calls Dorothy
2 Robe.

3 THE COURT: Robe? All right.

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

6 THE WITNESS: Okay. Who's the clerk?

7 THE MARSHAL: Right there.

8 THE WITNESS: Oh, okay.

9 DOROTHY ROBE, DEFENSE'S WITNESS, SWORN

10 THE CLERK: Okay, please sit down.

11 THE WITNESS: Okay.

12 THE CLERK: And pull our chair up to the microphone.
13 And state and spell your name for the record.

14 THE WITNESS: This is a microphone?

15 THE COURT: Yes.

16 THE CLERK: Yes, ma'am.

17 THE WITNESS: My name is Dorothy Robe. And it's
18 spelled -- excuse me. D-O-R-O-T-H-Y. And the last name is
19 Robe, R-O-B-E.

20 THE COURT: Go ahead, counsel.

21 MS. PALM: Thank you.

22 DIRECT EXAMINATION

23 BY MS. PALM:

24 Q Good afternoon, Ms. Robe. Are you a little bit
25 nervous?

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1 A Oh, I feel like I'm having a total attack.
2 Q Do you have a stress problem with testifying?
3 A I do, but I'll try to get through it. Okay?
4 Q Okay. What's your age?
5 A 70.
6 Q And where do you live?
7 A 424 (indiscernible) Lane.
8 Q Is that in Clark County, Nevada?
9 A Yes, it's in Las Vegas.
10 Q How long have you lived there?
11 A Nine years.
12 Q How long have you lived in Clark County?
13 A 42 years.
14 Q Okay. And what do you do for a living, if anything?
15 A I'm a retired school teacher.
16 Q Okay. Was -- how long were you a school teacher?
17 A 30 years.
18 Q Is that here in Clark County also?
19 A 25 years in Clark County, and five in Montana.
20 Q Okay. And do you know Brian O'Keefe?
21 A Yes, I do.
22 Q Is he the gentleman sitting at the table to my right?
23 A I can't see him very well.
24 MS. PALM: Can you stand up, Brian?
25 THE WITNESS: Is that Brian?

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1 BY MS. PALM:
2 Q Can you see him okay from there?
3 A Yeah, he looks a little different.
4 Q Okay. That is Brian.
5 A Okay.
6 MS. PALM: Would the Court reflect the
7 identification, Your Honor?
8 THE COURT: Yes, it will.
9 MS. PALM: For the record.
10 BY MS. PALM:
11 Q And do you also know a woman named Cheryl Morris?
12 A Yes, I do.
13 Q Okay. Was Cheryl Morris living with you at some
14 point?
15 A Yes. She lived with me -- I don't know, it seemed
16 like years. But maybe it was about a year, I don't know.
17 Q Okay, was that in 2008?
18 A I think so.
19 Q Okay. Was there a time that she lived with you with
20 Brian O'Keefe?
21 A Yes, for about three months.
22 Q Okay. And how often did you see them?
23 A Every day.
24 Q Okay.
25 MR. LALLI: Can we approach, Your Honor?

ROUGH DRAFT TRANSCRIPT

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

2
3 BRIAN K. O'KEEFE,
4 Appellant,
5 vs.
6 THE STATE OF NEVADA
7 Respondent.

Supreme Court No.:

District Court Case No.: 08C250630

Electronically Filed
Dec 01 2015 10:55 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 **APPELLANT'S APPENDIX – VOLUME XIII – PAGES 2400-2599**

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1 Q Okay. Okay. Now when you were asked to examine --
2 compare the knife with known exemplars, you were also asked to
3 compare it to Victoria Whitmarsh's exemplars; is that correct?

4 A Yes. She was listed on the request as -- which would
5 be typical in this -- in any investigation, to look at all of
6 the people who may have access to a particular item.

7 Q Okay.

8 A Elimination -- of these elimination standards. So
9 her listing was also on the request.

10 Q Okay. Now you had said that the area of the hand, I
11 believe that's called the writer's area; is that the term for
12 it?

13 A Well the writer's area would actually -- the writer's
14 -- what we call the writer's palm would actually be out a
15 little further than what I've described to the jury today.

16 Q Okay.

17 A Because in the writer's palm, what we call a writer's
18 palm is this blade, or the end. And it's called that in the
19 vernacular. Because if you put your hand down to sign
20 something, that's the portion of the hand that's going to touch
21 something, as if you're writing.

22 But normally what happens on that area of the hand is
23 that the ridges begin to get skinnier and skinnier and
24 skinnier, and they eventually kind of blend into the rest of
25 your skin. And I didn't see any of that in this particular

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1 touch. So that's why I believe that the print was more in this
2 hypothenar, this area on the fatty part of the hand, as opposed
3 to that writer's blade.

4 Q Okay. And it was in blood? It was a --

5 A Well in --

6 Q -- patent print?

7 A It was a patent print. Now it appeared to be blood
8 to me. I am not a DNA or a blood expert, that the print did
9 appear to be in what I would call suspected blood.

10 Q Okay. And before you subjected the knife to the
11 various means of enhancement, was DNA already collected from
12 it?

13 A Yes.

14 Q Okay. So when you did the final enhancement where
15 you subject the entire knife surface to the super glue method?

16 A Only the blade would have been subjected to the super
17 glue process. And the handle would have subjected to the acid
18 yellow process.

19 Q Okay. If you had previously testified that you use
20 the super glue method on the entire knife surface, would that
21 be incorrect?

22 A Oh.

23 Q I can approach if it would --

24 A Well the entire --

25 Q -- help you remember.

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1 A Well I suppose the entire knife would have been
2 placed into the super glue tank.

3 Q Okay.

4 A The primary area of my interest though would have
5 been the blade. Because the acid yellow at that point, by
6 applying this liquid over the handle. If there had been any
7 residue left there that would have been developed by super
8 glue, it would have been gone, because it would have been
9 simply rinsed away.

10 So even though I processed -- may have processed the
11 whole item with the glue, and maybe with -- and even maybe
12 dipped it with the -- as I said, that chemical that we use the
13 ALS (phonetic) with, my primary emphasis was on looking at the
14 blade for additional latent prints.

15 Q Okay. Once you performed the super glue -- you know
16 --

17 A Yes.

18 Q -- method of analysis, would that have corrupted any
19 DNA that was left there? Or would it have ruined the ability
20 to collect other DNA?

21 A Additional DNA?

22 Q Additional DNA.

23 A I believe there has been -- have been -- and maybe
24 the witness who comes after me next can explain this better.
25 But I believe that there still are some -- there is still some

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1 ability to collect DNA from items even after they have been
2 glued, super glued, is what my recollection is from some
3 articles that I've read.

4 Q Okay.

5 A We don't like to do it that way. We like to collect
6 -- obviously collect the blood sample, or anything from the
7 item prior to latent fingerprint processing.

8 Q Okay. And that's why you do the DNA first?

9 A Absolutely. It goes through a sequential system
10 through the laboratory, starting with DNA, and moving it's way
11 through the laboratory in an organized manner.

12 Q Could the blood on the knife handle have been caused
13 from dripping, and then laying a hand on the knife? From blood
14 dripping onto the knife, and then a hand resting on it?

15 MS. GRAHAM: Objection. It's beyond his scope of
16 knowledge.

17 THE COURT: Sustained.

18 BY MS. PALM:

19 Q Are you familiar with how fingerprints are caused?

20 A Yes.

21 Q And you're familiar with that fingerprints can be
22 imposed on a bloody surface?

23 A Correct.

24 Q Okay. Would you -- is it -- are you able to
25 determine if a fingerprint might have been caused by blood

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1 dripping on a surface, and then --

2 MS. GRAHAM: Objection, Judge. She --

3 MS. PALM: -- a hand resting on it?

4 MS. GRAHAM: He's not a blood spatter expert. He's a
5 fingerprint expert analysis.

6 THE COURT: Ms. Palm, why don't you ask him if he --
7 if Mr. Guenther has that expertise to answer that question.

8 BY MS. PALM:

9 Q Do you have the expertise to answer that question,
10 sir?

11 A Well I'm certainly not a blood spatter expert by any
12 stretch of the imagination. I mean, could give a layman's
13 opinion based on the blood that I've seen on evidence. That
14 would be it.

15 Q Okay. Well can you give an opinion on a fingerprint
16 might be placed in blood because blood had somehow gotten onto
17 that surface?

18 A I could give a generality.

19 Q Okay.

20 A What we normally -- what was normally observed is if
21 the print -- if the blood is on the fingers, and there is not
22 too much pressure applied, what you'll see is that the ridge
23 detail will be in blood. Often if the blood is on a surface,
24 and the hand or finger touches it, and it's -- and once again,
25 (indiscernible) a very small amount of blood. And the hand

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1 would pull the blood away from that surface, then the ridges
2 would be in what we call a reversed position.

3 So in other words, they're not as you would normally
4 visualize them. They're going to be kind of flipped backwards,
5 because the ridges actually pulled that blood away, as opposed
6 to the blood being deposited on that surface. Generally
7 speaking, that's the only way you can tell.

8 Q Okay. And in this situation, there just was not
9 enough clarity for you to be able to determine either way?

10 A I would not like to venture a guess. There is a --
11 it's a small area there.

12 Q Okay. Thank you very much.

13 A Okay.

14 MS. PALM: No more questions.

15 THE COURT: Any redirect?

16 MS. GRAHAM: No, Judge.

17 THE COURT: Any questions from any of the jurors? No
18 questions. Thank you, Mr. Guenther, for your testimony. You
19 are excused.

20 THE WITNESS: Thank you, Your Honor.

21 MS. GRAHAM: Thank you, Mr. Guenther.

22 UNKNOWN MALE SPEAKER: (Indiscernible).

23 THE COURT: All right. Do we have a question? Oh,
24 we did have a question.

25 THE WITNESS: Sorry.

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1 THE COURT: Counsel, approach.

2 (Off-record bench conference)

3 THE COURT: Mr. Guenther, we have a question from one
4 of the jurors.

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: "Is it possible and or likely prints will
7 wipe off the knife?"

8 THE WITNESS: Well in my analysis of the knife prior
9 to the collection that Jen Bas did, because I did examine the
10 knife in her presence prior to her collection, and then my
11 subsequent processing, I did not see any indication on the
12 knife anywhere of any kind of wipe marks.

13 Now when I got the knife eventually and I did process
14 it, there were some rub areas on the knife itself. And those
15 were caused by Ms. Bas and her collection technique, where they
16 -- and she will explain all of this, how it's -- how blood is
17 swabbed off of a surface.

18 But when I did that initial visual examination in her
19 presence at her work area, I did no see any indicated that the
20 blood -- that the knife had been wiped in any fashion
21 whatsoever.

22 THE COURT: All right, thank you. Ms. Graham, do you
23 have any follow up questions to that question?

24 MS. GRAHAM: Judge one, Judge.

25 REDIRECT EXAMINATION

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1 BY MS. GRAHAM:

2 Q Will you always find evidence of a wiping if a wiping
3 occurred?

4 A No. No.

5 THE COURT: Ms. Palm, any follow up?

6 RECROSS-EXAMINATION

7 BY MS. PALM:

8 Q Would you have expected to find some evidence of
9 wiping if a wiping occurred?

10 A It's hard to say. I -- it's very difficult to say.
11 Sometimes if there's moisture on the blood or if there's
12 moisture on the hand, or if there's -- if say a cloth is used
13 to actually wipe it, or if a hand is used to wipe that surface,
14 these are all variables that come into whether -- you know,
15 whether you can actually visualize these things.

16 So it's really difficult to make an assertion about
17 things -- about that. It truly is. But you can definitely
18 tell when it's not. But you're asking me if I can tell if it
19 is, it's hard.

20 Q Okay.

21 A It's really difficult.

22 Q Okay. Well there was -- there was the blood that's
23 on the handle of the knife that you looked at?

24 A Yes.

25 Q Okay. Did that appear to have wipe marks in it?

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1 A No.

2 Q Okay. And the knife blade that you examined had some
3 blood on it?

4 A Yes.

5 Q Okay. And there was nothing to indicate to you that
6 it had been wiped off?

7 A No. When I -- as I explained to the jury, when I saw
8 that knife the very first time in the presence of the DNA
9 analyst, Jen Bas, and I looked at it, there was no indication
10 of a wipe -- of any wipe marks on that blade at that time.

11 Q Thank you.

12 MS. GRAHAM: Just briefly, Judge.

13 FURTHER REDIRECT EXAMINATION

14 BY MS. GRAHAM:

15 Q And you say indication of any wipe marks. That
16 doesn't mean that there -- the knife was not wiped off before
17 it was given to you for analysis?

18 MS. PALM: Asked and answered, Your Honor.

19 THE COURT: No, overruled.

20 BY MS. GRAHAM:

21 Q You can answer.

22 A Oh. Well as I said, when I got the -- when I
23 eventually received the knife from Jennifer Bas, then,
24 especially after when I did my visual examinations and so
25 forth, I could see where her collection technique had made some

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1 wipe marks on the blade especially, because she was in the
2 process of collecting those blood swabs that were on the blade.

3 So yes, at that point I did see some wipe marks from
4 -- caused by the solution and the movement that they use in
5 collecting blood.

6 Q Um-hum. But my question specifically Mr. Guenther
7 was, just because you didn't see wipe marks that would indicate
8 somebody actually took a knife and wiped it off with a sheet
9 doesn't necessarily mean that didn't happen?

10 A No. It doesn't necessarily mean that, no.

11 Q Okay.

12 THE COURT: Ms. Palm?

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

14 THE COURT: Any other questions by the jurors? No
15 questions. Thank you sir, for your testimony. You are
16 excused.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: Next witness for the State?

19 THE WITNESS: Jennifer Bas.

20 THE MARSHAL: Ma'am, raise your right hand and face
21 the clerk.

22 JENNIFER BAS, STATE'S WITNESS, SWORN

23 THE CLERK: Please be seated.

24 THE WITNESS: Thank you.

25 THE CLERK: Pull up to your mic. And state and spell

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1 your name for the record.

2 THE WITNESS: My name is Jennifer Bas.

3 J-E-N-N-I-F-E-R, B-A-S.

4 DIRECT EXAMINATION

5 BY MR. LALLI:

6 Q Ma'am how are you employed?

7 A I work for the Las Vegas Metropolitan Police
8 Department. I'm the DNA technical leader of the biology DNA
9 detail.

10 Q Okay.

11 A Sorry.

12 Q That's okay. You indicate that you're a technical
13 leader?

14 A That's correct.

15 Q What is a technical leader?

16 A I am technically responsible for everything that
17 comes out of the DNA lab. I'm responsible for everybody's
18 training, all of our quality control procedures. I am
19 responsible for following the federal -- the FBI's quality
20 assurance standards that set forth what it means to be an
21 accredited DNA lab. Prior to this, for the six last years, I
22 was also a forensic scientist specializing in DNA testing.

23 Q So I take it the position of being a technical
24 director is kind of a supervisory position?

25 A It's a position that's mandated by the Federal Bureau

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1 of Investigation. I do not supervise people. However, I do
2 have the authority to shut down the laboratory if I felt there
3 was any issues. I am responsible for everybody that's in
4 training and the quality of their work that leaves the
5 laboratory as well.

6 Q So it's kind of a quality assurance manager-type
7 position?

8 A Exactly.

9 Q Am I getting closer?

10 A Yes.

11 Q Okay, thanks. Now you indicated that in addition to
12 that position, at least at one point, you also did analysis?

13 A Yes.

14 Q Do you still do analysis?

15 A I do.

16 Q What kind of analysis?

17 A Since 2004, I've been a forensic scientist
18 specializing in DNA testing. Over the course of that six
19 years, I've processed over 500 cases and thousands of samples
20 for DNA. So I am expected to be a fully trained DNA analyst.
21 That means that I examine evidence, I make comparisons, I issue
22 reports and do all of the things that other DNA examiners do.

23 Q Okay. Can you tell us about your formal education?

24 A Yes. I have a bachelor of science degree in genetics
25 and cell biology from the University of Minnesota. And then I

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1 also have a masters in forensic science specializing in
2 molecular biology from George Washington University. As I
3 mentioned, I've been employed in the forensic DNA testing field
4 for over six years.

5 And prior to working at Metro, I worked at the Armed
6 Forces DNA identification laboratory in Rockville, Maryland,
7 where my primary job responsibilities were to identify soldiers
8 that had lost their lives in previous work conflicts, or
9 current work conflicts like Iraq and Afghanistan.

10 Q Did you do that using DNA?

11 A Yes.

12 Q Okay. So how long have you been at Metro?

13 A Over three years.

14 Q Have you ever testified in the courts of Nevada as an
15 expert in the area of DNA analysis?

16 A I have.

17 MR. LALLI: Your Honor, at this point I would ask
18 that Ms. Bas be allowed to testify as to her opinions in the
19 area of DNA analysis.

20 THE COURT: Yes, she can testify in that field.

21 BY MR. LALLI:

22 Q Ms. Bas, can you explain to us what is DNA, and how
23 is it used to assist in criminal investigations?

24 A I like to think of DNA as kind of the blueprint for
25 the human body. It's a molecule that's found in the cell, and

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1 it's what makes each of us unique from the person sitting next
2 to you. With the exception of identical twins, no people on
3 this planet have the same DNA profile.

4 And so it's very useful in investigative situations
5 to try and identify the source of the DNA of who could have
6 been contributing to certain pieces of evidence that I'm
7 examining. And so more generally what I do is I take evidence
8 from crime scenes, and I generate DNA profiles from that.

9 And I also generate DNA profiles in the form of a
10 buccal swab, which is a swab from the inside of a cheek, for a
11 known individual. And then I can compare those DNA profiles
12 from the unknown samples to the known individual to determine
13 who may be included or excluded as contributing to that DNA.

14 Q Without getting too much into nitty gritty, can you
15 just explain in very general terms how you make a DNA
16 comparison?

17 A Yeah. There's a few steps in the laboratory that I
18 have to do. Typically, an item is examined for DNA and a
19 sample is collected, whether I swab that piece of evidence, or
20 a crime scene investigator takes a collection at the scene and
21 gives it to me.

22 I take that piece of evidence into the laboratory,
23 and I do four basic steps to it. The first thing that I want
24 to do is extract the DNA. It essentially means that I'm going
25 to isolate the DNA and get it by itself so that I can do

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1 further testing on it.

2 The next thing that I do is, it's called
3 quantitation. And basically I'm just trying to figure out how
4 much DNA is present. The third thing that we do is to amplify
5 the DNA, which basically means I want to go in and look at
6 certain regions of the DNA, and make millions of copies of it
7 so that I can interpret it on the fourth stage, which is
8 analysis on the instrument.

9 So from start to finish, I go in the lab and I do
10 that extraction, the quantitation, the amplification. Thank
11 you. Thank you.

12 Q You're welcome.

13 A And analyze it on the instrument. And then the DNA
14 profile is generated in a format that I can visualize. Once
15 I've generated a profile from a piece of evidence, and I can
16 generate another profile from a known contributor, I compare
17 those visually. So --

18 Q So --

19 A Yeah so --

20 Q I'm --

21 A No, go ahead.

22 Q That's okay. So the analysis that you were just
23 talking about deals with unknown biological fluid, such as
24 blood, at a crime scene; is that correct?

25 A That's correct.

ROUGH DRAFT TRANSCRIPT

002414

1 Q And you compare it with a known sample from an
2 individual?

3 A Yes.

4 Q You used the terminology, a buccal swab. Oftentimes
5 are buccal swabs used as a known?

6 A Yes. Buckle swabs are almost exclusively used as a
7 known reference sample for an individual.

8 Q How is a buccal swab generally collected?

9 A We just take a swab and scrape the inside of the
10 mouth. You know, hopefully this is a really good source of
11 your own DNA. I wouldn't expect anybody else's DNA to be
12 lingering in your mouth. And so that generates a nice profile
13 that we can compare to the evidence items.

14 Q Is that profile sometimes referred to as a standard?

15 A It is.

16 Q Okay. Did -- in this particular case, what standards
17 or known samples of DNA did you use, and for whom?

18 A May I refer to my case file?

19 Q Did you create a case file --

20 A I did.

21 Q -- as part of your analysis?

22 A I did.

23 Q Did you prepare your notes at or near the time of
24 your comparison?

25 A I did.

ROUGH DRAFT TRANSCRIPT

002415

1 Q And as you did so, did you accurately record the
2 information in your notes?

3 A I did.

4 Q You may do so.

5 A Thank you. Two buccal swab standards were submitted
6 to me as known references. The first was from Victoria
7 Whitmarsh, and the second was from Brian O'Keefe.

8 Q Okay. Let's talk about the buccal swab from Brian
9 O'Keefe. Were you able to obtain a DNA profile from that?

10 A I did. I generated a full male profile, which means
11 that I was able to obtain DNA results at all of the locations
12 that I test.

13 Q Okay. And with respect to Victoria Whitmarsh, was
14 that a buccal swab collected at autopsy in an evidence
15 collection kit?

16 A I believe so, yes.

17 Q Okay. And were you able to obtain a full DNA profile
18 from that buccal swab?

19 A I was. It was a full profile consistent with a
20 female.

21 Q All right. Now let's talk about some of the things
22 that you compared. Just for the benefit of the jury, I'm going
23 to publish State's Exhibit number 26. And then State's Exhibit
24 number 29, Crime scene analyst Maldonado testified that she
25 impounded a swab of what appears to be a red substance on a

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002416

1 light switch. Did you have the occasion to analyze that swab?

2 A I received a swab from Jocelyn Maldonado. It was a
3 swab from a light switch cover. I tested it for blood, and it
4 was blood positive. And then I developed a full male profile
5 from that blood.

6 Q How do you test it to determine whether it is blood
7 positive?

8 A We do a presumptive test in the laboratory, it's call
9 phenolphthalein. And when it reacts positively, it's a
10 presumptive test, meaning that it indicates that blood is
11 present. And then when I generate a human DNA profile, in this
12 case the full male profile, that's confirming that that was
13 blood.

14 Q Did you compare that full male profile with the
15 profile of the defendant, Brian O'Keefe?

16 A I did.

17 Q And what were your results.

18 A I'm going to refer to my report specifically.

19 Q Okay.

20 A Thank you. The DNA profile that was obtained from
21 the blood on the light switch cover was consistent with Brian
22 O'Keefe. We generate a statistic associated with it, and I'll
23 read that to you.

24 Q Well before you read that --

25 A Oh.

ROUGH DRAFT TRANSCRIPT

002417

1 Q -- can you explain to the jury -- I'm not a math
2 person. But can you explain to them -- you indicate that it's
3 consistent. And but you also associate a statistic with that?

4 A That's correct.

5 Q Explain what that statistic means.

6 A Okay. The statistic that I'm going to tell you
7 about, it's called an identity statement. When we have a
8 sample of evidence match or be consistent with a known
9 reference standard, we generate a statistic. The statistic
10 that I generated here is rarer than 100 times the entire
11 Earth's population.

12 So if you were to take 100 Earths, all of the people
13 on the Earth 100 times over, the statistic was more rare than
14 that. And so we cap it off at 100 times the Earth's
15 population, and we call it an identity statement, meaning that
16 the identity of the blood is assumed to have originated from
17 that person.

18 Q Okay. To a degree of certainty more than 100 times
19 the population of our Earth?

20 A Yes.

21 Q And whose blood was that?

22 A Brian O'Keefe's.

23 Q All right. Now we had some testimony about what is
24 depicted in State's 35, which are some stretch pants located in
25 a bathroom. Did you create some diagrams to help explain areas

ROUGH DRAFT TRANSCRIPT

002418

1 of evidence that were in fact tested?

2 A I did.

3 Q All right. Did you create a diagram specifically for
4 some black stretch pants?

5 A I did.

6 MR. LALLI: May I approach?

7 THE COURT: Yes.

8 MR. LALLI: Thank you.

9 BY MR. LALLI:

10 Q Showing you what we've marked as State's proposed 123
11 for identification purposes, do you recognize that?

12 A I do.

13 Q What is it?

14 A This is a picture that I took in the laboratory of a
15 pair of black stretch pants.

16 Q And is there also some arrows and some diagraming on
17 the photographs?

18 A Yes.

19 Q Would this exhibit assist you in explaining the
20 results of your analysis to the jury?

21 A It would.

22 MR. LALLI: Your Honor, move for the admission of
23 State's proposed 123.

24 MS. PALM: No objection.

25 THE COURT: It will be admitted.

ROUGH DRAFT TRANSCRIPT

002419

1 (Exhibit 123 admitted)

2 MR. LALLI: Okay.

3 BY MR. LALLI:

4 Q What I will do is -- well why don't you explain,
5 there's some labeling up at the top of this?

6 A Sure.

7 Q What is that?

8 A The labeling at the very top is the event number
9 under which I analyzed the evidence. The JB5 is my initials
10 for Jennifer Bas, and 5 meaning it was the 5th item of evidence
11 that I examined. We always create a unique identifier for a
12 piece of evidence. And then in the yellow --

13 Q Well let's go to the left side first.

14 A Sure.

15 Q And I'll zoom in there. What is that?

16 A Okay. So this is a picture of one side of the black
17 stretch pants. And here you see my labeling -- oh. Right
18 there you see the labeling of the event number, that unique
19 identifier that I just mentioned, as well as the date that I
20 examined it.

21 Q Let's move over to the lefthand side now. What is
22 this?

23 A Okay. This is a picture that I took where it might
24 be kind of hard to see what I had done. But right there, I had
25 the pants laying flat out, and then I took the pant leg, and I

ROUGH DRAFT TRANSCRIPT

002420

1 folded it up so that it was laying on top of the top of the
2 pants over here. And so these two circled areas are indicating
3 the areas that I took samples of on the pants.

4 Q Okay. So I'm going to zoom in to the lower of those
5 two.

6 A Okay.

7 Q Does that -- well what is it? Is that a blood spot
8 at the bottom of the pants?

9 A This is. I noticed a blood spot on the front side of
10 the pant, on the lower left ankle area. And as I had mentioned
11 before, if I see something that appears to look like blood, I
12 do that presumptive test to let me know that it is blood.

13 Q Did you do that in this case?

14 A I did.

15 Q And what were your results?

16 A It was presumptively positive for blood.

17 Q So did you perform an analysis on that area of the
18 pants?

19 A I did. So I took a sample of that bloodstain, and I
20 took it on to DNA testing.

21 Q And what did you find?

22 A The profile that was generated from this particular
23 stain was a mixture, meaning that more than one person's DNA
24 was present in that specific location.

25 Q So let me just ask you this. We looked at the swab

ROUGH DRAFT TRANSCRIPT

002421

1 taken from the light switch. Is that different from this DNA
2 result?

3 A That was. The swab that was taken from the light
4 switch was consistent with a single source, meaning that it
5 originated from one individual. This particular DNA profile
6 generated from this stain is a mixture.

7 Q Okay. Are you able to make comparison statements or
8 conclusions with respect to DNA mixtures?

9 A Yes.

10 Q Okay. Did you compare this particular bloodstain
11 against the DNA profiles of the defendant and the DNA profile
12 of Victoria Whitmarsh?

13 A I did.

14 Q And can you tell us what you found?

15 A The DNA that was obtained from this particular stain
16 was consistent with a mixture of two individuals. And those
17 two individuals that could not -- that were included in that
18 mixture were Brian O'Keefe and Victoria Whitmarsh.

19 Q So you could not exclude them?

20 A No, I could not exclude either of them.

21 Q All right. Do -- now you mentioned in the previous
22 example a statistical number associated with your comparison?

23 A Yes.

24 Q Do you also receive statistical numbers with respect
25 to the comparison of mixtures?

ROUGH DRAFT TRANSCRIPT

002422

1 A I generate statistics.

2 Q You generate those?

3 A Yes.

4 Q Do they work a little differently?

5 A They do. So this is a different type of scenario.
6 Because it's a mixture of two people, I have to generate a
7 statistic that is consistent with a mixture. So the statistic
8 that I generate in essence is saying, what percentage of the
9 population could be excluded from this mixture. And so the
10 statistic was that greater than 99 point 99 percent of other
11 individuals in the population could be excluded from this
12 mixture profile.

13 Q Could be excluded?

14 A Yes.

15 Q Okay. Are you able to put that number in the
16 inverse, like the identity statement we talked about in the
17 last example? Are you able to give us in other words a
18 frequency of inclusion for that --

19 A Yes.

20 Q -- mixture?

21 A I can generate -- it's called a combined probability
22 of inclusion. It's slightly different, because again it's a
23 mixture. So the inclusion's statement is basically saying,
24 what percentage of individuals in the population could be
25 included in that mixture.

ROUGH DRAFT TRANSCRIPT

002423

1 Q Okay. And what number did you reach for that
2 statistic?

3 A I'm just going to refer to that --

4 Q If you would.

5 A -- statistic page, please. The statistic was that
6 approximately 1 in 21,000,890 people could be included. So one
7 out of every 21,000,890 individuals.

8 Q Okay. So if you take a group of what, 21 million --
9 over 21 million people, two of those people would be --

10 A One --

11 Q Or one of those people --

12 A I would expect one person to be included for every
13 million.

14 Q Got it. Thank you.

15 A You're welcome.

16 Q Now that wasn't the only area on these pants that you
17 looked at, was it?

18 A No.

19 Q In addition to at the bottom cuff area of the pants,
20 did you also look at another stain on the pants?

21 A Yes.

22 Q And does that -- am I correct that we're looking at
23 almost the very top of the pants, or?

24 A Yeah, this is the top. It's kind of the front panel
25 of the pant, underneath the waist drawstring area, or the waist

ROUGH DRAFT TRANSCRIPT

002424

1 -- elastic waist area.

2 Q Okay. Did you perform an analysis of the blood in
3 that area?

4 A Yes. Again I saw red, which indicated blood to me.
5 I did a presumptive test for blood, and it was positive. From
6 this sample, I generated a single source profile, and that was
7 consistent with Victoria Whitmarsh, meaning she is the source
8 of the blood that was at that location.

9 Q Okay. Did you analyze a DNA collection kit that was
10 collected at autopsy?

11 A I examined an evidence collection kit from Victoria
12 Whitmarsh.

13 Q All right. Can you tell the jury what kinds of
14 things are in a DNA collection kit?

15 A One of the first things that is collected is a buccal
16 swab. As I mentioned earlier, that's used as the standard
17 known of the individual, where this kit was collected from. I
18 also received some vaginal swabs, some cervical swabs, rectal
19 swabs, an oral swabs (sic), which just means from the mouth,
20 the oral cavity. I received a pubic hair brushing, and some
21 nail clippings from the right and the left hands.

22 Q Okay. Did you analyze the vaginal swabs, the
23 cervical swabs, the rectal swab, the oral swab for the presence
24 of semen?

25 A I did.

ROUGH DRAFT TRANSCRIPT

002425

1 Q And what were your results.

2 A The vaginal swabs, the cervical swabs, and the rectal
3 swabs were all semen negative, meaning I did not detect any
4 semen at all. And the oral swabs, they were negatively
5 presumptive for semen.

6 Q Okay.

7 A I think I had mentioned earlier that I kind of do --
8 I do a presumptive test, and then I can do a confirmatory test.
9 So for the first three, the vaginal, cervical and oral, I was
10 able to confirm that semen was not there. For the oral swabs,
11 I did that first presumptive test. It was negative, and I
12 stopped testing at that point.

13 Q Okay. Now did you also have the occasion to analyze
14 nail clippings?

15 A I did.

16 Q And when those are collected, are they designated as
17 from the right hand and from the left hand?

18 A In this case, they were.

19 Q All right. What if anything did you find with regard
20 to the right hand nail clippings of Victoria Whitmarsh?

21 A There was blood in the right hand fingernail
22 clippings, it was positive for blood. And the profile
23 generated from that was a full female profile, and it was
24 Victoria Whitmarsh.

25 Q What about the left hand nail clippings?

ROUGH DRAFT TRANSCRIPT

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1 A Again, there was also blood on the fingernails. And
2 the DNA from that blood was Victoria Whitmarsh as well.

3 Q Okay. I'm going to show or publish for the just
4 State's Exhibit number 62. Did you analyze a swab that was
5 collected by Dan Ford (phonetic) from the right index finger of
6 the defendant?

7 A I did.

8 Q Okay. And you subjected it to the same sort of
9 analysis that we've been -- oops, I can't really tell what that
10 is. What if anything did you find in that analysis?

11 A The swab that was submitted to me was from the right
12 index finger of Brian O'Keefe. That was positive for blood.
13 And I generated a full male profile, and the source of that
14 blood was Brian O'Keefe.

15 Q In your report, you indicated that there were
16 additional alleles below threshold which were detected.

17 A Okay.

18 Q Is that correct?

19 A That's correct.

20 Q And I don't want to get overly technical here, but
21 can you explain to us what that means?

22 A Sure. The DNA profile that I generate is essentially
23 made up of alleles. And what I like to think of alleles as is
24 different forms of a gene. And so maybe you might have heard
25 that if you're a female, you have X and X chromosomes, and

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1 maybe you've heard that males have an X and a Y.

2 And so I -- that's a really good example of what an
3 allele is. Even though they're from the same location or in
4 the same general area, they're two different forms of the same
5 gene. So males are X and a Y, and females are X and X.

6 And so the alleles are the profile that I generated
7 of Brian O'Keefe, you know, that's what his alleles are or his
8 DNA profile. And in this case, there was an indication that
9 there was some other DNA there. But it wasn't above my
10 threshold, so I couldn't make any determinations about it one
11 way or the other.

12 Q So for you to make a conclusion with respect to
13 biological fluid, am I correct that there has to be enough
14 information there for you to do it?

15 A That's correct.

16 Q Mr. Guenther just testified that he was able to find
17 a partial patent print on the knife, and there just wasn't
18 enough information there for him to conduct an analysis. Is
19 that kind of the same situation here?

20 A That's correct. I do not -- the DNA that I talking
21 (sic) to you about in court has to meet a certain threshold for
22 me to report it. So the DNA profile that I obtained, Brian
23 O'Keefe's profile met that threshold, and it exceeded that
24 threshold. There was a little bit of something else there, but
25 it didn't meet that threshold that I need to determine what

ROUGH DRAFT TRANSCRIPT

002428

1 else it was.

2 Q That something else there, is it -- can you tell
3 whether it's human DNA?

4 A I would have to look at the profile. I mean -- yes.
5 Because the markers that we amplify are human specific, it's
6 just not there at a level that I can make any conclusive
7 statements about it one way or the other.

8 Q Okay.

9 MR. LALLI: May I approach the witness?

10 THE COURT: Yes.

11 BY MR. LALLI:

12 Q Ms. Bas, I want to show you what we've marked as
13 State's proposed --

14 (Pause in proceedings)

15 BY MR. LALLI:

16 Q -- State's proposed 121 and 122. Do you recognize
17 those?

18 A I do.

19 Q Are those similar explanatory diagrams, except with
20 respect to a knife?

21 A Yes.

22 MR. LALLI: Your Honor, I would move for the
23 admission of State's proposed 121 and 22.

24 MS. PALM: No objection.

25 THE COURT: They will be admitted.

ROUGH DRAFT TRANSCRIPT

002429

1 (Exhibits 121 122 admitted)

2 BY MR. LALLI:

3 Q During the course of this trial, Ms. Bas, there's
4 been a lot of discussion about a knife that was recovered from
5 the crime scene.

6 A Okay.

7 Q And so I want to show you your diagram, State's
8 Exhibit 121. What is that?

9 A These are some pictures of the knife that I take for
10 my own recollection, and I keep these pictures in my case file.
11 Up at the top again, you see the event number under which the
12 knife was collected. And then the initials, JB4, again JB for
13 my name, and 4 being that it was the fourth item of evidence
14 that I examined.

15 Q Okay. Let's zoom in to the lefthand photo.

16 A This is a picture of how the knife was packaged
17 inside the box at the time that I received it.

18 Q And there appear to be the initials JM, and the P
19 number in between. Do you see that?

20 A Yeah, that Jocelyn Maldonado's P number and initials.

21 Q Have you analyzed items impounded by Ms. Maldonado
22 before?

23 A Quite frequently.

24 Q Okay. And let's move to the top lefthand photo.
25 What's that?

ROUGH DRAFT TRANSCRIPT

002430

1 A This is a picture of one side of the knife.

2 Q And is there -- what appears to be a ruler type
3 device above it?

4 A Yes.

5 Q Okay. So on one side of the knife, do you see any
6 biological -- what you later confirmed to be biological fluid
7 on that side of the knife?

8 A Well I can see there's some, you know, red staining
9 up here. And I also see a little bit over here. And this is
10 just based on this picture.

11 Q Sure. Okay. Now let me just go down to right below
12 it. What's that?

13 A And this is the other side of the knife. And here I
14 can see some, you know, more distinct stains.

15 Q Did you analyze both sides of the knife?

16 A I analyzed different areas of the knife. I would
17 rather look at the picture with the circled items.

18 Q Okay. Let's do that. Let's move to State's Exhibit
19 number 121. And I'll zoom out just for a moment so we can get
20 some perspective. And I'll go over to the lefthand side.

21 A Okay.

22 Q Okay. What are we looking at there?

23 A The areas that are in yellow are specific areas that
24 I tested on the knife. I think when you look at it, if you can
25 see as I can see, you know, there's other areas where there was

ROUGH DRAFT TRANSCRIPT

002431

1 some red-brown staining.

2 However, I don't test every single area where there's
3 staining on a knife. I want to make sure that I'm getting a
4 representative sample of what's there, but also leaving enough
5 evidence in case, you know, there ever needs to be testing in
6 the future.

7 So I chose to test four areas on this knife. The
8 first three are indicated right here. This is the first --
9 this one over here is the first sample that I took, and I
10 designated that as JB4A.

11 Q Okay. Tell us about your analysis on that spot.

12 A I noticed that there was blood at this location of
13 the knife, and I tested it, and it was positive for blood. And
14 I actually -- in my report, I call this the middle of the
15 blade. I call this the top of the blade, and down here was the
16 tip of the blade. So in the middle area on this one side of
17 the knife, it was positive for blood, and it was a mixed
18 profile. Again, it was DNA from more than one person there.

19 Q Did you compare that mixture profile with the
20 standard profiles from the defendant and Victoria Whitmarsh?

21 A I did.

22 Q What did you find?

23 A In this case, there was a major DNA profile. What
24 that means is that one person had the majority of the DNA that
25 was present. You know, maybe one person had this much DNA --

ROUGH DRAFT TRANSCRIPT

002432

1 and I'm just giving you a visual here with my hands. Maybe
2 somebody else contributed a little bit. So --

3 Q And just for the record, you're holding one hand up
4 higher than the other hand?

5 A Exactly. I'm just demonstrating that somebody is
6 contributing more DNA here. So the major DNA profile was Brian
7 O'Keefe.

8 Q And were you able to create a statistical statement
9 associated with that?

10 A Yes.

11 Q What was it?

12 A The statistic associated with that was that the
13 frequency of that major profile was rarer than 100 times the
14 Earth population, or it's rarer than one in 650 billion.

15 Q So you can without any question say that's Brian
16 O'Keefe's blood?

17 A He is the source of that major profile.

18 Q Okay. What about a minor profile? Were you able to
19 come to any conclusions in that regard?

20 A Yes. And then Victoria Whitmarsh could not be
21 excluded as the minor contributor to that mixture.

22 Q And were you able to reach any statistical statements
23 with that finding?

24 A Yes. Greater than 99 point 99 percent of individuals
25 in the population could be excluded as as contributor to that

ROUGH DRAFT TRANSCRIPT

002433

1 mixture.

2 Q Okay. Now the next area that you looked at, just
3 kind of following your photograph across --

4 A Um-hum.

5 Q -- from left to right is -- oh --

6 A Whoa.

7 Q -- now you're screwing up our -- okay.

8 A I didn't do it.

9 Q Okay. You want to try one more time? There you go.
10 Okay. Is that JB4B?

11 A That is my JB4B.

12 Q Okay.

13 A And you can see I had swabbed a little stain right
14 there at the top of the blade. And again, it was blood
15 positive. And this one was a single source, full male profile.
16 And the source of that blood was Brian O'Keefe.

17 Q All right. What about JB4C?

18 A This sample, I called it the bottom of the handle. I
19 was actually swabbing on the underside of the handle. Again,
20 this was positive for blood, and it was a mixture profile. The
21 mixture again had a major contributor, and the major
22 contributor was Brian O'Keefe. And again the statistic was
23 rarer than one in 650 billion. However in this instance, the
24 minor profile was so low that I couldn't make a conclusion
25 about it at all.

ROUGH DRAFT TRANSCRIPT

002434

1 Q Okay. So someone else's DNA was there, but you can't
2 tell us anything about that person?

3 A Because it didn't meet that threshold that I had
4 talked about previously.

5 Q Let me ask you this. Mr. Guenther testified that
6 there was what he called a patent print on the handle.

7 A Okay.

8 Q Is that what you swabbed, or did you swab something
9 else?

10 A No, I did not swab the print.

11 Q Okay.

12 A In my experience, if I see something that looks like
13 a print, even though I'm not a latent print examiner, I know
14 enough to leave it alone and let the latent print examiners
15 handle that.

16 Q All right. Now all three of those samples came from
17 the same side of the knife?

18 A 4A and 4B did. 4C is the underside of the handle.

19 Q Fair enough, fair enough. Okay. Now I believe on
20 the other side of the knife, (indiscernible) the top photo, you
21 have an area near the tip that you analyzed?

22 A That's correct.

23 Q What did you find in that regard?

24 A Again, the staining here on the tip of the knife, it
25 was positive for blood. And I generated a full female profile.

ROUGH DRAFT TRANSCRIPT

002435

1 and the source of that blood was Victoria Whitmarsh.

2 Q Was there a statistical number associated with the
3 frequency of Victoria Whitmarsh having been the donor of the
4 blood if you will on the tip of that knife?

5 A Yes. Again, it did meet that identity statement
6 threshold. It was rarer than one in 650 billion.

7 Q So can you tell us without any question at all
8 whether that was Victoria Whitmarsh's blood?

9 A Yes. Yes.

10 Q It was her blood?

11 A She's the source of the blood on the tip of the
12 knife.

13 MR. LALLI: Your Honor, that concludes
14 cross-examination.

15 THE COURT: All right. Ms. Palm?

16 MS. PALM: Thank you.

17 CROSS-EXAMINATION

18 BY MS. PALM:

19 Q Good afternoon, Ms. Bas.

20 A Good afternoon.

21 Q When you --

22 (Pause in proceedings)

23 MS. PALM: Court's indulgence.

24 (Pause in proceedings)

25 BY MS. PALM:

ROUGH DRAFT TRANSCRIPT

002436

1 Q When you swabbed the JB4B and -- in State's Exhibit
2 121, was that -- did that actually look like a drop of blood,
3 and you swabbed the middle of it out?

4 A Yes.

5 Q Okay. So what you see there isn't what it actually
6 looked like before you swabbed it, that's after the swabbing?

7 A That is correct.

8 Q Okay.

9 A Yes.

10 Q Okay. And as to mixtures, you have no idea how two
11 sources became mixed, do you?

12 A No.

13 Q Okay. And you don't make any statement about that in
14 your report?

15 A No. I only make statements about what the source of
16 that mixture is.

17 Q Okay. And the ankle on the stretch pants, that was
18 the front ankle?

19 A The front left ankle.

20 Q Okay. And the other portion where you took the
21 cutting from, is that -- what part of the pants was that?

22 A The first sample?

23 Q Yes, the --

24 A JB5A?

25 Q Yes.

ROUGH DRAFT TRANSCRIPT

002437

1 A Was the front of the pant.

2 Q Okay. Did you take any from the back side?

3 A I did not.

4 Q Okay. So those were the only two you took from the
5 pants?

6 A That's correct.

7 Q Were you able to tell if those pants were contained a
8 lot of blood at one point?

9 A They did.

10 Q Okay.

11 A I could see quite a bit of blood on them.

12 Q Okay. So but you chose to test two different areas,
13 not because that's the only areas that were there?

14 A That's correct.

15 Q When a knife -- or a print on a knife is enhanced,
16 for example the knife in this case, by super glue, can you
17 still collect DNA afterwards, or does that compromise your
18 ability to?

19 A In my experience, I've never done that, because it's
20 not a best practice to do that. Typically the items are
21 examined for DNA first, and then they're moved on to the other
22 area of the laboratories.

23 Q Okay.

24 A So I've never done it.

25 Q And in the storage of items that are bloody, are

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1 precautions taken to store them so that fluids don't seep to
2 other places?

3 A Typically, samples that are wet or have wet fluid on
4 them should be dried, and then packaged appropriately so that
5 it maintains the dryness.

6 Q Okay.

7 A Yes.

8 Q And I wasn't sure if I heard -- I note, correct me if
9 I'm wrong, these swabs, the oral swabs, and the vaginal swabs,
10 and the rectal swabs were all negative for semen?

11 A That's correct.

12 Q Okay. And the pubic hair brushing, was that negative
13 for pubic hair also?

14 A There were no pubic hairs present in the pubic hair
15 brushing. So I did not -- there was nothing to test.

16 Q Okay. And I just want to talk a little bit about
17 alleles. You had mentioned that alleles were present on the
18 wound that was swabbed. Can you explain how alleles transfer
19 from one person to another.

20 A It really could be anything. You know, if I had
21 touched this glass, and then you had touched this glass, both
22 -- the chances are that both of our DNA would be present here.

23 Q Okay.

24 A So how an allele gets there, I can't say, much like
25 we had just described, I can't say how it gets there.

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1 Q Okay. So if I touch somebody, they might have my
2 alleles on them?

3 A Yes.

4 Q Okay. And that would not be uncommon at all?

5 A No, it's quite frequent to see mixtures in a lot of
6 samples that I test.

7 Q And the DNA under Ms. Whitmarsh's fingernails was
8 only her DNA?

9 A That is correct.

10 MS. PALM: Court's indulgence. Pass the witness.
11 Thank you.

12 THE COURT: Any redirect?

13 THE WITNESS: Okay.

14 MR. LALLI: Just one area, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. LALLI:

17 Q Ms. Bas, with respect to the DNA profile that you
18 obtained in State's Exhibit 121 from the tip of the knife, were
19 there any other alleles in that sample?

20 A No.

21 Q No indication that anybody else's --

22 A Oh, I'm sorry. I'm sorry. Let me rephrase that.
23 Yes, there were additional alleles below threshold detected on
24 that (indiscernible).

25 Q Okay. On the -- in the tip of the knife?

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1 A Yes, my sample JB4D.

2 Q Okay. Thank you very much.

3 MR. LALLI: Nothing further.

4 MS. PALM: Nothing further, thank you.

5 THE COURT: Any questions from any of the jurors? We
6 do have a question. Counsel, approach.

7 (Off-record bench conference)

8 THE COURT: Ms. Bas, we have a question from one of
9 the jurors. "Was there DNA skin cells of the defendant under
10 Victoria's nails?"

11 THE WITNESS: Under the fingernails, there was blood,
12 and that blood was Victoria Whitmarsh's. I have no way of
13 knowing if there was skin cells under there. I don't have a
14 test for skin cells. I just know that there was blood under
15 her fingernails, and that was her blood.

16 THE COURT: Mr. Lalli, anything follow up -- any
17 follow up?

18 MR. LALLI: No, Your Honor.

19 THE COURT: Ms Palm?

20 MS. PALM: No, Your Honor.

21 THE COURT: Any follow up question by any of the
22 jurors? All right, no questions. Thank you, Ms. Bas, for your
23 testimony. You are excused.

24 THE WITNESS: Thank you.

25 THE COURT: Ladies and gentlemen, we're going to take

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1 a quick recess before our next witness.

2 During this recess, it is your duty not to converse
3 among yourselves, or with anyone else on any subject connected
4 with the trial. Or to read, watch or listen to any report of
5 or commentary on the trial by any person connected with the
6 trial, or by any medium of information, including without
7 limitation, newspaper, television, radio, or the internet. You
8 are not to form or express an opinion on any subject connected
9 with this case until this matter is submitted to you. We'll
10 see you back in 5 or 10 minutes.

11 (Outside the presence of the jury)

12 THE COURT: Now we are outside the presence of the
13 jury panel. Mr. Lalli, with this next witness, or your prior
14 or subsequent thereto, are you going to be admitting the
15 conviction into evidence?

16 MR. LALLI: I am, Your Honor.

17 THE COURT: Okay. Well at what point, so I can --
18 and have you reviewed the limiting instruction that Ms. Palm
19 has proposed?

20 MR. LALLI: I will.

21 THE COURT: Okay. Okay. Well give me enough time to
22 -- you know, if we need to discuss it if you have any
23 objection. Do you know which one it is?

24 MS. PALM: You've got it?

25 THE COURT: Yeah, I have it.

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1 MS. PALM: Okay.

2 (Pause in proceedings)

3 (Court recessed at 2:58 p.m. until 3:12 p.m.)

4 (Outside the presence of the jury)

5 THE COURT: All right, let's bring the jury in.

6 MS. GRAHAM: Are we going to bring Juror 2 in?

7 MR. LALLI: Oh, yeah. What do you want to do about
8 the procedural --

9 MS. GRAHAM: Are we going to bring Juror 2 in?

10 THE COURT: I'm sorry?

11 MR. LALLI: What about --

12 MS. GRAHAM: Are we going to bring Juror 2 in?

13 MS. PALM: Yeah, we should probably find out what
14 that procedural thing is.

15 THE COURT: Oh, that's right. Can you -- Ms.
16 Graham, if you can catch the marshal.

17 MS. GRAHAM: Sure.

18 THE COURT: There was a note from one of the jurors.
19 Maybe he's going to discuss proper techniques for DNA.

20 MS. GRAHAM: Bringing Juror number 2 in.

21 THE COURT: Sir, you can just have a seat in the
22 front here. Or just anyplace. Take a seat wherever you're
23 comfortable.

24 JUROR NO. 2: Okay.

25 THE COURT: All right. Sir, the marshal advised me

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1 that you had a question for me regarding some procedural
2 matter.

3 JUROR NO. 2: Yeah, I don't know if it's important.
4 But on witness Ed Guenther, I don't remember any questions
5 about his notes, and him being a fair representative, like they
6 do on every other witness.

7 THE COURT: So --

8 JUROR NO. 2: It didn't seem like his notes -- he
9 could use his notes.

10 THE COURT: Okay. As far as admitting the notes into
11 evidence; is that what you're referring to?

12 JUROR NO. 2: Well usually it's -- and I have no
13 legal expertise. But in every other witness, they've
14 established -- they've asked the witness if the notes are a
15 fair and accurate representation of their reports, and they did
16 not do that.

17 THE COURT: Well I don't think it goes so much to
18 reports. It's been typically the photographs that one of the
19 attorneys would ask, does this photograph appear to be a fair
20 and accurate depiction of the scene of the crime, a car
21 accident, whatever it may be. That's what you're referring to,
22 sir?

23 JUROR NO. 2: No. It seemed like they did that with
24 the notes as well.

25 THE COURT: Okay.

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1 JUROR NO. 2: Something to that effect.

2 THE COURT: They only do that when something's
3 actually being admitted into evidence. And so his notes were
4 not admitted into evidence.

5 JUROR NO. 2: Okay.

6 MR. LALLI: Well, can we approach?

7 THE COURT: Sure.

8 MR. LALLI: I think I understand what he's saying.

9 (Off-record bench conference)

10 THE COURT: Sir, actually I think we do understand
11 what you're saying. That matter that bring up is a part of
12 evidentiary foundation that you need not be concerned about.

13 JUROR NO. 2: Okay.

14 THE COURT: All right. Thank you, sir.

15 JUROR NO. 2: Thank you.

16 THE COURT: Why don't you go out with the marshal,
17 and then we'll bring you back in together.

18 JUROR NO. 2: Okay.

19 THE COURT: But thank you very much, sir.

20 THE MARSHAL: All rise for the presence of the jury.

21 (In the presence of the jury)

22 THE MARSHAL: Please be seated.

23 THE COURT: All right. State, your next witness?

24 MR. LALLI: Your Honor, State calls Detective Martin
25 Wildemann.

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1 THE COURT: All right.

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

4 MARTIN WILDEMAN, STATE'S WITNESS, SWORN

5 THE CLERK: Please be seated. And state and spell
6 your name for the record.

7 THE WITNESS: Marti Wildemann. W-I-L-D-E-M-A-N-N.

8 THE COURT: (Indiscernible).

9 MR. LALLI: Your Honor, before I begin this witness,
10 I intend to elicit evidence admitted pursuant to NRS 48045.
11 And so I would just ask that the Court read the requisite
12 admonishment to the jury.

13 THE COURT: And that was the instruction you
14 previously approved of?

15 MR. LALLI: Yes, sir.

16 THE COURT: All right.

17 MR. LALLI: Thank you.

18 THE COURT: Ladies and gentlemen, evidence that Brian
19 O'Keefe committed the felony offense of domestic battery or is
20 alleged to have made statements indicating an intent to harm
21 Victoria Whitmarsh, and evidence that he is alleged to have
22 indicated an ability to kill with a knife by cutting a person
23 in the sternum area was not received, and my not be considered
24 by you to prove that he is a person of bad character, or to
25 prove that he has a propensity to commit any crime.

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1 Such evidence was received, and may be considered by
2 you only for the limited purpose of determining the issue of
3 whether or not Brian O'Keefe had a motive or intent to commit
4 the crime occurred. Neither the felony conviction nor other
5 acts if believed necessarily establish proof of motive or
6 intent to commit the crime charged. You must weigh this
7 evidence in the same manner as you do all other evidence."
8 Thank you, Mr. Lalli.

9 MR. LALLI: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. LALLI:

12 Q Sir, can you please tell our jury how you're
13 employed?

14 A I'm a detective with the Las Vegas Metropolitan
15 Police Department.

16 Q Do you have a specific assignment within Metro?

17 A I am currently assigned to homicide for the last
18 eight and-a-half years.

19 Q How long total have you been with Metro?

20 A Almost 23 years.

21 Q In the -- is it almost eight years, or just over
22 eight years in homicide?

23 A Almost nine years, coming up on nine.

24 Q Okay. In the almost nine years that you've been a
25 homicide detective, can you give us a sense of the number of

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1 cases that you've investigated?

2 A I would estimate well over 200 cases.

3 Q And approximately how many of those involve stabbing?

4 A I would say roughly 25 percent of them.

5 Q Okay. Now Detective Wildemann, I want to direct your
6 attention to November, actually probably the 6th of 2008. Were
7 you assigned the investigation of a homicide on that early
8 morning?

9 A Yes, I was.

10 Q Where was the homicide located?

11 A It was at an apartment complex on El Parque. I'm not
12 exactly sure of the exact numbers.

13 Q 5001?

14 A 5001 is it, yes.

15 Q Okay. And do you travel to that location --

16 A Yes.

17 Q -- for a crime?

18 A Yes. I leave my house, and travel directly there.

19 Q Okay. Is there a person in custody when you arrive?

20 A Yes.

21 Q Who is that?

22 A Brian O'Keefe.

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

24 A Yes, I do.

25 Q Can you please point to him and identify something

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1 he's wearing today?

2 A He's wearing a green sports jacket, seated at the
3 defense table.

4 MR. LALLI: Your Honor, may the record reflect the
5 witness has identified the defendant?

6 THE COURT: Yes, it will.

7 BY MR. LALLI:

8 Q Did I ask you, or were you asked to research whether
9 the defendant had ever been convicted of an offense of domestic
10 battery?

11 A Yes.

12 Q Did you do that?

13 A Yes.

14 MR. LALLI: May I approach the witness?

15 THE COURT: Yes.

16 BY MR. LALLI:

17 Q Detective Wildemann, does that appear to be a
18 judgment of conviction?

19 A Yes, sir.

20 Q Okay. And is that marked as State's proposed Exhibit
21 number 133 for identification purposes? Down at the bottom.

22 A Oh, I'm sorry. Yes.

23 Q Okay.

24 MR. LALLI: Your Honor, move for the admission of
25 State's proposed 133.

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