

1 of the time, but we submit that we still should be allowed to
2 have the officer relay the underlying effect of the defendant's
3 statement because it does show a consciousness of guilt, at
4 least from our position.

5 THE COURT: Ms. Palm, is that yours or Mr. Pike's?

6 MR. PIKE: That's mine.

7 MS. PALM: No, I'm sorry, I'm not prepared for that
8 one.

9 MR. PIKE: Oh, okay. I've got it. In relationship
10 to that, they're attempting to use this as an adoptive
11 admission. And I think they're theory under that is Harrison
12 v. State (phonetic), to bring that in.

13 And in dealing with that, that is -- that's -- that
14 case is looked on with disfavor in subsequent cases. And
15 clearly, there's -- there's a lot of problems that deal with
16 adoptive admissions is number one. Then you have to go through
17 the issues of whether or not it was knowing whether he was
18 intoxicated, whether or not it's a violation of his Miranda
19 rights because the officers are in there.

20 And if that is going to come in, then probably we're
21 going to have to then put in the entire, or at least major
22 portions of the videotaped interrogation of the defendant in
23 which he denies doing anything to her, denies stabbing her,
24 denies anything. And in fact, is -- denies the fact that she's
25 even dead until she is told -- until he's informed of that by

1 the -- the police officers.

2 MR. SMITH: And Judge, if I could jump in. I think
3 Mr. Pike has the chronologically confused. We're not talking
4 about the taped statement that he gave to Detective Bunn and
5 Wildemann. We're talking about the patrol officers at the
6 scene as they're leading him to the patrol car. Before
7 homicide detectives have even responded, the defendant makes a
8 spontaneous statement. He says three things. He says, "I
9 swear to God, I didn't mean to hurt you, V," V probably be
10 Victoria Witmarsh. He said, "Let's go, let's do the ten
11 years." And there was a third statement that he said, "I swear
12 to --

13 MS. PALM: "What did I do wrong?"

14 MR. SMITH: "What did I do wrong?"

15 MS. PALM: And the other thing, your Honor, is he
16 said other things such as, "She tried to stab me," "she stabbed
17 herself." Or if they want to put that in, then all of his
18 other statements have to come in under the rule of completeness
19 because they can't have it one-sided of his spontaneous
20 statements at the scene.

21 MR. SMITH: And that's something we've contemplated.
22 And if your Honor wants to rule that all the other things come
23 in, we'll deal with that. But right now we're focusing on the
24 admissibility, should we choose to introduce that evidence
25 through Hutcherson of that particular statement --

1 THE COURT: And isn't it --

2 MR. SMITH: -- and how to sanitize it.

3 THE COURT: The positive statements for your client
4 were made at about the same time he's making these other
5 statements en route to the parole vehicle?

6 MS. PALM: Apparently. We have no discovery --

7 MR. SMITH: Yes.

8 MS. PALM: -- on Hutcherson other than a handwritten
9 note, so we don't know the timing of his statement or the
10 circumstances of his statement other than the representations
11 made here today.

12 MR. SMITH: I can represent that they appear to be
13 around the same time. I mean, he said --

14 THE COURT: While they're walking towards the car?

15 MR. SMITH: While they're walking to -- and there's
16 like five or six patrol officers all within earshot, and he
17 says different things while -- and different officers hear
18 separate statements. So it is -- they are pretty
19 contemporaneous.

20 THE COURT: Well, I think in all fairness, you know,
21 those statements need to come in.

22 MR. SMITH: If we -- I agree.

23 THE COURT: Right.

24 MR. SMITH: And I don't dispute that. But because of
25 the particular nature of the statement saying, "Let's go, let's

1 do the ten years," I wanted to address that with the court
2 first.

3 MR. PIKE: And there is one other housekeeping matter
4 also. We --

5 THE COURT: Let me -- let me finish --

6 MR. PIKE: Okay.

7 THE COURT: -- up with this issue here.

8 MR. PIKE: Thank you. I'm sorry.

9 THE COURT: Obviously, the jury's advised that
10 they're not to be concerned about punishment. You know, that's
11 a statement made -- you know, allegedly made by your client. I
12 don't know that, you know, that we're going to redact something
13 that he made, you know, allegedly made. Unless the parties can
14 come to some agreement to sanitize that in some fashion.

15 MR. SMITH: And I'm hoping that we can. I mean would
16 you guys have an opposition to our officer saying that he said,
17 "Let's go, let's do the prison time," or something like that?
18 Because I really don't want him to say, "Let's go, let's do the
19 ten years." I think --

20 MR. PIKE: Well, the -- there -- unfortunately -- and
21 I appreciate Counsel's desire to do that. Because of the time
22 frame that's involved and because of the issues of the
23 deceased's medical condition and -- and exactly what she was --
24 was doing with her health -- she had cirrhosis of the liver,
25 Hep C, she was taking anti-depressants, she was underweight,

1 she -- she had a great deal of medical issues. Whether the
2 reference is, is let's go do ten years or we -- you know, I
3 want you to recover so we can have a good ten years together so
4 that we can deal with issues like that, I don't think that we
5 can pull that time frame out.

6 Now, the jury's going to be informed during the --
7 the selection process that if they find -- make a finding of
8 first degree murder, that they're going to do the sentencing, I
9 guess, unless the stipulation's been entered into.

10 MR. SMITH: It hasn't, but I --

11 MR. PIKE: Okay. But it -- and so during this period
12 of time they'll learn that there's a potential 20 year sentence
13 that's involved and not a ten year sentence.

14 So I don't think the prejudice as far as the ten
15 years is -- is that key. And that's a tactical decision that I
16 -- we're kind of forced to make at this point in time. So the
17 State has offered what they believe to be corrective or
18 sanitizing language, and it doesn't fit with what -- if we
19 sanitize it then it just, in my opinion, becomes more
20 noticeable, more directed towards prison. And I think that
21 with the ten years basically we can deal with it in other ways.

22 THE COURT: All right. Anything else, Mr. Smith?

23 MR. SMITH: No, Judge. I -- at this point we'd
24 submit it.

25 THE COURT: Anything else from any other party on any

1 issue?

2 MR. PIKE: Any issue, okay.

3 THE COURT: Okay.

4 MR. PIKE: We do have a --

5 MR. SMITH: We have some --

6 MR. PIKE: -- one other issue that came up, or two
7 issues. Let me address them. The State had noticed Mr.
8 Witmarsh as an identification witness in relationship to this
9 case. Because we have stipulated to identity, there -- he is
10 not going to be in the case in chief. He may or may not be a
11 rebuttal witness. That's so speculative that, as a family
12 member and as the husband of the deceased, I don't think we're
13 in a position to stop him from being out of the courtroom
14 during the time of the trial.

15 So they have withdrawn him for purposes of their case
16 in chief, and they don't anticipate him for rebuttal, but that
17 may happen. So I -- he may or may not be in the courtroom.
18 That's -- that's fine.

19 MR. SMITH: So to me -- to the State it seems like
20 their waiving any exclusionary rule.

21 MS. PALM: No, we're not.

22 MR. SMITH: We -- no?

23 MR. PIKE: No, as far as him --

24 MS. PALM: As far as him --

25 MR. SMITH: Is that's what I mean. I mean --

1 MS. PALM: Okay.

2 MR. SMITH: -- as far as him. I don't mean --

3 MS. PALM: Okay.

4 MR. SMITH: -- in general.

5 MR. PIKE: No, no, just as far as him, yeah.

6 THE COURT: All right. So --

7 MR. SMITH: I'm not that slick.

8 THE COURT: The rule will be waived as far as applies
9 to him.

10 MR. PIKE: Right.

11 THE COURT: Is that agreed?

12 MR. PIKE: Yes.

13 THE COURT: Both sides?

14 MR. SMITH: Sure.

15 THE COURT: Okay.

16 MR. SMITH: And I would just hope they wouldn't in
17 turn argue if he says anything in rebuttal that because he had
18 the opportunity to sit here and hear all that, that's why he
19 said x, y, and z.

20 THE COURT: Well, I'm --

21 MS. PALM: That's -- that's fair argument, your
22 Honor, if he's going to sit in here.

23 THE COURT: That's fair argument, so.

24 MR. SMITH: Okay. All right, fair enough.

25 THE COURT: If you want to just exclude him --

1 MR. SMITH: We'll figure out what we're going to do.

2 MR. PIKE: That -- we'll leave it to their choice.

3 THE COURT: All right.

4 MR. SMITH: Okay.

5 THE COURT: Anything else?

6 MR. PIKE: We ran into a witness problem. We had Dr.
7 Hyatt (phonetic) who was going to be toxicologist expert in
8 relationship to the medication and the alcohol that was being
9 taken by the deceased. There was a problem. We contacted his
10 employer. He was gone. He was out of the jurisdiction. We
11 couldn't contact him. Because the State and the defense had
12 both invoked the right to a speedy trial, we were able to
13 obtain and retain Dr. Christiansen, Dr. Tawni Christensen to
14 come and review the protocols on the medication.

15 She has agreed to take this and appear as an expert
16 witness. She took all of the information, prepared a report.
17 I provided that to counsel over the weekend. They have that.
18 And -- and she would not testify any differently than Dr. Hyatt
19 in relationship to the medication. And it was an issue that I
20 highlighted at the time of the preliminary hearing.

21 I requested that Dr. Christensen get the -- the
22 report to me as quickly as possible so that we could go ahead
23 and give it to the State, they could have the ME review it, and
24 if necessary, they may bring her -- either address it during
25 her direct testimony or call -- recall her as a rebuttal

1 witness, or attempt to obtain a rebuttal witness during that
2 period of time.

3 But they I think graciously have indicated that
4 because it was not our fault and because we're just try willing
5 to save this trial date, that they would waive the -- the
6 advance notice on an expert.

7 MR. SMITH: That's correct, Judge. The State did
8 waive any notice requirement. We have no problem with Dr.
9 Christensen testifying in lieu of their doctor previously
10 noticed.

11 I am going to kind of put the court on notice that we
12 anticipate perhaps doing a quick voir dire outside the presence
13 of the jury with her because we want to make sure that her
14 testimony is limited in scope and not kind of getting into
15 issues that we don't think she can testify to as an expert in
16 her particular field.

17 MR. PIKE: And that would be appropriate.

18 THE COURT: All right. Anything else?

19 MR. PIKE: We anticipate that we'll be picking a jury
20 most of this morning. I believe the State has a number of
21 witnesses available for this afternoon if we complete it, so
22 we'll be ready to do opening arguments and cross-examination.
23 The witnesses that they've anticipated calling are civilian
24 witnesses that were the first ones into the apartment.

25 MR. SMITH: That's correct.

1 THE COURT: You know we typically start at 9:30 for
2 the entire week.

3 MR. SMITH: Okay.

4 THE COURT: All right.

5 MR. SMITH: Okay.

6 MR. PIKE: Thanks.

7 THE COURT: Anything else? Smith.

8 MR. PIKE: We have --

9 MR. SMITH: Not -- not -- oh, I'm sorry, go ahead.

10 MR. PIKE: We our witnesses all scheduled for
11 Thursday.

12 MR. SMITH: Not now. I anticipate we might have to
13 litigate some other issues, so.

14 THE COURT: All right.

15 MR. SMITH: But -- but for now I think -- and for
16 today we're good.

17 THE COURT: Okay. All right.

18 MR. PIKE: Okay.

19 THE COURT: We'll be back in a couple of minutes --

20 MR. SMITH: Okay.

21 THE COURT: -- when the jury shows up.

22 (Court recessed at 9:58 a.m. until 10:22 a.m.)

23 (Court called to order)

24 (In the presence of the prospective jurors)

25 THE COURT: Good morning, ladies and gentlemen. I am

MOTION TO ADMIT EVIDENCE OF OTHER CRIMES

C250630 (2/2/2009)
FILED

Exhibit 16

003360

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN O'KEEFE,
#1447732

Defendant.

Case No. C250630

Dept No. XVII

NOTICE OF MOTION AND MOTION TO ADMIT
EVIDENCE OF OTHER CRIMES

DATE OF HEARING: 02/10/2009
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through PHILLIP N. SMITH, JR., Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other Crimes.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XVII thereof, on the 10th day of February, 2009, at the hour of 8:00 o'clock a.m., or as soon thereafter as counsel may be heard.

DATED this _____ day of February, 2009.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/ PHILLIP N. SMITH, JR.
PHILLIP N. SMITH, JR.
Deputy District Attorney
Nevada Bar #010233

POINTS AND AUTHORITIES**STATEMENT OF FACTS**

Victoria Whitmarsh, a fashion model in New York City, met and married David Whitmarsh, a fashion photographer, in 1985. They had a child, Alexandria. They were planning on having another child, but Mrs. Whitmarsh was diagnosed with Hepatitis C in 1996. Physicians initially gave her five (5) years to live. The Whitmarshs subsequently moved to Florida, hoping to spend Mrs. Whitmarsh's final years in a warmer climate. The terrorist attacks of September 11, 2001 had an adverse effect on Mr. Whitmarsh's business (which was based out of New York City); consequently, they moved to Las Vegas. Mrs. Whitmarsh began working at Merck-MEDCO, a local pharmaceutical company. Not long after, she met Brian O'Keefe (the Defendant). Mrs. Whitmarsh ultimately decided she no longer wanted to be with her husband and began to pursue a dating relationship with O'Keefe. Mrs. Whitmarsh and O'Keefe had what could best be termed as an "on-again, off-again" relationship.

///

1 Perhaps most importantly, it was a relationship that was rife with domestic violence
2 upon Mrs. Whitmarsh at the hands of O'Keefe. This all culminated on November 5, 2008 at
3 approximately 11:00 p.m., when LVMPD dispatch received a 911 call from Robin Kolacz,
4 the manager of the "Casa Salvatore" apartments located at 5001 El Parque Avenue. Robin
5 stated that the female in apartment C-35 was lying inside the apartment and there was blood
6 everywhere. Police officers and medical personnel responded to the apartment complex.
7 Patrol officers arrived at the apartment and found the front door open. Officers challenged
8 the apartment and a male, later identified as O'Keefe, yelled at them to come in. The
9 officers cleared the front room and could hear O'Keefe talking from the master bedroom.
10 Officers continued to talk to O'Keefe, attempting to get him to come out of the bedroom;
11 however, he refused. O'Keefe's actions made officers believe O'Keefe was attempting to
12 "bait" them into the room for a confrontation. Officers from the Crisis Intervention Team
13 approached the bedroom and observed O'Keefe holding the victim, identified as Victoria
14 Whitmarsh.

15 Officers could see that there was blood on the bed. O'Keefe first told officers Mrs.
16 Whitmarsh was dead, then stated she was alive and demanded officers enter to help her.
17 O'Keefe still refused to move away from the victim. Not knowing if Mrs. Whitmarsh was
18 still alive, officers entered the bedroom to expedite the removal of O'Keefe, so medical
19 could render aid. O'Keefe refused to comply with officer's orders to move away from Mrs.
20 Whitmarsh; he therefore received one cycle from an electronic control device (ECD).
21 O'Keefe still refused to comply and received an additional cycle from the ECD.
22 Subsequently, O'Keefe complied with the officers' commands and was taken into custody
23 and removed from the bedroom, enabling medical personnel to enter and attend to Mrs.
24 Whitmarsh. Medical personnel determined Mrs. Whitmarsh was deceased. Medical
25 personnel and officers exited the apartment. The area was cordoned off with crime scene
26 tape, and homicide detectives and criminalistics personnel were requested to the scene.
27 Homicide detectives arrived and a telephonic warrant was requested.

28 ///

1 Mrs. Whitmarsh appeared to have a stab wound on her right side under the arm pit
2 area, an injury to the middle knuckle of her left hand, and an injury to her right index finger.
3 Mrs. Whitmarsh was lying on her back on the floor and was nude from the waist down. The
4 bed linens were saturated with blood and there was a bloody black-handled kitchen knife
5 (approximately 8 inches long) lying on the bed. O'Keefe was taken to the homicide office
6 and advised of his rights per the Miranda decision, which he stated he understood. Homicide
7 detectives spoke with O'Keefe who stated he did not know what happened to Mrs.
8 Whitmarsh. O'Keefe stated only he and Mrs. Whitmarsh were in the apartment but he did
9 not know where all the blood came from. O'Keefe also stated he had been drinking
10 throughout the day of November 5, 2008. Detectives spoke to Charles and Joyce Toliver,
11 who live directly below O'Keefe. Joyce stated she heard loud thumping noises in the
12 apartment above that began around 10:00 p.m. The noises continued and eventually woke
13 up Joyce's husband, Charles. Charles used a broom to strike the ceiling in an attempt to
14 have the upstairs neighbors, O'Keefe and Mrs. Whitmarsh, quiet down.

15 When the thumping noise continued, Charles went up to apartment C-35. Charles
16 found the front door of the apartment open and yelled in to O'Keefe. O'Keefe called for
17 Charles to "come in and get her, she's dead." Charles entered the apartment and walked to
18 the master bedroom. Charles only saw Mrs. Whitmarsh and O'Keefe in the apartment.
19 Charles looked into the bedroom and saw O'Keefe standing over the body of Mrs.
20 Whitmarsh. O'Keefe was attempting to lift Mrs. Whitmarsh at the waist. Mrs. Whitmarsh
21 was naked from the waist down and did not appear to be moving. Charles could see blood
22 all over the bed and there was a black-handled knife lying on the bed. Charles ran from the
23 room to the apartment manager's apartment, spoke to Todd Armbruster (Robin's boyfriend)
24 and told him to call the police. Jimmy Hathcox, who lives in apartment 36, next to O'Keefe
25 and Mrs. Whitmarsh, also heard loud thumping from apartment 35 at approximately 10:00
26 p.m. Hathcox stated he went outside of his apartment and saw O'Keefe standing outside of
27 his apartment. O'Keefe looked at Hathcox strangely and walked back into his apartment.

28

1 Hathcox stated the next thing he heard was people yelling and he opened the door and
2 saw Charles Toliver and Todd Armbruster standing in front of O'Keefe's door. The men
3 told Hathcox, "he killed her and there's blood all over the place." Todd Armbruster stated
4 that Charles Toliver came to his door and told him to call the police. Toliver told Todd that
5 he thought the girl in apartment 35 was dead. Todd went up to apartment 35, entered the
6 apartment, and saw O'Keefe bent over Mrs. Whitmarsh and blood on the bed. O'Keefe
7 looked up, saw Todd and took a swing at him and told him to "get the fuck out of here" (or
8 words to that effect). Todd left the apartment, went to apartment C-37, and phoned the
9 police. Detectives noted a large amount of blood on O'Keefe's clothing and hands, an
10 incised wound on his right index finger and two abrasions on his forehead. O'Keefe also had
11 several long scratch marks on his back at the belt line. O'Keefe was photographed and his
12 clothing was impounded. O'Keefe was arrested and transported to the Clark County
13 Detention Center, where he was booked for Murder with Use of a Deadly Weapon.

14 On November 6, 2008, at approximately 9:00 a.m., an autopsy was performed on the
15 body of Mrs. Whitmarsh at the Clark County Coroner's Office by Dr. Jacqueline Benjamin.
16 Mrs. Whitmarsh had several bruises on her body including three on her left upper arm. Dr.
17 Benjamin noted a single stab wound just under the victim's right arm pit. The wound looked
18 to have been made by a single edged knife with the sharp edge of the knife pointed towards
19 the victim's back. Dr. Benjamin concluded that the wound was approximately 4.25 inches
20 long and traveled downward and forward. Upon completion of the autopsy, Dr. Benjamin
21 found that Mrs. Whitmarsh died from a single stab wound and the manner of death was a
22 homicide. During the interview of O'Keefe, O'Keefe was insistent he had called 911.
23 Detectives checked all the phones at the scene and none of them had a call to 911 or to the
24 non-emergency police number.

25 On November 20, 2008, Cheryl Morris gave a statement to the detectives assigned to
26 the case. Cheryl Morris stated she had a dating relationship with O'Keefe prior to Mrs.
27 Whitmarsh moving in with him at the 5001 El Parque address. Ms. Morris stated she and
28 O'Keefe dated for several months (starting in early 2008) and in June or July of 2008 she

1 and O'Keefe moved into the El Parque address. At this point, the relationship was going to
2 be platonic. Ms. Morris said she slept in the master bedroom and O'Keefe slept on the
3 couch. Ms. Morris said she and O'Keefe had an agreement that they would share the
4 apartment as roommates, and after four (4) days O'Keefe called her and said he was bringing
5 Mrs. Whitmarsh home to live with them. Ms. Morris, not amenable to such a living
6 situation, left the house and only returned to recover her property. Ms. Morris said that
7 during the course of their relationship, O'Keefe would always talk about his prior
8 relationship with Mrs. Whitmarsh and how he loved her and couldn't live without her.

9 Ms. Morris stated when O'Keefe would drink he would become angry and abusive,
10 and he would also talk about how Mrs. Whitmarsh had ruined his life and would state that he
11 wanted to kill her (specifically because she had testified against him and "sent [him] to
12 prison" in case C207835) and that she (Mrs. Whitmarsh) was "poison." She stated that he
13 said this several times over several different occasions. O'Keefe also told Ms. Morris that he
14 liked Mrs. Whitmarsh because she was "submissive." Ms. Morris related how O'Keefe
15 would tell her about his training in the military and how he would demonstrate on her how
16 he could kill someone easily using a knife. Ms. Morris also indicated that in a conversation
17 with O'Keefe subsequent to the murder, he stated to her that "all he remembered" was him
18 being asleep on the couch and being woken up by something sharp poking him in the side
19 and Mrs. Whitmarsh standing over him, "and the next thing he knew, she was bleeding" (or
20 something to that effect).

21 The Defendant has an extensive history of violence against this victim. On January 7,
22 2003, the Defendant was arrested for slapping the victim, causing her to have a bloody nose.
23 This injury was observed by police officers. The Defendant ultimately pled guilty to
24 Resisting a Police Officer in the Las Vegas Justice Court in case 03M00410X. On
25 November 14, 2003, the Defendant got into an argument with Mrs. Whitmarsh which
26 became physical when he grabbed her by the arm, pushed her down, struck her in the head
27 with his fist, and then strangled her with one hand. He then got a pillow and attempted to
28 smother her with it, but was interrupted by the next-door neighbor responding to Mrs.

1 Whitmarsh's screams and knocking on the door. The neighbor came in and took Mrs.
2 Whitmarsh to her apartment, whereupon the Defendant broke into and entered the neighbor's
3 apartment through her front window. Police officers in the vicinity heard the commotion
4 and took the Defendant into custody. The Defendant ultimately pled guilty to Battery
5 Constituting Domestic Violence in the Las Vegas Justice Court in case 03M25901X.

6 On November 26, 2003, police responded to Mrs. Whitmarsh's home in order to do a
7 "welfare check" whereupon they came in contact with both her and the Defendant. The
8 police observed that Mrs. Whitmarsh "had been severely beaten." Although initially
9 uncooperative, Mrs. Whitmarsh ultimately stated to police that the Defendant had beaten her.
10 The Defendant was charged with Battery Constituting Domestic Violence in the Las Vegas
11 Justice Court in case 03M26791X, but the charges were ultimately dismissed as part of a
12 package negotiation. On April 2, 2004, Mrs. Whitmarsh called the police because the
13 Defendant had accused her of being unfaithful and slapped her repeatedly, breaking her
14 glasses. On April 3, 2004, the Defendant again accused Mrs. Whitmarsh of being unfaithful
15 and slapped her. She ran to the apartment manager's office and the Defendant chased her
16 there. The manager called the police, and the Defendant was taken into custody. The
17 Defendant ultimately pled guilty to Battery Constituting Domestic Violence in the Las Vegas
18 Municipal Court in case C581783A.

19 On May 29, 2004, the Defendant again accused Mrs. Whitmarsh of being unfaithful
20 to him. He then battered Mrs. Whitmarsh and apparently forced her to have sex with him.
21 After the Defendant "passed out," Mrs. Whitmarsh contacted a security guard at their
22 residence, and he in turn contacted the police. This incident ultimately led to charges of
23 Battery with Intent to Commit Sexual Assault, Sexual Assault, Attempt Sexual Assault, and
24 Burglary being filed against the Defendant in case C202793. The case was tried before a
25 jury before the Honorable Sally Loehrer on October 25, 2004, with Mrs. Whitmarsh
26 testifying against the Defendant. The Defendant was convicted of Battery (a misdemeanor)
27 and Burglary and sentenced to credit for time served for Battery and 24 to 120 months for
28 Burglary—suspended for an indeterminate term of probation not to exceed five (5) years.

1 The April 2, 2004 incident ultimately led to a charge of felony battery domestic violence
2 (based on two prior convictions) being filed against the Defendant in case C207835. The
3 case was tried before a jury before the Honorable Valorie Vega on September 19, 2005, with
4 Mrs. Whitmarsh testifying against the Defendant. The Defendant was convicted and
5 sentenced to 24 to 60 months in prison. He was released in April 2008.

6 The State now respectfully requests that evidence with regards to the Defendant's
7 conviction in C207835 be admitted in its case-in-chief.

8 **STATEMENT OF THE LAW**

9 NRS 48.045(2) provides:

10 Evidence of other crimes, wrongs or acts is not admissible to
11 prove the character of a person in order to show that he acted in
12 conformity therewith. It may, however, be admissible for other
13 purposes, such as proof of motive, opportunity, intent,
preparation, plan, knowledge, identity, or absence of mistake or
accident.

14 See NRS 48.045(2); see also *Tinch v. State*, 113 Nev. 1170, 1176 (1997). The State will
15 seek to introduce, in its case-in-chief, evidence that the Defendant was arrested and
16 ultimately convicted (due to Mrs. Whitmarsh's testimony) of felony Battery Constituting
17 Domestic Violence in case C207835. The State will also introduce evidence indicating that
18 the Defendant served close to three (3) years in prison as a result of said conviction. The
19 State seeks this evidence to show the Defendant's motive and intent. In the instant case, the
20 Defendant is charged with Open Murder. This charge leaves to the jury the task of
21 determining if the Defendant is guilty of First Degree Murder, Second Degree Murder,
22 Voluntary Manslaughter, or Involuntary Manslaughter. Consequently, the Defendant's intent
23 and motive is highly relevant. The State submits that evidence regarding case C207835 is
24 admissible pursuant to NRS 48.045 for the limited purpose of establishing a motive with
25 regards to first degree murder and/or establishing the Defendant's intent with regards to any
26 lesser degree of homicide. It is anticipated that these will be the key issues in the trial on this
27 matter.

28 ///

1 In order to admit "prior bad act" evidence, the State must establish that (1) the prior
2 act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence;
3 and (3) the probative value of the evidence is not substantially outweighed by the danger of
4 unfair prejudice. Tinch, 113 Nev. at 1176. The admissibility of prior bad acts is within the
5 sound discretion of the trial court and will not be overturned on appeal unless found to be
6 manifestly wrong. Id. The Nevada Supreme Court has held that the State may offer
7 evidence in its case-in-chief in anticipation of an expected aspect of the defense. See, e.g.,
8 Overton v. State, 78 Nev. 198, 205-6, 370 P.2d 677, 681 (1962). In the instant case, due to
9 the underlying facts as well as pleadings already filed by the Defendant, it is anticipated that
10 the defense will assert that the Defendant lacked the requisite intent and/or malice for murder
11 due to his voluntary intoxication. Consequently, for the crime that the Defendant is charged
12 with here—Open Murder—an essential element will be the subjective intent of the
13 Defendant.

14 **A. Motive.**

15 At the preliminary hearing, Cheryl Morris (hereinafter "Morris") testified that the
16 Defendant told her that he "hated" Mrs. Whitmarsh because she previously testified against
17 him, "put him in jail," and "took three years of his life." (December 17, 2008 Preliminary
18 Hearing Transcript, at 69-70 [hereinafter "PHT"]). Morris went on to say that because of
19 this, the Defendant stated that he "wanted to kill the bitch." Id. at 70. Morris testified that
20 the Defendant said this on more than one occasion. Id. The fact that the Defendant was in
21 fact convicted of felony Battery Constituting Domestic Violence in case C207835, and
22 ultimately sent to prison for almost three (3) years due to Mrs. Whitmarsh's testimony, is
23 corroborative evidence with regards to Morris' testimony at the preliminary hearing (as well
24 as the statement she gave to the police during the initial investigation). Specifically, it is
25 evidence that clearly establishes a motive (pursuant to the Defendant's own statements), and
26 is therefore germane to the State's efforts in securing a first-degree murder conviction. The
27 Nevada Supreme Court has repeatedly upheld the provision of NRS 48.045 that allows the
28 State to introduce evidence of other bad acts in order to establish a motive. See, e.g., Wesley

1 v. State, 112 Nev. 503, 916 P.2d 793 (1996); Lay v. State, 110 Nev. 1189, 836 P.2d 448
2 (1994); Felder v. State, 107 Nev. 237, 810 P.2d 755 (1991); Cavanaugh v. State, 102 Nev.
3 478, 729 P.2d 481 (1986).

4 B. Intent.

5 Long ago, the Nevada Supreme Court held that in the trial of an accused, evidence of
6 other crimes is competent when it tends to establish intent. See, e.g., Wyatt v. State, 367
7 P.2d 104, 77 Nev. 490 (1961). Sister states have reached a similar conclusion. For example,
8 in State v. Brewer, 507 P.2d 1009 (Ariz. App. 1973), the defendant was tried and convicted
9 of felony theft of a motor vehicle. At the trial in the matter, the prosecutor introduced
10 evidence that the defendant had possessed a different stolen vehicle the same day he was
11 arrested for the theft of the vehicle he had been charged with. The Arizona Court of Appeals
12 found no error. The court held that the evidence of possession was relevant to the
13 "defendant's criminal intent or knowledge of his wrongdoing and [was] competent [because
14 it tended] to establish an absence of mistake or accident." Id. at 1010. Similarly, in Dutton
15 v. State, 94 Nev. 461 (1978), disapproved on other grounds by Gray v. State, 100 Nev. 556,
16 688 P.2d 313 (1984), police conducted an undercover fencing operation called "Operation
17 Switch." On the day of the incident, the defendant walked into a store with a co-conspirator.
18 Both the defendant and the co-conspirator negotiated the sale to an undercover police officer
19 of a stolen camera and stolen bronzeware. The defendant, however, was charged only with
20 the possession of the stolen camera.

21 At trial, the State introduced evidence that the bronzeware the defendant possessed
22 was stolen the same day as the camera. The district court allowed the evidence, and the
23 Nevada Supreme Court upheld this ruling, reasoning that the evidence was admissible under
24 the complete story of the crime doctrine as well as to counter the defendant's claim that he
25 did not have knowledge that the camera was stolen. Dutton, 94 Nev. at 464. In Findley v.
26 State, 94 Nev. 212, 577 P.2d 867 (1978), overruled on other grounds by Braunstein v. State,
27 118 Nev. 68, 40 P.3d 413 (2002), the defendant was charged with lewdness with a minor. At
28 trial, the State presented two witnesses (other than the charged victim) who testified that the

1 defendant molested them similarly some nine years earlier. (Implicit in the Court's ruling to
2 allow admission of such evidence was the finding that nine years was not overly remote in
3 time.) The Court affirmed the admission of the evidence to prove intent and absence of
4 mistake or accident. Perhaps most importantly, the Court noted that intent is placed in issue
5 when the defendant pleads not guilty, holding in Overton, *supra*: "[a] plea of not guilty puts
6 in issue every material allegation of the information." Overton, 78 Nev. at 205, 370 P.2d at
7 680. In the instant case, the Defendant has necessarily put every material allegation of the
8 Information in issue.

9 Federal courts, applying the Federal Rule of Evidence 404(3)(b)—which is identical
10 to NRS 48.045—also allow such evidence when it is used to establish intent. In United
11 States v. Thomas, 835 F.2d 219 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1741, 486 U.S. 1010
12 (1988), the Court held that evidence that the defendant had previously written bad checks
13 was admissible to show intent in the prosecution for transporting a security known to have
14 been taken by fraud. In the charged offense, the defendant had written a check on an
15 account that had been closed for six months and subsequently obtained a cashier's check on
16 the strength of that deposit. The prior bad checks were written approximately one year
17 before transaction for which the defendant was on trial. The court concluded that
18 defendant's intent in depositing the bad check was very much in issue, and consequently the
19 admission of the evidence was appropriate.

20 In United States v. Kirk, 528 F.2d 1057 (5th Cir. 1976), the defendant was charged
21 with threatening the life of the President of the United States of America. At trial, the
22 prosecution presented evidence showing that three years earlier the defendant had committed
23 the same offense. The court ruled this evidence to be properly admissible to show the
24 defendant's intent, holding:

25
26 Whether the prior conviction tended to show that defendant made this threat
27 intentionally or as the result of "alcohol taking," was a matter for the jury's
28 determination. The fact that the former offense occurred three years prior to the
offense charged does not make it so remote as to be excluded.

1 Id. at 1061.

2 In United States v. Berchum, 582 F.2d 898 (5th Cir. 1978), a jury convicted the defendant, a
3 substitute letter carrier for the United States Postal Service, of unlawfully possessing a 1890
4 silver dollar that he knew to be stolen from the mails, in violation of 18 U.S.C. Section 1708
5 (1976). To establish that the defendant intentionally and unlawfully possessed the silver
6 dollar, the Government introduced into evidence of two Sears, Roebuck & Co. credit cards
7 found in the defendant's wallet when he was arrested. Neither card was issued to the
8 defendant, and neither was signed. The Government also introduced evidence indicating that
9 the cards had been mailed some ten months prior to the defendant's arrest to two different
10 addresses on routes he had serviced. The Court ultimately held:

11 Where the issue addressed is defendant's intent to commit the offense charged,
12 the relevancy of the extrinsic offense derives from the defendant's indulging
13 himself in the same state of mind in the perpetration of both the extrinsic and
14 charged offenses. The reasoning is that because the defendant had unlawful
15 intent in the extrinsic offense, it is less likely that he had lawful intent in the
16 present offense.

15 Id. at 911.

16 In United States v. DeLoach, 654 F.2d 763 (D.C. Cir. 1980), the defendant was
17 convicted for submitting false applications for labor certification of an undocumented
18 immigrant. The Court allowed admission of testimony of three government witnesses, all
19 undocumented immigrants, that the defendant was a "swindler" who took their money for a
20 false promise to find them jobs and labor certifications and that the conduct occurred over a
21 period encompassing a year and a half prior to the offense charged. The Court held that the
22 testimony was properly admissible. The prosecution argued that the evidence of the other
23 "swindles" related to the ultimate issue of intent and the intermediate issues of knowledge,
24 motive, common plan and absence of mistake and accident. The defendant argued that the
25 prior bad acts were so dissimilar that the only logical inference to be drawn from the
26 admission of them was that he was a bad person who swindles undocumented immigrants,
27 and therefore, he was likely to try to deceive the government. The Court held:

28

1 These prior acts were instead introduced to show intent. In this case, where
2 intent was the only real issue, and where appellant predictably raised the
3 defense of mistake, the admissible bad acts evidence need not show incidents
4 identical to the events charged, so long as they are closely related to the
5 offense and tend to rebut the defense of mistake.

6 Id. at 769.

7 The Court cited three additional factors, which reinforced the admissibility of the extrinsic
8 evidence. The prior acts were introduced to show intent, which was the only real issue. The
9 government had great need for evidence on the issue of intent; and the trial court gave a
10 limiting instruction which properly restricted the jury's use of the evidence.

11 The admission of the other acts in this case is entirely appropriate since the necessary
12 element of the instant crime sought to be proved (the intent and motive to commit a violent
13 act against Mrs. Whitmarsh notwithstanding the Defendant's anticipated claim of voluntary
14 intoxication and the inability to form the requisite intent) cannot be substantially established
15 by other evidence. See, e.g., Jones v. State, 85 Nev. 4, 448 P.2d 702 (1969); Tucker v. State,
16 82 Nev. 127, 412 P.2d 970 (1966). The intent to commit a violent act upon Mrs. Whitmarsh
17 will be a crucial element that the State must prove beyond a reasonable doubt. As such, the
18 evidence here is probative in helping the State meet that substantial burden of proof.

19 D. Balancing Test.

20 After a court finds that evidence of other crimes fits within NRS 48.045(2), it must
21 then review the evidence in regard to NRS 48.035.¹ This statute requires a weighing of
22 probative value against prejudicial effect. As stated above, it is anticipated that the defense
23 will argue that the proffered evidence is more prejudicial than probative. In United States v.
24 Parker, 549 F.2d 1217 (9th Cir. 1977), cert. denied, 430 U.S. 971, 97 S.Ct. 1659 (1977), the

25 ¹ NRS 48.035 provides in pertinent part:

- 26 1. Although relevant, evidence is not admissible if its probative value is substantially
27 outweighed by the danger of unfair prejudice, of confusion of the issues or of
28 misleading the jury.
2. Although relevant, evidence may be excluded if its probative value is substantially
outweighed by considerations of undue delay, waste of time or needless presentation
of cumulative evidence.

1 defendants were convicted of armed bank robbery and one defendant was also convicted of
2 bank larceny. During the course of the trial, evidence was brought in that the defendant had
3 been addicted to heroin for approximately ten years and had been involved in drug
4 counseling during most of that period. The court held that the evidence of defendant's
5 narcotics dealing was admissible to show his motive to commit a robbery. The defendant
6 argued that the prejudicial effect of the extrinsic offense substantially outweighed its
7 probative value. The court stated that "evidence relevant to defendant's motive is not
8 rendered inadmissible because of its highly prejudicial nature The best evidence often
9 is!" Parker, 549 F.2d at 1222.

10 In Tucker v. State, 82 Nev. 127, 412 P.2d 970, (1966), the Nevada Supreme Court
11 elucidated the standard for balancing the probative value versus the prejudicial effect of bad
12 act evidence:

13 The reception of such evidence is justified by necessity and, if other evidence
14 has substantially established the element of the crime involved (motive, intent,
15 identity, absence of mistake, etc.), the probative value of showing another
16 offense is diminished, and the trial court should rule it inadmissible even
17 though relevant and within an exception to the rule of exclusion.

18 Id. at 130, 412 P.2d at 971-972.

19 In the instant case, the only way to show the motive is to actually admit evidence of it. The
20 probative value of admitting evidence with regards to the Defendant's conviction in
21 C207835 is therefore by no means substantially outweighed by the danger of unfair
22 prejudice. The State prays that this Court will recognize the necessity and the admissibility
23 of the evidence it now seeks to admit to prove the Defendant's motive and intent in the
24 instant case. The State intends to illustrate by clear and convincing evidence that the
25 Defendant indeed committed the acts which are sought to be admitted, pursuant to Petrocelli
26 v. State, 101 Nev. 46, 692 P.2d 503 (1985). The State intends to do so in an evidentiary
27 hearing prior to trial.

28 ///

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///

1 **CONCLUSION**

2 Based upon the foregoing, the State requests the Court grant the State's Motion to
3 Admit Evidence of Other Crimes.

4
5 DATED this _____ day of February, 2009.

6
7 DAVID ROGER
8 DISTRICT ATTORNEY
9 Nevada Bar #002781

10 BY /s/ PHILLIP N. SMITH, JR.
11 PHILLIP N. SMITH, JR.
12 Deputy District Attorney
13 Nevada Bar #010233
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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's Notice and Motion to Admit Other Bad Acts, was made this ____ day of February, 2009, by facsimile transmission to:

PATRICIA PALM, ESQ.
FAX # 455-6265

/s/ Terry Schessler
Secretary for the District Attorney's Office

ts/dv1

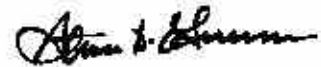
MOTION IN LIMINE TO ADMIT
EVIDENCE OF OTHER BAD ACTS

C250630

(1/6/2011
FILED)

Exhibit 17

003377



CLERK OF THE COURT

0332
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER LALLI
Nevada Bar #005398
Chief Deputy District Attorney
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRIAN O'KEEFE,
#1447732

Defendant.

Case No. C250630

Dept No. XVII

**NOTICE OF MOTION AND MOTION *IN LIMINE* TO ADMIT EVIDENCE
OF OTHER BAD ACTS PURSUANT TO NRS 48.045 AND
EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061**

DATE OF HEARING: 01/20/2011
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
CHRISTOPHER LALLI, Chief Deputy District Attorney, and LIZ MERCER, Deputy
District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other
Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS
48.061.

///

///

1 This Motion is made and based upon all the papers and pleadings on file herein, the
2 attached points and authorities in support hereof, and oral argument at the time of hearing, if
3 deemed necessary by this Honorable Court.

4 **NOTICE OF HEARING**

5 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
6 will bring the foregoing motion on for setting before the above entitled Court, in Department
7 XVII thereof, on the 20th day of January, 2011, at the hour of 8:00 o'clock a.m., or as soon
8 thereafter as counsel may be heard.

9 DATED this _____ day of January, 2011.

10 DAVID ROGER
11 DISTRICT ATTORNEY
12 Nevada Bar #002781

13
14 BY /s/ LIZ MERCER
15 LIZ MERCER
16 Deputy District Attorney
17 Nevada Bar #0010681

18
19 **POINTS AND AUTHORITIES**

20 **STATEMENT OF FACTS**

21 On November 5, 2008, Victoria Whitmarsh was killed by a single stab wound
22 inflicted by Defendant Brian O'Keefe. Defendant was charged with one count of Open
23 Murder with Use of a Deadly Weapon. At the first jury trial in this case, Defendant was
24 convicted of Second Degree Murder with Use of a Deadly Weapon. The case was
25 subsequently reversed by the Nevada Supreme Court and retried. Upon retrial of this case,
26 the jury hung. In each of the trials of this matter, Defendant presented a defense of self-
27 defense and/or accident. The case is presently set for jury trial on January 24, 2011.
28

PRIOR DOMESTIC VIOLENCE**Event Number 030107-0129**

Defendant and Victoria engaged in a verbal argument on January 7, 2003, when Defendant became jealous. The two had been drinking. Victoria attempted to calm Defendant down but it did not work. Defendant began to slap Victoria in the face repeatedly causing her to get a nose bleed. Police were contacted and when they responded, they observed that Victoria still had an active nose bleed. Defendant was charged in Las Vegas Justice Court Case No. 03M00410X. Ultimately, Defendant pled guilty to obstructing a police officer.

Event Number 030804-2025

On August 4, 2003 Defendant and Victoria were at the Albertson's on Silverado when Victoria advised Defendant that she did not feel well. The two returned to their apartment. When they got to their apartment, Defendant carried Victoria on her stomach and Victoria asked him not to because she was afraid it would make her throw up. Defendant then dropped her on her back and said he did not care. Victoria told Defendant that he hurt her and Defendant became upset. Defendant then poured water on Victoria and told her she would be fine. Victoria became frightened and went to the office to call 911. The disposition of this incident is unknown.

Event Number 031114-0539

Three months later, on November 14, 2004, Victoria and Defendant began to argue over money matters. At approximately 8:20 p.m., Defendant arrived at Victoria's residence. Once inside, the two argued again and Defendant grabbed Victoria by the arm, pushed her down in the kitchen area, struck her on the head with his fist, and then choked her with one hand while smothering her with a pillow. The next door neighbor, Honey Mott, heard the commotion and knocked on the door. Mott heard yelling and screaming. A few minutes passed and Victoria unlocked the door. Mott grabbed Victoria and took her to her apartment. Defendant immediately went to Mott's residence, broke out the front window

1 and entered Mott's apartment. Mott and Victoria went into the bedroom area attempting to
2 exit through the bedroom window. Police officers in the vicinity heard the commotion and
3 breaking glass and responded to the apartment. Defendant was arrested at the scene.
4 Officers noted bruising on Victoria as well as redness around her neck and a lump on her
5 head. Defendant was charged in Las Vegas Justice Court Case No. 03M25901X and
6 ultimately pled guilty to Battery Constituting Domestic Violence.

7 Event Number 031126-0903

8 Just days after the November 14, 2004 beating, police were called to the residence of
9 Defendant and Victoria yet again. On November 26, 2003, Officers were dispatched to the
10 couple's home for a welfare check. Upon arrival, the apartment manager unlocked the door
11 for officers. When officers made contact with Victoria, she was covered in bruises and
12 appeared to have been beaten severely. With Defendant speaking over her, Victoria initially
13 claimed she "fell." However, once the officers separated the parties, Victoria began to cry
14 and told Officer Penny that Defendant drinks whiskey, gets violent, and beats her. Victoria
15 claimed the injuries were from two (2) or three (3) days prior. When advised that neighbors
16 reported hearing the two engaged in a dispute that day, Victoria stated that Defendant was
17 yelling at her about her ex-husband. Officers then confronted Victoria with information they
18 received from the neighbors indicating that the neighbors heard Defendant beating her, at
19 which time Victoria looked away, began to cry, and stated that it was her fault. Victoria
20 would not elaborate any further. Officers noted that some of the bruising was old, but some
21 looked fresh.

22 Detective Hodson was eventually able to obtain the details of the incident from
23 Victoria on December 18, 2003 in a written Voluntary Statement. Victoria recounted that
24 following the brutal November 14 beating, she called her ex-husband and daughter and went
25 to stay with them. Once Defendant was released from jail, two (2) days after the November
26 14 incident, he began calling her and leaving her messages. Because Victoria needed to get
27 some of her belongings from Defendant, she agreed to meet with him. Defendant went to
28 where Victoria was staying, and she got into the car with Defendant. They returned to their

1 residence. The two began to discuss their relationship and Victoria told Defendant that she
2 could not continue to be in a relationship with him if he was going to continue being violent
3 with her. Defendant then asked her why she was back with her husband, grabbed her by the
4 right hand and threw her into the wall. Then, Defendant punched her on the left side of her
5 face. Victoria's left eye immediately began to swell and she felt excruciating pain. Victoria
6 asked him why he hit her. Defendant told her that no one else could have her because
7 she is his, that if he found out she was with someone else, he would kill her and, that if
8 she tried to leave him, he would hunt her down until the end of time. Defendant then
9 grabbed her by the hair and repeatedly bashed her head into the cabinet door. Victoria told
10 Defendant to stop and tried to push him away. Defendant began choking her so hard it
11 caused her to cough. Defendant shouted at her, "So, you want to fight back. Let's see if you
12 can." Victoria tried to calm him. He grabbed her hair again, dragged her by the hair, and
13 then knocked her on the ground. Defendant shouted at her, "I will kill you if I find out
14 you're cheating on me!" At that point, Defendant began repeatedly punching Victoria over
15 and over again. Then, he got up and started kicking her in the ribs and back. Victoria could
16 not breathe because of the intensity of the pain. Defendant stopped beating her and she
17 begged him to take her to the hospital but he refused. When Victoria tried to escape,
18 Defendant grabbed her and told her she better not leave or he would do something to her.
19 He took all of the clothes that she was wearing, except for her panties so that she could not
20 leave. Defendant kept her there for several days. On the day the police responded
21 (November 26) when Victoria told Defendant that the police were there, he told her
22 that she better tell them she fell or else. Defendant was charged with Battery Constituting
23 Domestic Violence in Case No. 03M26791X but the case was ultimately dismissed as part of
24 a packaged negotiation.

25 Event Number 040402-3158

26 On April 2, 2004, Defendant and Victoria became involved in a verbal dispute
27 because Defendant believed Victoria was unfaithful. Defendant struck her in the face with
28 the palm of his hand. Victoria ran out of the apartment and called 911. Because there was

1 no visible injury, no arrest was made. However, Defendant was escorted from the residence
2 he shared with Victoria by Officer Price with the Las Vegas Metropolitan Police Department
3 and instructed to not return for twenty-four (24) hours. At approximately 11:00 p.m., that
4 same date, Defendant returned to residence, burst through the door open and entered. A
5 verbal argument again ensued. Defendant then began slapping Victoria with open hands on
6 both sides of her face, breaking her glasses in the process. A neighbor who heard the noise
7 telephoned police. Defendant fled the area prior to Officer Price's arrival. When Price
8 responded, he found Victoria crying, in fear, with a visible injury to her face. Defendant was
9 subsequently charged with battery constituting domestic violence, third offense in Case No.
10 C207835. After Jury Trial, Defendant was convicted of the charge and sentenced to twenty-
11 four (24) to sixty (60) months in the Nevada Department of Corrections.

12 **Event Number 040403-1089**

13 On April 3, 2004, Defendant returned to the apartment and began shouting at Victoria
14 for calling the police on him the day prior and continued to accuse her of being unfaithful.
15 Defendant then slapped Victoria across the face and tried to corner her. Victoria was able to
16 escape, fled from the apartment and ran to the apartment office. The manager, Linda
17 Eggleston, heard Victoria screaming, "Help me! Help me!" Eggleston was able to grab
18 Victoria and pull her into her office and lock the door. Then, they called the police. Officer
19 Rumery contacted Defendant at the couple's apartment and he was arrested for two (2)
20 counts battery constituting domestic violence - one for the April 2 incident and one for the
21 April 3 incident. Defendant was charged for both incidents in Las Vegas Municipal Court
22 Case No. C581783A and pled guilty to Battery Constituting Domestic Violence.

23 **Event Number 040529-2232**

24 In the late hours of May 28, 2004/early morning hours of May 29, 2004, Victoria and
25 Defendant got into a verbal argument. The police were once again called to the couple's
26 residence and Defendant left for a cooling off period. Later on May 29, 2004 dispatch
27 received a call from the Budget Suites management office where Defendant and Victoria
28 resided reporting a domestic incident between the two (2). Security advised dispatch that

1 Victoria was very upset and bleeding from the mouth.

2 Victoria spoke with dispatch and relayed that in addition to being beaten by
3 Defendant, he also forced her to have anal intercourse with him. Patrol responded to the
4 Budget Suites and made contact with Victoria and Defendant who had been placed into
5 custody by security prior to Metro's arrival. Patrol also observed that Victoria was visibly
6 upset and crying. Victoria advised them that Defendant beat her and subjected her to sexual
7 contact. Patrol contacted Detective Moniot who responded to UMC where Victoria was
8 transported.

9 When Detective Moniot made contact with Victoria, she was very withdrawn, visibly
10 upset, crying vigorously, and holding herself around her mid-section. Detective Moniot also
11 observed that she was walking "gingerly." Victoria complained of severe rectal pain from
12 being anally penetrated. While speaking with Victoria, Detective Moniot also noticed that
13 there was a significant amount of hair from Victoria's head on her upper body. Victoria
14 stated that it was a result of Defendant pulling out her hair.

15 During the course of Detective Moniot's taped interview of Victoria, she detailed the
16 circumstances of Defendant's brutal attack. According to Victoria, the two had been having
17 problems because of Defendant's drinking problems and his thoughts that she was
18 unfaithful. Victoria advised Detective Moniot that she suffered abuse at Defendant's hands
19 many times over the several preceding years, but that she always took him back because he
20 sweet talked her. On the evening of May 28, 2004, the two were at Texas Station bowling
21 and drinking. The two got into an argument because Defendant was drinking too much and
22 Victoria wanted him to stop and go home. Victoria ended up walking home alone.

23 Victoria contacted security at Budget Suites to obtain an escort to her room because
24 she was afraid of Defendant. Security walked her to their room and found Defendant
25 present. Security called Metro due to the domestic issues. Metro responded and asked
26 Defendant to leave for the night. Victoria went to sleep for the night and awoke some time
27 after noon when Defendant began knocking on the door. She did not want to allow
28 Defendant inside, but he stated that he just needed to get his belongings because he had

1 someone coming to pick him up. Victoria ultimately allowed Defendant inside.

2 When Defendant entered the room, he immediately began behaving aggressively and
3 accusing Victoria of having sex with other individuals. Defendant struck her about the head,
4 face, and body repeatedly. He then pushed her onto the couch and forced her to perform oral
5 sex on him. Victoria complied because she feared for her life. Then, Defendant forced her
6 to engage in vaginal intercourse for a short time before demanding anal intercourse.
7 Defendant forced her to engage in anal intercourse, telling her that rectum felt loose and he
8 believed she was sleeping with other men. Defendant ejaculated inside of her anus.

9 Approximately half an hour later, Defendant forced her to perform oral sex on him
10 and submit to vaginal intercourse again. Additionally, he once again forced her to engage in
11 anal intercourse. Victoria convinced Defendant to stop because she wanted to use the
12 restroom. Victoria went to the restroom and would not come out. She waited until
13 Defendant fell asleep, got dressed, left the room quietly and got security.

14 During the course of the follow-up investigation, Detectives learned that Security
15 Officer Besse was first contacted by Victoria who was very upset and had blood on her face.
16 Besse went to the couple's room and found Defendant passed out in the bed, completely
17 naked. Due to the gravity of the situation, Besse placed Defendant in custody.

18 CSA Horn responded to the scene and discovered that the scene was consistent with
19 Victoria's version of events. Specifically, he located a white and black Zebra print dress
20 with fecal matter and blood on it and a pair of blue shorts with fecal matter and blood on it.
21 Those were the clothing items worn by Victoria after the first and second assaults.

22 Victoria also underwent a SANE exam at UMC which was administered by Linda
23 Ebbert. Nurse Ebbert noted multiple sites of bruising all over Victoria's body and a
24 laceration to her upper lip. Additionally, she observed several deep lacerations to Victoria's
25 anus. The injuries were consistent with Victoria's version of events.

26 Defendant was ultimately charged with multiple counts of Sexual Assault, Attempt
27 Sexual Assault, Burglary, and Assault and Battery. Following a jury trial, Defendant was
28 found guilty of Burglary and Battery.

ARGUMENT**I.****EVIDENCE CONCERNING PRIOR INSTANCES OF DOMESTIC VIOLENCE IS
ADMISSIBLE PURSUANT TO 48.045 AND 48.061.**

The State seeks to admit evidence concerning Defendant's prior instances of domestic violence committed against Victoria pursuant to NRS 48.045 and NRS 48.061 as evidence of motive (ill-will), intent, and absence of mistake. Additionally, the State seeks to admit the evidence to provide a much needed context for the facts and circumstances of Victoria's killing. The State respectfully submits that the jury should not be forced to judge the facts and circumstances of the events of November 5, 2008 in a vacuum. Rather, the jury should be entitled to fully understand the dynamics of the relationship between Defendant Brian O'Keefe and Victoria Whitmarsh. More specifically, the State submits that the prior incidents of domestic violence against Victoria manifest malice/ill-will toward Victoria which is a material issue in this case. Furthermore, the evidence is relevant to the Defendant's intent and/or the absence of mistake at the time of the stabbing (i.e. Was the stabbing intentional?). Additionally, the evidence is particularly relevant to rebut a claim that Victoria's death was "accidental" and/or committed in "self-defense." As set forth more fully below, this Court has the authority to introduce such evidence pursuant to NRS 48.045 and the Domestic Violence Statute, NRS 48.061.

A.**THE EVIDENCE IS ADMISSIBLE PURSUANT TO NRS 48.045(2) AS PROOF OF
MOTIVE, INTENT, AND ABSENCE OF MISTAKE**

Section 48.045(2) of the Nevada Revised Statutes provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admitting such evidence, the State must establish that (1) the prior act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the

1 evidence is more probative than prejudicial. Cipriano v. State, 111 Nev. 534, 541, 894 P.2d
2 347, 352 (1995), overruled on other grounds by State v. Sixth Judicial District Court, 114
3 Nev. 739, 964 P.2d 48 (1998). With regard to a determination of prejudice:

4 "prejudicial" is not synonymous with "damaging." Rather, evidence is
5 unduly prejudicial...only if it "uniquely tends to evoke an emotional bias
6 against the defendant as an individual and...has very little effect on the
7 issues" or if it invites the jury to prejudge "a person or cause on the basis of
8 extraneous factors." Painting a person faithfully is not, of itself, unfair.

9 People v. Johnson, 185 Cal.App.4th 520, 534 (2010). The admissibility of prior bad acts is
10 within the sound discretion of the trial court and will not be overturned on appeal unless the
11 decision is manifestly wrong. Canada v. State, 104 Nev. 288, 291-293, 756 P.2d 552, 554
12 (1988).

13 In Fields v. State, - Nev. -, 220 P.3d 709 (2009), the Nevada Supreme Court
14 affirmed the District Court Judge's determination to admit evidence that the Defendant owed
15 debts to the victim and that he had previously engaged in a conversation about killing a man
16 to whom he owed money. The Nevada Supreme Court agreed with the District Court's
17 decision that such evidence was admissible as proof of motive, to disprove his contention
18 that he was just an innocent bystander to his wife's scheme, and to prove identity.

19 Likewise in Ledbetter v. State, 122 Nev. 252, 262-263, 129 P.3d 671, 678-679
20 (2006), the Supreme Court held that it was proper for the District Court to admit evidence of
21 other bad acts to establish the Defendant's motive to repeatedly subject his stepdaughter to
22 sexual assaults. The bad act evidence in that case consisted of evidence that Defendant
23 sexually assaulted other young female members of his own family. In reaching its decision,
24 the Court noted that the evidence was relevant to motive, proven by clear and convincing
25 evidence (due to four (4) different witnesses' testimony) and highly probative as it showed
26 Defendant's sexual attraction to, and an obsession with, young female members of his
27 family.

28 Most on point is Hogan v. State, 130 Nev. 21 (1987), wherein the Nevada Supreme
Court upheld the trial court's determination to admit evidence of a prior domestic violence

1 incident committed by Defendant against the victim in the days preceding her murder. In
2 Hogan, the trial court admitted evidence that several days prior to the murder, Defendant
3 dropped the victim to the ground from shoulder height. In affirming the District Court's
4 ruling, the Nevada Supreme Court recognized that such evidence was "other acts" evidence
5 pursuant to NRS 48.045(2) which was properly admitted to establish "ill-will as a motive to
6 the crime." Hogan v. State, 130 Nev. 21, 23 (1987).

7 Other jurisdictions have also permitted the admission of evidence concerning prior
8 acts of domestic violence pursuant to "other acts" statutes in murder cases as evidence of
9 motive/ill-will, intent, absence of mistake, etc. For instance, in People v. Bierenbaum, 301
10 A.D.2nd 119, 748 N.Y.S.2d 563 (2002), the defendant was charged with murdering his wife,
11 who disappeared in 1985. His wife's body was never recovered and the case against him
12 was circumstantial. The trial court admitted evidence that throughout the course of the
13 marriage, the relationship between the two was volatile. In addition, it admitted evidence
14 that Defendant choked her to the point of unconsciousness on at least one occasion, and that
15 he had been physically violent with her on many occasions. On appeal, the defendant
16 challenged the admission of such evidence and claimed that it was improperly admitted
17 "propensity" evidence. However, the reviewing Court recognized that the evidence was
18 relevant to intent and stated:

19 [T]he proof here evinces defendant's intent to focus his aggression on one
20 person, namely, his wife—his victim. That key factor in the context of
21 marital or other intimate relationships frequently differentiates domestic
22 violence assaults and homicides—wherein prior bad acts have often been
23 deemed admissible during the People's direct case—from other cases
24 wherein evidence of past assaultive behavior against people other than the
25 victim has most properly been precluded. In the former, the previous
aggression principally indicates intent, or motive, or identity; whereas in
the latter it can predominately give rise to an inference of propensity.

26 Id. (emphasis added). It also acknowledged that the evidence of prior abuse evinced that the
27 defendant was motivated and had intent to harm the victim.

28 Similarly, in Benjamin v. Kentucky, 266 S.W.3d 775 (2008), a case almost identical

1 the one presently before this Court, the Supreme Court of Kentucky found that evidence of
2 Defendant's prior assault against the decedent was properly admitted as evidence of his
3 motive and absence of mistake. In Benjamin, the evidence established that the relationship
4 between the defendant and victim was riddled with discord and that the two often fought
5 after consuming alcohol together. The two had recently broken-up, but on the night of the
6 murder were together, drinking again. While together, the two began to argue over the
7 victim's alleged infidelities. Ultimately, Defendant strangled the victim to death. At the
8 trial, the Defendant claimed he acted in self-defense but could remember very little of the
9 details leading up to her death because of his alleged intoxication. In reviewing the trial
10 court's decision to admit evidence of the prior assault, the Court found that it was relevant in
11 that it tended to prove the defendant intentionally murdered his wife, had a motive to do so,
12 and that the killing was not a mistake. Id. at 791.

13 Likewise, in People v. Illgen, 145 Ill.2d 353, 366-367, 583 N.E.2d 515, 52, 164
14 Ill.Dec. 599, 604 (1991), the court upheld a trial court's decision to admit evidence that
15 throughout the course of the marriage of the defendant and victim, the defendant was violent
16 and abusive. The Court determined that "the evidence of the defendant's prior assaults on
17 the victim was probative of the defendant's criminal intent." It further noted that "evidence
18 which shows that an event was not caused by accident tends to show that it was caused
19 intentionally." Id. at 367, citing, 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 224-
20 25 (1985) (defining intent as "merely the absence of an accident").) It concluded that the
21 defendant's prior unprovoked assaults on his wife tended to negate the likelihood that the
22 shooting was an accident and thereby tended to prove his intent. Importantly, it recognized:

23 Whereas the shooting incident, standing alone, might appear accidental, when
24 considered together with the evidence of the defendant's prior unprovoked
25 attacks upon his wife, the circumstances suggest that the shooting was
26 deliberate and not accidental. This evidence, taken together with other
27 evidence in the case, tends to make it more probable that the defendant acted
28 with the criminal intent required for murder and less probable that his actions
were inadvertent or the product of an innocent state of mind.

1 Id. at 367. Additionally, the Court reasoned that the evidence was also relevant to proof of
2 motive, "in this case, a hostility showing him likely to do further violence. Id. at 367.
3 ("Here, the evidence that the defendant physically assaulted his wife throughout their
4 marriage was relevant to show their antagonistic relationship and, thus, tended to establish
5 the defendant's motive to kill her.").

6 The Supreme Court of Vermont has also held that such "evidence was relevant...to
7 portray the history surrounding the abusive relationship, providing the needed context for the
8 behavior in issue." see also, State v. Laprade, 184 Vt. 251, 256 (2008), citing State v.
9 Sanders, 168 Vt. 60, 716 A.2d 11 (1998). Furthermore, it has acknowledged that such
10 evidence is relevant in cases where a defendant claims self-defense. Id., citing, State v.
11 Hendricks, 173 Vt. 132, 143, 787 A.2d 1270, 1279 (2001). The Laprade Court noted that
12 without admitting such evidence in domestic violence cases, the jury would be left without
13 knowledge of the context in which the acts occur and would not be able to understand the
14 victim's actions or inactions. Id. at 259.

15 In light of the foregoing binding and persuasive authority, the State respectfully
16 submits that evidence concerning these prior acts of domestic violence committed against
17 Victoria Whitmarsh by Defendant should be admitted as evidence of motive and
18 intent/absence of mistake. In regard to motive, the evidence is relevant because it establishes
19 ill-will, that he was motivated by a desire to dominate and control her, and/or to get revenge
20 for sending him to prison. Likewise, as in Ledbetter v. State, supra, 122 Nev. at 262-263, the
21 evidence is highly probative of motive because it establishes that over the course of five (5)
22 years, Defendant was fixated on abusing Victoria Whitmarsh. As to intent, the evidence is
23 relevant as it makes it more likely that Defendant intentionally stabbed Victoria Whitmarsh
24 and less likely that the stabbing occurred accidentally or in self-defense as Defendant has
25 previously claimed. See, People v. Illgen, supra, 145 Ill.2d at 366-367. Furthermore, this
26 evidence is not more prejudicial than probative because: (1) the facts of the prior instances
27 are all very similar to the ones present in this case; (2) the incidents are not remote in time
28 from the incident for which he is currently charged; (3) most of them resulted in convictions

1 (which means that Defendant will not be placed in a position of having to defend those
2 allegations); and, (4) the facts of the prior instances are not more horrendous than the facts of
3 this case.

4 **II.**

5 **EVIDENCE OF PRIOR DOMESTIC VIOLENCE SHOULD BE ADMITTED**
6 **PURSUANT TO NRS 48.061.**

7 Pursuant to NRS 48.061,

8 Except as otherwise provided in subsection 2, evidence of domestic
9 violence and expert testimony concerning the effect of domestic violence,
10 including, without limitation, the effect of physical, emotional or mental
11 abuse, on the beliefs, behavior and perception of the alleged victim of the
12 domestic violence that is offered by the prosecution or defense is admissible
13 in a criminal proceeding for any relevant purpose, including, without
14 limitation, when determining:

15 (a) Whether a defendant is excepted from criminal liability pursuant to
16 subsection 7 of NRS 194.010, to show the state of mind of the defendant.

17 (b) Whether a defendant in accordance with NRS 200.200 has killed another in
18 self-defense, toward the establishment of the legal defense.

19 2. Expert testimony concerning the effect of domestic violence may not be
20 offered against a defendant pursuant to subsection 1 to prove the occurrence of
21 an act which forms the basis of a criminal charge against the defendant.

22 3. As used in this section, "domestic violence" means the commission of any
23 act described in NRS 33.018.

24 Prior to the statute's amendment in 2001, it inadvertently limited the use of evidence of prior
25 domestic violence to those cases wherein a criminal defendant claimed to be suffering from
26 battered women's syndrome as a defense to charged crimes. More specifically, prior to its
27 amendment in 2001, the statute read,

28 Evidence of domestic violence as defined in NRS 33.018 and expert testimony
concerning the effect of domestic violence on the beliefs, behavior and
perception of the person alleging the domestic violence is admissible in chief
and in rebuttal, when determining:

1 1. Whether a person is excepted from criminal liability pursuant to subsection
2 7 of NRS 194.010, to show the state of mind of the defendant.

3 2. Whether a person in accordance with NRS 200.200 has killed another in
4 self-defense, toward the establishment of the legal defense.

5 In 2001, prosecutors who were frustrated by the repeated thwarting of their efforts to
6 explain to jurors the cycle of domestic violence and the effects of repeated abuse on victims
7 of domestic violence, urged legislators to amend the statute to its current form. More
8 specifically, when lobbying in support of Assembly Bill 417 during the 71st session, Gemma
9 Waldron, the Legislative Representative for the Washoe County District Attorney's Office
10 and Nevada District Attorney's Association, argued that the bill was much needed due to the
11 unique dynamics of domestic violence cases. Waldron contended that the ability to call an
12 expert in the field of domestic violence, as well as the ability to present the jury with
13 evidence of repeated abuse of the victim by the defendant, would help jurors understand the
14 reaction and behavior of the victim (recanting, minimizing, etc.). See, Minutes of the
15 Meeting of the Assembly Committee on the Judiciary, Seventy-First Session, April 5, 2001;
16 see also, Minutes of the Senate Committee on the Judiciary, Seventy-First Session, May 16,
17 2001. Assembly Bill 417 was fashioned after California's legislation dealing with the issue.
18 See, Minutes of the Senate Committee on the Judiciary, Seventy-First Session, May 16,
19 2001. Ultimately the Bill passed the House and the Senate unanimously. Since the statute's
20 enactment in its revised form, the Nevada Supreme Court has yet to address the use of the
21 statute by the State in a published opinion. However, it has permitted the introduction of
22 such evidence in an unpublished opinion. See, Holcomb v. State, 2010 WL 4019626 (Nev.
23 2010)(upholding District Court's decision to admit testimony of domestic violence expert to
24 explain the varying ages of the injuries to victim).

25 While there is no binding authority in Nevada concerning the admission of evidence
26 pursuant to NRS 48.061 by the State absent the statute itself, California Courts interpreting
27 and applying California Evidence Code § 1109 (the statute after which NRS 48.061 was
28 apparently modeled) have allowed the introduction of domestic violence evidence in a

1 variety of instances. For example, in People v. Hoover, 77 Cal.App.4th 1020 (2000), the
2 Court upheld the trial court's decision to admit evidence of previous attacks against the
3 victim by the defendant who was charged with aggravated assault under circumstances
4 involving domestic violence pursuant to § 1109 of the California Evidence Code. In
5 reaching its conclusion the Court examined the intent of the legislature when it enacted §
6 1109 and noted:

7 The [admission of evidence of prior incidents of domestic violence] is
8 particularly appropriate in the area of domestic violence because on-going
9 violence and abuse is the norm in domestic violence cases. Not only is there a
10 great likelihood that any one battering episode is part of a larger scheme
11 of dominance and control, that scheme usually escalates in frequency and
12 severity. Without [the admission of prior instances of domestic violence],
13 the escalating nature of domestic violence is likewise masked. If we fail to
14 address the very essence of domestic violence, we will continue to see cases
15 where perpetrators of this violence will beat their partners, even kill them, and
16 go on to beat or kill the next intimate partner. Since criminal prosecution is
17 one of the few factors which may interrupt the escalating pattern of
18 domestic violence, we must be willing to look at that pattern during the
19 criminal prosecution, or we will miss the opportunity to address this
20 problem at all. (citing, Assem. Com. Rep. on Public Safety Report (Jun. 25,
21 1996) pp. 3-4.)

22 Based on the foregoing, the California Legislature has determined the
23 policy considerations favoring the exclusion of evidence of uncharged
24 domestic violence offenses are outweighed in criminal domestic violence
25 cases by the policy considerations favoring the admission of such evidence
26 (emphasis added).

27 Id. at 1027-1028 (internal citations omitted). In that case, the defendant struck the victim in
28 the nose causing it to break after she informed him that she was involved in a new
relationship. The trial court permitted the victim to testify regarding prior incidents of
violence wherein the defendant hit her in the face and/or choked her and threatened to kill
her. While upholding the Court's determination to admit the evidence under § 1109, the
reviewing Court held that the State could have also sought to admit the evidence as proof of

1 motive, intent, etcetera because it tended to show that Defendant intended to inflict great
2 bodily injury upon her. Id. at 1027.

3 Similarly, in People v. Johnson, 185 Cal.App.4th 520 (2010), the Court upheld the
4 trial Court's decision to admit evidence of two (2) prior domestic violence related offenses
5 committed by the defendant. Johnson was convicted of attempted first degree murder,
6 firearm assault, injury to cohabitant, felon in possession of a firearm, criminal threats, and
7 mayhem following an incident wherein he shot his ex-girlfriend (Henderson) in the back.
8 Prior to the commencement of trial, the prosecution sought to admit evidence of three (3)
9 prior incidents of domestic violence by defendant.

10 The first incident was in 1984 when the defendant struck Lynn Webb in the jaw,
11 breaking it in two places. However, because it did not involve the use of a weapon the trial
12 court did not admit it. The second incident was in 1988 against Amanda Floyd whom the
13 defendant dated for a year. Floyd broke up with the defendant after she caught him using
14 drugs and told him to move out. Three (3) weeks later, the defendant tracked Floyd down at
15 her apartment and visited her. They argued again and the defendant threatened to burn down
16 the apartment and kill her. Floyd tried to escape at which point the defendant grabbed her by
17 the hair and said, "Bitch, I'm going to kill you." The defendant put the gun to Floyd's
18 forehead and pulled the trigger, but the gun did not fire. He pulled the trigger two (2) more
19 times as Floyd backed away, but it still did not fire. Floyd then tripped over a chair and
20 covered her face with her arms. The fourth time the defendant pulled the trigger, the gun
21 fired, hitting her in the left elbow. Her arm was broken and the bullet was still lodged in her
22 arm at the time of trial.

23 The third incident occurred in 1992 and involved Lynn Webb. The defendant and
24 Webb were arguing in front of his mother's house at which time he pulled out a gun. Webb
25 ducked and heard two (2) shots. She looked down and saw she was struck in the leg.
26 Webb's femur was broken and she had to undergo hip surgery. The trial court admitted
27 evidence of the 1988 and 1992 shootings finding the evidence more probative than
28 prejudicial and concluding that it would "assist the trier of fact in determining elements and

1 issues that will be relevant in this case." People v. Johnson, supra, 185 Cal.App.4th at 530-
2 531.

3 The reviewing Court in Johnson, in evaluating the Court's determination of
4 probativeness once again examined the legislature's intention in enacting Section 1109 and
5 noted the uniqueness of domestic violence cases.

6 The statute reflects the legislative judgment that in domestic violence cases, as
7 in sex crimes, similar prior offenses are 'uniquely probative' of guilt in later
8 accusations...Indeed, proponents of the bill that became section 1109 argued
9 for admissibility of such evidence because of the 'typically repetitive nature'
10 of domestic violence...This pattern suggests a psychological dynamic not
11 necessarily involved in other types of crimes.

12 Id. at 532. It noted that the principal factor in determining probativeness is the similarity to
13 the charged offense. Furthermore, it determined that the probative value of the prior
14 incidents was great because in each incident Defendant resorted to shooting his girlfriend
15 when she either decided to leave him or engaged in an argument with him. Additionally,
16 Defendant's drug usage was a factor in each incident and each incident resulted in serious
17 injury. The Court also reasoned that the fact that Defendant was convicted in each incident
18 weighed in favor of admissibility, as did the fact that the evidence came from independent
19 sources.

20 While the Court noted the evidence was inflammatory, it agreed with the trial court's
21 decision that it was less offensive than the allegations in the instant case wherein Defendant
22 lured the victim to the parking lot and shot her in the back in front of children. Id. at 534
23 (citations omitted)(emphasis added). It also rejected Defendant's contention that the
24 evidence was more prejudicial than probative because the victim was cooperative. Instead,
25 the reviewing Court determined the probativeness should be evaluated independent of the
26 victim's cooperativeness with the principal consideration being the similarity of the incident
27 to the charged offenses. The Court also concluded that the prejudicial impact was
28 diminished by the fact that evidence of the current crime was strong because it was less
likely the jury would convict based upon his past misdeeds. Id. at 536.

1 In addition, the Court declined to find error with the trial court's decision to admit the
2 evidence despite the fact that the events took place more than ten (10) years prior to the
3 charged offenses. It noted that the trial court determined there was a significant issue of
4 intent and found the evidence relevant to intent, motive and lack of mistake. As such, the
5 Court concluded that the trial court properly considered the issues.

6 Alaska has also enacted a statute similar to that enacted in California and Nevada.
7 See, Alaska R. Evid. 404(b)(4). Following the passage of that statute, the Alaska Court of
8 Appeals developed several factors that the courts are to examine prior to admitting evidence
9 of prior incidents of domestic violence. Those factors include: (1) the strength of the
10 government's evidence that the defendant committed the other acts; (2) the character trait the
11 other acts tend to prove; (3) whether that trait is relevant to any material issue in the case; (4)
12 if so, how relevant; and, (4) how strongly the other acts tend to prove that trait. Bennett v.
13 Municipality of Anchorage, 205 P.3d 1113, 1116 (Alaska App.2009) citing, Bingaman v.
14 State, 76 P.3d 398, 408, 415 (Alaska App.2003). Like California, Alaska requires an
15 evaluation of remoteness and similarity to the charged offenses in determining the probative
16 value of the evidence. Id.

17 In Bennett v. Municipality of Anchorage, supra, 205 P.3d 1113, the trial court
18 admitted evidence of a prior 2005 attack by the defendant against the named victim because
19 it was relevant to his propensity to attack his wife and then claim self-defense. The charges
20 in Bennett arose from an incident in 2008 wherein the defendant was angry and drinking all
21 day. The two (2) began arguing and the victim began to call the police, at which point the
22 defendant took the phone and threw it against the wall repeatedly until it broke. Then, the
23 defendant started to scream at the victim, held her down by the throat and put his hand over
24 her mouth and nose so she could not breathe. The defendant then struck her in the head
25 several times and slammed her head into the wall.

26 The victim testified to a 2005 incident in which the defendant struck her repeatedly in
27 the face and choked her causing her to sustain two black eyes, bruises around her neck, and
28 broken blood vessels in her eye. As with the 2008 incident, the defendant was drunk at the

1 time of the offense. In both the 2005 incident and the 2008 incident for which the defendant
2 was on trial, the defendant claimed self-defense. The Appellate Court upheld the trial
3 court's determination to admit the evidence due to the similarities between the two incidents.
4 It noted that the 2005 incident had some tendency to make more or less probable the
5 defendant's propensity to assault his wife and then claim he acted in self-defense. As such,
6 that character trait was material to the government's case because Bennett's intent—whether
7 he intended to assault the victim or merely acted in self-defense—was the only disputed
8 issue. *Id.* at 1118.

9 Illinois has also enacted a statute similar to the above-mentioned statutes. *See* 725
10 ILCS 5/115-7.4. That statute provides that "in a criminal prosecution in which the defendant
11 is accused of an offense of domestic violence evidence of the defendant's commission of
12 another offense or offenses of domestic violence is admissible, and may be considered for its
13 bearing on any matter to which it is relevant." The statute also sets forth the factors a court
14 should consider in determining the admissibility of such evidence. Those specific factors
15 include weighing the probative value against the prejudicial effect, remoteness, factual
16 similarities, and other relevant facts and circumstances. *Id.*

17 In *People v. Dabbs*, 396 Ill.App.3d 622 (2010), the Illinois Court of Appeals was
18 called upon to determine the constitutionality of the statute following Defendant's conviction
19 for domestic battery. During the trial, the Court admitted evidence that Defendant
20 previously abused his ex-wife (not the victim in the case). On appeal, Gregory Dabbs
21 claimed that the statute violated both the Equal Protection Clause and the Due Process
22 Clause. As to the equal protection claim, the Court determined that domestic violence
23 defendants are not a "suspect class;" and, therefore, the statute must only pass the rational
24 basis test. The court adopted the rationale of the California Courts and held that domestic
25 violence is a repetitive and secretive crime that is highly unreported and typically turned into
26 a credibility contest and noted that § 115-7.4 was passed as an attempt to address the
27 difficulties of proof unique to the prosecution of domestic violence cases by strengthening
28 the evidence and promoting the prosecution of such cases. *Id.* at 627. Ultimately, the Court

1 concluded that those reasons were sufficient to satisfy the rational basis test. Dabbs' Due
2 Process argument failed because of the safeguards built into the statute – the requirement
3 that the State provide notice to the defendant of its intent to present such evidence and the
4 requirement that the Court weigh the probative value of the evidence against its prejudicial
5 effect.

6 While the Nevada Supreme Court has yet to interpret NRS 48.061 in a published
7 opinion in which the State has sought to introduce evidence of prior acts of domestic
8 violence, the plain language of the statute indicates that the evidence may be admitted for
9 "any relevant purpose." Furthermore, the legislative history of the statute indicates that the
10 legislative intent was to model the statute after California's equivalent statute (§ 1109).
11 Moreover, it evinces that the intent in amending the statute in 2001 was to permit the State to
12 admit evidence of prior instances of domestic violence to provide context to the relationship
13 between the defendant and the victim in domestic violence cases. Similarly, California and
14 the numerous jurisdictions cited above have liberally interpreted similar statutes and/or
15 general bad acts statutes to authorize the admission of such evidence because of the unique
16 problems faced by the prosecution of domestic violence cases as well as the repetitiveness of
17 domestic violence.

18 In light of the plain language of NRS 48.061, which states that such evidence may be
19 admitted "for any relevant purpose" as well as the above-cited persuasive authority, the State
20 respectfully submits that evidence concerning the prior acts of domestic violence committed
21 by Defendant against Whitmarsh should be admitted in this case. The evidence is relevant to
22 provide the jury with information concerning the context of the relationship between
23 Defendant and Whitmarsh (State v. Laprade, supra, 184 Vt. 251), to establish Defendant's
24 intent to kill/intentionally stab Whitmarsh (People v. Hoover, supra, 77 Cal.App.4th 1020;
25 People v. Johnson, supra, 185 Cal.App.4th 520; People v. Bierenbaum, supra, 301 A.D.2d
26 119; State v. Laprade, supra, 184 Vt. at 256), to explain why Whitmarsh would return to
27 Defendant after he went to prison for beating her, as well as to refute Defendant's claim that
28 the stabbing was accidental/done in self-defense (See, Bennett v. Municipality of Anchorage,

1 supra, 205 P.3d 1113).

2 Moreover, the prior instances are not remote in time to the charged offenses as they
3 all occurred within the five (5) years leading up to Victoria's killing. Likewise, the acts are
4 similar to the acts charged in this case, which makes them probative to the issue of intent (an
5 intent to abuse/kill as opposed to defend himself). Furthermore, many of the acts the State
6 seeks to introduce resulted in prior convictions, making them less prejudicial as the proof of
7 such acts is strong. Additionally, the State's evidence in this case is strong, making it less
8 likely that the jury will convict Defendant simply because of his past conduct.

9 **CONCLUSION**

10 Based upon all of the foregoing, the State respectfully requests that its Motion *in*
11 *Limine* to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of
12 Domestic Violence Pursuant to NRS 48.061 be granted.

13 DATED this ____ day of January, 2011.

14
15 DAVID ROGER
16 DISTRICT ATTORNEY
17 Nevada Bar #002781

18 BY /s/ LIZ MERCER
19 LIZ MERCER
20 Deputy District Attorney
21 Nevada Bar #0010681
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1 cabinet. He left her body. He left her body because he walked
2 his bloody footprints in the bathroom. But he didn't walk his
3 bloody footprints into the living room to grab the cell phone
4 to call 911. What's that say about motive and state of mind?

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

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

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

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

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

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

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

25 A couple more things. The stretch pants that

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

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

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

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

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

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

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

22 (Pause in the proceedings).

23 DEFENSE'S CLOSING ARGUMENT

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

ROUGH DRAFT TRANSCRIPT

003302

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<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
-------------	---------------	--------------	-----------------	----------------

DEFENDANT'S WITNESSES:

Tracy Burger	11			
Chelsea Collins	28			
Robert Francis Paisano	34	40	52	

* * *

EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
---------------------	-----------------

DEFENDANT'S EXHIBITS:

Exhibits XXXX, YYYY, ZZZZ, AAAAA	30
Exhibit EEEEE	32
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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.

Verbatim Digital Reporting, LLC
Littleton, CO 80120
303-798-0890

Julie Lord
JULIE LORD, TRANSCRIBER

11-15-10
DATE

ROUGH DRAFT TRANSCRIPT

003304

TUESDAY, APRIL 7, 2009 R.D.T.

C250630

Exhibit 9

003305

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

FILED

DEPT. NO. 17

JUL 10 2009

TRANSCRIPT OF
PROCEEDINGS

Shafiq
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, APRIL 7, 2009

ROUGH DRAFT TRANSCRIPT OF
DEFENDANT'S MOTION TO SETTLE RECORD

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

1 LAS VEGAS, NEVADA, TUESDAY, APRIL 7, 2009, 9:07 A.M.
2 THE COURT: State of Nevada versus Brian O'Keefe.
3 This is defendant's motion to settle the record, and if I can
4 sort of paraphrase here, it's Mr. Pike's position that on some
5 of the jury instructions that perhaps all of his - from the
6 arguments of the instructions you wanted to give as well as
7 some that you objected to were not completely stated on the
8 record. Is that correct?
9 MS. PALM: Well, your Honor, it's - we're settling
10 the record as to the second degree murder instruction which was
11 instruction number 18. It's spelled out in any declaration. I
12 believe as to that instruction we had agreed in chambers that
13 it would not be given as written. And then when the Court got
14 the final instructions to us right before the reading of them,
15 the Court called us up to the bench having realized that it was
16 supposed to be altered to delete the second degree felony
17 murder theory, and the State had indicated, well, we won't
18 argue that theory, and they did not argue it.
19 But it was our position at the bench that that would
20 not correct it because the jury could still find it having been
21 instructed in it. And so we just wanted to make we made a
22 clear rod of that one issue. And if the State doesn't recall
23 that any different, I'll move onto the other issue.
24 MR. SMITH: Well, how the State recalls it, Judge.

Page 2
ROUGH DRAFT TRANSCRIPT

1 THE COURT: Okay.
2 MS. PALM: - and my contention exactly, your Honor,
3 is that the Court was not going to give that instruction as
4 written. It was a mistake at that it ended up in the final
5 packet, and I don't think it was corrected by the State simply
6 yeah not arguing the second degree felony murder. And I do
7 think that was a second degree felony murder instruction, and
8 so that would be -
9 THE COURT: Okay.
10 MS. PALM: And then as to the other issue, it was
11 Detective Mogg's testimony, and we had - if the Court recalls
12 that we had called Detective Mogg to testify as a witness. He
13 was not relate today this case, but it was that in 2007 he had
14 another case which actually was my case. It was State versus
15 Francis Bill Franco Ardonias (phonetic) was a murder suspect
16 who claimed to be intoxicated, and Detective Mogg arranged for
17 him to have a Beth test for alcohol, and I was going to ask the
18 detective, you know, was that possible to be done, how was it
19 done, what's the training for Metro on that, and did it, in
20 fact, happen in that case, and did you arrange it, and you
21 know, why did you arrange it.
22 And Court ruled on the State's objection that it was
23 collateral and not relevant to this case. Our argument that it
24 was relevant because it showed the bad faith of the State - or
25 the lack of good faith State investigation and the State's

Page 4
ROUGH DRAFT TRANSCRIPT

1 was that we had a dispute whether or not the language that was
2 contained in the instruction that was ultimately submitted to
3 the jury was, in fact, a felony second degree murder
4 instruction. And it was our understanding that your Honor
5 instructed us not to argue that the defendant committed the
6 homicide in the commission of any felony, and we didn't, and
7 that there wouldn't be a problem.
8 So I just want to make sure that the record's clear
9 we have with the State that it was our contention that the
10 precise language that was submit that in the instruction that
11 actually went to the jury did not rise to the second degree
12 felony murder instruction.
13 THE COURT: I think that was the Court's recollection
14 that I kept the language in over the objection of the defense
15 attorneys, but I did admonish the prosecutor that they were not
16 going to argue felony murder rule on the case, and that's my
17 recollection, they did not in closing.
18 MR. SMITH: And that's correct. Now, if the defense
19 is contending that not with stand being the Court's decision
20 that the language that was actually contained in that
21 instruction, in fact, arose to a second degree felony murder
22 instruction, then I mean, all I can say is the State
23 respectfully disagrees and we can just let an appellate court
24 determine that.
25 MS. PALM: Well -

Page 3
ROUGH DRAFT TRANSCRIPT

1 motive most minimize the alcohol intoxication in Mr. O'Keefe at
2 the time of the offense. So the Court overruled our objection
3 to it, and then I had no more questions for Detective Mogg. He
4 stepped down as a witness. I just wanted to make sure our
5 record was clear on that.
6 MR. SMITH: I actually have two replies. If I
7 remember correctly, it was the State's position that the
8 detective in question, which I believe it was Detective Marty
9 Wildermann, simply testified that to his knowledge there was no
10 other case where a homicide detective took a breath test from a
11 suspect or defendant prior to conducting an interview. And it
12 was - if I recall correctly, it was our position that simply
13 because another detective in an independent case of his own
14 accord decided to take a breath test from a suspect, which
15 clearly was not any part of any established protocol, that they
16 couldn't simply use that to say well, the Government acted in
17 bad faith because Detective Wildermann didn't do in this case.
18 Furthermore, I would suggest that the issue was
19 actually entirely moot because it stands to reason that the
20 reason why they didn't find the defendant guilty of first
21 degree murder was because they bought into the defense's
22 contention that he was too drunk to form the intent.
23 MS. PALM: And your Honor, I'm not arguing the appeal
24 here so it doesn't matter if it's moot or not.
25 THE COURT: All right.

Page 5
ROUGH DRAFT TRANSCRIPT

000388

003307

1 MR. SMITH: Oh, I know. I'm just making a record for
2 -
3 MS. PALM: I'm settling the record.
4 MR. SMITH: I'm just making a record for the law
5 clerk who's ultimately going to get this.
6 THE COURT: All right, well, I think the record is
7 clear in that regard, and, you know, I think that's why the
8 jury did come back with a second as opposed to a first because
9 of alcohol issue. All right, record's clear?
10 MS. PALM: Thank you.
11 MR. SMITH: Thank you, Judge.
12 THE COURT: Thank you very much.
13 MR. SMITH: Have a good day.
14 THE COURT: You too.
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Page 6

ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

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ACKNOWLEDGEMENT

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

Verbatim Digital Reporting, LLC
Littleton, CO 80120
(303) 798-0890

Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

JURY INSTRUCTIONS NOS. 1, 3, 18 3/20/2009

C250630

Exhibit 10

003310

1 INST

FILED IN OPEN COURT

MAR 20 2009 @ 2:15pm

EDWARD A. FRIEDLAND
CLERK OF THE COURT

BY

Kristen Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

KRISTEN BROWN DEPUTY

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8 THE STATE OF NEVADA,

9 Plaintiff,

10 -VS-

11 BRIAN KERRY O'KEEFE,

12 Defendant.

CASE NO: C250630

DEPT NO: XVII

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.
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2 An Information is a formal method of accusing a person of a crime but is not evidence
3 of his guilt.

4 In this case, it is charged in an Amended Information that on or about the 5th day of
5 November, 2008, the Defendant committed the offense of MURDER WITH USE OF A
6 DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165) in the
7 following manner, to-wit: did then and there wilfully, feloniously, without authority of law,
8 and with premeditation and deliberation, and with malice aforethought, kill VICTORIA
9 WHITMARSH, a human being, by stabbing the said VICTORIA WHITMARSH with a
10 deadly weapon, to-wit: a knife.

11 It is the duty of the jury to apply the rules of law contained in these instructions to the
12 facts of the case and determine whether or not the Defendant is guilty of the offense charged.
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Murder of the Second Degree is murder which is:

- 1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or
- 2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

000354

003313

ORDER OF REVERSAL AND REMAND

C250630

Exhibit 11

003314

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53859

FILED

APR 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Brian Kerry O'Keefe contends that the district court erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory. We agree. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted). Here, the district court abused its discretion when it instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that O'Keefe killed the victim while he was

committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder. Cf. Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000) (adding an additional theory of murder at the close of the case violates the Sixth Amendment and NRS 173.075(1)). The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error. See Neder v. United States, 527 U.S. 1, 18-19 (1999); Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Because we conclude that the judgment of conviction must be reversed and the case remanded for a new trial, we need not reach O'Keefe's remaining contentions. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry J.
Cherry

Saitta J.
Saitta

Gibbons J.
Gibbons

cc: Hon. Michael Villani, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

WEDNESDAY, SEPT. 21, 2005 C207835

C250630

Exhibit 12

003317

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FILED

APR 26 2 27 PM '06
APR 26 2 27 PM '06

ORIGINAL

Lisa Lizotte
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

CASE NO. C207835

vs.

DEPT. II

BRIAN KERRY O'KEEFE,

Defendant.

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

WEDNESDAY, SEPTEMBER 21, 2005

RECORDER'S TRANSCRIPT RE:
JURY TRIAL
DAY TWO - VOLUME TWO

APPEARANCES:

For the State:

GLEN P. O'BRIEN, ESQ.
Deputy District Attorneys

For the Defendant:

CYNTHIA L. DUSTIN, ESQ.
Attorney At Law

RECORDED BY: LISA LIZOTTE

COUNTY CLERK

APR 26 2006

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Cross-examination	1	26
Re-direct Examination	1	31
Cross-examination	2	32
Re-direct Examination	1	31
Re-cross-examination	1	33
WITNESS: DANIEL HOLLEY		
Direct Examination	1	34
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Re-direct Examination	1	44
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WITNESS: FIDDER PRICE		
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Cross-examination	1	54
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No defense witnesses were called.

REDACTED DRAFT TRANSCRIPT - VOLUME TWO

INDEX OF EXHIBITS

STATE'S EXHIBIT	Identified	Admitted
1 Officer's Report	B-53/64	
DEFENSE EXHIBITS	Identified	Admitted
A. Letter	B-28	
B. Letter	B-28	
C. Officer's report		

REDACTED DRAFT TRANSCRIPT - VOLUME TWO

WEDNESDAY, SEPTEMBER 21, 2006

(Out of the presence of the jury)

THE COURT: The record shall reflect that the Defendant is present together with his counsel and the prosecuting attorney is present in the continuation of the trial under Davis versus O'Keefe under C007833. Good morning everyone.

MR. O'BRIEN: Good morning, Your Honor.

MS. DUSTIN: Good morning, Your Honor.

THE COURT: We are outside the presence of the jury. We had a conference call yesterday between Mr. O'Brien, Ms. Dustin, and myself regarding a request that had come in from juror badge number 083. Last first, requesting to be excused and counsel stipulated that she could be excused for cause, so this was noticed that she was released from jury service. So we will need to bring the next person from the audience of the -- into the group of 23, which will be 087, Mark Hartum.

The court clerk just advised me about the order that we had individually quoted an affidavit on the end of the day and announced, so we were going to need to bring three up from the audience to replace these ones, plus last first being gone before, so it would be Mr. Hartum and then 086, Larry Greco, 088, Suzanne Carson, and 100, Stephen Lint, Okay.

Also, I wanted to make a record that counsel had informed the Court that this was not a case that has itself to doing juror notebooks, that it's really not a dependency or physical evidence type of a case.

MS. DUSTIN: That's correct, Your Honor. I'm not seeing the need for

REDACTED DRAFT TRANSCRIPT - VOLUME TWO

juror notebooks in this particular matter.

MR. O'BRIEN: That's correct, Your Honor. We basically have no idea what we'd put in a juror notebook on this kind of a case, so --

THE COURT: Very well. Are there any other matters that we need to address outside the presence of the jury?

MR. O'BRIEN: Not on behalf of the State.

MS. DUSTIN: No, Your Honor.

THE COURT: Okay, then I'm going to step down and have the clerk return the jurors to the courtroom and we'll go off the record while that's accomplished.

(A brief recess was taken.)

(Voir dire was not transcribed as requested.)

(In the presence of the jury)

THE COURT: Ladies and gentlemen, the Court has a few opening remarks from you. I have found in prior trials that occasionally we'll have a situation arise where there are people into trial a juror notebook that they did know something about the case. That they had read a newspaper article, for example, or we have a witness walk through the floor and when you see the person's face, you realize that it's your neighbor across the street but you never learn what their last name was, so you don't discuss that during the voir dire process.

If anything along these lines should occur and you become aware that you did know something about the case or did know something about someone who will be involved in the case, you will need to do a written disclosure of that.

REDACTED DRAFT TRANSCRIPT - VOLUME TWO

003319

1 witness statement that she works out about this particular second time, that Mr.
2 O'Keefe slapped her face, slapped her in the head, pulled her hair. She didn't
3 talk about choking. She didn't talk about broken glasses this time. The
4 defendant is going to show you letters from Mr. Whitmarsh to Mr. O'Keefe,
5 where Mr. Whitmarsh says: You didn't hit me that night. We're also going to
6 where Mr. Whitmarsh says: You didn't hit me that night. We're also going to
7 show you letters where she says: Just into a door.

8 As a result of Mr. Whitmarsh's representations Mr. O'Keefe was
9 accused of battery domestic violence. That brings us all here today. I'm going
10 to ask that you all hold off from making a decision about what happened that
11 night until you hear all the evidence. I think after you hear all the evidence
12 you're going to find Mr. O'Keefe not guilty and acquit him on these charges.
13 Thank you.

14 THE COURT: Thank you, counsel. The State may call their first
15 witness.

16 MR. O'BRIEN: Your Honor, the State would call Victoria Whitmarsh.
17 VICTORIA WHITMARTH

18 Having been called as a witness, being duly sworn, testifies as follows:

19 THE CLERK: Thank you, and please be seated. State your name and
20 swear it for the record, please.

21 THE WITNESS: My name is Victoria Whitmarsh. It's V-I-C-T-O-R-I-A
22 W-H-I-T-M-A-R-S-H.

23 THE COURT: The State may proceed.

24 MR. O'BRIEN: Thank you, Your Honor.

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1 DIRECT EXAMINATION

2 BY MR. O'BRIEN:

3 Q Good afternoon, my name is Brian O'Keefe, what do you do for a living?

4 A I'm in the security industry.

5 Q You work at a store here locally?

6 A Yes, I work at a store here locally?

7 A Yes, I work at a store here locally?

8 A Yes, I work at a store here locally?

9 A Yes, I work at a store here locally?

10 A Yes, I work at a store here locally?

11 A Yes, I work at a store here locally?

12 A Yes, I work at a store here locally?

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46 A Yes, I work at a store here locally?

47 A Yes, I work at a store here locally?

48 A Yes, I work at a store here locally?

49 A Yes, I work at a store here locally?

50 A Yes, I work at a store here locally?

1 A I don't remember.
2 Q Would it refresh your recollection to look at your statement? Do
3 you remember writing a statement for the police?
4 A Yes.
5 Q Would that refresh your recollection to look at it?
6 A Yes.
7 Q Would that refresh your recollection as to what it said?
8 A Yes.
9 MR. O'BRIEN: Your Honor, if I could approach the witness.
10 THE CLERK: You may approach the clerk and have a moment.
11 MR. O'BRIEN: I wasn't planning to speak to the judge. I'm just going to
12 refresh her recollection.
13 THE COURT: For identification purposes only. It's two pages marked
14 collectively as State's Proposed One?
15 THE CLERK: Yes, Your Honor.
16 THE COURT: Good.
17 BY MR. O'BRIEN:
18 Q Can you tell me a moment and read your statement to yourself.
19 Does that refresh your recollection as to what you told the officers?
20 A In a way, but I don't really remember writing this at that point
21 because I was intimidated myself. I wrote it and I don't really remember.
22 Q But this is your handwriting --
23 A Yes.
24 Q This is your statement?
25 A Okay.
26 Q Okay. At the time the officers told you that one of you had to
27 leave, what happened?

-2-
RULIN DRAFT TRANSCRIPT - VOLUME TWO

1 whatever you want but I'm getting out of the apartment, and he took his phone
2 and some money, and then I came back and he was gone.
3 Q Did he strike you at that time?
4 A No.
5 Q Do you remember the police coming out to the apartment a
6 second time?
7 A Yeah, vaguely, not quite. Yeah, I remember they came back
8 'cause I did call again, I said that he's back.
9 Q Do you remember telling the officers at that time that you had
10 been struck?
11 A No.
12 Q Do you remember showing injuries to the officer?
13 A No, I don't remember.
14 Q Do you remember having some scratches on the right side of
15 your face?
16 A No.
17 Q Do you remember your glasses being broken?
18 A But he didn't --
19 Q Do you remember that?
20 A I remember my glasses was on the -- when I came back my
21 glasses was on the coffee table, the broken.
22 Q Do you remember telling the officers that the glasses broke as a
23 result of Mr. O'Keefe hitting you?
24 A No.
25 Q Do you remember putting in your written statement to the

-3-
RULIN DRAFT TRANSCRIPT - VOLUME TWO

1 A Brian volunteered to leave. He said he will leave himself.
2 Q And he left with the officer?
3 A I believe so. I don't really -- I don't remember at that point.
4 Yeah, he did leave, but I don't know if he left with the officer.
5 Q Okay. What happened after Brian left?
6 A Okay. What happened after Brian left?
7 A He came back because he wanted to get his phone back and get
8 some money I guess.
9 Q About how long after he had left with the --
10 A A couple hours.
11 Q A couple hours? Okay. When he came back the second time,
12 what happened then after leaving him, what happened then?
13 A He opened the door because I forgot to take the tape away from
14 him, and I said if he doesn't leave I'll call the cops again.
15 Q Had you done anything to try to prevent him from opening the
16 door?
17 A I believe I put a chair against the door, but he was able to open
18 it.
19 Q What kind of chair did you put against the door?
20 A Just a -- like a chair -- like that.
21 Q Like a chair from your dining room or your living room?
22 A Like from the dining room, right.
23 Q But he was able to get into the apartment anyway?
24 A Yes.
25 Q What happened once he came into the apartment?
26 A Well he took -- I hit and I don't -- I left because I said: Take

-4-
RULIN DRAFT TRANSCRIPT - VOLUME TWO

1 officers that he had went into and slapped you on your head, face, and pulled
2 your hair?
3 A I don't remember so he hit me with you. It's been two years.
4 Q And do you remember telling the officers that Mr. O'Keefe had
5 told you that you were the only one and that the cops were on his side?
6 A No, I don't remember.
7 Q This has been some time since this happened, is that correct?
8 A Correct.
9 Q Do you -- and I'm sorry, do you remember the officers coming out
10 the second time? Do you remember talking to them?
11 A Vaguely. I think I told them not to come back. I told them to
12 leave.
13 Q Have you had anything to do with Mr. O'Keefe since this
14 incident in April of 2006?
15 A Yes.
16 Q Are you still in contact with him?
17 A I would be with.
18 Q And are the two of you still together?
19 A No.
20 Q Do you want to still be together?
21 A We talked about it, but we're not -- we just talked about it. I
22 don't know.
23 Q Do you still love him?
24 A Yes.
25 Q You don't want to be his wife, is that correct?

-5-
RULIN DRAFT TRANSCRIPT - VOLUME TWO

003321

1 A Correct.
2 Q You're here because the State subpoenaed you and made you
3 come to court today -
4 A Right.
5 Q -- isn't that correct? Pass the witness.
6 Q -- isn't that correct? Pass the witness.
7 CROSS-EXAMINATION
8 BY MS. DUSTIN:
9 Q Miss Whitmarsh the State asked if you have had any ongoing
10 contact with Mr. O'Keefe, do you remember?
11 A I'm sorry?
12 Q The State asked if you've had contact with Mr. O'Keefe since
13 this happened. You know, haven't you?
14 A Yes, correct.
15 Q Have you written him seven letters?
16 A Yes.
17 Q Okay. Do you recall in your letter stating that he didn't hit you
18 that night?
19 A I don't remember. I read to me the letter.
20 MS. DUSTIN: If I could approach, Your Honor.
21 THE COURT: Again, which -
22 MS. DUSTIN: I've already had it on the stand. I'm going to approach
23 with Defendant's Proposed Exhibit A.
24 MR. O'BRIEN: Miss Dustin which one is that?
25 MS. DUSTIN: [Indicating]
26

-26-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

1 Q Okay. Were you interviewed when the second incident happened
2 where you had got the chair and Mr. O'Keefe wanted to come back in to get his
3 cell phone and money, were you still interviewed at that time?
4 A I don't remember.
5 Q Okay. Now, Miss Whitmarsh, you wanted this matter resolved,
6 right?
7 A Right.
8 Q You wanted Mr. O'Keefe to take a deal on this, right?
9 A I just don't want to be here.
10 Q Do you remember writing a letter to him where you just asked:
11 Can't you just make a deal with these people?
12 A Yeah, 'cause I don't really want to be here.
13 Q Okay. And that you knew that he didn't want to take a deal
14 because he wanted to keep his integrity?
15 A That's what he said, yes.
16 Q Okay. Court's indulgence. Now, Your Honor, referring back to
17 Defendant's Proposed Exhibit A may I approach and mark that?
18 THE COURT: All right.
19 Q Now, Miss Whitmarsh, you previously testified - this is a letter
20 by you to the Defendant, correct?
21 A Right.
22 Q And can you note the date of this letter?
23 A August 25, 2008.
24 Q And you mailed this to the Defendant, is that correct?
25 A Right.

-27-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

1 BY MS. DUSTIN:
2 Q Miss Whitmarsh, I'm handing you what is marked as Defendant's
3 Proposed Exhibit A. Do you recognize that?
4 A Yes, it's my handwriting.
5 Q Okay. And can you describe in general terms what that particular
6 document is?
7 A It's my letter.
8 Q Understood. And you wrote this letter to who?
9 A To Brian, yeah.
10 Q Okay. Can I direct your attention to - the page indicating. Can
11 you tell me what you - can you review that? Okay that refreshes your
12 recollection of what you might have written in a letter to the Defendant?
13 A Yeah, I recall it now.
14 Q Okay. Did you happen to write that Mr. O'Keefe did not hit you
15 that night on April 27?
16 A Yes.
17 Q Now, Miss Whitmarsh you stated that you'd been drinking that
18 night, right?
19 A Yeah, I did admit it, yes.
20 Q And you started drinking before the first verbal argument began,
21 right?
22 A We were both drinking, right.
23 Q Did you continue drinking after Mr. O'Keefe left the apartment
24 with the police officers?
25 A No, I remember that point, no.

-28-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

1 MS. DUSTIN: Your Honor, I move for admission of Defendant's
2 Proposed Exhibit A.
3 MR. O'BRIEN: No objection.
4 THE COURT: Granted.
5 BY MS. DUSTIN:
6 Q Now, Miss Whitmarsh, we talked about potentially meeting later,
7 isn't that correct?
8 A Right.
9 MS. DUSTIN: Your Honor, can I approach the witness?
10 THE COURT: Has this ever been marked also?
11 MS. DUSTIN: This - it should be Defendant's Proposed Exhibit -
12 THE CLERK: B.
13 MS. DUSTIN: - B but we did have a J accidentally marked on there.
14 THE COURT: Okay. Does it still say J?
15 MS. DUSTIN: Yes. If you'd like I can correct it.
16 THE COURT: Would you take it back to the clerk for correction.
17 MS. DUSTIN: I'm now approaching with what is marked as Defendant's
18 Proposed Exhibit B.
19 THE COURT: You may.
20 BY MS. DUSTIN:
21 Q Now, Miss Whitmarsh, can you identify this document for me,
22 please?
23 A It's a letter that I wrote.
24 Q Okay. And who did you write it to?
25 A Brian.

-29-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

003392

Q Okay. And can you tell me what the date is of that letter?

A July 26th.

Q Of what year?

A 2008.

Q And I would like to refresh your recollection of this particular thing.

A And I would like to refresh your recollection of this particular paragraph indicating.

A Yes.

Q Okay. And isn't it true in this letter you particularly asked the Defendant to make a deal with these people?

A Yes.

Q And isn't it true in this letter you also said that you knew that he wanted to maintain his integrity?

A Yes.

MS. DUSTIN: Your Honor, I have for admission of Defendant's Proposed Exhibit B.

MR. O'BRIEN: No objection.

THE COURT: Granted.

MS. DUSTIN: Court's indulgence.

BY MS. DUSTIN:

Q Now, Miss Whitmarsh, I know this is difficult because it happened a little while ago but back on April 2nd you called the police two times, isn't that correct?

A Yes.

Q And isn't it true based upon your testimony earlier you indicated the police told you just warned Mr. O'Keefe to leave the apartment?

-35-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

Q Let's talk about Defense Exhibit A, the letter from August 26th. You talk in there a little bit about the DA's office trying to pressure you for this case and you were not being cooperative in that scenario, isn't that correct?

A Yeah, 'cause I didn't want to go home.

Q Okay. And you told him: I will tell them what happened that night I do not remember. Isn't that correct?

A Yeah, I don't remember.

Q And you repeated it again: I don't remember what happened?

A Right.

Q Isn't that correct?

A [Nods]

THE COURT: Is that a yes?

THE WITNESS: Yes.

BY MR. O'BRIEN:

Q And you signed at your initials with a heart U, I love you, isn't that correct?

A On that letter?

Q Right.

A I have to put it, I don't recall.

Q Okay. If I can approach again, Judge.

THE COURT: Yes, sure.

THE WITNESS: [Rereading exhibit] Yes, yes.

MR. O'BRIEN: Nothing further.

THE COURT: Recross.

MS. DUSTIN: Just a couple follow-up questions.

-36-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

A That's correct.

MS. DUSTIN: Nothing further, Your Honor.

MR. O'BRIEN: Could I see the defense's exhibits, please.

RECESS EXAMINATION

BY MR. O'BRIEN:

BY MR. O'BRIEN:

Q Miss Whitmarsh let's talk about these letters for a moment. The August 20th or, I'm sorry, the July 26th of this year letter. Did you not tell Mr. O'Keefe in that letter that you were not going to testify and that you had told him that before?

A I don't recall.

Q You don't recall. Can I approach, Your Honor.

THE COURT: Yes, you may.

THE WITNESS: Which one?

BY MR. O'BRIEN:

Q Let's take a look at your letter that that.

A [Rereading exhibit] Yes.

Q You told him that then: Like I said before, I am not going to testify?

A Yes, correct.

Q You told him you loved him and you missed him, is that correct?

A Yes.

Q And you told him that: I know you're thinking yourself that I'm just going to disappear on you, well, I'm still here waiting. Hoping to see you soon. Is that correct?

A Yes.

-37-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

RECESS EXAMINATION

BY MS. DUSTIN:

Q Miss Whitmarsh in both these letters you stated that the State was threatening you, isn't that correct?

A Yeah, I feel threatened, yes, 'cause that's why I didn't want to be there but I have to.

Q And they were "the District Attorney and using those tactics" on you?

A Yeah, I did get a call, yes. They said if I didn't agree I have to be - right [is correct].

Q And then they - I'm sorry. And they kept coming to your work place?

A They came to my work place, right.

Q And they threatened that they would threaten you to jail if you didn't come today, isn't that correct?

A Yes.

Q Now, the District Attorney just said in your letter from August 26th, which is Defendant's Exhibit A that you stated you couldn't really remember what happened, isn't that correct?

A Right.

Q Would you remember if somebody hit you?

A Of course.

Q So when you say that you couldn't remember what happened and then you later in this same sentence said that Mr. O'Keefe did not hit you, you would remember if he did hit you that night, correct?

-38-
ROUGH DRAFT TRANSCRIPT - VOLUME TWO

1 A That's correct.
2 MS. DUSTIN: Making further, Your Honor.
3 THE COURT: Proceed?
4 MS. O'BRIEN: No, Your Honor.
5 THE COURT: You may step down from the stand. Good-
6 bye to witness five, thank you.
7 THE COURT: You may step down from the stand. Good-
8 bye to witness six, thank you.
9 I stopped that. I've got to ask if the jury has any questions
10 before you go out the door, hold on a second. Did the jury have any questions
11 that they wish to ask? If you have a question I need you to raise your hand.
12 No questions. Okay. Thank you.
13 State may call its next witness.
14 MR. O'BRIEN: Judge the State would call Dan Holley.
15 THE COURT: Okay.
16 DANIEL HOLLEY
17 (having been called as a witness, being first duly sworn, testified as follows):
18 THE CLERK: State your name and swear it for the record, please.
19 THE WITNESS: Daniel Holley, Heed-I-Do.
20 THE COURT: Swear only proceed.
21 MR. O'BRIEN: Thank you, Your Honor.
22 DIRECT EXAMINATION
23 BY MR. O'BRIEN:
24 Q Good afternoon, sir.
25 A Good afternoon.
26 Q How are you currently employed?
27 A I'm employed as a detective with the Las Vegas Metropolitan
28 Police Department.

REDACTED TRANSCRIPT - VOLUME TWO

1 Q How just as we're clear have you testified in domestic violence
2 type cases before?
3 A Hundreds I'm certain.
4 Q And do you always testify as an officer who has responded on
5 the stand?
6 A In many cases, yes, I do.
7 Q In every case though?
8 A No.
9 Q And in fact you were not the responding officer on this case, is
10 that correct?
11 A I was not.
12 Q And you have not reviewed the reports of the files in this case?
13 A I have not, I have not looked at any reports for how I speak
14 with anybody involved with this case except yourself.
15 Q In your years of experience and training and having taught on the
16 issue of domestic violence can you tell the jury a little bit about the dynamics of
17 domestic violence?
18 MS. DUSTIN: Question, Your Honor, he has not agreed to admit this
19 particular witness as an expert.
20 MR. O'BRIEN: Judge, in Nevada we don't have to admit people as
21 experts we simply lay their qualifications of qualifications and leave right into
22 questioning.
23 THE COURT: Overruled.
24 MS. DUSTIN: And just as a follow-up, Your Honor, I think I'm entitled
25 to ask the witness the State testifies as an expert witness?

REDACTED TRANSCRIPT - VOLUME TWO

1 Q And how long have you been so employed?
2 A Twenty-two years.
3 Q And in what capacity do you work for the Las Vegas
4 Metropolitan Police Department?
5 A I work as a member of the family crimes section and do
6 specifically instruct persons violent, domestic violence, stalking behavior
7 intimate partners.
8 Q How long have you been doing that assignment?
9 A I've been six years this time around and four years my last time
10 in the interim.
11 Q And what sort of training do you have that helped you obtain your
12 current assignment?
13 A I've attended hundreds of hours of training all over the country
14 regarding stalking and all types of assault against, witness further violence
15 between husband and wife or somebody with some type of intimate relationship.
16 I train in the police academy and I train our Offense Police Academy, medical
17 doctors and nurse groups, folks in Nevada are considered to be mandatory
18 reporters of domestic violence.
19 Q And how often do you do such trainings?
20 A Oh, several times a year. I've attended also as a member of the
21 Southern Nevada Domestic Task Force and through that there's a lot of training
22 offered and a lot of training that we're asked to give statewide.
23 Q Do you belong to any other associations or have any other
24 affiliations?
25 A Not anything related, no.

REDACTED TRANSCRIPT - VOLUME TWO

1 THE COURT: Do you wish to take an oath first? You may.
2 MS. DUSTIN: Thank you.
3 YOUR OATH EXAMINATION

4 BY MS. DUSTIN:
5 Q Opposite Holley -
6 A Yes.
7 Q -- have you ever been barred from being an expert witness in a
8 domestic violence case?
9 A I have.
10 Q When is that bar was?
11 A Yes.
12 Q In the Eighth Judicial District Court of Nevada?
13 A In this very hallway.
14 MS. DUSTIN: Your Honor, I think the very fact that just last week he
15 was denied as being an expert I think brings into some serious issues whether
16 he can testify as expert as an expert still.
17 MR. O'BRIEN: Judge, I just have one follow-up question.
18 Detective Holley have you also been qualified as expert as an
19 expert in the District Court?
20 THE WITNESS: Many times.
21 MR. O'BRIEN: Judge, the fact that one judge did not want to allow
22 Detective Holley to testify doesn't mean that this Court should not allow him to
23 testify. He's been qualified in the past, he has the training and experience and
24 he can help the jury understand the issues in question here, that's all the
25 people required.

REDACTED TRANSCRIPT - VOLUME TWO

003324

PRESENTENCE INVESTIGATIVE RPT.

C250630 (Pg. 6)

Exhibit 13

003325

PRESENTENCE INVESTIGATION REPORT
BRIAN KERRY O'KEEFE
CC#:C250630

Page 2

05-03-2005
(LVMPD)

FTA: Battery Domestic Violence,
3rd Offense (F)

FTA: 05-03-2005

(The victim, same one as instant offense, filed a report with the Las Vegas Metropolitan Police Department that she became a victim of Battery Domestic Violence on April 2, 2004. She reported that she was preparing dinner when her boyfriend, Mr. O'Keefe, began an argument, accusing her of having an affair with another man. The argument turned physical when Mr. O'Keefe began slapping her in the face with his hand and pushed her down onto a couch. The victim was able to escape and call the police. A responding officer transported Mr. O'Keefe away from the scene and advised him not to return until the next day; however, Mr. O'Keefe returned shortly thereafter and physically assaulted her again.)

CC#C207835

03-02-2006. Adjudicated guilty of Battery Domestic Violence (F), sentenced to 24/60 NDOC with 311 days credit for time served.

04-26-2007, paroled

01-18-2008, parole violation

04-14-2008, Honorable discharge

*not parole
traffic
citation
not
released*

11-05-2008
(LVMPD)

Murder with Deadly Weapon (F)

Instant Offense CC#:C250630

Institutional/Supervision Adjustment: The defendant received his first felony conviction in December 2004, for Burglary, and was awarded probation. However, upon sentencing, the defendant was extradited to Ohio to answer child support related charges in that jurisdiction. After his conviction in Ohio, for two counts of Criminal Non-Support of Dependents (F), he returned to Las Vegas on May 3, 2005. At this time, Mr. O'Keefe turned himself into the Las Vegas Metropolitan Police Department for Battery Domestic Violence, 3rd Offense, under C207835. On March 2, 2006, the defendant was convicted of such charge and sentenced to 24/60 NDOC. On April 26, 2007, the defendant was paroled to be supervised by the Division of Parole and Probation. Although, one parole violation is noted, the defendant received an honorable discharge on April 14, 2008, roughly three weeks before he committed the instant offense. Nonetheless, at the time of his discharge, the defendant remained on probation under 2001 CR00237, which is not scheduled to expire until April 29, 2010.

** Ohio case **

Supplemental Information: NDOC#90244

003326

TUESDAY, FEBRUARY 10, 2009 B.D.V.

C250630

Exhibit 14

003327

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

[Signature]
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 10, 2009

ROUGH DRAFT TRANSCRIPT OF
ALL PENDING MOTIONS

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

1
2 LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 10, 2009, 3:05 A.M.
3 THE COURT: C250630, State of Nevada versus Brian
4 O'Keefe.
5 MR. PIKE: Thank you very much.
6 THE COURT: Mr. O'Keefe is present in custody.
7 MR. PIKE: Randal Pike (phonetic) and Patricia Palm
8 from the Special Public Defender's Office appearing with Mr.
9 O'Keefe.
10 MR. SMITH: Morning, Judge. Philip Smith on behalf
11 of the state of Nevada.
12 THE COURT: All right, and this is the petition for
13 writ of habeas corpus filed by the defense.
14 MR. PIKE: That's correct, your Honor. It's - I
15 antited it a writ of habeas corpus and in the alternative is
16 motion so that we just kind of accomplished all bases with
17 this. It has to do about the failure to preserve specific
18 evidence of intoxication testimony at the preliminary
19 hearing testified that it was (indiscernible) present upon
20 impression of the officer or the detective that Mr. O'Keefe was
21 intoxicated at the time. Yet, they - and they had AMER
22 individuals that were available to draw the blood. It's - I
23 believe that the Court can even take judicial knowledge that
24 there was a nurse on duty at the Clark County Detention Center
25 that can always -- is always available to draw blood for DUIs

Page 2
ROUGH DRAFT TRANSCRIPT

1 as it is recovered and as it is processed in this case, that it
2 only be allowed to process in that extent allowed under the
3 law, and we believe that's our position.
4 THE COURT: All right, thank you. Mr. Smith.
5 MR. SMITH: Judge, it's our position that according
6 to the case law, the State's failure to preserve any evidence,
7 first of all, has to be made in bad faith and/or we have to
8 show prejudice. Here the evidence was, for lack of a better
9 phrase, inside of the defendant's body. The only thing that we
10 had custody of was the defendant himself.
11 The United States Supreme Court has clearly come down
12 and said that the State -- the defendant cannot force the State
13 to obtain certain evidence. In other words, it's not a fourth
14 amendment due process violation that the State did not do a
15 blood draw from him.
16 It would have been different and I would agree with
17 Mr. Pike had the State done a blood draw from him and then lost
18 or destroyed that evidence. But here the State simply never
19 had possession of the evidence because we never had the blood
20 draw.
21 So therefore, in order for Mr. Pike's motion to have
22 any merit, that presumes that the State had an affirmative duty
23 to take his blood and find out his blood alcohol content -- him
24 being the defendant -- so begin with because we never had
25 possession of it. The Supreme Court has clearly said that is

Page 4
ROUGH DRAFT TRANSCRIPT

1 for drug concerns.
2 And in relationship to this, where a specific intent
3 as to a first or second degree murder can be vitiated by even
4 voluntary intoxication, it becomes such an important piece of
5 evidence that the failure to -- the failure of the police to
6 preserve that evidence when it is known to them, and in this
7 case it was known to them, becomes only not excusable, but only
8 remedial by either allowing prosecution solely for secondary
9 murder or a corrective instruction such as it was done in the
10 case versus Sandborn.
11 And in relationship to this, as the interrogation of
12 the detective continues on, he was unaware even of the effect
13 of a (indiscernible) in relationship to a first or second which
14 it is disconcerting to begin with. And also, that there is,
15 according to his testimony, there's no policy to collect that
16 evidence in murder cases. And that creates an institutional
17 problem that can only be remedied by allowing for a second
18 degree offense.
19 Now, it -- as there's the companion motion that the
20 State has filed it at this point in time to allow in evidence
21 of other bad acts. They've requested only one of three felony
22 convictions to be allowed. So our motion may be -- appear a
23 victory if we're one because they could potentially petition
24 the court for an additional criminal adjudication.
25 But it's important that based upon the evidence that

Page 3
ROUGH DRAFT TRANSCRIPT

1 not the case.
2 So for that reason and that reason alone, the
3 defendant's motion must fail. We've never had possession of
4 the defendant's blood alcohol content.
5 Now, in regards to any instruction that the defendant
6 would like to have saying that, you know, because the State
7 didn't, I presume it would be something along the lines of that
8 since the State didn't draw the blood, you can presume x, y or
9 z. That's something that we can certainly argue at trial.
10 But simply because of the State, for whatever reason,
11 did not take a blood and urine -- a blood or urine alcohol test
12 in a case where the allegation is murder with use of a deadly
13 weapon, that doesn't rise to the level of a due process
14 violation that would warrant your Honor penalizing the State
15 saying you can only try him for first -- or excuse me, for
16 second degree murder or lesser of crimes and not first degree
17 murder.
18 THE COURT: How about on the evidence of -- bringing
19 in evidence of other, you know, bad acts?
20 MR. SMITH: Well, Judge, as my motion outlined, I
21 mean, there's a long historic history of domestic violence
22 between this defendant and the named victim in this case.
23 We're not trying to get every single domestic battery that he's
24 ever committed against this victim. We're trying to get one,
25 and that is the battery domestic violence -- the felony

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ROUGH DRAFT TRANSCRIPT

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1 conviction that ultimately led to his previous time in prison.

2 And it's our position that that goes to motive in
3 this case in that Cheryl Morris testified in no uncertain terms
4 that the defendant made comments to her that because the victim
5 testified against him in that case, that that's why he wanted
6 to kill her. That's it. Our motion is strictly limited in its
7 scope. We're not trying to jolly (phonetic) his reputation by
8 painting him as a woman beater in general. We simply want to
9 get that one conviction in because it is a crucial part of the
10 State's case in chief.

11 Now, in regards to any of the other domestic violence
12 between the two, you know, that could become important or
13 assault depending on what the defendant got into and
14 testified to. But with regards to our case in chief, we just
15 want to get the one incident in. I feel that the probative
16 value substantially outweighs any prejudicial effect. Sure-
17 it's prejudicial, but as I'm sure your Honor knows, all the
18 evidence that the State has is prejudicial against the
19 defendant. And because of that, we're asking that you grant
20 our motion.

21 THE COURT: All right, thank you. Mr. Pike, if a
22 defendant has glassy eyes and slurs his speech a little bit, is
23 there a requirement that the State or the police department
24 always take a blood draw?

25 MR. PIKE: There should be. We don't have evidence

Page 6

ROUGH DRAFT TRANSCRIPT

1 evidence, and so it has to be not just a presumption, it almost
2 has to be a conclusive fact as was done in Sandborn. The
3 conclusive instruction that at the time that this was done, he
4 was intoxicated.

5 He was -- and the only way to establish the policy
6 that should be in effect, just like the exclusionary rule, if
7 you don't give people their Miranda rights, you can't get those
8 statements in, in cases of this magnitude and of evidence that
9 is so easily and normally and available to be collected, it
10 would be appropriate to as a judicial function to preserve the
11 integrity of these types of charges to allow for or to require
12 that that blood draw occur when it's available because they
13 have exclusive control. He can't just draw blood and say here,
14 you have to do something with it.

15 In reference to the motion to introduce the evidence
16 of the prior bad act in the case in chief. Because there was
17 the testimony that was done at the time of the preliminary
18 hearing and because of the nature of the judgment of
19 conviction, counsel for the State and the defense agreed that
20 an abbreviate Petrichelli hearing and argument of this could be
21 done.

22 This is the concerns I have in relationship to that.
23 Number one, the statements that he's -- that he allegedly made
24 to Cheryl Morris are hearsay. Do they fall within an exception
25 of a statement against penal interest? At that point in time

Page 8

ROUGH DRAFT TRANSCRIPT

1 that it is the policy. However, as an officer of the court I
2 can indicate that Henderson does it, that we have other cases
3 in which an individual that has been arrested for this that has
4 exhibited signs of being under the influence of controlled
5 substances where there have been blood draws that were done by
6 the arresting officers at times contemporaneous to or closely
7 associated with the homicide in which the suspect is being
8 arrested.

9 In this case beyond that, we've got the chief, Mr.
10 O'Keefe, who is over and holding Mrs. Winmarsh who is obviously
11 confused, who is unresponsive to officers, who is then shot by
12 a taser gun and given two electronic charges into his body, and
13 he's taken out and handcuffed, and he sat on the outside on the
14 balcony, and he's maintained there until the next morning when
15 he's brought down, interrogated and -- and by the police.

16 They -- the State had complete custody of that
17 exculpatory evidence, that necessary evidence. The blood that
18 was coursing within his veins and that was dissipating rapidly
19 that was there, it was readily available and at minimal expense
20 of the State's ability to do that.

21 Taking blood is so important that even on a
22 misdemeanor DUI, a defendant has a right to request and have
23 his own blood draw that -- at the time that he is arrested for
24 a DUI. He had no right, was never told of any right to do
25 that, and they controlled and maintained that sole place of

Page 7

ROUGH DRAFT TRANSCRIPT

1 in which they were given, they do not. It was not directed.
2 It was an expression of anger, obviously, if it was indeed said
3 at all. Cheryl Morris, again, will be challenged as an
4 unreliable witness.

5 Nevertheless, based upon that, if it doesn't fit
6 specifically within the exception of the hearsay rule to the --
7 what he is saying to the individual at that time and in
8 reference to his actions at that time, this then becomes so
9 dissociated with the admission of the prior felony that the
10 prejudice grossly outweighs the probative value, and therefore
11 it should not be admitted.

12 Now, again, as Mr. Smith correctly pointed out, if
13 Mr. O'Keefe does take the stand, then the prior felony
14 convictions, of course, are available for impeachment purposes.
15 But not getting into statements that are allegedly said to an
16 unreliable third party.

17 THE COURT: On the issue of prior bad acts, I want to
18 hear more on that, so I'm going to schedule a Petrichelli
19 hearing. Whether or not the State meets their burden, this
20 Court has not decided yet whether it's going to come in, okay,
21 on the relevancy issue and the hearsay issue. But we'll go
22 ahead and set a hearing on that.

23 On the issue of the loss or destruction of the
24 evidence, I think the cases that have been cited apply more to
25 where the law enforcement actually retrieved -- has kept, has

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ROUGH DRAFT TRANSCRIPT

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1 actual custody of the evidence. In this case the defendant's
2 not precluded from presenting evidence of his intoxication, but
3 I don't find that the State or the law enforcement acted in bad
4 faith.

5 And any prejudice here can be remedied by other
6 testimony stating his condition. And so that -- I know
7 (indiscernible) has a petition for writ of habeas
8 corpus alternative to preclude the prosecutor from seeking
9 first degree murder charge. I'm going to deny that motion, and
10 then we'll have the hearing on the following day. Okay.
11 Before we set that, I see the trial's coming up March 16th. I
12 just want to double check right now, is all the evidence been
13 turned over? Is there any issues, anything missing, DNA?
14 Because I don't like people coming in -- I'm not saying any of
15 you have done this.

16 MR. PIKE: Right.

17 THE COURT: I just don't want to come into calendar
18 call and say oh, we're missing some photos or we're missing a
19 disk or were missing a test.

20 MR. PIKE: In relationship to that, there are two
21 housekeeping matters that we have. The State has prepared an
22 amended information. I've been provided a copy of that. That
23 can be filed without objection by the defense.

24 THE COURT: All right, that will be filed, then?

25 MR. PIKE: In -- okay.

Page 10

ROUGH DRAFT TRANSCRIPT

1 MR. SMITH: And just for the record, Judge, the
2 minute information simply faces some (indiscernible) errors
3 that were made upon the initial filing.

4 THE COURT: All right.

5 MR. PIKE: That's correct. And I didn't think it was
6 necessary to have a motion brought. In addition to that, there
7 was some medical records that we're going to (indiscernible) by
8 the defense. Under new HIPAA rule requirements, we would
9 normally -- we require an order of the court. I advised the
10 State as to the records I was looking for and prepared a
11 stipulation and order in relationship to obtaining an order to
12 get those medical records.

13 I'll provide a copy to the State. Before they may be
14 used in court, I will appropriately notify the State if I
15 believe that I can use them and present something prior to
16 calendar call, but --

17 THE COURT: Do you have the order?

18 MR. PIKE: -- other than that, we -- there is only
19 one piece of evidence that is still being processed and that is
20 the knife, and I believe that that's being processed for DNA
21 and finger prints. The State doesn't have that. We've met
22 with the State to make sure that we've coordinated and we have
23 all evidence today.

24 THE COURT: All right, do you have your order --

25 MR. PIKE: I do.

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: -- Mr. Pike?

2 MR. PIKE: If I may approach the bench?

3 THE COURT: Yes. Mr. Smith, you've reviewed the
4 order?

5 MR. SMITH: I have, Judge, and I signed it.

6 THE COURT: All right.

7 MR. PIKE: Thank you.

8 THE COURT: All right, if there's any other issues on
9 discovery, please immediately put them back on calendar.

10 MR. PIKE: Thank you.

11 THE CLERK: Do you need a Petrichelli hearing?

12 THE COURT: Yes.

13 THE CLERK: Held February 26th at 10:00 a.m.

14 MR. SMITH: That sounds good.

15 MR. PIKE: That will be fine, thank you.

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Page 12

ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

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003331

ACKNOWLEDGEMENT

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

Verbatim Digital Reporting, LLC
Littleton, CO 80120
(303) 798-0890

Julie Lord

JULIE LORD, TRANSCRIBER

7-7-09

DATE

(Petrocelli: Hearing)
MONDAY, MARCH 16, 2009 P.D.T.

C250630

Exhibit 15

003333

COPY
DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
OCT 14 2009

[Signature]
CLERK OF 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

MONDAY, MARCH 16, 2009

JURY TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

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

003334

1 LAS VEGAS, NEVADA, MONDAY, MARCH 16, 2009, 9:26 A.M.

2 (Court called to order)

3 (Outside the presence of the jury)

4 THE COURT: All right, this is C-250630, State of
5 Nevada versus Brian O'Keefe. Is it O'Keefe or O'Keefe?

6 THE DEFENDANT: O'Keefe, sir.

7 THE COURT: O'Keefe, all right. Mr. Pike, his
8 attorney, Mr. Smith and Ms. Graham for the State. The State's
9 motion to admit evidence of other crimes.

10 MR. SMITH: And Judge, I'm paying attention to you.

11 THE COURT: All right. Proceed. Proceed.

12 MR. SMITH: Judge, it's the State's position that the
13 testimony of Cheryl Morris at the preliminary hearing clearly
14 establishes at that the defendant had a motive to kill Ms.
15 Witmarsh (phonetic) and that the defendant relayed to Cheryl
16 Morris that he had a deep seeded animosity towards Ms. Witmarsh
17 for testifying against him at a previous battery domestic
18 violence trial.

19 Our proffer would be that we intend to call a
20 detective who would be able to testify that he obtained
21 certified copies of the Judgment of Conviction from that
22 domestic violence charge showing that he was, in fact
23 convicted.

24 Also, he would be able to testify that he personally
25 determined the length of his prison sentence because, as I

1 stated in my motion, the defendant specifically stated to
2 Cheryl Morris that Ms. Witmarsh had taken away three years his
3 life.

4 So we would -- we would put the detective on to say
5 that he did investigation into the defendant's criminal records
6 at the Nevada Department of Corrections and it did, in fact,
7 reveal that he spent three years in prison.

8 So the State submits that we have certainly met the
9 burden that it has probative value, especially because this is
10 an open murder charge. To support a conviction of first degree
11 murder the State has to show deliberation and premeditation and
12 intent.

13 And with the defendant making statements that he
14 specifically wanted to "kill the bitch" because she had
15 testified against him, I submit that this is clearly a motive
16 evidence contemplated by NRS 48.045.

17 That being said, it's the State's position that your
18 Honor has to weigh the probative value versus the prejudicial
19 value. I submit that it is certainly more probative than
20 prejudicial because it clearly establishes motive. The State
21 is not going to make any argument that he's necessarily a bad
22 guy because of that. It's simply one part of the entire story
23 of this case, and I submit that it should certainly be admitted
24 into evidence.

25 THE COURT: All right. Mr. Pike?

1 MR. PIKE: Thank you, your Honor. For the record, in
2 anticipation of this -- this issue coming in, we conducted a
3 thorough cross-examination of Cheryl Morris at the time of the
4 preliminary hearing so that there would be a record and you
5 could actually read the full transcript as to what she was
6 going to say. That's the reason we don't have to actually have
7 witnesses called in at this point in time because the -- as you
8 can see from the documents that have been filed, this is not a
9 case that has a great deal of varied issues in it, would (sic)
10 have developed a number of them.

11 In relationship to this one, this -- you're dealing
12 with Cheryl Morris. Cheryl Morris is a girlfriend of the
13 defendant that was an interim girlfriend after he had gotten
14 out of prison, and they had established a relationship. Cheryl
15 and Mr. O'Keefe, in fact, had resided together, were boyfriend
16 and girlfriend, they had shared a joint account, they bought a
17 car together, they had done a number of things like that. And
18 she is a jilted girlfriend in that as soon as the deceased in
19 this, Victoria Witmarsh re-contacted Mr. O'Keefe -- and he did
20 not contact her. He did not seek her out. He did not attempt
21 to reestablish the relationships after this.

22 But he -- Mrs. Witmarsh contacted him. They
23 reestablished a relationship. If -- if this had any probative
24 value it would be in a case where the issue of the identity of
25 an individual who had killed Mrs. Witmarsh may be at issue.

1 This is -- this is a couple that had reestablished themselves.
2 They'd been very public about their reuniting. He -- Mr.
3 O'Keefe had taken her to the union hall where they had worked
4 together. They were a couple to the neighbors around the
5 apartment where they had been. They were -- had gone into a --
6 my client was involved in a rehab program through the union at
7 MINDS. So he had gone forward in relationship to them
8 appearing together, and Mrs. Witmarsh had appeared with him
9 during that period of time.

10 There is a reason why hearsay statements are
11 considered as inherently unreliable unless they meet certain
12 criteria. And this is certainly one, because it is not -- the
13 issue is not whether this was a planned homicide or anything
14 like that.

15 In fact, given the alcohol -- the obvious
16 intoxication of Mr. O'Keefe at the time, the intoxication and
17 drug -- and overdosage not to the extent of death, but a high
18 amount of an anti-depressant along with the .24 alcohol level
19 in the deceased as a result of the autopsy. It appears that
20 these two were -- were not anywhere near their normal state of
21 mind during that period.

22 So for a jilted girlfriend to come in and say he told
23 me that he was -- you know, he would kill her because of this,
24 I think is far more prejudicial than probative because she has
25 her own motives for doing that.

1 THE COURT: Well doesn't this -- the State's
2 presented it as motive -- purpose of motive or intent of your
3 client. Doesn't it relate to that? Because I think -- if the
4 court or if the jury and the court believes the former
5 girlfriend and she had said that the defense -- and I'm -- she
6 took, you know, three years out of my life and he's got a ax to
7 grind, isn't that relevant to motive and intent?

8 MR. PIKE: It would be if this was -- appeared to be
9 a premeditated type of criminal offense where he was trying to
10 hide from police, or establish an alibi or do anything at all
11 like that. In circumstances where we have two drunk people
12 involved in it, I just don't -- I don't see where it meets that
13 probative versus prejudicial test.

14 THE COURT: All right. Anything further, Mr. Smith?

15 MR. SMITH: Judge, my reply would be Mr. Pike has
16 raised some issues that are right for cross-examination when
17 Ms. Morris gets on the stand. But the point here is if the
18 State made a prima facie showing that it does have probative
19 value and that it outweighs the prejudicial value, and I think
20 it does.

21 Surely there are several interpretations as to what
22 the evidence is going to show in this case, but the State is
23 entitled to a little deference if we can show that our theory
24 of the case supports the probative value of that testimony, and
25 it, in fact, does.

1 Furthermore, the fact that he -- the defendant didn't
2 try and establish an alibi or anything of that nature, I mean,
3 we hear that premeditation can be as quickly as successive
4 thoughts of mind. And I'm sure your Honor can think of a
5 theory that State could put forward that uses testimony of Ms.
6 Morris, despite the fact that the defendant did not give an
7 alibi or didn't do any of the things that Mr. Pike put forward
8 that one would normally expect in a case of premeditation and
9 deliberation. I submit that we've met our burden and it should
10 come in.

11 THE COURT: Anything further, Mr. Pike?

12 MR. PIKE: No, your Honor.

13 THE COURT: Mr. Pike, were you the defense attorney?
14 Did you cross-examine this witness at the lower stage?

15 MR. PIKE: Yes, I was, your Honor.

16 THE COURT: Okay.

17 MR. PIKE: The -- in --

18 THE COURT: She made these statements, correct, under
19 oath?

20 MR. PIKE: Pardon?

21 THE COURT: She made these statements?

22 MR. PIKE: She did make those --

23 THE COURT: She relayed the -- right.

24 MR. PIKE: -- statements under oath and they were
25 subject to cross-examination. The -- the statement about

1 taking three years out of his life, Mr. O'Keefe spent basically
2 a year in custody in Clark County Detention Center. While that
3 was pending Ms. -- Mrs. Witmarsh visited him in -- in jail,
4 also in prison and then reconnected with him afterwards.

5 They -- their relationship really didn't end for a
6 period of three years. So if the court is going to allow it
7 in, then I'm going to have to have kind of a wide range on the
8 investigation of the detective in relationship to visitation
9 logs, Mrs. Witmarsh's contact with him. It does present a -- a
10 bit of the Gordian knot or a messy situation as far as
11 examination. And I don't think it's -- it's so -- it's so
12 insightful that it would -- it becomes a -- a hot poker of
13 probative value for the State.

14 THE COURT: All right. I think the prior acts here
15 and the statements are relevant to the charge. With the
16 testimony under oath they've been proven by clear and
17 convincing evidence. And Mr. Pike, I do find that the
18 probative value is not substantially outweighed by the
19 prejudicial effect of this, so I'm going to allow that
20 testimony to come in. And we start in 20 minutes; is that
21 correct?

22 MR. PIKE: That's correct, your Honor. In
23 relationship to this, we've got -- if we could go ahead and
24 take some time and take care of some housekeeping matters for
25 the trial.

1 As the court has seen, we have exchanged our proposed
2 jury instructions. I filed a hard copy, or provided a hard
3 copy to the clerk. In addition to that, the documents, as part
4 of the reciprocal discovery that I provided to counsel, I've
5 made a -- a list of exhibits and have provided those to the
6 clerk also.

7 THE COURT: All right.

8 MR. PIKE: In anticipation in this case, it -- the
9 trial may go where Mr. O'Keefe may decide to testify or not
10 testify. In the event that he does elect to testify, we do
11 have some issues in relationship to a prior conviction of a
12 burglary in which the charging documents indicated the burglary
13 was for purposes of a sexual assault. The sexual assault was
14 found to be -- there was insufficient evidence to support the
15 sexual assault allegations. And at that offense, he was just
16 convicted of a burglary and a misdemeanor battery.

17 If he takes the stand, we will go ahead and preview
18 the conviction for the burglary and the battery. Although, if
19 -- since the court has issued the ruling that -- that battery's
20 probably going to come forward.

21 I'm going to request that before the State be allowed
22 to further impeach in relationship to the burglary, that
23 because we will establish that within the ten year time period
24 and since we will establish it, that there really is nothing to
25 impeach. And if there is any portion of the sexual assault

1 that comes in in relationship to that, of which he was
2 acquitted, then we'd be bringing a motion for a mistrial.

3 And I don't anticipate the State's going to do that.
4 I'm just -- I'm just telling you there's some -- there's a
5 couple hot issues that you need to be aware of that are in the
6 --

7 MR. SMITH: There are some land mines --

8 MR. PIKE: -- past.

9 MR. SMITH: -- in this case.

10 MR. PIKE: There are.

11 MR. SMITH: There are plenty of land mines.

12 MR. PIKE: And there --

13 THE COURT: You're not going to do that, Mr. Smith,
14 are you?

15 MR. SMITH: I'm not going to go into the sexual
16 assault. Judge, I'm going to keep my impeachment, if he
17 testifies with regards to his prior felonies, as sanitary as
18 possible. When were you convicted, what jurisdiction and what
19 was the crime, that's it. Even with the DV third.

20 THE COURT: All right. That's all you're allowed to
21 do.

22 MR. SMITH: The only details, Judge -- I'm sorry, I
23 just want to make sure --

24 MR. PIKE: That's okay. No, no, this is what --

25 MR. SMITH: -- Randy knows.

1 MR. PIKE: -- it's for.

2 MR. SMITH: The only detail I'm going to go into with
3 regards to the prior DV obviously is who the witness was that
4 testified against him, because that -- I mean, that kind of
5 comes in. But other than that, the other convictions I'm going
6 to stay away from them with the exception of what's allowed by
7 law.

8 THE COURT: Can you make sure your witness doesn't
9 blurt something out?

10 MR. SMITH: And I certainly won't bait him.

11 MR. PIKE: And then in relationship --

12 THE COURT: You know, we had a mistrial --

13 MR. PIKE: Yeah.

14 MR. SMITH: Right.

15 THE COURT: -- in the next department first witness.

16 MR. SMITH: First witness. Well, we don't anticipate
17 that happening here.

18 MR. PIKE: We don't. We -- and in relationship to
19 the -- the other issues, there are some prior, of course,
20 because it is a -- was a third offense domestic violence, there
21 were two prior misdemeanor convictions for battery domestic
22 violence. I guess, we're just going to have to kind of deal
23 with those if Mr. O'Keefe takes the stand in relationship to
24 whether they're going to bring them in as other bad acts. If
25 they're just going to stick to the felonies, then we won't, but

1 I don't --

2 MR. SMITH: And again, I'm not going to ask the
3 defendant about any of his priors, with the exception of ones
4 that are -- have already been deemed admitted. But, of course,
5 the State reserves his right to cross-examine him if were the
6 defendant to open the door, as it were, to any -- any acts he
7 may have allegedly committed against Mrs. Witmarsh.

8 MR. PIKE: That's correct, and we have -- and may the
9 --

10 THE COURT: I'm sure you've counseled your client
11 carefully.

12 MR. PIKE: We have. In fact, Ms. Palm is present
13 here. In going through this, we've indicated to Mr. O'Keefe
14 that those misdemeanors may not be used as impeachment
15 materials unless he opens the door by indicating that there was
16 never any problems him and Mrs. Witmarsh, or we're trying to
17 just stick to prospective Lee from when they reunited after he
18 got out of prison this time, which -- and I think if we can
19 successfully do that, then we're not going to have an issue
20 with the prior DVs except for the -- the one felony as motive.

21 And if during cross-examination there's anything
22 that's blurted out or Mr. O'Keefe elects to talk about that,
23 then it kind of -- it opens the door for State. So as they're
24 being careful with their witnesses, Mr. O'Keefe, if he'll pay
25 attention right now during trial then he'll understand the --

1 the potential land mines or doors that he will open.

2 THE COURT: Mr. O'Keefe, do you understand what your
3 attorney just stated?

4 THE DEFENDANT: Yes, your Honor, I do.

5 THE COURT: Okay, because if you blurt something out
6 or you don't listen to the question carefully and answer
7 something that's not being asked, you may open the door, and
8 it's going to -- perhaps the other domestic violence issues
9 will come in, and I'm sure that will adversely impact your
10 case.

11 MR. PIKE: And the one other --

12 THE COURT: Do you understand that, sir?

13 THE DEFENDANT: Yes, I do, your Honor.

14 THE COURT: All right.

15 THE DEFENDANT: I do.

16 THE COURT: Okay.

17 THE DEFENDANT: I do have something I'd like it
18 mention, if I may.

19 THE COURT: Well, why don't you talk to Mr. Pike
20 first see if you want to advise the court of it.

21 MR. PIKE: In relationship to -- again, back to
22 Cheryl Morris. Now, there are two aspects of the testimony,
23 and I didn't cover one of it. The Court's ruled on the aspect
24 in relationship to the now testify.

25 The other is the means. As the transcript indicated,

1 we went through and because she was saying that he would --
2 that Mr. O'Keefe said that he would threaten her or would kill
3 her, she demonstrated that he would stab her with a knife, or
4 he said that he would stab her with a knife in the sternum, the
5 center of the sternum which I'm pointing at right now for the
6 record and which she pointed to at the time of the preliminary
7 hearing.

8 In fact, the -- the death producing wound is under
9 the armpit forward with the -- the blade facing back towards
10 the back, the cutting edge facing back towards that. So that
11 is dissimilar enough that I -- I think that that portion of the
12 testimony is not -- is not probative and certainly is
13 prejudicial if it's says he's going to do it with a knife and
14 then pointing to a specific area that is, given the size of the
15 victim in this case, is probably no more than a foot away.

16 MS. PALM: And your Honor, if I could just clarify
17 that for a second because her -- she made statements that he
18 had told her and demonstrated to her how he would kill people
19 with a knife. That, I think, is completely irrelevant and had
20 nothing to do with Victoria Witmarsh. She never said that he
21 was going to do that exactly to Victoria Witmarsh. Just that
22 she had said he said he was going to kill Victoria Witmarsh.
23 Those are two separate things.

24 So in reference to him demonstrating how he would
25 kill people with the knife, we would ask that they caution her

1 not to go into that because that hasn't been noticed as a bad
2 act, as well as any prior domestic violence against her has
3 also not been noticed.

4 MR. PIKE: We've done that.

5 MS. PALM: Okay.

6 MR. PIKE: Yeah.

7 MS. PALM: Sorry, I was late to the game.

8 MR. SMITH: Judge -- Judge, the defendant's stating
9 to another person that he has the ability to kill somebody in a
10 specified means is not a bad act. It's not a crime to say --
11 for instance, if I'm a sniper and I'm in the Marine Corp., and
12 I tell one of my friends, "You know, I'm really good with a 30
13 odd 6 from 500 yards," it's not a crime.

14 But then if I go ahead and use -- and kill somebody
15 with that same means, certainly the Government in prosecuting
16 me should be able to use evidence that I indicated that I have
17 a proficiency at killing somebody in that manner. That's not a
18 bad act, and that's our position. That's why we didn't file
19 the motion -- we didn't file a motion saying, you know, we
20 should be able to get in that the defendant or stated to Ms.
21 Morris that he has a proficiency with knives and can use them.
22 That's not a bad act.

23 THE COURT: I'm not interpreting it as a bad act, so
24 --

25 MR. SMITH: And so Ms. Morris should certainly be

1 allowed to testify to that.

2 THE COURT: I'm going -- she will be allowed to
3 testify to that.

4 MR. SMITH: Thank you.

5 THE COURT: Anything else, Mr. Pike?

6 MR. PIKE: No, your Honor.

7 THE COURT: Ms. Palm? Anything else, Mr. Smith?

8 MR. SMITH: We have one thing, Judge. One of our
9 officers, Christopher Hutcherson, when he arrived at the scene,
10 the defendant made some spontaneous statements. Specifically
11 the one that we want to address is one where the defendant
12 allegedly stated to Officer Hutcherson, "Let's go, let's do the
13 ten years."

14 It's the State's position that that's a statement
15 showing a consciousness of guilt. Now, I know it's kind of a
16 double whammy in that the defendant is saying "let's do the ten
17 years", which if it comes out in that fashion, the jury would
18 then be given evidence regarding sentencing.

19 So what the State wanted to suggest with the defense
20 counsel's agreement, and with your Honor even ruling that it's
21 admissible, is that Officer Hutcherson be allowed to say
22 something to the effect that the defendant stated, "Let's go,
23 let's do the prison time," or "Let's go, let's do something
24 like that."

25 But to sanitize it where he doesn't say the quantity

1 There's no physical evidence to support another
2 theory. There's in fingerprints. There's nothing. There's no
3 witnesses. The State has alleged an attempt -- or death by
4 intentional stabbing, and that's what they have to prove, and
5 they have not done it. They want wanted to show you that Brian
6 had a motive to kill Victoria by calling Cheryl Morris to
7 testify. And I want you to consider instruction 7 when you're
8 thinking about Cheryl Morris' testimony.

9 And that tells you that you can weigh her credibility
10 based upon, among other things, her relationship to the
11 parties, her motives, her feelings. And if you think she's
12 lied about anything, then you can throw out her entire
13 testimony. And I submit to you that she had a motive to lie.

14 Cheryl Morris was a woman scorn. Brian hurt her, and
15 she had a right to be angry, and he's not disputing that. He
16 was not a good guy. He cheated on her, he lied to her. He let
17 her put a car in his name. That's a shameful thing, but that
18 does not make him guilty of murder.

19 But Cheryl Morris is unbelievably upset, and after
20 she hears about Victoria's death, she goes to the police. They
21 don't go to her. She goes to them. She calls them. She says
22 I want to talk to you. She testified at the preliminary
23 hearing, and then we hear her testimony yesterday at trial, and
24 she's telling a story about how when she went to visit Brian,
25 he made some statements to her about what occurred, and it's

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1 from Mr. DeSalvio. She went to his MINDS counseling with him.
2 He took her to see his young daughters. That's not something
3 you do if you're planning to kill somebody or if you want to
4 kill somebody or you hate somebody. These two people loved
5 each other.

6 Even the State's witness, Jimmy Hatchcoos, their next
7 door neighbor, said that they were a loving and affectionate
8 couple. That's what he saw the whole time that they were
9 living together for that two months. You saw photographs of
10 their little apartment, Defense Exhibit M. This place was a
11 home. That apartment was nice. It was a home for these two
12 people, and that's where they were planning their future
13 together.

14 And what was Brian saying when Cookie and Todd went
15 in that apartment? He was trying to pick her up. He was
16 saying baby, don't do this to me. Baby, wake up. Wake up. He
17 wasn't responsive to them. He was focused on her. He wants
18 her to get up. He doesn't know what's the matter. He is in a
19 drunken fog.

20 Should he have called for help? Of course. But he
21 told you why he didn't. He didn't tonight leave Victoria. And
22 if this was an intentional thing, don't you think he would have
23 done it in a way to cover it up? That he would have hid some
24 evidence or tried to take off? He wasn't leaving Victoria no
25 matter what because he loved Victoria.

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1 not anything he remembers ever telling her about the case, and
2 I'm not sure why she would say it.

3 I mean, she's saying that Victoria was trying to stab
4 him, and then he didn't remember something. And maybe she
5 thinks that helps him now. Maybe she's feeling guilty about
6 saying the things before that he had said he wanted to kill
7 Victoria. I don't know why she did it, but it doesn't make
8 sense, and Brian never told her those things, and I think that
9 her testimony can be discredited.

10 She also told you that Brian preferred Victoria over
11 her because Victoria was submissive. Well, she also said that
12 Victoria called her five times wanting to talk about how she
13 wants to be with Brian and why does Cheryl want to be Brian or
14 whatever the conversation was. But she's yelling at her. I
15 don't think that's submissive. A woman who is calling the
16 girlfriend of her former boyfriend and yelling at her is not a
17 submissive woman.

18 Brian loved Victoria and Victoria loved Brian. And
19 in their sad world, these two fragile and damaged people found
20 each other, and they loved each other. And when they got back
21 together, they did it -- Brian did it knowing he was risk his
22 health because of her Hepatitis C. She did it wanting to be
23 with him. And they were looking forward to a future together.
24 They made plans for the future. They start the living
25 together. He took her to meet his union friends. You heard

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1 Nothing makes sense about his reaction other than
2 that he was in a drunken stupor, an alcoholic haze and a
3 severely altered state. Nothing makes sense about it. It's
4 not how a normal person acts. And as far as evidence of his
5 drunkenness, we were handicapped in showing you how severe his
6 drunkenness was because detectives --

7 MR. SMITH: Objection, Judge. It's improper -- I
8 think she's going to make an improper argument.

9 MS. PALM: I'm going to say they didn't obtain his
10 blood or breath.

11 THE COURT: All right.

12 MS. PALM: Because they did not obtain his blood or
13 breath sample. They could have. It would have been easy. It
14 was available. They knew how intoxicated he was, and they
15 didn't do it. George Schiro told you that that's a useful and
16 accepted practice in an investigation such as this.

17 Because we don't have it, we can't give you a
18 quantitative analysis. We can't give you a number. We can't
19 ever tell you what his alcohol level was at. But you can see
20 from the video yourself five hours later when they're doing the
21 penis swab, he still can't stand up straight. He's still that
22 intoxicated.

23 We had a lot of the State's witnesses come in here
24 and deny that they noticed any symptoms of intoxication and,
25 you know, maybe one of them smelled a little alcohol, but

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1 nobody was saying yeah, yeah, he was bad off. We didn't have
2 any evidence of that until we got the use of force report. And
3 that use of force report said that Officer Ballejos' impression
4 of Brian at the scene were that he was -- I want to make sure I
5 get the words right. I think it was extremely intoxicated
6 slash mentally ill. That was his impression. We didn't have
7 one document telling us that. There was not one report telling
8 us that until we obtained that use of force report. And then
9 the other officers came to the stand, and when asked about
10 that, they said oh, yeah, we don't disagree with him.

11 Todd Ambruster, luckily we had the State's 911 call
12 when he calls 911. And they ask him is -- they're asking well,
13 is the suspect intoxicated. He says very much so. So we know
14 that he was. And he admitted on cross that he's disoriented
15 and he's stumbling around and unsteady on his feet.

16 What is clear from all of that is that Brian's
17 ability to perceive, to relate and to remember was severely
18 impaired at the time of the incident and later when he's
19 talking about the officers. And I don't know if you noticed,
20 but there were quite a few inconsistencies between the
21 statements of the arresting officers because we had a morning
22 of officers coming, all the ones that entered the apartment,
23 and they're telling you different things about the lies, who
24 went into the room, who carried him out. And I don't fault
25 them for that because when you have that many people telling

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1 MS. PALM: Prescription drugs, I said.

2 THE COURT: All right, prescription drugs.

3 MS. PALM: I think Dr. Christensen testified that it
4 was an overdose.

5 THE COURT: Okay. Go ahead. I'm going to allow --

6 MS. PALM: Thank you.

7 THE COURT: -- your argument.

8 MS. PALM: Her blood alcohol level was a .24. And
9 that is three times the legal limit for driving. She had high
10 levels of Effexor in her blood, and you heard from Dr.
11 Christensen about the risks and side effects of that kind of
12 dosing. It can lead to seizures. It can lead to confusion,
13 anxiety, and agitation. These substances aren't meant to be
14 combined. Alcohol alone has its own toxic effects.

15 Brian told you what affected his ability to give a
16 statement to the detectives when they were questioning him
17 And you know, Detective Wildermand was extremely patient in that
18 questioning. That was a hard and difficult thing. And Brian
19 is an obnoxious drunk. You watched that video, and you're
20 thinking stop being so obnoxious. But he was also just about
21 drunk, and some people are like that when they're drunk. And
22 he couldn't remember, and he was trying to remember. And you
23 could see parts over the video where he's trying to remember.
24 He's saying he's trying to think. He's saying just wait, just
25 wait.

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1 the same story, you're going to get inconsistencies.

2 These people were sober. But this was a highly
3 exciting event, and these trained officers still got the
4 details wrong. Well, what is Brian, who is drunk out of his
5 mind supposed to do, and he's being faulted because he doesn't
6 -- didn't have perfect recall when they were questioning him
7 when he was still drunk out of his mind.

8 No one is questioning or faulting the behavior of the
9 arresting officers in this case. Brian was acting nuts, and
10 they had every right to take him, and he knows that. And
11 nobody's saying that they did anything wrong by their actions.
12 Thank God that there's brave men and women who are willing to
13 go into situations that are bloody and they don't know what
14 they're walking into. Thank God for them. We're not saying
15 that they did anything wrong. We're just pointing it out that
16 it was a chaotic situation, and to the extent that anybody had
17 anything to say other than he was extremely intoxicated, it's
18 because there's so many people in the room and so much going
19 on, and it was that way for Brian, too.

20 We also know that Victoria abused both alcohol and
21 prescription drugs that evening. Her blood alcohol level was
22 --

23 MR. SMITH: Objection, Judge. That misstates the
24 evidence. There's no evidence that she abused drugs that
25 evening.

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1 So they can't now come in here and deny that he's
2 confused. When they took advantage, they knew he was confused
3 because they were because they were telling him she's still
4 alive. They had to think he was confused enough to believe
5 that she was still alive because they kept that out through the
6 entire interview until the very end when they told him she's
7 dead, and then he breaks down crying.

8 That's alcohol, ladies and gentlemen. That's not my
9 intent to deceive. And so in summary, I submit to you that the
10 State has not proved their burden of proving beyond a
11 reasonable doubt and overcoming the presumption of innocence
12 that Brian committed any kind of intentional killing whether
13 that's first or second degree murder or voluntary manslaughter.

14 If you think he's negligent in anything he did that
15 morning night, that's involuntary manslaughter. That's not a
16 murder. It's not voluntary manslaughter. Victoria started the
17 actions that led to her death, and this was an accident and a
18 tragic ending and that's all. Thank you.

19 THE COURT: Thank you, Ms. Palm. Mr. Smith.

20 MR. SMITH: Well, we're almost done. I just want to
21 thank all of you guys for your patience, and I know it's been a
22 long week, and we've asked you to consider a lot of evidence.
23 And it's kind of my job to kind of address some of the points
24 that Ms. Palm raised without taking too long and addressing
25 every little point because I'm going to trust that you 12 -- 13

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1 reasonable men and women can figure out some of the things
2 yourself.

3 The important things I do have to address, so please
4 bear with me if I take a little bit longer than you
5 (indiscernible). Folks, one of the things that I
6 first want to talk about is, you know, the State of Nevada
7 doesn't have the luxury of picking who the victims of a crime
8 are. And it's important for you guys to realize that because
9 here we have a woman who has admittedly a .24 blood alcohol
10 level in her system. And as we've heard, that's three times
11 the legal limit.

12 But let me qualify that. That's three times the
13 legal limit if you're driving. If you're sitting in your
14 house, you can have whatever type of liquor that you want or as
15 long as you're not behind the wheel of a car. That brings me
16 in the picture that Ms. Palm just placed to try and get you to
17 believe that Victoria was driving that car simply because one
18 the seats was laid back. There's no evidence as to who was
19 actually driving that car. Keep that in mind.

20 Pictures do say a thousand words. Sometimes they
21 don't say what the defendant want you to think they say. Now,
22 the only people who have a choice against -- with regards to
23 the people that they commit crimes against are the people that
24 commit the crimes, like this man right here. He had a choice
25 that night.

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ROUGH DRAFT TRANSCRIPT

1 We've heard she had a .24. We heard she was taking
2 anti-depressants. But, I mean, does that alone that she
3 deserved to have what happened to her on this night? Of
4 course, not. Does that mean that because of that, the
5 defendant is absolved from criminal liability? Of course, not.
6 Now, I'm by no means trying to suggest that we still don't have
7 the burden of proof.

8 But what I want to import upon you is that Victoria
9 Wismarsh's condition is irrelevant so long as we prove that the
10 defendant committed a crime against her. She's still a victim
11 of a crime.

12 Now, got some common sense for you. And I call this
13 things you don't do if you kill someone in self-defense and/or
14 you're in the guilty of murder. And I have a little asterisk.
15 And that asterisk say no matter how much you've had to drink.
16 Just bear with me. It's not long.

17 Number one, say she stabbed herself initially, but
18 then change your name and said well, no she attacked me.
19 Number two, refuse to allow medical assistance to be provide to
20 that person. Number three, resist arrest. Number four, fall
21 asleep after you've just killed them. Number five, decline to
22 call 911, but then lie to the police when they're interviewing
23 you and say well, yeah, I did. The next one, say tack someone
24 who's trying to provide assistance. The next one, say let's
25 go, let's do the ten years. Another one, no way possible she

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ROUGH DRAFT TRANSCRIPT

1 This case is about choices, folks. He want you to
2 give him a pass because he's an alcoholic. But he's testified
3 that I acknowledge that I fell off the wagon. This case is
4 about choices. It's about the choice that Brian O'Keefe made
5 on November 5th, 2008. He wants you to believe that he was no
6 drunk that night there is no way he could have intentionally
7 taken his life -- or taken Victoria Wismarsh's life. And we'll
8 talk a little bit more about that in a second.

9 But what he wants you to believe is not supported by
10 common sense. And because we don't have a witness who can say
11 I saw Mr. O'Keefe stab Victoria Wismarsh, you have to use a lot
12 of your common sense. And that's no different -- I mean, think
13 about it, folks, in a murder trial it's not really important
14 that we have a witness because a lot of the murders are
15 committed outside the view of another person except the person
16 that's killed. That's why the law allows you to take into
17 consideration circumstantial evidence.

18 And let's talk about common sense. And I apologize,
19 folks. I don't have the Power Point. But it says you must
20 bring to the consideration of the evidence your everyday common
21 sense and judgment as reasonable men and women. Thus, you're
22 not limited to what you see in here, but you can kind of figure
23 things out yourself. The evidence is going to point you in the
24 right direction.

25 And let's talk a little bit about Victoria Wismarsh.

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ROUGH DRAFT TRANSCRIPT

1 did this to herself. Now, remember, he says that when he
2 police are not inside that room. He's sitting inside that room
3 by himself thinking nobody's paying attention to him. He says
4 there's no way possible she did this to herself. It is at 2:06
5 a.m. on that video.

6 Now, we're asking you to make a really important
7 decision, folks. And I really hope that because this has been
8 a long trial that you don't rush through some of the important
9 decisions that we're asking you to make. That video's going to
10 be available to you. That video also tells you a lot of
11 things. It also speaks a thousand words because it shows the
12 demeanor. And you can see on that video that he might be a
13 little tipsy, but he's not completely drunk that you would
14 forget how you killed somebody.

15 Let me continue. Give the police false information
16 about the victim. Take her pants off while she's bleeding like
17 a stuffed pig. Leave the person looking like this, meaning the
18 pictures that we've shown. And I don't want to belabor the
19 point by keep on showing you guys the photos. You guys can --
20 you guys are going to have that to look back.

21 Tell the police come and get her, she's dead. Tell
22 anybody come and get her she's dead. Wait two to three minutes
23 while they lay there injured and bleeding. These are things
24 that you don't do when you unlawfully take the life of another,
25 no matter how drunk you are.

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ROUGH DRAFT TRANSCRIPT

0003063252

1 Now speaking of self-defense, the defendant wants you
2 to believe that this small woman, after they've just been out
3 celebrating, for some reason she decides to wait until they get
4 home, and then she tries to come at him with a knife and tries
5 to stab him repeatedly. But the only thing they has to show
6 for is two, I submit to you, superficial cuts on the sides of
7 his fingers.

8 Now, may I borrow your ruler, Ms. Palm? Now, he said
9 that when she came at him with that knife, he grabbed it but
10 didn't get a good hold of it and she snatched it. Well, the
11 blade is resting - presumably the blade would be against the
12 fingers, and let me make sure I do it right because she said it
13 was in his right hand, and he grabs it like this. But when
14 they snatches it, you would expect the front cuts along the
15 entirety of his hand, not just right here, right there and
16 right there. You're going to have those pictures, and you're
17 going to see that that's where those cuts are.

18 Now, an alternate theory, obviously, is that when
19 you're holding the knife and you stab somebody, it might get in
20 between there and there. That's certainly an alternate theory,
21 and it's one that's supported by the evidence.

22 Furthermore, he's told you he's a trained combat
23 veteran. He's been in Grenada. He got a bronze star for valor
24 some 20 something years ago. I mean, this is like David versus
25 Goliath here, folks. She's an itty bitty woman. His story

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ROUGH DRAFT TRANSCRIPT

1 the reasonableness of his story or the fact that it may or may
2 not comport with some of the photographs you've seen.

3 And let's talk about what he told the police during
4 that interview night after this happened. And I don't want to
5 misquote him, so please bear with me while I find it. Here we
6 go. He didn't stab her. She stabbed herself. Back then he
7 had no idea how he got the cuts on his hand.

8 Now, from that statement he said he walked into the
9 bedroom and said what the F are you doing. That's what he
10 said. He said that's what precipitated this argument. Watch
11 that video, it's on there. He walked in the bedroom and said
12 what the F are you doing, and then he grabs knife.

13 But on the stand he says he walks to the bedroom to
14 hang up his coat, and she comes out, surprised attack, I'm
15 going to get you this time. Those are two completely
16 inconsistent stories. Furthermore, people usually, I'm submit
17 to you, folks, don't remember facts better after several months
18 have passed, whether you're drunk or not. That's actually an
19 incident like this, which I submit to you is what's called
20 sobering experience. It's sobering.

21 Meaning when something like this happens, you kind of
22 get your faculties, back. Perfect example, if you go out and
23 have a couple of drinks -

24 MS. PALM: Your Honor, may we approach.

25 MR. SMITH: Is there an objection?

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ROUGH DRAFT TRANSCRIPT

1 does not make sense. It doesn't add up.

2 Now, Victoria isn't here to tell her side of the
3 story, so it's easy for the defense to get up here and say it's
4 self-defense. She can't tell you that there's no way I tried
5 to stab him with a knife that night or each on the night of her
6 birthday where he tried to tell you where she came at me two
7 days before when she drank some wine.

8 But you heard him say that despite the fact that she
9 allegedly tried to stab him two days before, he lets her go
10 drink some more. Now does that make sense? You're home with
11 your significant other and for some reason they have a couple
12 of bottles to drink. He said she had two bottles. Then they
13 try and kill you or try and stab you. Two days later they say
14 honey, I'm going out to get something to drink. Are you going
15 to say okay? Doesn't add up, folks. Doesn't add up to
16 self-defense drunk or sober.

17 Now, he knows you wouldn't believe that she stabbed
18 herself. So he falls to a plan b, the self-defense plan. He
19 he abandoned that she stabbed herself defense a long time ago.
20 Now, don't forget, folks, he's had some time to think about
21 this. He's been here through the this whole trial, and, in
22 fact, he's the only person who's had the benefit to hear what
23 every other witness had to say. No other witness has been able
24 to do that.

25 So take that into consideration when you think about

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: Quickly, please. Yes.

2 MS. PALM: Yes, there is.

3 (Off-record bench conference).

4 MR. SMITH: Common sense tells you that something
5 like this would be a sober experience, and you'd be able to
6 remember more when it actually happened. An example being if
7 you go out and have a couple of drinks, you're a little tipsy,
8 you don't think you're drunk, too drunk to drive, but you get
9 in your car anyway, and you start driving home. And the next
10 thing you know, you said red and blue lights behind you.
11 Sobering experience. You're like, I need to get myself
12 together. I need to make sure I'm going to be okay. Sobering
13 experience.

14 Now, if you would agree that that's a sobering
15 experience, wouldn't the night that you killed the woman that
16 you love be a sobering experience? You would expect that you
17 would be able to remember every single detail. Now, you've
18 heard evidence that the defendant suffered from blackouts.
19 That's what he said on the stand. But those medical records
20 that you have in evidence said that he also told people that he
21 was trying to get treatment that he never suffered from
22 blackouts. So if he tells you this now, when it would help
23 him, but he doesn't tell you - he doesn't tell people that you
24 would think he would be honest with.

25 Ms. Palm wants you to believe that when he's told

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ROUGH DRAFT TRANSCRIPT

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1 that she's dead, Mr. O'Keefe breaks down and cries. The video
2 didn't support that. What it showed was a person who sat there
3 for several seconds and then began to kind of whine. And you
4 heard the testimony from the detective who was actually there,
5 that he saw no tears, he saw no welling up of her eyes, he saw
6 no reaction. That's because he already knew she was dead. He
7 was just kind of playing a game.

8 Now let's talk about credibility. They've already
9 said the credibility instruction, and we're talking about
10 Cheryl Morris. Now, the defense attorney wants you to believe
11 that Cheryl Morris came in here and basically told you a lie on
12 the stand because she was a jilted ex-girlfriend. But this is
13 the same ex-girlfriend that the defense attorney called and
14 said hey, you know, we think that Mr. O'Keefe's — you still
15 have Mr. O'Keefe's glasses, can you bring them. She brought
16 them.

17 Does that sound like the woman who has an ax to
18 grind? She brought the man's glasses. When asked on the stand
19 well, why are you here, because I was subpoenaed. She's
20 subpoenaed, she gets on the stand, she's take an oath where
21 she's asked questions, she tells the — she provides the
22 answers. She certainly didn't seem like a woman scorn. They
23 want you to believe that this is hell hath no fury like a
24 woman scorned simply because the defendant cheated on her
25 sometime ago.

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ROUGH DRAFT TRANSCRIPT

1 on direct examination, did you ever demonstrate on her how you
2 could kill somebody with a knife? He said well, no, I didn't
3 demonstrate. Well, certainly that can infer that he admits
4 that he at least told her.

5 Why would she make that up? Because she hates him?
6 I don't think so. And let's talk about the testimony of Joyce
7 and Todd and the timing here. The evidence certainly supports
8 that there was noise coming from that apartment for an
9 extensive period of time. Not five minutes, not ten minutes,
10 but for an extensive period of time. And at some point it got
11 to loud that Mr. Toliver went upstairs to find out what was
12 going on. And we all know what happened after that, the police
13 were called.

14 This brings me to circumstantial evidence. You heard
15 Joyce Toliver talk about how she could hear the woman crying
16 during the time that she heard that noise. Some of you might
17 be thinking well, this whole scenario could have been avoided
18 if Ms. Toliver had called the police. That might be true, but
19 that doesn't change the facts of this case, folks. And it
20 doesn't get the defendant off the hook.

21 You got a woman crying, you got loud noises, you have
22 signs of disturbance inside that apartment, inside that
23 bedroom, and you have a woman looking like the way she looks in
24 those photographs with all those bruises. You have an injury
25 to the front of her head. You have an injury to the back of

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ROUGH DRAFT TRANSCRIPT

1 But you also heard that Ms. Wismarsh stopped dealing
2 with Mr. O'Keefe in August when she moved out. And now some
3 six or seven months later he wants you to believe that she still
4 has this pinned up aggression that she would craft this
5 preposterous story about — they want you to believe it's
6 preposterous, but that she would make up this story about what
7 the defendant told her about his underlying disdain or enmity
8 towards Victoria Wismarsh because what had happened.

9 Now, some of you may say but yeah, they were together
10 at the time. Sure, but that doesn't mean that he didn't have
11 some deep seeded disdain for what happened during that time she
12 testified against him in front of a jury of people like you.
13 It doesn't change the fact because there could be an alternate
14 scenario as to what happened that night, and I'll get to that
15 in a second.

16 You heard Ms. Wismarsh say that the defendant told
17 her that he wanted to kill the bitch because she took away
18 three years of his life by testifying against him. Take into
19 consideration that her testimony is corroborated by the
20 evidence. The judgment of conviction that's been admitted into
21 evidence, folks, read it.

22 The defendant said that he served about two years,
23 but I'd ask you this, how would Cheryl know this information
24 unless the defendant told her? Cheryl testified that the
25 defendant told her he was proficient with knives. When asked

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ROUGH DRAFT TRANSCRIPT

1 her head. That's certainly circumstantial evidence of a
2 battery or something that precipitated a stabbing.

3 Now, if he started this, he can't now claim
4 self-defense because the law says the initial aggressor does
5 not have the right to self-defense. That's the law. Ms. Pike
6 — excuse me, Ms. Palm also said that doubt Cheryl Morris'
7 credibility because she called the police. Well, it's
8 reasonable to infer it's because she learned what had happened
9 in that apartment, and she had some relevant information to
10 provide. That's not unlike something that anyone would do
11 under those circumstances. Not just a person who had an ax to
12 grind.

13 The night in question the defendant never said look,
14 this is where I got injured. But not some several months
15 later, he wants to fall back on that as some evidence
16 corroborating that this little woman trying to kill him that
17 night. Folks, it's unreasonable under these circumstances.

18 Now, with regards to the testimony about the DNA, you
19 can't really conclude anything from that but except that two
20 people came into contact with knife, Victoria Wismarsh and
21 Brian O'Keefe. And the reason why is because the defendant
22 doesn't even know what happened to that knife after she got
23 stabbed, and you can see on the pictures that there's
24 pillowcases laying on top of it. There's an indication that
25 the blade may have been wiped off. I mean, you can't just —

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ROUGH DRAFT TRANSCRIPT

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1 you can't really just trust the testimony of Dr. Schiro and
2 that his interpretation means that these wounds are totally
3 defensive because I've shown how they aren't.

4 Now, briefly allow me to talk about the defendant's
5 testimony on the stand. He tells you about his military
6 service some 25 years ago. We know since then some things have
7 happened in his life. The law says that you can take, for
8 instance, his felony convictions as evidence in assessing his
9 credibility, especially when combined with the fact that he's
10 - the story's he's given today is inconsistent with the story
11 he told Cheryl Wymarsh (sic), and it's inconsistent with the
12 story he gave on that videotape.

13 Folks, I'm almost done. Mr. Palm wants you to
14 consider the defendant's actions after this happened as
15 evidence that he didn't mean anything to happen on the night in
16 question, but that's not what the law says. The law says you
17 determine a person's intent at the moment they commit the act.
18 And that makes sense because sure, a lot of times people are
19 sorry that they kill somebody after it's happened and/or before
20 they get caught. But it doesn't mean -- it doesn't make the
21 underlying act any less criminal.

22 Now, in talking about reasonable doubt, the
23 instruction tells you exactly what reasonable doubt is. It
24 says doubt to be reasonable must be actual, not mere
25 possibility or speculation. I submit to you the story that the

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ROUGH DRAFT TRANSCRIPT

1 (Swearing in the marshal)

2 (Outside the presence of the jury)

3 THE COURT: Let the record reflect we're outside the
4 presence of the jury panel. I just want to put on the record
5 when I read the jury instructions, instruction number 3, as was
6 provided to counsel, actually I read it as is, but it was
7 retyped because if you look at line 11, the word instructions
8 was broken up on the line, and that was just retyped. And so
9 the corrected -- or the typed version is provided to the jury.

10 Instruction 42 that was original provided to the
11 attorneys at line 7 and line 8 it says read backs, and I had
12 that -- I read it as play back, but it's originally typed for
13 both counsel and read backs, and so that was fixed.

14 And instruction 43, which you had copies of, was just
15 the instruction that I signed, and the signature line was moved
16 up. So three changes were made and those changes were included
17 in the packet of jury instructions provided to the jury panel.
18 And everyone has provided their cell phone numbers to the
19 clerk, and please within 15, 20 minutes of the court house to
20 be called. It's my understanding is that they wish to
21 deliberate tonight and --

22 MR. PIKE: I plan on staying here --

23 THE COURT: Okay.

24 MR. PIKE: -- until (indiscernible).

25 MS. PALM: Yes, I'll be here, too.

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ROUGH DRAFT TRANSCRIPT

1 defendant gave does not comport with the evidence, and I'm
2 talking about the story he gave today and yesterday on the
3 stand. He said that she fell backwards, he fell on top of her,
4 and somehow she ends up stabbed.

5 Now, folks, if you land on -- I submit to you that if
6 you land on somebody with all your body weight and you weigh
7 180 something pounds and you land on them and a knife goes into
8 them because your entire body weight is on them and they only
9 weigh a hundred pounds, the blade is going to go in a lot
10 further than four inches. It's going to go all the way in
11 because all your weight is on there.

12 But here, the length of the wound was four inches,
13 which is consistent with an intentional stabbing, but
14 consistent with an accidental stabbing where you fall on top of
15 the person holding the knife. That's another part of common
16 sense. So what we're asking you to do here is to use some
17 common sense, realize that the credibility of the State's
18 witnesses shouldn't be questioned under the circumstances of
19 this case, take into the fact -- take in fact that the State's
20 evidence has corroboration. Go ask me to convict him. We've
21 met our burden. The burden is beyond a reasonable doubt. It
22 says that if you feel an abiding conviction and the truth of
23 the charge, there is no reasonable doubt. Thank you.

24 THE COURT: Thank you, Mr. Smith. The clerk will now
25 swear in the marshal to take charge of the jury panel.

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ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right.

2 MS. GRAHAM: Judge, (indiscernible).

3 MR. SMITH: I'll be here but no guarantee I'll be
4 sober.

5 THE COURT: Okay.

6 MS. PALM: Yeah, are either.

7 THE COURT: That's off the record, Michelle.

8 (Court recessed at 4:02:58 p.m. until 7:12:55 p.m.)

9 (In the presence of the jury)

10 THE COURT: You may be seated. I understand that we
11 have a verdict, and Mr. Livermash, are you the foreperson?

12 JUROR NO. 6: Yes, sir.

13 THE COURT: Please hand the verdict form to the
14 marshal. The clerk will now read the verdict.

15 THE CLERK: District Court, Clark County, Nevada,
16 State of Nevada, plaintiff versus Brian Kerry O'Keefe,
17 defendant. Case No. C2566 - 250630, Department No. 17.
18 Verdict. We the jury in the above-entitled case find the
19 defendant, Brian Kerry O'Keefe, as follows: Count one, murder
20 with use of a deadly weapon, open murder, guilty of second
21 degree murder with use of a deadly weapon. Dated this March
22 20th, 2009. Signed by the foreperson, Kirk Livermash. Ladies
23 and gentlemen of the jury, is this your verdict as read? So
24 are you one, so say you all.

25 THE JURY: Yes.

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ROUGH DRAFT TRANSCRIPT

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1 THE COURT: Either party which to have the jury
2 polled?
3 MR. PIKE: Defense does not, your Honor.
4 THE COURT: Okay. All right, at this time the clerk
5 will record the verdict in the court minutes. The defendant is
6 remanded to custody. We'll refer this matter to Department of
7 Parole and Probation for preparation of pre-sentence
8 investigation report inposition of sentence on the following
9 day:
10 THE CLERK: That will be May 5th at 8:00 a.m.
11 THE COURT: Okay, ladies and gentlemen of the jury.
12 I'd like to thank you for your service, and I - Nancy Mirolock
13 was our alternate; is that correct.
14 THE CLERK: That's correct.
15 THE COURT: And I'd like to give you an extra special
16 thanks because you were here all week, you paid attention, and
17 I think you asked some questions, and were the jury - the
18 alternate. I know you were probably as -
19 (Court recessed at 7:15:29 p.m.)
20
21
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23
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ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

ROUGH DRAFT TRANSCRIPT

000310
003256

SECOND AMENDED INFORMATION 8/19/2010
C250630

Exhibit 6

003257

1 AINF
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 CHRISTOPHER J. LALLI
6 Chief Deputy District Attorney
7 Nevada Bar #005398
8 200 South Third Street
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

FILED IN OPEN COURT
AUG 19 2010 20

CHARLES J. SHORT
CLERK OF THE COURT

BY CAROL DONAHOO
DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 BRIAN KERRY O'KEEFE,
14 #1447732

15 Defendant.

Case No. C250630
Dept No. XVII

SECOND AMENDED
INFORMATION

16 STATE OF NEVADA }
17 COUNTY OF CLARK } ss:

18 DAVID ROGER, District Attorney within and for the County of Clark, State of
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

20 That BRIAN KERRY O'KEEFE, the Defendant above named, having committed the
21 crime of MURDER OF THE SECOND DEGREE WITH USE OF A DEADLY
22 WEAPON (Felony - NRS 200.010, 200.030, 193.165), on or about the 5th day of
23 November, 2008, within the County of Clark, State of Nevada, contrary to the form, force
24 and effect of statutes in such cases made and provided, and against the peace and dignity of
25 the State of Nevada, did then and there wilfully, feloniously, without authority of law, and
26 with malice aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing at

27 ///

28 ///

1 and into the body of the said VICTORIA WHITMARSH, with a deadly weapon, to-wit: a
2 knife.

3
4 DAVID ROGER
DISTRICT ATTORNEY
5 Nevada Bar #002781

6 BY Christopher J. Lalli
7 CHRISTOPHER J. LALLI
8 Chief Deputy District Attorney
Nevada Bar #005398

9
10 In addition to any other Notice of Witnesses, names of witnesses known to the
11 District Attorney's Office at the time of filing this Information are as follows:

12 <u>NAME</u>	<u>ADDRESS</u>
13 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
14 BALLEJOS, JEREMIAH	LVMPD #8406
15 BENJAMIN, JACQUELINE DR	ME 0081
16 BLASKO, KEITH	LVMPD #2995
17 BUNN, CHRISTOPHER	LVMPD #4407
18 COLLINS, CHELSEA	LVMPD #9255
19 CONN, TODD	LVMPD #8101
20 CUSTODIAN OF RECORDS	CDC
21 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
22 CUSTODIAN OF RECORDS	LVMPD RECORDS
23 FORD, DANIEL	LVMPD #4244
24 FONBUENA, RICHARD	LVMPD #6834
25 HATHCOX, JIMMY	3955 CHINCHILLA AVE LVNV
26 HUTCHERSON, CHRISTOPHER	LVMPD #12996
27 IVIE, TRAVIS	LVMPD #6405
28 KYGER, TERESA	LVMPD #4191

1	KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV
2	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
3	MALDONADO, JOCELYN	LVMPD #6920
4	MORRIS, CHERYL	C/O DISTRICT ATTORNEY
5	MURPHY, KATE	LVMPD #9756
6	NEWBERRY, DANIEL	LVMPD #4956
7	PAZOS, EDUARDO	LVMPD #6817
8	RAETZ, DEAN	LVMPD #4234
9	SANTAROSSA, BRIAN	LVMPD #6930
10	SHOEMAKER, RUSSELL	LVMPD #2096
11	TAYLOR, SEAN	LVMPD #8718
12	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
13	TOLIVER, CHARLES	1013 N. JONES #101 LVNV
14	TOLIVER, JOYCE	1013 N. JONES #101 LVNV
15	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
16	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
17	WILDEMANN, MARTIN	LVMPD #3516
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26		
27	DA#08F23348X/ts	
28	LVMPD EV#0811053918	
	(TK9)	

WEDNESDAY, AUGUST 25, 2010 R.D.T.

C250630

Exhibit 7

003261

COPY

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

Nov 23 10 21 AM '10

Ann L. Palmer
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 3

WEDNESDAY, AUGUST 25, 2010

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER LALLI, ESQ.
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

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

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1 So we'll see you back in five to ten minutes.

2 (Court recessed at 2:45 p.m. until 2:59 p.m.).

3 (In the presence of the jury).

4 THE MARSHAL: All right, you may be seated, ladies
5 and gentlemen. Let's make sure all cell phones are turned off,
6 please.

7 THE COURT: State ready to proceed?

8 MR. LALLI: Yes, your Honor.

9 THE COURT: And defense ready?

10 MS. PALM: Yes, your Honor, thank you.

11 THE COURT: All right, State, your opening.

12 STATE'S OPENING STATEMENT

13 MR. LALLI: Thank you. May it please the court,
14 Brian O'Keefe was found guilty by a jury of felony battery
15 constituting domestic violence in 2006. The victim in that
16 case, Victoria Whitmarsh is the same woman he murdered on
17 November 5th, 2008.

18 The evidence will show that he stabbed her, that she
19 suffered a fatal stab wound under her arm and that she died as
20 a result of essentially bleeding out. Her death was by no
21 means instantaneous. And really, the murder should come as no
22 surprise. You will learn that the defendant never really got
23 over the fact that Victoria was responsible for putting him in
24 prison.

25 He would say that he wanted to kill the bitch. After

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1 the defendant went to prison, his relationship with Victoria
2 came to an end, at least for a time. Shortly after his
3 release, he began a romantic relationship with a woman by the
4 name of Cheryl Morris. And there was a somewhat eery
5 resemblance between Victoria and Cheryl.

6 You will learn that like Victoria, Cheryl is a small
7 Asian woman. The defendant's girlfriend Cheryl, the two of
8 them became very close, and it was in this context that the
9 defendant shared with Cheryl his feelings about Victoria. And
10 he shared with her his ability to kill.

11 You will learn that the defendant would boast about
12 being in the military. He bragged about knowing how to kill
13 people. And whenever he talked about doing this, he only
14 talked about doing it with a knife.

15 While his relationship with Cheryl was ongoing, the
16 defendant began to secretly see Victoria again. Like most
17 domestic violence relationships, there was a fatal attraction
18 between the two. At one point the defendant even tried to move
19 Victoria into the apartment in which he was living with Cheryl,
20 while Cheryl was still living there. And Cheryl would have
21 nothing to do with it. And she eventually moved out.

22 After a time the defendant took up a relationship in
23 that apartment, 5001, El Parque, Unit 35, along with Victoria.
24 In many ways Victoria Whitmarsh led a tortured life. She
25 suffered from depression. Like many people who suffer from

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1 that disease, she would cut herself at times to cope with her
2 emotions.

3 You will learn that she had attempted suicide before.
4 She took medication to help her deal with her depression. You
5 will learn that at autopsy she had a drug called Effexor in her
6 system, which is an anti-depressant. Victoria had been
7 infected with Hepatitis C, she was estranged from her husband
8 and from her daughter. By all accounts, the evidence will show
9 that she was vulnerable, at times even pathetic.

10 At the time of her death she weighed just 108 pounds.
11 Just the sort of woman the defendant could control. As I told
12 you, the defendant lived in this apartment complex located at
13 5001 El Parque. His unit was the upstairs unit. And you'll
14 learn that many of the neighbors in the apartment complex knew
15 each other, they were somewhat close, somewhat friendly,
16 certainly good neighbors.

17 You will learn about the Tolivers. Charles Toliver,
18 who's known to his friends as Cooky, as well as his wife,
19 Joyce. And the Tolivers lived just below the defendant. Well,
20 back on November 5th of 2008, you will hear from the Tolivers
21 that it was about 10:00 o'clock at night. And Mrs. Toliver is
22 fairly certain of the time because she will tell you that
23 something she did at this period was watched the Soap Opera
24 Network. Night time was kind of her opportunity to catch up on
25 the soaps.

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1 And at about 10:00 o'clock was a soap opera that she
2 would usually watch. Well, on this particular evening at that
3 time she began to hear a disturbance upstairs directly above
4 her apartment. And it continued for some 30 minute, getting
5 louder and louder. Mr. Toliver, Cooky Toliver, is an early
6 riser, he goes to bed early at night. He heard the
7 disturbance. It woke him from a sleep.

8 And in an attempt to let whatever was going on
9 upstairs become aware that they were being bothered, they took
10 a broom and they began to bang the -- the ceiling to make a
11 noise to let the people up above, you know, to cool it, but the
12 noise didn't stop. At one point Mrs. Toliver will tell you
13 that she actually heard a woman crying. And over the course of
14 about ten minutes that crying turned to moaning and then fell
15 silent.

16 Mr. Toliver was quite angry at being awakened and
17 actually ascended those stairs to confront the defendant about
18 making all the noise. When he gets to the front door, he sees
19 the defendant and the defendant tells him come in here and get
20 her. Mr. Toliver walks into the back bedroom and this is what
21 he sees. He sees Victoria's legs on the floor. They are
22 obstructed by the bed. She is naked from the waist down, and
23 there is a great deal of blood in the room.

24 He looks at the defendant and he says man, what the
25 hell have you done? He runs out in an attempt to get help. He

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1 runs to the unit of an individual named Tom Armbruster. Both
2 Todd and Cooky ultimately return to this apartment. They go up
3 the stairs and into the room. Todd enters the room with Cooky
4 just behind him. He sees Victoria's body.

5 The defendant is standing over or close to Victoria
6 and saying words to the effect of come on, get up, come on, get
7 up. Out of nowhere once the defendant realizes that Todd is in
8 the room, he stands up and actually takes a swing at him. And
9 then tells him to get the hell out of here.

10 The evidence will show that the defendant never
11 called the paramedics. He never called for a firefighter. He
12 never called the police. He never called anybody to try to
13 help Victoria Whitmarsh on that evening. But 911 is called.
14 Calls are placed to the authorities. Not by the defendant, but
15 by among other people, Todd Armbruster, and you will hear that
16 911 call.

17 The police begin to arrive almost immediately. They
18 make their way up to the apartment. They enter the living room
19 area of the apartment and they are naturally very cautious.
20 They have received information that there is a woman down who
21 has been stabbed. There's blood in the area, the -- they don't
22 know exactly what to make of the situation. They know that
23 there is a male in the room where the female is at.

24 They enter, they attempt to talk to the defendant.
25 They tell him he needs to come out so that they can help

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1 Victoria. He refuses to come out. He tells them get in here.
2 You will learn what a CIT officer is. A crisis intervention
3 team officer. Metro has a group of officers who are trained in
4 deescalating situations like this. It just so happened that a
5 crisis intervention team or a CIT officer was very close by who
6 makes his way on scene almost immediately.

7 And he begins to explain to the defendant his need to
8 come out of the back room so that officers and paramedics can
9 come in to help Victoria. The police feel as though they're
10 being baited. At one point the defendant says she's alive,
11 come in here and help her or words to that effect. Then he's
12 saying no, she's dead, it's too late. They have no idea what
13 they're dealing with.

14 Eventually, they make the decision that they must
15 enter the back bedroom to remove him so that they can assess
16 Victoria and give her help if she needs it. So you'll learn
17 that officers in a very methodical manner enter the room. As
18 they're entering the room, they see Victoria's body naked from
19 the waist down and the defendant almost laying on her.

20 And what does the defendant do when the police
21 officers enter? He says don't look at her. He's putting her
22 hands out. Don't look at her as though this is my woman and I
23 don't want anybody else to see her in the nude. Eventually, he
24 struggles with the police officers. He refuses to leave. They
25 try to cuff him, he is fighting with them. They have to deploy

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1 to tazer.

2 Eventually, they're able to actually pick him up and
3 move him out of that room. Paramedics are very close by, but
4 unfortunately it's too late. When the first police officer,
5 Sergeant Dan Newberry, reaches Victoria's body, he attempts to
6 find a pulse and he's up able to do so. Paramedics come in,
7 they look for any signs of life, and unfortunately there are
8 none.

9 Now, the defendant is taken out of the immediate area
10 and eventually taken to a police car, he's put in the back seat
11 of a patrol car. And he starts making statements that are
12 spontaneous statements. So in other words, statements that are
13 not in response to any questions that anybody had asked him.

14 And what he says at one point is I swear to God, V --
15 and he would refer to Victoria as V -- I swear to God, V, I
16 didn't mean to hurt you. What I -- what did I do wrong? Let's
17 go do the ten years. Homicide detectives respond to the scene,
18 along with other members of law enforcement. Crime scene
19 analysts, the CSI people that we see on TV sometimes, they
20 respond to the scene.

21 The knife that was used to stab Victoria is located
22 and impounded. It's photographed and packaged for forensic
23 testing. They noticed that the defendant has received a cut on
24 his hand. He has blood on his hand. And what you will learn
25 is that in violent attacks it is not at all uncommon for the

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1 stabber to actually suffer some injury on his hands while
2 perpetrating the crime.

3 Now, the knife that was used to kill Victoria was
4 processed by DNA scientists. And you will learn that they
5 attempted to get fingerprints from the knife. And you will
6 learn of the various techniques they employed, but they were
7 unable to do so. The most they could do was get a partial
8 print on the handle of the knife, but there was not sufficient
9 information on that print to make a comparison.

10 You will learn that the blood on the knife and the
11 knife itself was also processed by a DNA expert by the name of
12 Jennifer Bas. And analyst Bas found just what one would
13 expect. On the very end of the handle and the blood on the
14 very top part of the blade, that blood was the defendant's
15 blood.

16 Blood found in the middle of the blade was determined
17 to be a mixture of Victoria's blood and the defendant's blood.
18 And blood on the very end of the tip of the knife was
19 Victoria's blood.

20 Now, an autopsy was conducted on Victoria's body just
21 two days later on November 7th of 2008. And the autopsy was
22 conducted by a medical doctor by the name of Jacqueline
23 Benjamin. And she will tell you that Victoria died as a result
24 of a stab wound to the right side of her chest.

25 However, there are many other things that Dr.

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1 Benjamin was able to learn during the course of the autopsy.
2 As part of that process, the blood is analyzed. And as I
3 alluded to before, she found evidence of Effexor in Victoria's
4 blood. She also found a large quantity of alcohol. Her blood
5 alcohol was .24. Probably some of you have heard that the legal
6 limit in the State of Nevada is .08. Well, Victoria's was .24,
7 well over that limit.

8 There was also a great deal of blunt force trauma on
9 Victoria's body. And that really is just a fancy way of saying
10 that her body was badly bruised. Now, while it is true that
11 Victoria suffered from the disease of Hepatitis C, which
12 accentuates bruising in the body, in other words it makes it
13 more visible, you will learn that each bruise on Victoria's
14 body represents some form of trauma or hitting.

15 Many of the bruises will be described by Dr. Benjamin
16 as acute or recent. But you will learn that Victoria suffered
17 trauma on her head, both the front of her head and the back of
18 her head. The head trauma was acute. She had trauma on her
19 chest. She had trauma on her back. She had trauma on her
20 buttocks. She had suffered trauma on her left arm, on her
21 right arm, on her left leg, on the right leg.

22 So much bruising, in fact, on this woman's body that
23 Dr. Jacqueline Benjamin listed blunt trauma as an other
24 significant condition in her death. An anonymous domestic
25 violence survivor once made this observation. If you can't be

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1 thankful for what you have, be thankful for what you have
2 escaped. Well, unfortunately Victoria was not able to escape
3 from the defendant, and he murdered her in a brutal way.

4 At the conclusion of this trial we will ask you for
5 justice for Victoria's murder. We will ask you to find the
6 defendant guilty of murder of the second degree with use of a
7 deadly weapon. Thank you.

8 THE COURT: Thank you, Mr. Lalli. Ms. Palm, do you
9 wish to exercise your right for an opening at this time?

10 MS. PALM: I do, your Honor.

11 THE COURT: All right.

12 DEFENSE'S OPENING STATEMENT

13 MS. PALM: Thank you. Good afternoon again, ladies
14 and gentlemen. This is where we get to give our road map of
15 how the evidence -- how we expect the evidence to come in and
16 what we would like you to pay attention to as it comes in, what
17 we think is important about this case.

18 This -- the evidence is going to show you that this
19 is not a murder case. This is not any kind of killing by my
20 client, Brian O'Keefe. The only way you can get to murder in
21 this case is by exaggerating, exaggerating what the bruises on
22 Victoria's body mean. By that mean, I mean she had advanced
23 cirrhosis. She had Hepatitis C. She was drinking that night.

24 She -- from Hepatitis C and cirrhosis, you bruise on
25 slighter than normal contact. Some of those bruises on her

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WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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PLAINTIFF'S WITNESSES:

Jacqueline Benjamin	*	87	107	
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* * *

EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
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PLAINTIFF'S EXHIBITS:

Exhibits 81 through 120	60
Exhibit 130	61

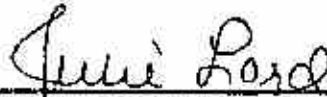
DEFENDANT'S EXHIBITS:

Exhibits A through J	88
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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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TUESDAY, AUGUST 31, 2010 R.D.T

C250630

Exhibit 8

003275

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DISTRICT COURT
CLARK COUNTY, NEVADA

Ann L. Johnson
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

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER LALLI, ESQ.
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

PATRICIA PALM, ESQ.
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

103276

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

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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 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.

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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?

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1 (Off-record bench conference)

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

3 MS. PALM: Thank you.

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

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

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

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

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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

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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 bare 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

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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

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

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

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

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

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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

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

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

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

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

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

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

7 THE COURT: All right.

8 (Off-record bench conference).

9 THE COURT: Go ahead, Ms. Graham.

10 MS. GRAHAM: Judge, can we approach?

11 (Off-record bench conference).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN K. O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA
Respondent.

Supreme Court No.:
District Court Case No.: 08C250630
Electronically Filed
Dec 01 2015 10:57 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S APPENDIX – VOLUME XVII – PAGES 3200-3399

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25	Motion to Withdraw Counsel filed on 11/28/11	3193-3198
26	Motion to Withdraw Counsel for Conflict and Failure to Present Claims when I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant Chapter 34 filed on 06/08/15	5148-5153
27	Motion to Withdraw filed on 09/14/10	1434-1437
28	Notice of Appeal filed on 03/13/14	4843-4849
	Notice of Appeal filed on 04/11/14	4858-4861
	Notice of Appeal filed on 05/21/09	0332-0333
	Notice of Appeal filed on 07/31/15	5467-5472
	Notice of Appeal filed on 08/11/15	5478-5483
	Notice of Appeal filed on 08/29/14	4923-4924
	Notice of Appeal filed on 10/21/15	5552-5553
	Notice of Appeal filed on 11/03/15	5569-5571

1	Notice of Appeal filed on 11/21/14	5067-5069
2	Notice of Change of Address filed on 06/06/14	4864-4865
3	Notice of Defendant's Expert Witness filed on 02/20/09	0180-0195
4	Notice of Defendant's Witnesses filed on 03/06/09	0224-0227
5	Notice of Entry of Findings of Fact, Conclusion of Law and Order filed on 10/06/15	5537-5546
6	Notice of Expert Witnesses filed on 03/05/09	0222-0223
7	Notice of Motion and Motion by Defendant O'Keefe for a Reasonable Bail filed on 09/24/10	1441-1451
8	Notice of Motion and Motion by Defendant O'Keefe for Discovery filed on 08/02/10	1211-1219
9	Notice of Motion and Motion by Defendant O'Keefe for Evidentiary Hearing on Whether the State and CCDC have Complied with Their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/02/10	1220-1239
10	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1064-1081
11	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 07/21/10	1099-1116
12	Notice of Motion and Motion by Defendant O'Keefe to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/02/10	1199-1210
13	Notice of Motion and Motion by Defendant O'Keefe to Dismiss on Grounds of Double Jeopardy Bar and Speedy Trial Violation and, Alternatively, to Preclude State's New Expert Witness, Evidence and Argument Relating to the Dynamics or Effects of Domestic Violence and Abuse filed on 01/07/11	2785-2811
14	Notice of Motion and Motion by Defendant O'Keefe to Preclude Expert Testimony filed on 08/16/10	1284-1291
15	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1047-1063
16	Notice of Motion and Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 07/21/10	1082-1098
17	Notice of Motion and Motion by defendant O'Keefe to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/03/11	1682-2755
18	Notice of Motion and motion by Defendant O'Keefe to Suppress his	

1	Statements to Police, or, Alternatively, to Preclude the State from	
2	Introducing Portions of his Interrogation filed on 08/02/10	1152-1198
3	Notice of Motion and Motion for Leave of Court to File Motion for	
4	Rehearing – Pursuant to EDCR, Rule 2.24 filed on 08/29/14	4914-4921
5	Notice of Motion and Motion in Limine to Admit Evidence of Other Bad	
6	Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence	
7	Pursuant to 48.061 filed on 01/06/11	2762-2784
8	Notice of Motion and Motion to Admit Evidence of Other Crimes filed on	
9	02/02/09	0150-0165
10	Notice of Motion and Motion to Admit Evidence of Polygraph	
11	Examination Results filed on 03/29/12	3412-3415
12	Notice of Motion and Motion to Dismiss based Upon Violation(s) of the	
13	Fifth Amendment Component of the Double Jeopardy Clause,	
14	Constitutional Collateral Estoppel and, Alternatively, Claiming Res	
15	Judicata, Enforceable by the Fourteenth Amendment Upon the States	
16	Precluding State's Theory of Prosecution by Unlawful Intentional	
17	Stabbing with Knife, the Alleged Battery Act Described in the Amended	
18	Information filed on 03/16/12	3201-3224
19	Notice of Motion and Motion to Seal Records filed on 03/22/12	3416-3429
20	Notice of Motion and Motion to Waive Filing Fees for Petition for Writ of	
21	Mandamus filed on 12/06/13	4695-4697
22	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
23	09/23/15	5517-5519
24	Notice of Motion and Motion to Withdraw as Attorney of Record filed on	
25	09/29/15	5525-5527
26	Notice of Motion filed on 01/13/14	4721
27	Notice of Motion filed on 01/21/14	4748
28	Notice of Motion filed on 01/27/14	4760
	Notice of Motion filed on 02/24/14	4810
	Notice of Motion filed on 03/04/14	4833
	Notice of Motion filed on 06/08/15	5154-5160
	Notice of Motion filed on 07/23/14	4890
	Notice of Motion filed on 08/29/14	4922
	Notice of Motion filed on 09/15/14	4953
	Notice of Witness and/or Expert Witnesses filed on 02/03/09	0166-0167
	Notice of Witnesses and/or Expert Witnesses filed on 02/17/09	0178-0179
	NV Supreme Court Clerks Certificate/ Judgment Affirmed filed on	
	02/06/15	5072-5081
	NV Supreme Court Clerks Certificate/Judgment Affirmed filed on	
	07/26/13	4653-4661
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
	06/18/14	4866-4870
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	
	03/12/15	5089-5093
	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on	

1	09/28/15	5520-5524
2	NV Supreme Court Clerks Certificate/Judgment Dismissed filed on 10/29/14	5062-5066
3	O'Keefe's Reply to State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/13/10	1256-1265
4	Opposition to State's Motion to Admit Evidence of Other Bad Acts filed on 02/06/09	0169-0172
5	Order Authorizing Contact Visit filed on 03/04/09	0219-0220
6	Order Authorizing Contact Visit filed on 08/12/10	1253-1254
7	Order Denying Defendant's Ex Parte Motion to Extend Prison Copywork Limit filed on 08/13/15	5486-5488
8	Order Denying Defendant's Ex-Parte Motion for Reimbursement of Incidental Costs Declaring Defendant Ingigent and Granting Forma pauperis filed on 03/11/14	4840-4842
9	Order Denying Defendant's Motion for Relief From Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issues any Remand, Mandare or Remittature filed on 09/04/14	4927-4929
10	Order Denying Defendant's Motion to Dismiss filed on 04/11/12	3434-3435
11	Order Denying Defendant's Motion to Seal Recoreds and Defendant's Motion to Admit Evidence of Plygraph Examination filed on 05/24/12	3448-3449
12	Order Denying Defendant's Petition for Writ of Mandamus or in the Alternative Writ of Coram Nobis; Order Denying Defendant's Motion to Waive Filing Fees for Petition for Writ of Mandamus; Order Denying Defendant's Motion to Appoint Counsel filed on 01/28/14	4761-4763
13	Order Denying Defendant's Pro Per Motion for Judicial Notice- The State's Failure to File and Serve Response in Opposition filed on 04/01/14	4855-4857
14	Order Denying Defendant's Pro Per Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit filed on 07/15/15	5464-5466
15	Order Denying Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 03/25/14	4852-4854
16	Order Denying Defendant's Pro Per Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 07/15/15	5461-5463
17	Order Denying Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 11/19/15	5574-5575
18	Order Denying Motion to Disqualify filed on 10/06/14	5037-5040
19	Order filed on 01/30/09	0149
20	Order filed on 11/06/10	1462-1463
21	Order for Petition for Writ of Habeas Corpus filed on 10/15/14	5051
22	Order for Production of Inmate Brian O'Keefe filed on 05/26/10	1032-1033
23	Order for Return of Fees filed on 11/10/11	3183

1	Order for Transcripts filed on 04/30/12	3442
2	Order Granting and Denying in Part Defendant's Ex-Parte Motion for Production of Documents (Specific) Papers, Pleadings, and Tangible Property of Defendant filed on 02/28/14	4818-4820
3	Order Granting Ex parte Motion for Defense Costs filed on 07/01/10	1044-1045
4	Order Granting Request for Transcripts filed on 01/20/11	2966-2967
5	Order Granting Request for Transcripts filed on 04/27/11	3043
6	Order Granting Request for Transcripts filed on 09/14/10	1430-1431
7	Order Granting Request for Transcripts filed on 09/16/10	1438-1439
8	Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe for Discovery filed on 08/23/10	1394-1395
9	Order Granting, in Part, and Denying, in Part, Motion by Defendant O'Keefe to Preclude the State from Introducing at Trial Other Act or Character Evidence and Other Evidence Which is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 09/09/10	1427-1429
10	Order Granting, in Part, the State's Motion to Admit Evidence of Other Bad Acts filed on 03/13/12	3199-3200
11	Order Releasing Medical Records filed on 04/08/11	3039-3040
12	Order Requiring Material Witness to Post Bail or be Committed to Custody filed on 03/10/09	0230-0231
13	Order Shortening Time filed on 08/16/10	1283
14	Petition for a Writ of Mandamus or in the Alternative Writ of Coram Nobis filed on 12/06/13	4663-4694
15	Petition for Writ of Habeas Corpus or in the Alternative Motion to Preclude Prosecution from Seeking First Degree Murder Conviction Based Upon the Failure to Collect Evidence filed on 01/26/09	0125-0133
16	Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive I Based On Subject-Matter of Amended Information Vested in Ninth Circuit by notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since filed on 09/15/14	4940-4949
17	Petitioner's Supplement with Exhibit of Oral Argument Scheduled by the Ninth Circuit Court of Appeals for November 17, 2014, Courtroom #1 filed on 10/01/14	4984-4988
18	Pro Se "Reply to State's Opposition to Defendant's Pro Se Motion to Modify and/or Correct Illegal Sentence filed on 03/04/14	4821-4832
19	ProSe "Reply" to State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/24/14	4792-4799
20	Receipt of Copy filed on 01/03/11	2761
21	Receipt of Copy filed on 01/12/11	2812
22	Receipt of Copy filed on 01/12/11	2813
23	Receipt of Copy filed on 01/18/11	2876
24	Receipt of Copy filed on 01/27/09	0134
25	Receipt of Copy filed on 01/30/09	0146
26	Receipt of Copy filed on 02/06/09	0168
27		
28		

1	Receipt of Copy filed on 03/04/09	0221
2	Receipt of Copy filed on 03/24/09	0323
3	Receipt of Copy filed on 05/24/10	1031
4	Receipt of Copy filed on 06/13/11	3163
5	Receipt of Copy filed on 06/30/10	1036
6	Receipt of Copy filed on 08/02/10	1240
7	Receipt of Copy filed on 08/02/10	1241
8	Receipt of Copy filed on 08/02/10	1242
9	Receipt of Copy filed on 08/02/10	1243
10	Receipt of copy filed on 08/13/10	1255
11	Receipt of Copy filed on 09/14/10	1432
12	Receipt of Copy filed on 09/17/10	1433
13	Receipt of Copy filed on 09/21/10	1440
14	Receipt of File filed on 07/01/10	1046
15	Reply in Support of Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on 08/25/15	5500-5510
16	Reply to State's Response to Defendant's Pro Per Post-Conviction Petition for Habeas Corpus filed on 06/16/15	5423-5432
17	Reply to State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus filed on 08/24/15	5489-5499
18	Request for Rough Draft Transcripts filed on 10/21/15	5549-5551
19	Request for Rough Draft Transcripts filed on 07/17/12	3458-3460
20	Request for Certified Transcript of Proceeding filed on 09/09/09	0772-0723
21	Request for Rough Draft Transcript filed on 05/21/09	0329-0331
22	Request for Rough Draft Transcripts filed on 11/20/12	4629-4631
23	Return to Writ of Habeas Corpus filed on 01/29/09	0135-0145
24	Second Amended Information filed on 08/19/10	1326-1328
25	State's Opposition to Defendant's (Ex-Parte) "Motion for Reimbursement of Incidental Costs Subsequent the Courts Declaring Defendant Indigent and Granting Forma Pauperis" filed on 02/07/14	4768-4791
26	State's Opposition to Defendant's Motion for a Reasonable Bail filed on 09/27/10	1452-1461
27	State's Opposition to Defendant's Motion for Judicial Notice - The State's Failure to File and Serve the Response in Opposition filed on 03/10/14	4834-4839
28	State's Opposition to Defendant's Motion to Dismiss filed on 03/21/12	3407-3411
29	State's Opposition to Defendant's Motion to Preclude the State from Introducing at Trial Improper Evidence and Argument filed on 01/12/11	2814-2871
30	State's Opposition to Defendant's Motion to Seal Records filed on 04/05/12	3431-3433
31	State's Opposition to Defendant's Motion to Suppress his Statements to Police, or, Alternatively, to Preclude the State from Introducing Portions of his Interrogation filed on 08/17/10	1306-1319
32	State's Opposition to Defendant's Motion to Withdraw Counsel for Conflict and Failure to Present Claims When I.A.C. Claims Must be	

1	Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 06/25/15	5442-5446
2	State's Opposition to Defendant's Pro Per Motion for Leave of Court to File Motion. . Rule 2.4 filed on 09/12/14	4935-4939
3	State's Opposition to Defendant's Pro Per Motion to Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear "Want of Jurisdiction" Thereby Losing Immunity, Absolutely filed on 09/12/14	4930-4934
4	State's Opposition to Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 02/24/14	4811-4817
5	State's Opposition to Motion for Evidentiary Hearing on Whether the State and CCDC have Complied with their Obligations with Respect to the Recording of a Jail Visit Between O'Keefe and State Witness Cheryl Morris filed on 08/10/10	1244-1247
6	State's Opposition to Motion to Admit Evidence Pertaining to the Alleged Victim's Mental Health Condition and History, Including Prior Suicide Attempts, Anger Outbursts, Anger Management Therapy, Self-Mutilation and Erratic Behavior filed on 08/16/10	1277-1282
7	State's Opposition to Motion to Admit Evidence Showing LVMPD Homicide Detectives Have Preserved Blood/Breath Alcohol Evidence in Another Recent Case filed on 08/10/10	1248-1252
8	State's Opposition to Motion to Dismiss and, Alternatively, to Preclude Expert and Argument Regarding Domestic Violence filed on 01/18/11	2908-2965
9	State's Opposition to Motion to Preclude Expert Testimony filed on 08/18/10	1320-1325
10	State's Response and Motion to Dismiss Defendant's Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals had not Issued any Remand, Mandate or Remittature of filed on 08/07/14	4891-4902
11	State's Response and Motion to Dismiss to Defendant's Pro Per Petition for Writ of Habeas Corpus Pursuant to NRS 34.360 Exclusive based on Subject-Matter of Amended Information Vested in Ninth Circuit by Notice of Appeal Then "COA" Granted on a Double Jeopardy Violation with No Remand Issued Since (Post Conviction), Amended Petition and Accompany Exhibits, Opposition to Request for Evidentiary Hearing, and Opposition to Pro Per Motion to Appoint Counsel filed on 10/10/14	5041-5050
12	State's Response to Defendant's Motion to Preclude the State from Introducing at Trial Other Bad Acts or Character Evidence and Other Evidence that is Unfairly Prejudicial or Would Violate his Constitutional Rights filed on 08/16/10	1268-1276
13	State's Response to Defendant's Petition for a Writ of Mandamus or in the Alternative Writ of Coram and Response to Motion to Appoint Counsel filed on 12/31/13	4708-4713
14	State's Response to Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus filed on 06/02/15	5145-5147
15	State's Response to Defendant's Pro Per Supplemental Petition for Writ	

1	of Habeas Corpus and Evidentiary Hearing Request, "Motion for Leave to	
2	File Supplemental Petition Addressing all Claims in the First Instance	
3	Required by Statute for Judicial Economy with Affidavit." "Reply to	
4	State's Response to Defendant's Pro Per Post Conviction Petition for	
5	Habeas Corpus," and "Supplement with Notice Pursuant NRS 47.150(2);	
6	NRS 47.140(1), that the United States Supreme Court has Docketed (#14-	
7	10093) the Pretrial Habeas Corpus Matter Pursuant 28 USC 2241(c)(3)	
8	from the Mooting of Petitioner's Section 2241 Based on a Subsequent	
9	Judgment Obtained in Want of Jurisdiction While Appeal Pending" filed	
10	on 07/09/15	5455-5458
11	State's Response to Defendant's Reply in Support of Supplemental Post-	
12	Conviction Petition for Writ of Habeas Corpus filed on 09/03/15	5511-5516
13	State's Response to Defendant's Supplement to Supplemental Petition for	
14	Writ of Habeas Corpus (Post-Conviction) filed on 07/31/15	5473-5475
15	State's Supplemental Opposition to Motion to Seal Records filed on	
16	04/17/12	3436-3437
17	Stipulation and Order filed on 02/10/09	0173-0174
18	Substitution of Attorney filed on 06/29/10	1034-1035
19	Supplement to Supplemental Petition for Writ of Habeas Corpus (Post-	
20	Conviction) filed on 07/13/15	5459-5460
21	Supplement with Notice Pursuant NRS 47.150 (2); NRS 47.140 (1), That	
22	the United State's Supreme Court has Docketed (#14-10093) The Pretrial	
23	Habeas Corpus Matter Pursuant 28 U.S.C. § 2241 ©(3) From the Mooting	
24	of Petitioner's Section 2241 Based on a Subsequent Judgment Obtained in	
25	Want of Jurisdiction While Appeal Pending filed on 06/17/15	5433-5437
26	Supplemental Appendix of Exhibits to Petition for a Writ of Habeas	
27	Corpus Exhibits One (1) Through Twenty Five (25) filed on 06/12/15	5161-5363
28	Supplemental Notice of Defendant's Expert Witnesses filed on 07/29/10	1117-1151
	Supplemental Notice of Expert Witness filed on 05/17/12	3443-3447
	Supplemental Notice of Expert Witnesses filed on 01/03/11	2756-2760
	Supplemental Notice of Expert Witnesses filed on 08/13/10	1266-1267
	Supplemental Notice of Expert Witnesses filed on 08/16/10	1297-1305
	Supplemental Notice of Witnesses filed on 01/14/11	2872-2875
	Supplemental Notice of Witnesses filed on 03/10/09	0228-0229
	Supplemental Notice of Witnesses filed on 03/11/09	0237-0238
	Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed	
	on 04/08/15	5094-5144
	Supplemental Petition for Writ of Habeas Corpus filed on 06/15/15	5364-5419
	Verdict filed on 03/20/09	0289
	Verdict filed on 06/15/12	3457
	Verdict Submitted to the Jury but Returned Unsigned filed on 09/02/10	1397-1398
	Writ of Habeas Corpus filed on 01/30/09	0147-0148

TRANSCRIPTS

Document	Page No.
Transcript – All Pending Motions and Calendar Call filed on 02/04/11	2996-3038
Transcript – All Pending Motions filed on 07/10/09	0351-0355
Transcript – All Pending Motions filed on 08/30/12	3461-3482
Transcript – All Pending Motions filed on 11/23/10	1464-1468
Transcript – All Pending Motions on 07/10/09	0348-0350
Transcript – Calendar Call filed on 02/04/11	2968-2973
Transcript – Calendar Call filed on 08/30/12	3520-3535
Transcript – Continued Hearing: Motion in Limine to Present Evidence of Other Bad Acts filed on 08/30/12	3483-3509
Transcript – Defendant's Petition for Writ of Habeas Corpus (Post Conviction) filed on 10/29/15	5560-5564
Transcript – Defendant's Pro Per Motion to Dismiss Based Upon Violation(s) filed on 08/30/12	3510-3519
Transcript – Defendant's Motion to Settle Record filed on 07/10/09	0342-0345
Transcript – Entry of Plea/Trial Setting filed on 07/10/09	0356-0358
Transcript – Jury Trial – Day 1 filed on 10/14/09	0724-1022
Transcript – Jury Trial – Day 1 filed on 07/10/09	0582-0651
Transcript – Jury Trial – Day 1 filed on 07/10/09	0652-0721
Transcript – Jury Trial – Day 1 filed on 09/04/12	4278-4622
Transcript – Jury Trial – Day 1 filed on 11/23/10	1579-1602
Transcript – Jury Trial – Day 2 filed on 07/10/09	0515-0581
Transcript – Jury Trial – Day 2 filed on 11/23/10	1603-1615
Transcript – Jury Trial – Day 2 on 09/04/12	4001-4227
Transcript – Jury Trial – Day 3 filed on 07/10/09	0462-0514
Transcript – Jury Trial – Day 3 filed on 11/23/10	1616-1738
Transcript – Jury Trial – Day 3 on 09/04/12	3779-4000
Transcript – Jury Trial – Day 4 filed on 07/10/09	0408-0461
Transcript – Jury Trial – Day 4 filed on 11/23/10	1739-2032
Transcript – Jury Trial – Day 4 on 09/04/12	3600-3778
Transcript – Jury Trial – Day 5 filed on 07/10/09	0359-0407
Transcript – Jury Trial – Day 5 filed on 09/04/12	3538-3599
Transcript – Jury Trial – Day 5 filed on 11/23/10	2033-2281
Transcript – Jury Trial – Day 6 filed on 11/23/10	2282-2507
Transcript – Jury Trial – Day 7 filed on 11/23/10	2508-2681
Transcript – Jury Trial – Day 8 filed on 11/23/10	1469-1470
Transcript – Jury Trial – Day 9 filed on 11/23/10	1471-1478
Transcript – Matthew D. Carling's Motion to Withdraw as Attorney of Record for Defendant filed on 10/29/15	5557-5559
Transcript – Motions Hearing – August 17, 2010 filed on 11/23/10	1479-1499
Transcript – Motions Hearing – August 19, 2010 filed on 11/23/10	1500-1536
Transcript – Motions Hearing – August 20, 2010 filed on 11/23/10	1537-1578

1	Transcript – Notice of Motion and Motion by Defendant O’Keefe to	
2	Preclude the State from Introducing at Trial Improper Evidence and	
3	Argument filed on 02/04/11	2974-2989
4	Transcript – Partial Transcript of the Jury Trial - Day 2 filed on 03/18/09	0240-0244
5	Transcript – Petrocelli Hearing filed on 05/19/11	3049-3162
6	Transcript – Proceedings filed on 01/02/09	0028-0124
7	Transcript – Sentencing August 16, 2012 filed on 12/03/12	4632-4635
8	Transcript – Sentencing August 28, 2012 filed on 12/03/12	4636-4652
9	Transcript – Sentencing filed on 07/10/09	0337-0341
10	Transcript – Status Check: Availability of Dr. Benjamin for Trial filed on	
11	02/04/11	2990-2995

1 THE COURT FURTHER FINDS, that the facts and circumstances of the April 2,
2 2004 offense are relevant to the issues of motive (ill-will), intent, absence of accident or
3 mistake, to rebut a potential claim of self-defense, and to provide the jury with the context of
4 the relationship between Defendant Brian O'Keefe and Victoria Whitmarsh.

5 THE COURT FURTHER FINDS, that the probative value of the evidence concerning
6 the April 2, 2004 offense is not substantially outweighed by danger of unfair prejudice
7 because: (1) the events are not remote in time to the charged offense in this case; (2) the facts
8 and circumstances are not more offensive than the allegations in this case; and, (3)
9 Defendant was convicted pursuant to a Jury Verdict so he will not now be placed in a
10 position of having to defend against those allegations for the first time many years later.

11 THE COURT FURTHER FINDS, that the admission of facts and circumstances of
12 the other cases, 03M00410X, 03M25901X, 03M26791X, and C581783A, and C202793,
13 would have a prejudicial effect which would outweigh the probative value.

14 IT IS, THEREFORE, HEREBY ORDERED that the State's Motion to Admit
15 Evidence of Other Bad Acts, shall be, and it is hereby GRANTED as to the April 2, 2004
16 offense, and it is DENIED as to all others.

17 DATED this 12 day of March, 2012.

18 

19 DISTRICT JUDGE *ca*

20
21 STEVEN B. WOLFSON
22 Clark County District Attorney
23 Nevada Bar #001565

24 
25 CHRISTOPHER J. LALLI
26 Chief Deputy District Attorney
27 Nevada Bar #005398

28 08F23348X: LM/sam-MVU

PRO SE

BRIAN KERRY O'KEEFE
#141132

CLARK COUNTY DETENTION CENTER
300 S. CASINO CENTER BLVD.
LAS VEGAS NEVADA 89101

FILED

MAR 16 12 04 PM '12

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA

John L. Johnson
CLERK OF THE COURT

STATE OF NEVADA,
 plaintiff,

vs.

BRIAN KERRY O'KEEFE,
 defendant.

CASE NO : CR50630

DEPT. No : XVII

DATE OF HEARING: _____

TIME OF HEARING: _____

● SEE APPENDIX (V) EXHIBITS

NOTICE OF MOTION AND

MOTION TO DISMISS BASED UPON VIOLATION(S) OF THE
FIFTH AMENDMENT COMPONENT OF THE DOUBLE JEOPARDY
CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND, ALTERNATIVELY,
CLAIMING RES JUDICATA, ENFORCEABLE BY THE FOURTEENTH
AMENDMENT UPON THE STATES PRECLUDING STATE'S THEORY OF
PROSECUTION BY UNLAWFUL INTENTIONAL STABBING WITH KNIFE,
THE ALLEGED BATTERY ACT DESCRIBED IN THE AMENDED INFORMATION.

COMES NOW the defendant BRIAN KERRY O'KEEFE, who hereby moves this
HONORABLE court for an ORDER of dismissal with prejudice on the grounds that true
5th Amendment violations have already occurred and commencement of a third trial
will further violate the Doctrine of the Law of the case of the First appeal with
Constitutional collateral estoppel "barring" prosecutions theory of unlawful intentional
stabbing with knife. The Fifth Amendment guarantee against double jeopardy
is enforceable against the States through the Fourteenth Amendment due
process with equal protection. The state now lacks theory and evidence to SUPPORT
the AMENDED INFORMATION charging Second Degree malice murder, conclusively.

1280811
CLERK OF THE COURT
MAR 16 2012

RECEIVED
MAR 16 2012
CLERK OF THE COURT

1 IN accordance with HANES v. KEENE, 404 U.S. 519, 92 S.Ct. 594, defendant
2 humbly requests liberal reading be afforded and less stringent standards be
3 applied to defendant's MOTION TO DISMISS.

4 This MOTION is made and based upon the Following Points and Authorities,
5 all papers and documents on file in the record, Appendix of exhibits
6 attached, and any argument as will be had at the time of hearing.
7

8 Dated this 14th day of March, 2012.

9
10 MOTION WITH
11 APPENDIX OF EXHIBITS
(1-18) EXHIBITS - (978 Pgs.)

Brian O'Keefe
BRIAN O'KEEFE
C.C.D.C. - #1447732
IN PROSE

12
13 NOTICE OF MOTION

14 TO: STATE of Nevada, Plaintiff, and

15 To: STEVE Wolfson, District Attorney, Attorney for Plaintiff.
16

17 You will please take NOTICE that the undersigned will bring on
18 the above and attached MOTION on the 29 day of MARCH, 2012,
19 at the hour of 8:15 a.m., in Department XVII of the above
20 entitled court, or as soon thereafter as defendant may be heard.
21

22 DATED this 14th day of MARCH 2012.

23
24 Bj Brian O'Keefe
BRIAN O'KEEFE
C.C.D.C. - #1447732
25 PRO SE

I. PROCEDURAL HISTORY II. PREDOMINATE OVERVIEW III. DOUBLE JEOPARDY Collateral Estoppel OPERATIVE FACTS, 5th Violations
IV. AUTHORITIES - ARGUMENT V. CONCLUSION 2 6 3 4

I. PROCEDURAL HISTORY

The state wrongfully charged Defendant Brian Denay O'Keefe with murder with use of a deadly weapon for the alleged November 5, 2008 killing of Victoria Whitmarsh. On January 20, 2009 he entered a plea of not guilty and invoked his constitutional and statutory rights to a speedy trial. • On February 2, 2009, State Files Motion to admit evidence of other crimes, hearing set February 10, 2009. On February 10, 2009, state files in OPEN COURT their Amended Information also. (Prior to the hearing) At the conclusion, Court sets a petrocelli hearing. This hearing is continued several times finally being conducted immediately preceding trial held March 16, 2009. The Court ruled State could enter O'Keefe's FELONY battery domestic violence case, C207835, in their case in chief through their WITNESSES.

The case was tried ending after five days. On March 20, 2009 the jury found O'Keefe guilty of Second Degree murder with the use of a deadly weapon.

• On April 7, 2009, defense Motion to settle the record was heard concerning INSTRUCTION No. 18 on defining and proving Second Degree MURDER. The Court and State make as a matter of the record, the definition is statutorily correct.

EMPHASIS also made on the judicial admission made by State and Court that jury and all believed O'Keefe was too intoxicated to form, "INTENT," therefore acquitting O'Keefe of INTENTIONALLY STABBING WITH KNIFE.

• On May 3, 2009 this Court sentences O'Keefe to 10-25 years for second and 8-20 years for the weapon enhancement. O'Keefe timely appeals. The Court reversed O'Keefe's conviction "DECIDING" issue #2 on direct appeal.

1 The Nevada Supreme Court explained, (ORDER OF REVERSAL AND REMAND)

2 66 the State's charging document did not allege
3 that O'Keefe killed the victim while he was committing an UNLAWFUL ACT and the
4 evidence presented at trial did not support this theory of Second Degree Murder.

5 • O'KEEFE v. STATE N.S.C. DOCKET NO. 53859 (APR 7, 2010)

6 On June 10, 2010, remand. Scheduled retrial for August 23, 2010. On August 19,
7 2010, State files a second amended information in OPEN COURT, C250630.

8 The State's prosecution theory again is unlawful intentional stabbing with
9 knife. Second trial commences with state rehearsing exact same evidence used
10 in first trial. Trial ending with a hung jury. Court declares mistrial on
11 September 2, 2010. Defendant now truly indigent. Case status checked until
12 September 14, 2010 for defense attorney to be appointed after approval. Same
13 counsel appointed September 14, 2010 preserving defendant's speedy trial rights.

14 Third trial calendar call set for January 18, 2011, trial set January 24, 2011.

15 Now, CONTRARY to the Doctrine of the Law of the case, particularly
16 issue preclusion, and the trial court's late prior ruling on August 23, 2010,
17 being that the State was barred from discussing battered women's syndrome,
18 the State ignores and files a supplemental notice of expert witnesses for
19 the calling of Anders Sundberg as an expert in BWS in its case in chief.

20 Also, on January 6, 2011 the State filed a Motion in Limine to Admit
21 Evidence of Other Bad Acts. HIGHLIGHTS ON STATE'S MOTION

22 [X] STATE REHASHING SAME EVIDENCE BROUGHT IN FIRST PETROCELLI HEARING

23 [X] ALL ACTS ARE MISDEMEANORS (CONVICTIONS - dismissed cases) N.R.S. 20.095?

24 [X] MOTION IN LIMINE SCHEDULED FOR AFTER ORIGINAL CALENDAR CALL, LATE.

25 [X] Violation of the LAW of the CASE, CONSTITUTIONAL COLLATERAL ESTOPPEL.

State's Motion was docketed for January 20, 2011. Ck was 1-18-2011.

1 ● On January 7, 2011, O'Keefe's attorney filed a Motion to Dismiss on Grounds of
2 Double Jeopardy Bar, BASED ON WRONG OPERATIVE FACTS, a "RED HERRING",
3 and Speedy Trial Violation and, Alternatively, to preclude State's new expert
4 witness, evidence and argument relating to the dynamics or effects of domestic
5 violence and abuse. ● On January 14, 2011 State filed a supplemental notice
6 of witnesses. At calendar call, January 18, 2011, the defense stated that
7 it could not announce ready attributable to the State. This was based
8 on State's actual Late Notice on hearing their Motion. Basically,
9 this second bad acts hearing is the rehashing of the exact same crimes
10 litigated 2 years prior on February 10, March 14, of 2009. However, the
11 Court wanted to know if the defense was ready to proceed remembering
12 that this is still January 18, 2011 and the State's Motion is scheduled
13 for January 20, 2011. Ultimately, Court continues calendar call to
14 January 20, 2011 for all untimely Motions. Court denies O'Keefe's
15 Dbl. Jp. Motion but grants State a second petrocelli hearing and
16 vacates O'Keefe's trial date. Third new trial date set June 6, 2011.

17 Sets second petrocelli hearing, on same misdemeanors, for April 7, 2011, then
18 continued hearing to April 12, 2011. Simultaneously on April 8, 2011,

19 O'Keefe's attorney files writ in N.S.C., docket no. 58109. On April 12,
20 2011 petrocelli hearing again continued to April 27, 2011. With writ
21 pending, the trial court finally conducts the second petrocelli hearing.

22 At the conclusion of the hearing the court decides to set a two
23 week status check for his final decision. May 11, 2011 set for ruling.

24 ● On April 29, 2011 O'Keefe's attorney files Motion to withdraw, set
25 for May 12, 2011. Coincidentally, on May 10, 2011 the N.S.C. denies
O'Keefe's WRIT, based on prosecutorial misconduct as the operative fact.

● On May 11, 2011, which was docketed for the judge's final ruling pertaining to the State's motion in LIMINE, counsel for the defense advances her Motion to withdraw one day. Motion granted. Final ruling continued until September 23, 2011. Trial date vacated with new counsel being appointed. On July 21, 2011 new THIRD Trial date set. C/O June 5, 2012. Trial June 11, 2012.

● On September 23, 2011 ruling on misdemeanors continued several times ultimately to February 17, 2012. Defense Motion heard on November 8, 2011 by substitute Judge Brennan. Order signed returning O'Keefe's sentencing fees that were deducted while O'Keefe was in prison before the REVERSAL. Mr. Calli, for the state present, no objection. ● On December 16, 2011, defendant's 720 SE motion granted. Defense counsel goes stand by made. Parties reminded the final hearing, ruling on misdemeanors set for February 17, 2012. O'Keefe orally requests to file his own opposition. Court Denies. On December 20, 2011, O'Keefe mails for pretrial Federal habeas relief in the U.S. District Court.

U.S. District Judge NAVARRO responds admitting there are double jeopardy implications. Gives positive direction but dismisses O'Keefe's section 2241 without prejudice. O'Keefe appeals to the NINTH CIRCUIT COURT OF APPEALS. CASE PENDING. Awaiting decision if COA for single issue advanced, by AMENDED PETITION, will be issued.


● On February 17, 2012, State's Motion in Limine filed (13) months prior is finally completed. Judge temporarily defers decision but on March 13, 2012, enters judgment allowing the same felony C207835.

Defendant files Motion why COA should be granted March 6, 2012 with the NINTH CIRCUIT. O'Keefe notifies all parties. In addition, O'KEEFE directly attacks the trial court with this Motion, on the Collateral Estoppel claims and prior law of the Case of the First appeal. Res Judicata. [Motion for COA request mailed to Judge]

II. PREDOMINATE OVERVIEW

Defendant contends this argument holds extreme MERIT. After the first trial, anyone applying honest, intelligent and logical thought, concerning the following facts, would realize the first trial rulings and decisions, made by the Court, ultimately effected the jury returning a guilty verdict of second degree malice murder W.D.W..

Pointing out several rulings were so questionable that anybody reviewing would have severe questions as to the WHY? These rulings definitely became violations of ones due process to a "complete defense".

 The denial alone of allowing "no evidence" on Whitmarsh's mental health, suicides, cutting and self mutilations, anger management classes and therapy was more than questionable. THE FIRST JURY HEARD NOTHING RETURNING A MUCH (HIGHER) VERDICT. The denial of the defense motion to suppress O'Keefe's voluntary rambling, when the police even admit O'Keefe was acting like a NUT, INCOHERENT, and extremely INTOXICATED.

The denial of precluding the State to start at first-degree murder based on the State destroying O'Keefe's blood-broth drawer.

Police committing PERJURY concerning the existence of the use of force from on a "specific discovery" request.

The State Unnecessarily bringing in Racial slurs. Not taking photos of all cut Fingers O'Keefe had.

The scales were tipped heavily. It only makes manifest the backing of ROGUE cops who decided this case by O'Keefe's criminal scope unaware that Whitmarsh was Bi-POLAR, depressed, and in a overmedicated drunken rage in an extreme FIT OF ANGER.
(GOD BLESS HER SOUL!)

III. DOUBLE JEOPARDY COLLATERAL ESTOPPEL
OPERATIVE FACTS, 5th VIOLATION

- 2 - PROSECUTIONS THEORY - UNLAWFUL INTENTIONAL STABBING WITH KNIFE
- 2 - ISSUE #2 - DECIDED ON DIRECT APPEAL IN FAVOR OF DEFENDANT
- 2 - TWO UNTRUTHS - STATES WITNESSES; CHERYL MORRIS and DETECTIVE WIDEMANN
- 2 - Refreshing Evidence - State held two Petronelli hearings on misstatements

OPENING STATEMENT INFORMATION FIRST TRIAL CLOSING ARGUMENT

2 On November 5, 2006, O'Keefe is wrongfully charged with Battery/Domestic Violence and murder with a deadly weapon. (see BATTERY/DOMESTIC VIOLENCE, MURDER COMPLAINTS EXHIBIT 1)
On December 19, 2008 state electronically filed information. (INFORMATION - C250630 EXHIBIT 2)
On February 10, 2009 state files Amended Information, Open Court. (AMENDED INFORMATION EXHIBIT 3)

The state now makes manifest their theory of prosecution. The alleged battery act has been merged into the Amended Information. The same single alleged act is now described in the Amended Information as the "UNLAWFUL INTENTIONAL STABBING WITH KNIFE."

On Monday, March 16, 2009, opening statement by STATE declaring their THEORY.
(Monday, March 16, 2009 ROUGH DRAFT TRANSCRIPT JUST TRUE DAY 1 EXHIBIT 4)

FOR STATE LEAD, MR. SMITH OPENING STATEMENT TRIAL # 1

... the evidence is going to show you that the defendant, in fact, stabbed Victoria ...
... we have to prove the death of Mrs. Whitmarsh was UNLAWFUL ...
... we are going to prove that the death in this case was nothing less than an
INTENTIONAL ACT committed by the defendant against Mrs. Whitmarsh ...
... the defendant had a motive and underlying ill will towards Mrs. Whitmarsh which
we submit is going to help us meet our burden of proving beyond a reasonable doubt that
this was an INTENTIONAL ACT. (id at PAGE 171, LINES 4-22 EXHIBIT 4)

So the state claims conclusively that O'Keefe had a motive and that he unlawfully, intentionally stabbed Mrs. Whitmarsh with a knife.

Now, we'll jump to closing key statements by the State. Then I will outline second trial opening and closing by the State for double jeopardy.

1 • FOR STATE SECOND CHAIR, MS. GRAMM CLOSING ARGUMENT TRIAL # 1

2 • On Friday, March 20, 2009 the State argues what they feel they proved.

3 (FRIDAY, MARCH 20, 2009 ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 5 EXHIBIT E)

4 ... The State's position is that this is First degree murder with a deadly weapon...

5 (id at RDT Page 130, lines 22-23) ... But what is malice aforethought?,

6 INTENTIONAL KILLING... OHAY, so it's INTENTIONAL. An INTENTIONAL KILLING
7 without legal cause or excuse... (id at RDT Page 134, lines 22-25) ...

8 What is second degree murder? The killing... Just INTENTIONAL.

9 (id at RDT Page 137, lines 4-7) ... What is willfulness? The intent
10 to kill. The intent to kill — you intend it, kill. That's willful...

11 (id at RDT Page 135, lines 21-25) ... Our contention is that a knife was the
12 deadly weapon... (id at RDT Page 138, lines 11-12) ... this is how we know
13 it's First degree murder. It wasn't an accident. It was willful... It was
14 willful. THE ACT OF STABBING VICTORIA WAS WILLFUL...

15 (id at RDT Page 139, lines 15-25) Now, a "key" STATEMENT was made.

16 ~~Q~~ : This is much more than SECOND DEGREE MURDER. SECOND DEGREE
17 WOULD ONLY APPLY if defendant ACTED INTENTIONALLY...

18 (id at RDT Page 145, lines 14-18)

19 • FOR STATE LEAD, MR SMITH CLOSING ARGUMENT TRIAL # 1

20 ~~Q~~ : ... That's certainly circumstantial evidence of a BATTERY or
21 something that precipitated the STABBING.

22 (id at RDT Page 177, lines 1-2)

23 ... The Law says you determine a person's INTENT at the moment
24 they COMMIT the ACT... a lot of times people are sorry that they
25 kill somebody after it's happened and/or before they get caught. But it doesn't
mean — it doesn't MAKE THE UNDERLYING ACT ANY LESS CRIMINAL...

(id at RDT Page 178, lines 14-21) The Alleged MERGED BATTERY ACT.

III.

OPENING STATEMENT

SECOND AMENDED INFORMATION

SECOND TRIAL

CLOSING ARGUMENT

2. August 19, 2010, in OPEN COURT State Files their Second AMENDED INFORMATION.

Again the State charges not only the SAME OFFENSE, but the same prosecution theory of the INTENTIONAL, UNLAWFUL, STABBING with a KNIFE. (SECOND AMENDED INFORMATION, C250630 EXHIBIT 6)

● On Wednesday, AUGUST 26, 2010 opening statement made by State on day 3.

(ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 3 WEDNESDAY, AUGUST 26, 2010 EXHIBIT 7)

● FOR STATE LEAD, MR. Lalli OPENING STATEMENT TRIAL # 2


... BRAD O'KEEFE was found guilty by a jury of felony battery constituting domestic violence in 2006. The victim in that case, Victoria Whitmarsh is the same woman he murdered on November 5th, 2008. The evidence will show that he STABBED her, that she suffered a fatal stab wound under her arm and that she died as a result of essentially bleeding out.

... Like most domestic violence relationships, there was a fatal attraction between the two.

(id at Page 23, lines 14-16 and id at Page 24, lines 16-18)

... The knife that was used to stab Victoria is located and impounded...

(id at Page 29, lines 21-22)

: ... An anonymous domestic violence survivor once made this observation.

If you can't be thankful for what you have, be thankful for what you have escaped.

Well, unfortunately Victoria was not able to escape from the defendant, and he murdered her in a brutal way. (id at Pages 31-32, lines 24-25, lines 1-5)

● On Tuesday, AUGUST 31, 2010 CLOSING ARGUMENT made by State.

(ROUGH DRAFT TRANSCRIPT JURY TRIAL DAY 7 TUESDAY, AUGUST 31, 2010 EXHIBIT 8)

● FOR STATE SECOND CHARGE, MS. GRAHAM CLOSING ARGUMENT TRIAL # 2

... I hate her and I want to kill her. She took three years of my life.

(id at Page 81, lines 24-25) ... She sent me to prison. That's what the defendant said about Victoria Whitmarsh. He killed her on the night of November 5th, 2008. He did it INTENTIONALLY and he had a MOTIVE.


(id at Page 82, lines 1-3)


... I think you've heard statements and some evidence throughout these past few days that perhaps Victor's attacked him, that Victor's cut him.

(id at Page 84, lines 11-13)

... And malice aforethought can be either expressed or implied malice. The unlawful killing may be effective by any of the various means by which (indiscernible) in this case a STABBING. Malice aforethought means the INTENTIONAL doing of a wrongful act ... (id at Page 87, lines 19-23)

... malice requires the INTENTIONAL ACT, INTENTIONAL UNLAWFUL ACT, THE STABBING ... (id at Page 91, lines 16-18)

 : ... To CONSTITUTE the crime CHARGED in this case it's SECOND DEGREE MURDER, there must exist a joint -- a union or joint operation of AN ACT that is Forbidden by LAW and INTENT to do that ACT. In summary that means Forbidden by Law, a murder, a stabbing, and the INTENT to do the ACT. The INTENTIONAL STABBING into Victoria's body. The intent with which an ACT is DONE ... (id at Pages 91, line 23; 92, lines 1-5)

●  At this point it is crystal clear that the State has not only charged, in the Amended INFORMATION, an unlawful intentional stabbing with knife, this theory was argued by state and proven by trial transcripts. At first glance of O'Keefe's § 2241, U.S. DISTRICT Judge Gloria Navarro already admits in her ORDER that the COLLATERAL ESTOPPEL claim absolutely would appear to be based UPON DOUBLE JEOPARDY PROTECTIONS.

The U.S. DISTRICT JUDGE was more concerned with why this wasn't exhausted in STATE COURT first. It certainly will be now and is just one of the reasons this case is conclusively OVER. Now on to B. Authorities and ARGUMENT, INFRA.

III.

b.

ISSUE #2 - DECIDED ON DIRECT APPEAL IN FAVOR OF DEFENDANT

Before the case was reversed on appeal defendant's MOTION TO SETTLE RECORD was heard on APRIL 7, 2009. CRITICAL statements are made during this hearing. (TUESDAY, APRIL 7, 2009 ROUGH DRAFT TRANSCRIPT, MOTION TO SETTLE RECORD EXHIBIT 9) STATE, MR. SMITH and the Court both admit, INSTRUCTION #18 is statutory correct in language. (id at Page 3, lines 1-24)

Also, State admits O'Keefe was to drink to form "INTENT" by JURY decision. (id at Page 5, lines 18-22)

~~Case~~: The Court himself places on record the fact the alcohol issue caused the JURY to acquit O'Keefe of INTENTIONAL MURDER. (id at Page 6, lines 6-9)

"DECIDED" ON direct appeal, the argument arises from in fact INSTRUCTION #18. Defendant enters these 3 key instructions.

These 3 instructions are #1, #3, AND #18, defining Second Degree Murder. (SEE INSTRUCTIONS TO THE JURY FILED IN OPEN COURT MARCH 20, 2009 EXHIBIT 10)

Now to bolster my point defendant enters his REVERSAL ORDER. (SEE ORDER OF REVERSAL AND REMAND N.S.C. No. 53659 APRIL 7, 2009 EXHIBIT 11)

• N.P.S. 200.010 "MURDER" defined: Murder is the unlawful killing of a human being: 1.) With malice aforethought, either express or IMPLIED.

So the alleged single battery act is merged into the murder charge. Instruction #1 identifies case, scenario. Instruction #3 explains the states theory and describes the battery act merged. We also must keep in mind that N.P.S. 200.481 defines "battery" - (MEANS any intentional unlawful act of force upon the person of another.) IN CASE C250630, the ACT is described in INSTRUCTION #3 as the, INTENTIONAL, UNLAWFUL STABBING VICTORIA with knife.

The JURY, as the trier of fact, ACQUITS O'Keefe of FIRST-DEGREE murder, the INTENTIONAL STABBING with KNIFE. However, they return

a verdict of Second Degree murder implied, by the argued battery domestic violence in closing. Somehow, the jury is completely lost. When the jury acquitted the defendant of First degree murder, the ACT they acquitted me of APPLIED to either First or Second degree murder.

There was no other enumerated felony or inherently dangerous act committed by the defendant. Closing in on INSTRUCTION # 18 now.

The Nevada Supreme Court REVERSAL ORDER READS;

Here, the district court abused his discretion when he instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an unlawful act because the state's charging document did not allege O'Keefe killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of SECOND-DEGREE MURDER.

First, the state didn't have to allege any underlying act once they used malice aforethought. Second, if the state would have alleged a battery it wouldn't matter because the evidence presented at trial did not SUPPORT THIS THEORY OF SECOND DEGREE MURDER. What theory?

INSTRUCTION # 18 MURDER OF THE SECOND DEGREE is murder which is:

- 1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or
- 2) Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

NOTING, theory #2 was the theory complained about and decided.

Theory one is nothing more than Second degree murder DEFINED.

Theory two is implied malice murder by the act. It is how you PROVE theory one. Mainly it is EXACTLY EQUAL in criminal culpability.

Also, felony murder has no "intent." - 13 -

903213

So the jury acquits O'Keefe of FIRST DEGREE INTENTIONAL MURDER.
Then, the appellate court acquits O'Keefe of the UNLAWFUL ACT.
Here is what we have.

The jury returns a UNINTENTIONAL, UNPREMEDITATED, UNDELIBERATED guilty verdict of Second Degree malice murder IMPLIED by the SAME alleged single act they acquitted me of in First degree murder. However, the appellate court acquits me of the UNLAWFUL ACT. So, conclusively the battery argued as the underlying act is completely lacking.

Collateral Estoppel clearly applies. This issue of any battery has been decided and is no longer OPEN to consideration. Remembering the issue was in Favor for the defendant. ONLY the Nevada Supreme Court can change the LAW of the CASE.

: JUDICIAL ADMISSION MADE BY STATE

At the end of the second trial the state makes judicial admission and makes it a matter of the record. (EXHIBIT B, id at Page 57, lines 7-23)

Clearly the State admits the N.S.C. decided issue #2 on direct appeal. He also repeatedly admits the N.S.C. was well aware of what was "second degree murder" and not only was the instruction wrong, but it was precisely why it got REVERSED.

The evidence didn't "SUPPORT IT." Mr. LALL truly is WISE at times. The second jury hung, not being able to convict beyond a reasonable doubt based on INSUFFICIENT EVIDENCE, again. However, that is what the N.S.C. already said on DIRECT APPEAL.

??

III.

C.

TWO UNTRUTHS - STATE'S WITNESSES, CHERYL MORRIS and DETECTIVE WILDEMAN

UNTRUTH #1: In the petrocelli hearing conducted on March 16, 2009, the birth of this lie occurred. Mr Smith for the State used his star witnesses for this testimony. This claim has been made to this day which must end. The claim is that Mrs Whitmarsh testified against O'Keefe resulting in O'Keefe getting convicted and going to prison for a three year prison term. The case was the FELONY battery domestic violence case, C207835. How ironic, this was another reason stated in the State's plea to bring in the FELONY battery domestic violence case in their case in chief to help bolster their INTENT and MOTIVE in hopes for a first-degree murder verdict. This testimony was given in the State's Opening statement, during their C.I.C., and in closing argument for BOTH TRIALS. Here now is the TRUTH.

(see Case No. C207835 WEDNESDAY, SEPTEMBER 21, 2005 PERCIVALE'S TRANSCRIPT)
(JURY TRIAL DAY TWO - VOLUME TWO EXHIBIT 12)

Mrs. Whitmarsh's testimony is COMPLETELY for O'Keefe. Stop the perjury.
(id at Pages 18-34) The state is knowingly allowing this.

Also, O'Keefe was acquitted which makes it no longer relevant.
ALSO, LAW OF THE CASE APPLIES,

UNTRUTH #2: Also, throughout the petrocelli and both trials it repeatedly is misstated that O'Keefe did three years in prison. Another lie. O'Keefe did (13) months at TONOPAH FIRE CAMP. Minimum security, no doors, no locks, worked all over county, outside.

Testimony to this is by O'Keefe's current P.S.I., page 6, I received in Fact on this instant case. Stop the UNTRUTHS.

(see P.S.I. CASE C250630 PAGE 6 APRIL 2009 EXHIBIT 13)

READ TOP RIGHT HAND CORNER OF PPT. - 15 -

003215

III.

d.

REMAINING EVIDENCE - STATE HELD TWO PETROCELLI HEARINGS ON MISDEMEANORS

FIRST TRIAL

On February 10, 2009 States Motion to Admit Other Crimes is heard.

(see Tuesday, February 10, 2009 PUGH DRAFT TRANSCRIPT EXHIBIT 14)

The Court inquires about the bad acts. The State submits he is only trying to get the ONE FELONY for his case. (id at Page 8, lines 18-25)

Of course this being the Felony battery constituting domestic violence. CASE C207835. The Court states he wants to hear more on the matter of the crimes and schedules a Petrocelli hearing. (id at Page 9, lines 17-22)

Petrocelli hearing is now completed on March 16, 2009.

(see MONDAY, MARCH 16, 2009 JURY TRIAL DAY 1 TRANSCRIPT EXHIBIT 15)

State starts off with the TWO UNTRUTHS previously brought up in C. The lies that Whitmarsh testified against O'Keefe in Felony case C207835 and that O'Keefe did three years as a result. (id at Pages 2-3)

He Smith declares he only is going to use the felony unless O'Keefe opens the door to the misdemeanors. (id at Page 12, lines 1-7)

The Court explains to O'Keefe that if he takes the stand he should be careful not to blur anything out and open the door. EMPHASIS on the other misdemeanor domestic violence issues could adversely impact my case. (id at Page 13, lines 1-10)

Now for the record, O'Keefe wishes to manifest the States Motion reflecting knowledge of every act before trial.

(see Notice of Motion and Motion to admit Evidence of other crimes EXHIBIT 16)

(ELECTRONICALLY FILED FEBRUARY 2, 2009 CASE C250680)

The State list every misdemeanor act by their Justice Court numbers. (id at Pages 6-8) Special Note again on PAGE 8, the State specifically requests C207835, only in it's case-in-chief. (LINES 6-8.)

Again also noting the State alleges O'Hare did (3) years in prison because
"SPECIFICALLY" due to Mrs. Whitmarsh's testimony. Also, he requested the
Felony d.v., C207835, for Motive and Intent. (id at Page 8, lines 14-20)

SECOND TRIAL

(No BAD ACTS)
MISDEMEANORS


THIRD TRIAL

After second trial hung, based on insufficient evidence to convict, the
State has Second Chair File a Motion in Limine to Admit, MISDEMEANORS
(Motion in Limine to Admit Evidence of other BAD ACTS. EXHIBIT 17)

(ELECTRONICALLY FILED JANUARY 6, 2011 CASE C250630 MEMPHIS 1/20/2011)

With "DURABILITY" the State list exactly, every single misdemeanor case
from the hearing prior to trial #1, almost two years prior.

Also noting, the State now list every misdemeanor case
by the EVENT NUMBER versus the JUSTICE COURT CASE No.
(id at Pages 3-6) How about N.R.S. 50.095.?

★ : The Double Jeopardy Clause requires the
government to put on its strongest case the FIRST TIME. Also,
the State cannot REHASH SAME EVIDENCE FROM FIRST TRIAL. On 3/13/12,
the Judge just gave his ruling that only the misdemeanor event
04042-3158, which was enhanced to the Felony BATTERY, D.V. case
C207835 "can again" be used. (ORDER FILED MARCH 13, 2012 EXHIBIT 18)

IV. AUTHORITIES - ARGUMENT

IN Closing Argument, of the first trial, PROSECUTOR SMITH ARGUES
in fact that a "batterly domestic violence precipitated the stabbing."
(id at Page 174, lines 1-2, EXHIBIT 5) - "BATTERY OR SOMETHING"

Most important is at the very end of his closing argument, the State again suggest and plants the "seed" again, in the jury's mind, that the BATTERY ACT sustains the INTENT required. (id at Page 17B, lines 13-16 EXHIBIT 5)

Specifically, he states, "it doesn't make the UNDERLYING ACT any less criminal." WHAT ACT?

THE SAME SINGLE ALLEGED BATTERY D.V. ACT!

• IN (STATE v. MANGANA) 33 N.W. 541, 42 P. 693 (NEV. 1910) — ~~KEY~~

• Allows the State to pursue a First degree murder without charging the other crime. A charging document alleging murder in the ordinary form and proof that it was committed in the perpetration of the underlying act, then MALICE is IMPLIED. OF course, this works for Second Degree, also.

In the INSTANT CASE, without a doubt, the State was prosecuting upon the theory that the HOMICIDE was committed in carrying out the UNDERLYING ACT, (crime) of Battery Constituting Domestic Violence as charged initially when ARRESTED. (11-5-2008) (see EXHIBIT 1 - charging Battery D.V. COMPLAINT 11/7/2009)

Malice to sustain the general intent required could then be IMPLIED.

• IN (LARSEN v. STATE) 112 N.W. 1502, 931 P.2d 1304 (NEV. 1996)

• Implied malice may be found when : 1) The killing resulted from an INTENTIONAL ACT.
2) The natural consequences of the act are dangerous to human life, AND
3) [T]he act was deliberately performed with knowledge of the danger to, and with conscious disregard for, Human LIFE. (* 1347)

This is EXACTLY THEORY #2 of JURY INSTRUCTION #18 in the INSTANT CASE, C25063D. (see JURY INSTRUCTIONS EXHIBIT 1D)

1 • IN (LABASTIDA v. NEVADA) 115 Nev 298, 986 P.2d 442 (Nev. 1999)

2 • INSTRUCTION No. 27 in
3 Labastida on Second Degree Murder was IDENTICAL to O'KEEFE'S
4 INSTRUCTION No. 18. (* 448) They define what is NOT
5 involuntary manslaughter BUT BECOMES SECOND DEGREE MURDER
6 WHEN,

7 "the involuntary killing occurs in the commission of an
8 UNLAWFUL ACT, which in its consequences, naturally
9 tend to destroy the life of a HUMAN BEING"...

10 This is ABSOLUTELY the SECOND THEORY on my INSTRUCTION # 18.
11 We must remember that defining and proving malice is established

12 • IN (KEYS v. NEVADA) 104 Nev. 736, 766 P.2d 290, (Nev. 1988)

13 • HN [6] Proving express
14 malice means proving a deliberate intention to kill.; ~~AND~~ WHILE
15 PROVING IMPLIED MALICE MEANS PROVING ONLY THE COMMISSION
16 OF THE UNLAWFUL ACT.

17 ★ Now the problem O'Keefe has is on my direct appeal, the
18 LAW of the Case has been PRONOUNCED. ADJUDICATED, ALREADY!

19 The Law of the Case on the First appeal is the LAW of the
20 Case on all subsequent appeals where the Facts remain the same.

21 SEE HABERSTROM v. NEVADA, 119 Nev 173, 69 P.2d 676 (Nev. 2003) HN [24]

22 The DOCTRINE OF THE LAW OF THE CASE specifically states,

23 (1) the judgment of that court is Final upon all questions decided
24 and those questions are ARE NO LONGER OPEN TO CONSIDERATION.

25 Issue #2 was decided in favor of the defendant on direct appeal.

The evidence at trial did not prove O'Keefe committed an unlawful act.
So CONVERSELY, if the state's charging document would have alleged a

battery, it would not have mattered. Remembering State Alford the ACT.
For Collateral ESTOPPEL purposes the following would then apply.

- IN (U.S. COURT OF APPEALS 9th v. Castillo - BASSA) 483 F.3d 890 (9th 2007)

• HN [1]

The Double Jeopardy Clause forbids the government from conducting a series of prosecutions, involving the SAME FUNDAMENTAL ISSUE, in which it presents additional arguments and evidence at each iteration.

• HN [17]

An issue that is an element of the offense is always material to a subsequent claim of Collateral Estoppel.

HN [3][6][7][8]

The Double Jeopardy Clause does not only bar a second prosecution on the same charge of which a defendant has been previously acquitted (or convicted). It also prevents the government from seeking to prosecute a defendant on an ISSUE that has been determined in the defendant's favor in a prior prosecution, regardless of the particular offense involved in the earlier trial.

(Ashe v. Swenson, 397 U.S. 443)

Put another way, "When an issue of Fact or Law is actually litigated and determined by a final and valid judgment, and the determination is ESSENTIAL to the judgment, the determination is CONCLUSIVE in a subsequent action between the parties, whether on the same or a different claim."

① AS the SUPREME COURT has explained, Collateral Estoppel in the criminal context - the protection against the relitigation of issues previously determined - is "an integral part of the protection against double jeopardy guaranteed by the Fifth and enforceable by the Fourteenth."

Also, the FIFTH AMENDMENT, as interpreted in (Ashe v. Swenson) BARS
relitigation of an issue already decided, NO MATTER HOW MUCH
ADDITIONAL EVIDENCE the government may wish to introduce at a
THIRD TRIAL, like the instant case.

NEW EVIDENTIARY

FACTS may not be brought forward to obtain a different determination
of the ULTIMATE FACT. see HERNANDEZ, (572 F.2d at 221 n. 3)

Also, reheating of old evidence previously presented would
clearly be PROHIBITED by the Collateral Estoppel Doctrine.
see Sumo, (596 F.2d at 467)

The State, in the INSTANT CASE,
has now violated Double Jeopardy's offspring, collateral
estoppel under the 5th AMENDMENT of the laws and treaties
of the U.S. Constitution, also my due process rights.
enforceable by the 14th AMENDMENT that is guaranteed
and applied to the State's. [Under (Benton v. Maryland) case:
395 U.S. 784, 59 S.Ct. 2056, 23 L.Ed. 2d 707 (1969)] The mention of any Battery
is barred, in any fashion what-so-ever. The INTENT was
ABANDONED as looking, not proven. The act
has been declared not PROVEN beyond a reasonable doubt.

Also, now "barred", which also was violated,
was the prosecution's theory of the unlawful, intentional
stabbing with a knife.

• IN (SANTAMARIA v. HORSLEY) 133 F.3d 1242 (9th 1995)

The petitioner moved to prevent the State from proceeding on the
theory that he personally used a knife and stabbed victim.

The trial court granted the Motion based on Collateral Estoppel.

1 • IN (Pettway v. Plummer) 943 F.2d 1041 (9th Cir. 1991)

2 • The prosecution concedes
3 that at all times [its] theory of prosecution at the first trial and even
4 now at retrial would be Pettway shot and killed the victim.

5 Without it, there is no other theory of prosecution to
6 succeed in any conviction.

7 Point being that in Santamaria's
8 case, the prosecution also admitted that they had no other
9 evidence that the defendant was anything but the stabber...

10 • Santamaria, 8 Cal.4th at 929, 35 Cal. Rptr.2d 624, 884 P.2d 81.

11 The Fact remains the same here for
12 O'Brien in the INSTANT case. When the act was not
13 proven the State lost intent. (Proven) For SECOND DEGREE
14 MALICE MURDER, the state has no other theory available
15 to sustain the general intent required.

16 Malice, in
17 the instant case, O'Brien has already been acquitted of
18 the INTENT, by the jury, and the underlying
19 act also by the Nevada Supreme Court.

20 • IN (SCHIRO v. FARLEY) 510 U.S. 222, 114 S.Ct. 783 (1994)

21 • HN [10][11]

22 Issue preclusion attaches only to determinations that were necessary
23 to support the judgment entered in the first action.

24 Schiro didn't
25 convince the court on the intentional murder argument. In the instant
case however, O'Brien has been acquitted of INTENTIONAL
murder, by the JURY, and any underlying act by the N.S.C.
(The alleged intentional battery)

V. CONCLUSION

UNITED STATES DISTRICT COURT JUDGE GLORIA NAVARRO already has made a predetermination that as, N.A.S.A. would say, "Houston, we have a PROBLEM!" (Judge Navarro only wants the issue exhausted.)

I read in SANTANARIZ, * 1250, it made no difference that Santanariz's claim of exclusion is based on collateral estoppel rather than the more familiar constitutional grounds. IN FACT, they said Pettussey erred in asserting Federal jurisdiction BEFORE retrial. My second trial ended.

~~Now~~: My point is, with both trials now completed, it makes it much easier to make MANIFEST my claims on the repeated usage of the evidence, theory of criminal culpability and the adjudicated issue on INTENT. Also the same sovereign, and same statutory charge.

• [ONLY until trial, could we see STATE'S evidence used.] I'm officially declaring that CONSTITUTIONAL COLLATERAL ESTOPPEL applies on several operatives. My 5th and 14th AMENDMENT RIGHTS have been violated and will be further, if the third trial could somehow proceed. Any future theory of intentional stabbing must be barred. Based on no theory of prosecution and violations, I request dismissal with prejudice, of the Second-AMENDED INFORMATION charging second-degree murder w.d.w. (Also based on insufficient evidence)

• CONSIDER THIS! - With all the evidence wrongfully used, the State could not prove the charges. Without that evidence, how will State prove something that defendant already, anyway, has been acquitted of? The judgment of acquittal simply was never entered on second degree. (FORMER JEOPARDY ISSUE PENDING IN 9th - WILL COA BE ISSUED)

• CASE NO. C250630

DECLARATION

Defendant has constructed and verified contents
of his Motion to Dismiss. A copy of said motion
was hand delivered and signed for by the parties
listed below.

Dated: March 14, 2012

Brian O'Keefe
BRIAN O'KEEFE - #1447732

Copies ; 1) Clerk of the Court
2) District Attorney
3) Judge M. Villari

(• MOTION TOTAL 24 pgs.
• APPENDIX-EXHIBITS 178 PGS.
EXHIBITS # 1-18
18 TOTAL EXHIBITS)

DATED THIS 14th day of MARCH, 2012.

I, BRIAN KEENE O'KEEFE #1447732, do

solemnly swear, under the penalty of perjury, that

the above Motion to Dismiss based on 5th (allegation) is accurate.

correct, and true to the best of my knowledge.

NRS 171.102 and NRS 208.165.

Respectfully submitted,

Brian H. O'Keefe

BRIAN H. O'KEEFE

Defendant - PRO SE

#1447732

PRO SE

BRIAN KEELY O'KEEFE
#1447732

CLARK COUNTY DETENTION CENTER
3500 S. LAUREL CENTER BOULEVARD
LAS VEGAS, NEVADA 89101

FILED

MAR 16 12 06 PM '12

John L. Johnson
CLERK OF THE COURT

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,

vs.

BRIAN KEELY O'KEEFE,
Defendant.

CASE NO: C250630

DEPT. NO: XVII

EXHIBITS: 1-18
(161)

APPENDIX OF
EXHIBITS
For:

MOTION TO DISMISS BASED UPON VIOLATION(S) OF THE
FIFTH AMENDMENT COMPONENT OF THE DOUBLE JEOPARDY
CLAUSE, CONSTITUTIONAL COLLATERAL ESTOPPEL AND, ALTERNATIVELY,
CLAIMING RES JUDICATA, ENFORCEABLE BY THE FOURTEENTH
AMENDMENT UPON THE STATES PRECLUDING STATE'S THEORY OF
PROSECUTION BY UNLAWFUL INTENTIONAL STABBING WITH KNIFE,
THE ALLEGED BATTERY ACT DESCRIBED IN THE AMENDED INFORMATION.

DATED: MARCH 14, 2012

BEC250630
APR
Appendix
1790842



BRIAN K. O'KEEFE
#1447732
DEFENDANT IN PRO SE

CLERK OF THE COURT

MAR 16 2012

RECEIVED

003225
182

PROSE - # 1447732
BRIAN KERRY O'KEEFE
C.C.D.C.
320 S. CASINO CTR. BLVD.
LAS VEGAS NV 89101

CASE NO. C250630

APPENDIX OF EXHIBITS

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

IN THE
EIGHTH JUDICIAL
DISTRICT COURT
CLARK COUNTY, NEVADA HONORABLE WILLIAM
DEPT. NO. XVII

(5th AMENDMENT VIOLATIONS (COLLATERAL ESTOPPEL) CASE NO. C250630
PROSE, MOTION TO DISMISS: APPENDIX OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DOCUMENT TITLE</u>	<u>TOTAL OF PAGES</u>
1	BATTERY D.K./MURDER COMPLAINT	2
2	INFORMATION - C250630 12/19/2008	3
3	AMENDED INFORMATION 2/10/2009	3
4	MONDAY, MARCH 16, 2009 ROUGH DRAFT TRANSCRIPT	2
5	FRIDAY, MARCH 20, 2009 ROUGH DRAFT TRANSCRIPT	15
6	SECOND AMENDED INFORMATION - C250630	3
7	WEDNESDAY, AUGUST 25, 2010 ROUGH DRAFT TRANS.	12
8	TUESDAY, AUGUST 31, 2010 ROUGH DRAFT TRANSCRIPT	29
9	TUESDAY, APRIL 7, 2009 ROUGH DRAFT TRANSCRIPT	4
10	JURY INSTRUCTIONS NOS. 1, 3, 18 MARCH 20, 2009	3
11	ORDER OF REVERSAL AND REMAND NO. 53659	2
12	WEDNESDAY, SEPTEMBER 21, 2005 - C207835	7
13	PRESENTENCE INVESTIGATION REPORT - C250630	1
14	TUESDAY, FEBRUARY 10, 2009 ROUGH DRAFT TRANS.	5
15	MONDAY, MARCH 16, 2009 DAY 1 TRANSCRIPT	26
16	MOTION TO ADMIT EVIDENCE OF OTHER CRIMES (2/2/2009)	16
17	MOTION IN LIMINE TO ADMIT EVIDENCE OF OTHER BAD ACTS (1/6/2011)	26

(DATED: MARCH 14, 2012)

161 TOTAL PAGES

[FILED MARCH 13, 2012]

18

ORDER GRANTING, IN PART, THE STATE'S MOTION TO ADMIT EVIDENCE
OF OTHER BAD ACTS

003226

BATTERY D.V. / MURDER COMPLAINTS

C250630 - [JUDGE NO. OBF233+8X]
FILED: 11/7/2008

Exhibit 1

003227

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

- vs. -

BRIAN O'KEEFE, aka,
Brian Kerry Okeefe #1447732,

Defendant.

CASE NO.: 08F23348X

DEPT. NO.: 9

BATTERY/DOMESTIC VIOLENCE: ADMONISHMENT OF RIGHTS

I am the Defendant in this case. At this time, I am charged with battery constituting domestic violence in having willfully and unlawfully committed an act of force or violence upon my spouse, former spouse, a person to whom I am related by blood or marriage, a person with whom I am or was actually residing, a person with whom I have had or am having a dating relationship, a person with whom I have a child in common, my minor child, or the minor child of one of those persons (in violation of NRS 33.018/NRS 200.485).

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE(S) AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE MAY HAVE THE FOLLOWING CONSEQUENCES:

1. I understand the State will use this conviction, and any other prior conviction from this or any other State which prohibits the same or similar conduct to enhance the penalty for any subsequent offense;
2. I understand that, as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, in addition to other consequences provided by law, be removed, deported or excluded from entry into the United States or denied naturalization;
3. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply (unless a greater penalty is provided pursuant to NRS 200.481):

DEFENDANT'S INITIALS: _____

DEFENDANT'S ATTORNEY'S INITIALS (if applicable): _____

PAGE 1 of 2

1 JUSTICE COURT, LAS VEGAS TOWNSHIP
2 CLARK COUNTY, NEVADA

3 THE STATE OF NEVADA,

4 Plaintiff,

5 -vs-

6 BRIAN O'KEEFE, aka,
7 Brian Kerry Okeefe #1447732,

8 Defendant.

CASE NO: 08F23348X

DEPT NO: 9

CRIMINAL COMPLAINT

9 The Defendant above named having committed the crime of MURDER WITH USE
10 OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), in the manner
11 following, to-wit: That the said Defendant, on or about the 5th day of November, 2008, at
12 and within the County of Clark, State of Nevada, did then and there wilfully, feloniously,
13 without authority of law, and with premeditation and deliberation, and with malice
14 aforethought, kill VICTORIA WHITMARSH, a human being, by stabbing the said
15 VICTORIA WHITMARSH, with a deadly weapon, to-wit: with an unknown object.

16 All of which is contrary to the form, force and effect of Statutes in such cases made
17 and provided and against the peace and dignity of the State of Nevada. Said Complainant
18 makes this declaration subject to the penalty of perjury.

19
20
21 11/7/2008
22
23
24
25
26

27 08F23348X/cb
28 LVMPD EV# 0811053918
(TK9)

INFORMATION 12/19/2008

C250630

Exhibit 2

003230

Emil Smith
CLERK OF THE COURT

1 INFO
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 PHILLIP N. SMITH, JR.
6 Deputy District Attorney
7 Nevada Bar #0010233
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 01/06/09
13 9:00 AM
14 PD

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 BRIAN KERRY O'KEFFE,
19 #1447732

20 Defendant.

Case No: C250630
Dept No: V

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That BRIAN KERRY O'KEFFE, the Defendant(s) above named, having committed
26 the crime of MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)
27 (Felony - NRS 200.010, 200.030, 193.165), on or about the 5th day of November, 2008,
28 within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes
in such cases made and provided, and against the peace and dignity of the State of Nevada,

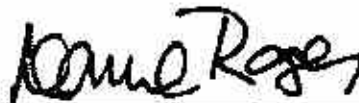
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///

1 VICTORIA WHITMARSH, a human being, by stabbing the said VICTORIA
2 WHITMARSH, with a deadly weapon, to-wit: a knife.
3
4

5 
6
7 DAVID ROGER
8 DISTRICT ATTORNEY
9 Nevada Bar #002781

10 Names of witnesses known to the District Attorney's Office at the time of filing this
11 Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
12 ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13 BALLEJOS, JEREMIAH	LVMPD #8406
14 BENJAMIN, JACQUELINE DR	ME 0081
15 BLASKO, KEITH	LVMPD #2995
16 BUNN, CHRISTOPHER	LVMPD #4407
17 COLLINS, CHELSEA	LVMPD #9255
18 CONN, TODD	LVMPD #8101
19 CUSTODIAN OF RECORDS	CDC
20 CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21 CUSTODIAN OF RECORDS	LVMPD RECORDS
22 FORD, DANIEL	LVMPD #4244
23 FONBUENA, RICHARD	LVMPD #6834
24 HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
25 HUTCHERSON, CHRISTOPHER	LVMPD #12996
26 IVIE, TRAVIS	LVMPD #6405
27 KYGER, TERESA	LVMPD #4191
28 KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV

1	LOWREY-KNEPP, ELAINE	DISTRICT ATTORNEY INVESTAGATOR
2	MALDONADO, JOCELYN	LVMPD #6920
3	MORRIS, CHERYL	UNKNOWN
4	MURPHY, KATE	LVMPD #9756
5	NEWBERRY, DANIEL	LVMPD #4956
6	PAZOS, EDUARDO	LVMPD #6817
7	RAETZ, DEAN	LVMPD #4234
8	SANTAROSSA, BRIAN	LVMPD #6930
9	SHOEMAKER, RUSSELL	LVMPD #2096
10	TAYLOR, SEAN	LVMPD #8718
11	TINIO, NORMA	2992 ORCHARD MESA HENDERSONNV
12	TOLIVER, CHARLES	5001 EL PARQUE #29 LVNV
13	TOLIVER, JOYCE	5001 EL PARQUE #C-29 LVNV
14	WHITMARSH, ALEXANDRA	7648 CELESTIAL GLOW LVNV
15	WHITMARSH, DAVID	7648 CELESTIAL GLOW LVNV
16	WILDEMANN, MARTIN	LVMPD #3516
17		
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24		
25		
26		
27	DA#08F23348X/ts	
28	LVMPD EV#0811053918	
	(TK9)	

AMENDED INFORMATION 2/10/2009

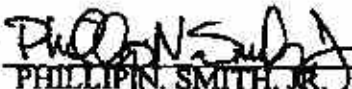
C250630

Exhibit 3

003234

1
2 DAVID ROGER
3 DISTRICT ATTORNEY
4 Nevada Bar #002781

5
6 BY


7 PHILLIP N. SMITH, JR.
8 Deputy District Attorney
9 Nevada Bar #010233

10 Names of witnesses known to the District Attorney's Office at the time of filing this
11 Information are as follows:

11	<u>NAME</u>	<u>ADDRESS</u>
12	ARMBRUSTER, TODD	5001 OBANNON DR #34 LVNV
13	BALLEJOS, JEREMIAH	LVMPD #8406
14	BENJAMIN, JACQUELINE DR	ME 0081
15	BLASKO, KEITH	LVMPD #2995
16	BUNN, CHRISTOPHER	LVMPD #4407
17	COLLINS, CHELSEA	LVMPD #9255
18	CONN, TODD	LVMPD #8101
19	CUSTODIAN OF RECORDS	CDC
20	CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
21	CUSTODIAN OF RECORDS	LVMPD RECORDS
22	FORD, DANIEL	LVMPD #4244
23	FONBUENA, RICHARD	LVMPD #6834
24	HATHCOX, JIMMY	5001 EL PARQUE AVE #C-36 LVNV
25	HUTCHERSON, CHRISTOPHER	LVMPD #12996
26	IVIE, TRAVIS	LVMPD #6405
27	KYGER, TERESA	LVMPD #4191
28	KOLACZ, ROBIN	5001 EL PARQUE AVE #38 LVNV

MONDAY, MARCH 16, 2009 R.D.T.

C250630

Exhibit 4

003238

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

JUL 10 2009

Ed. A. F.
CLERK OF 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 P. VILLANI, DISTRICT COURT JUDGE

MONDAY, MARCH 16, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

Page 1

ROUGH DRAFT TRANSCRIPT

000020

003239

1 defendant guilty beyond a reasonable doubt, the State has a
2 right to open and close the arguments. After the arguments
3 have been completed, you will retire to deliberate your
4 verdict. At this time, is the State ready for their opening?

5 MR. SMITH: Yes, Judge.

6 THE COURT: All right, go ahead.

7 MR. SMITH: May it please the Court, counsel. Folks,
8 despite the fact that this is a murder trial, I don't really
9 have a long and ornate opening statement because fundamentally
10 the facts of this case are pretty simple.

11 The State anticipates that the evidence that you're
12 going to see throughout this trial is going to show that on
13 November 30th, 2008 here in Clark County, Nevada, the defendant
14 was living with his on again, off again girlfriend, a woman by
15 the name of Victoria Witmarsh. They had been seeing each other
16 for several years dating back to 2001.

17 I say on again and off again, but obviously in
18 November 2008 they were on again, and in fact, they were living
19 together in a residence located off a street called El Parque.
20 Now, Ms. Witmarsh was actually estranged from her husband. Her
21 actual legal name was Mrs. Victoria Witmarsh. But at the time
22 she was in a relationship with the defendant, Brian O'Keefe.

23 Mrs. Witmarsh had been estranged from her husband for
24 several years, and in fact, she had a daughter with that
25 husband. The daughter's name was Alexandra. Now, on the night

Page 170

ROUGH DRAFT TRANSCRIPT

1 THE COURT: All right, thank you. Mr. Pike, do you
2 wish to exercise your right for opening at this time?

3 MR. PIKE: Yes, your Honor.

4 THE COURT: All right.

5 MR. PIKE: May it please the Court, ladies and
6 gentlemen of the jury, counsel, Ms. Palm and Brian, this is an
7 opportunity that I have to preview the defense's version of Mr.
8 O'Keefe's version and try to pull together some of the evidence
9 that's going to be produced to you so that when it comes
10 forward to you, it will -- it goes in context. Sometimes we
11 have to call witnesses out of order so the best thing I can
12 describe in opening statement is like a picture on a puzzle box
13 because sometimes we put a piece over here in the corner, and
14 it isn't until we bring in the other pieces that that makes
15 sense and it all kind of fits in.

16 So once you understand the theory of the State as
17 they presented it, now we're going to show you what the
18 evidence is going to show in this case and why it would be
19 appropriate to come back not with a verdict of guilty of murder
20 in this case.

21 This is the case of the State versus Brian O'Keefe.
22 It is a case about tragedy and not about murder. It starts out
23 with the State alleging this premeditation. That he thought
24 about it. He had the malice, the ill will that they talked
25 about. But it's not supported by the physical evidence that's

Page 172

ROUGH DRAFT TRANSCRIPT

1 in question, November 30th, 2008, it's the State's position that
2 the defendant and Victoria Witmarsh got into what we'll call
3 for now an argument or an altercation.

4 Now, by no means are we conceding this was mutual
5 combat but something happened, and the evidence is going to
6 show you what exactly happened. At the conclusion of this
7 altercation, it's State's position that the evidence is going
8 to show you that the defendant, in fact, stabbed Victoria
9 Witmarsh and that she died.

10 We also anticipate that the evidence is going to
11 prove to you this was no self-defense, this was not an
12 accident, and it was not a suicide. And that's what we have to
13 prove. We have to prove that the death of Ms. -- Mrs. Witmarsh
14 was unlawful.

15 We anticipate that we are going to prove that the
16 death in this case was nothing less than an intentional act
17 committed by the defendant against Mrs. Witmarsh. You're also
18 going to hear evidence indicating that the defendant had a
19 motive to kill Mrs. Witmarsh and that he had what we'll
20 describe as an underlying ill will towards Mrs. Witmarsh, which
21 we submit is going to help us meet our burden of proving beyond
22 a reasonable doubt that this was an intentional act.

23 And at the conclusion of all the evidence in this
24 case, we are going to ask you to return a verdict of guilty to
25 the crime of first degree murder. Thank you.

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ROUGH DRAFT TRANSCRIPT

1 going to come in. This is the apartment where all these events
2 occurred. It was not done in a secret or a premeditated or
3 where somebody stuck to where someone was at and then killed
4 them and tried to get away from what was happening.

5 It was this on again, off again girlfriend. They
6 were living together. They were living in this apartment and
7 neighbors were around. They walked up. This is where they
8 came. The door was open. The evidence is going to show that
9 when the neighbors came, they came in the door. It was open.
10 This is not something that was done in secret, which is what
11 you would reasonably expect or would interpret as a
12 premeditation or planning.

13 They were a couple. They lived together. He gave
14 her flowers. They had their clothing together. They kept an
15 apartment. They kept a clean apartment. They had gotten over
16 their past problems. They were hoping for that happy ending
17 that we heard about. And they were back together.

18 The physical evidence will show that this is a couple
19 that was bearing for a future together. (Indiscernible) the
20 bathroom, the closet space. It appears to be equally divided.
21 They're working side by side with the union. We'll bring in
22 union members to show that as a couple they were open. This is
23 not something where anybody was keeping a secret. They were
24 back together.

25 Victoria and Brian were inseparable around the union

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FRIDAY, MARCH 20, 2009 R.D.T.

C250630

Exhibit 5

003241

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

Cliff A. Smith
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

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

1 (Off-record bench conference).
2 THE COURT: I'm sorry, ladies and gentlemen.
3 (Reading of the jury instructions resumed but not
4 transcribed).

5 THE COURT: Counsel,

6 MS. GRAHAM: Yes, Judge. Court's indulgence. I'm
7 not a technical person. I apologize. So Mr. Smith is helping
8 me out setting this up. And while we're waiting to do that, I
9 just - it's been a long week, I think you'd all agree. It's
10 been a long week. A lot to take in. This is a really serious
11 case. Somebody's dead. It's the State's position that she was
12 murdered, and it's also I'm going to tell you right off the
13 bat, it's the State's position that defendant committed first
14 degree murder with a deadly weapon.

15 You're going to have a verdict form here that gives
16 lots of options for you to consider. First degree murder with
17 use of a deadly weapon, first degree murder, second degree
18 murder with use of a deadly weapon, second degree murder,
19 voluntary manslaughter with use of a dead weapon, voluntary
20 manslaughter, involuntary manslaughter with use of a deadly,
21 involuntary manslaughter, and obviously not guilty.

22 The State's position is that this is first degree
23 murder with use of a deadly weapon. You're going to have
24 copies of the jury instructions. I think the judge informed
25 you of that. So I know that that was a lot of stuff to hear

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ROUGH DRAFT TRANSCRIPT

1 Direct evidence. We heard direct evidence in this case.
2 Direct evidence is evidence from witnesses, okay. You were
3 able to observe them while they testified, to hear the content
4 of their testimony, to judge their credibility by their actions
5 on the stand, their eye contact, their mannerisms. That's
6 really important. And you all have life experience. I mean,
7 you can judge somebody's credibility.

8 So and credibility's another one of the instructions.
9 But the witnesses, that's direct evidence okay. Their
10 testimony is direct evidence. The weight of that evidence is
11 going to be determined by you. And I just gave an example.

12 Circumstantial evidence is a chain of facts. And
13 this is real important, okay. Circumstantial evidence is a
14 chain of facts that draws an inference that you can give weight
15 to. And you're to give the same weight to direct evidence,
16 evidence that you've actually heard, as things that can be
17 inferred, and I'll give you an example of that. And I think,
18 you know, the judge gave you an example of that at the
19 beginning of this case.

20 I guess the best example that comes to my mind is
21 because I'm from the midwest, and it snows there a lot. You
22 are home, you're awake, you lookout the window, you see the
23 snow falling on the ground, you see the snow. That's the
24 direct evidence. The difference between that, circumstantial,
25 is I go to bed that night, I wake up the next morning, I

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ROUGH DRAFT TRANSCRIPT

1 and read. You're not going to have to try to remember it.
2 You're getting copies of all of that to take back with you.

3 My job now is to try to help explain all of those
4 things that the judge said and how that would apply to this
5 case. And how the evidence in this case proves that he
6 committed first degree murder with use of a deadly weapon, a
7 knife.

8 Now let's see if this works for me. Your job is very
9 important, as the judge told you when you first got here and
10 through voir dire, and that's why we took a lot of time. The
11 system wouldn't work without you guys because, you know, we
12 want everybody of different backgrounds and different
13 experiences on our jury. Your sole duty when you go back in
14 that deliberation room right now is to determine what crime was
15 committed by the defendant.

16 Jury instructions, those are the law. That's the law
17 in Nevada per the judge and actually per our legislatures.
18 Whether you agree with the law or not, it's the law, and you
19 all took an oath to follow the law. And what the judge
20 described to you and what my attempts to explain to you the law
21 in the state and of course, defense will explain to you law of
22 the state, that's the law, folks. And that's what you have to
23 apply to the evidence in this case. But, again, you're going
24 to have copies.

25 Two types of evidence. Direct and circumstantial.

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ROUGH DRAFT TRANSCRIPT

1 lookout the window, there's snow all over the ground. I can
2 infer that it snowed last night, right. I mean, that's an
3 inference I can draw because when I went to bed, it - there
4 was no snow on the ground, I didn't see it snow. I didn't see
5 it snow, but when I woke up, there's snow on the ground, so
6 wouldn't that be a reasonable inference? Yes, that would be a
7 reasonable inference.

8 And you're to give the same weight to circumstantial
9 evidence as you are to direct evidence. So you can infer. You
10 need to use your common sense. Credibility of the witnesses,
11 live testimony. Like I said, he discussed that. That's so
12 important. You know, we've had so many people testify. We've
13 had officers testify today. We've had the defendant testify.
14 We've had lay witnesses, neighbors testify, medical examiners
15 testify, doctors testify. That live testimony, you can judge
16 the credibility of those witnesses because you were here, you
17 watched, you observed. Evaluate the ones that are supposed to
18 judge the credibility and their motives to lie.

19 You can disregard the entire testimony of a witness
20 if you don't find them credible. That's important. If you
21 find any one of our witnesses not credible, you're free under
22 the law to disregard that entire testimony. So remember that.
23 Don't get caught up in trying to figure things out. Common
24 sense. That's a big one want you don't leave it at the door.

25 There's a jury instruction - I think there a jury

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ROUGH DRAFT TRANSCRIPT

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1 instruction that says you bring your common sense and life
2 experience in. You don't leave it at the door. That's why
3 there's so many - you know, on each side of you, you're all
4 different. You all have different life experience. You're to
5 bring that life experience and your common sense into that
6 deliberation room. Don't forget it, okay.

7 Punishment. Your duty at this point right now when
8 you go back in the deliberation room is confine to the guilt of
9 the defendant. Whether or not he's guilty and what he's guilty
10 of. You were not to discuss punishment. The judge instructed
11 you on that. Or consider the subject of punishment during your
12 deliberations as to his guilt. That cannot be a factor in your
13 determination of what he's guilty for. The judge has
14 instructed you on that, and that is the law in Nevada. You
15 need to put that aside.

16 What is murder? I'm going to try to break it down.
17 I mean, it's so complicated. There's just - you know, you -
18 I was watching some of you. It's like well, what does all that
19 mean? Well, murder is the unlawful killing of a human being
20 with malice aforethought. Malice aforethought can be expressed
21 or implied. What is malice aforethought? We know what killing
22 another human being is, right? Okay. But what's malice
23 aforethought? Intentional killing without legal cause or
24 excuse or what the law would consider adequate provocation.

25 Okay, so it's intentional. An intentional killing

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ROUGH DRAFT TRANSCRIPT

1 What happened to my Power Point?

2 The intent to kill, though, can be a certain or
3 deduced from the facts and circumstances of the killing. So
4 the intention of the person that killed, you can deduce that
5 from all of the facts and circumstance of the evidence that we
6 presented to you today or throughout the week. Most
7 importantly, such as the use of a weapon that's calculated a
8 deduced detective in the manner that it was used and the
9 circumstances surrounding that act. That can be inferred.

10 Deduced. There doesn't have to be an amount of time,
11 a (indiscernable) amount of time needed between the formation
12 of the intent to kill and the act of killing itself, okay.

13 What is deliberation? You think about it first, you weigh the
14 options, consider the consequences, you make a decision. That
15 decision, folks, can be made very, very quickly by
16 premeditation, decision to kill, formed in the mind of the
17 killer, before the killing. It can be as instantaneous as
18 successive thoughts of the mind. Less than a minute.

19 The law doesn't measure the length of time of
20 premeditation, okay. It doesn't require how long that thought
21 must be pondered in the mind before it's premeditated. That's
22 really important for you to understand. Time can be varied
23 based on the individual and the circumstances of the evidence
24 that is presented to you. Instantaneous just is successive
25 thought in the mind. The law doesn't look at the duration of

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ROUGH DRAFT TRANSCRIPT

1 without legal cause or excuse. Anger, hatred, revenge, ill
2 will or spite is not required for malice, okay. That's in your
3 injury instructions, so don't feel like you're going to have to
4 remember everything that I tell you. Expressed malice is the
5 deliberate intention to take away the life of another.
6 Deliberately do it. Implied malice. Malice can be implied
7 just kind of like the circumstantial evidence kind of thing.

8 You know, you can imply malice when no considerable
9 provocation appears or when all of the circumstance of a
10 killing show an abandoned or malignant heart. So there's
11 implied malice as well as expressed. It can be deliberate or
12 you can imply it. And you can imply it with no provocation
13 appears and when all of the circumstances showing a killing of
14 an abandoned or malignant heart.

15 Simply put, malice aforethought means it wasn't an
16 accident, okay. Malice aforethought simply put, not an
17 accident. What is first degree murder? The killing was
18 willful, deliberate, premeditated. All of those have
19 definitions, too, believe it or not. Of course, they do.
20 Okay. And each one is different.

21 What is willfulness? The intent to kill. The intent
22 to kill - you intended it kill. That's willful. You know, we
23 kind of all know we what - we willfully do things everyday.
24 You know, we willfully get in our car and come in the - start
25 it and drive down to the court house to sit for jury duty.

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ROUGH DRAFT TRANSCRIPT

1 time for premeditation.

2 If you believe the evidence - from the evidence that
3 the act constituting the killing has opinion premeditated by and
4 has been the result of premeditation, no matter how rapidly,
5 the killing's premeditated.

6 What is second degree murder? The killing was not
7 deliberate, not premeditated. Just intentional. Voluntary
8 manslaughter. Killing without malice aforethought,
9 deliberation or premeditation with provocation. An example
10 would be a serious injury. Self-defense, maybe. Or somebody
11 is trying to hurt you. With no time to think. An irresistible
12 impulse in the heat of passion.

13 And the objective standard, though, for that heat of
14 passion is an ordinary person would have killed without
15 thinking. I mean, it's just innate, okay. You're in a
16 circumstance where, you know, let's say that you're at the zoo
17 and a tiger comes out of the cage and he's loose, I mean, it
18 would be - you wouldn't even think to try to save your
19 daughter or, you know, that's instantaneous. That's an
20 instantaneous - that's what an ordinary person would do. You
21 know, a situation where an ordinary person would kill.

22 Involuntary manslaughter, killing without any intent
23 during the commission of an unlawful act or a lawful act which
24 probably might produce such a consequence in an unlawful
25 manner. But where the involuntary killing occurs in the

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1 commission of an unlawful act which in its consequences
2 naturally tends to destroy the life of a human being the
3 offense is murder.

4 What's a deadly weapon? Well, it's complicated,
5 according to the law. Any instrument if used in the ordinary
6 manner contemplated by its design and construction will or is
7 likely to cause substantial bodily harm or death. Or any
8 weapon, device, any instrument, under the circumstances it was
9 used or attempt to be used or threaten to be used that's
10 readily capable of causing substantial bodily harm or death is
11 a deadly weapon. And of course, our contention is that a knife
12 was the deadly weapon.

13 Substantial, what's substantial bodily harm?
14 Substantial bodily harm means that it's bodily injury which
15 creates a substantial risk of death or causes serious
16 impairment, disfigurement or prolonged physical pain. All
17 right, what's self-defense. We use the reasonable person
18 standard. Honest but unreasonable does not negate malice and
19 does not reduce the offense from murder to manslaughter.

20 It has to be reasonable under the reason person
21 standard. There has to be the threat of imminent death.
22 Imminent means quicker than immediate. Or substantial bodily
23 harm. So there has to be a risk of imminent death or
24 substantial bodily harm, which, again, was, you know, the
25 threat of serious bodily injury.

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ROUGH DRAFT TRANSCRIPT

1 instantaneous? How do we know all this? Well, I'm going to
2 get to that want it was deliberate. And there was definitely
3 malice aforethought, either express, definitely implied. Okay.

4 MR. PIKE: Objection, your Honor. May we approach
5 the bench, I'm sorry.

6 THE COURT: All right.

7 MR. PIKE: I hate to interrupt Counsel's argument.
8 (Off-record bench conference).

9 MS. GRAHAM: Okay. So we look at the evidence before
10 the murder, during the murder and after the murder. What did
11 he say, the defendant? What did he do before the murder? He
12 said I want to kill the bitch. He told Cheryl Morris that, I
13 want to kill the bitch, she's poison. Why? He told her why.
14 She took three years of his life.

15 You can judge the credibility of Cheryl Morris
16 herself. He even told her how he could kill somebody with a
17 knife. He demonstrated to Cheryl that he can kill somebody
18 with a knife. He talked about his proficiency in the services
19 with a knife. His training. Before the murder he said all
20 that.

21 What about during the murder? Well, that's a little
22 tougher because we don't really know what was said or exactly
23 in what order that transpired. We know that the Tolivers, who
24 live directly under the defendant and Victoria that night,
25 directly under, were in their bedroom where the murder occurred

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ROUGH DRAFT TRANSCRIPT

1 The killing was absolutely necessary to avoid your
2 death or substantial bodily harm in this case, as it applies in
3 this case. The reasonable person standard. Fear alone is not
4 enough. And you cannot use more force than was necessary under
5 the law. And it doesn't apply to initial aggressors.

6 Intoxication. We've heard about intoxication. If an
7 intoxicated person has the capacity to form the intent to take
8 a life and he conceals and excuses that intent, that's no
9 grounds for reducing the degree of this crime. There are other
10 instructions that are the packet. Those are pretty much
11 self-explanatory.

12 How do we know defendant killed Victoria? Well, for
13 one thing, there's been absolutely no evidence that anybody was
14 in the room but the defendant and Victoria. I don't think
15 identity's an issue in this case. All right, this is how we
16 know it's first degree murder. It wasn't an accident. It was
17 willful. I don't think I have to go through all the facts.

18 You guys, there's been so much testimony here. Use your common
19 sense. Use all the evidence. You can infer that there was no
20 accident here. The medical examiner testified that the
21 location of the wound - you can view the photos yourself and
22 determine that this was no accident. It was willful. The act
23 of stabbing Victoria was willful.

24 It was premeditated. He had time to think about it
25 and thought about it. Remember, premeditation can be quick

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1 directly under. And Joyce told you as she was laying in bed,
2 she heard lots of thumping, lots of noises, a woman crying.
3 She kept turning up the volume. It got louder. It wasn't on
4 for about an hour. She heard thumps, she heard crying. And
5 then at one point it got so loud, it woke Cookie (phonetic) up.
6 You remember, he jumps up, what the hell? Stick the broom up
7 - you know, the old broom trick on the ceiling, you know, to
8 try to quiet it down. It didn't quiet it down. It got louder.

9 And then Cookie was so frickin' irritated because he
10 was awoken. He went up there to tell them to quiet down, and
11 what did he see? Well, he saw Victoria laying there in a pool
12 of blood. And Cookie's reaction is what the hell did you do?
13 He ran down stairs, started calling for people to call 911.
14 Defendant never asked him to call 911. He saw Cookie. Told
15 him to get out. Most importantly, one of the things that we
16 can infer that during the murder, since we don't know exactly
17 how everything transpired, we have photos.

18 The photos, and you know the saying? A picture is
19 worth a thousand words. These are all going to be back in the
20 jury room, State's Exhibit 55, State's Exhibit 56, State's
21 Exhibit 59, State's Exhibit 46, State's Exhibit 39, State's
22 Exhibit 58, 57. There's more, folks. I'm not going to show
23 you all of them. How about this one, 87 State's Exhibit 60.
24 How about this one, Defendant's Exhibit UU? That says it all,
25 really. Picture's worth a thousand words.

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1 After, well after - after, we have Todd coming in
2 the room. Todd Annbruster, remember the neighbor or the
3 maintenance guy that worked on the property? He came in the
4 room because Cookie's like dude, you know, call 911. He's done
5 killed that little girl. Todd goes up there. He goes into the
6 room. He sees Victoria laying on the pool of blood. And what
7 does the defendant do? He says get the fuck out, and he takes
8 a swing at him, right? That's what Todd testified to. You can
9 believe Todd if you want to, but -

10 So he takes a swing at Todd. Todd calls 911. They
11 leave. Cookie says he sees this face. They all - Todd,
12 Cookie, and even the neighbor next door, Doomy (phonetic), who
13 saw the defendant that night - described this face, this scary
14 face that the defendant had. It scared Cookie. You remember
15 he wanted to get the hell out of there. He wanted to get the
16 hell out of there because he said he didn't know what would
17 happen to him.

18 So defendant didn't call 911. We know that because
19 Detective Wildmann told you that he checked the cell phones,
20 and there was absolutely no entry of 911. I think there were
21 three cell phones, maybe four recovered from that apartment.
22 He didn't call 911. He didn't call for help. If this was an
23 accident, if this was self-defense, if she stabbed herself,
24 you'd call 911 for help.

25 And when they came, because other people had to call,

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ROUGH DRAFT TRANSCRIPT

1 blood on the floor.

2 They cannot send emergency personnel in a situation,
3 a dynamic situation like that. Defendant would allow - even
4 if she was alive at that point, he wouldn't allow her to be
5 treated. He would not allow them to enter the room to help
6 her. They had to take him twice and drag him out of the room.
7 Well, he says he doesn't want to leave her body.

8 He testified - I mean - let's see, what else
9 happened after? Okay, he told Hutcherson, you know, once he
10 was in custody he was put in the back of a patrol car - a
11 patrol car. He says sorry, V, I didn't mean to hurt you, let's
12 go, let's go, let's do the ten years. Sorry V doesn't cut it.
13 Sorry V.

14 The fact that you have remorse after you kill someone
15 does not negate the intent to kill at the time. Sorry V, that
16 doesn't cut it. He made so many statements. You know what, I
17 can't - I'm not even going to go into them because we would be
18 here all week.

19 You saw the defendant testify in his taped statement.
20 Well, you saw the taped statement that Detective Wildmann -
21 it was Detective Wildmann and Detective Krieger (phonetic), I
22 believe - Krieger. You guys saw that. You know how many
23 different statements he made and things he said. You were able
24 to watch his demeanor, and you were able, you know, to observe
25 Detective Wildmann and Detective Krieger with him. You can

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ROUGH DRAFT TRANSCRIPT

1 you wouldn't have a stand off in the bedroom with them. You
2 would let them attend to a woman that you supposedly love
3 bleeding all over the floor. But that didn't happen. Instead
4 when they got there, you heard from Officer Conn, Santarossa,
5 Ballesjos, Taylor, Hutcherson, they were all on the scene. He
6 wasn't going to let them near him and Victoria. They're
7 shouting to him, you know, is she hurt? What is defendant
8 saying? She's dead, she's alive, get the fuck out, go away,
9 fuck you, fuck - there's so many inconsistent statements.
10 There's so many things the defendant said.

11 But what we do know is he never would allow - and
12 the police announce Metro, we need to get her help, is she
13 alive, is she dead? He wouldn't respond want get the fuck out.
14 We need to get medical to her. Get the fuck out. Okay, so
15 what happens, you know? They're worried about this woman
16 laying on the floor. They can't go in there? Why can't they
17 go in there? There's protocol. They don't have him in his
18 line of sight?

19 They see a woman's feet at first. Sergeant Newberry,
20 I believe peeks around the corner, there was testimony of that,
21 and sees and says cover me, you know. They can't go there.
22 They think he's baiting him, you know. They testified to all
23 the things that he was saying and his demeanor, and they think
24 they're baiting him. He - they can't see. They don't know if
25 there's a weapon. They just see a woman lying in a pool of

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ROUGH DRAFT TRANSCRIPT

1 judge their credibility and theirs during that interview. And
2 you guys are going to have that, and if you want to, you can
3 watch it again.

4 He testified today, so you can judge that credibility
5 of him on the stand today, you know. You can infer, you can,
6 you know, the demeanor. You know, there's a box of Kleenex
7 right there. I didn't see one Kleenex lifted out of that box
8 while he was up there. You guys saw it. You know when he said
9 I can't go over it, it's - there's too much.

10 You know what's interesting, in opening statement Mr.
11 Pike gave, you know, a brief opening where he said one stab
12 wound, one stab wound. And I find it really ironic that today
13 on the stand the defendant when referred to alcohol, what did
14 he say? One is too many. One drink is too many. Well, one
15 stab wound is too many.

16 This is much more than second degree murder. Second
17 degree would only apply if defendant acted intentionally but
18 did not have the time to think about what he was doing
19 (indiscernible). No successive thoughts before
20 stabbing Victoria dead. He hadn't folks. The facts show he
21 had plenty of time for the weighing of choices and decided to
22 kill despite the possible consequences. There's plenty of
23 time.

24 I mean, co-counsel Smith's - even if you believe the
25 defendant's version of, you know, the incident between him and

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ROUGH DRAFT TRANSCRIPT

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1 Victoria, he had plenty of time to think about it. The
2 defendant had time to premeditate. Again, remember
3 premeditation. It's not, you know, planning for days or weeks.
4 Prior to the stabbing defendant had successive thoughts about
5 what he was going to do. This is much more than voluntary
6 manslaughter. Again, defendant had plenty of time to think
7 about what he was about to do, to weigh his choices and
8 consider the consequences. Defendant wanted the Victoria dead.
9 It's not self-defense.

10 We talked about self-defense and what that is by law.
11 It's not self-defense. You know, even if you believe the
12 defendant's version that Victoria had the knife and came at him
13 and was the initial aggressor, you know, he's bigger. What did
14 everybody say, all the neighbors? She's an itty bitty thing.
15 She was a little thing. You know, we have her driver's
16 license. She was what -- well, he even admitted, what, she's
17 five, four, a buck ten, as Mr. Smith said. You know, she's a
18 little bitty thing.

19 And he could have used other means. So self-defense
20 is just absolutely -- it -- it's so far from the realm of
21 self-defense. Deadly weapon. This is a murder with use of a
22 deadly weapon. The knife was the cause of death, okay.
23 According to the law, I at this point that this would qualify,
24 even though Wolfgang Puck probably didn't contemplate his
25 butcher knife being used to stab somebody to death, I think

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ROUGH DRAFT TRANSCRIPT

1 told you in the -- talked about regarding the jury
2 instructions. When Mr. Pike argued to you, he told you that
3 you should start your deliberations in this case with a second
4 degree murder or in other words, you'll be able to rule out a
5 first degree murder pretty fast, and here's why: instruction
6 34 tells you how you consider evidence of voluntary
7 intoxication, and you can consider that evidence to reduce the
8 intent -- as far as the intent requirement for a murder.

9 A first degree premeditated murder, as instruction 16
10 will tell you, requires -- oops. It requires deliberation.
11 That's this right here. Deliberation's the process of
12 determining upon a course of action to kill as a result of
13 thought, including weighing the reasons for and against the
14 action and considering the consequences of the action. A
15 deliberate determination may be arrived at in a short period of
16 time, but in all cases the determination must not be formed in
17 passion or if formed in passion, it must be carried out after
18 there's been time for the passion to subside and deliberation
19 to occur. A mere unconsidered and rash impulse is not
20 deliberate, even if it includes the intent to kill.

21 And also, a first degree murder requires that you
22 find premeditation. As far as premeditation is defined, the
23 truth (indiscernible) duration of time, but the extent of the
24 reflection. A cold, calculated, judgment and decision may be
25 arrived in a short period of time, but a mere unconsidered

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1 that this certainly qualifies under the law as a deadly weapon.
2 He talked about his proficiency with a knife.

3 In conclusion, after weighing all of the evidence --
4 and there's a lot, you guys have a task ahead of you -- State
5 is asking you to return a verdict of guilt for first degree
6 murder with use of a deadly weapon. Thank you.

7 THE COURT: Thank you, Ms. Gram. Ms. Palm.

8 MS. PALM: Thank you, Judge. Good afternoon, ladies
9 and gentlemen. This may be your last time that I get to talk
10 to you because as you heard at the beginning of this case, if
11 you come back with anything other than a first degree murder
12 verdict, we're done. If you come back with a first degree
13 murder verdict, then we would be doing another penalty phase
14 after this. So and after my closing today, the State will get
15 another chance. They get that other chance to argue again
16 because they have the burden of proof.

17 MS. GRAHAM: Objection, Judge. You know, the law
18 says --

19 MR. SMITH: Can we approach?

20 MS. GRAHAM: -- that we're not --

21 MR. SMITH: Let's approach.

22 THE COURT: Sustained. No, overruled. Go ahead, Ms.
23 Palm, you're fine. Go ahead.

24 MS. PALM: So they will argue again, and this will be
25 it for us. I just want to address some points that Ms. Graham

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1 and rash impulse, even though it includes an intent to kill, is
2 not a deliberation, and premeditation as will fix the unlawful
3 killing of murder of the first degree.

4 So you can consider Mr. O'Keefe's extreme
5 intoxication when you're considering whether the State has
6 proved to you a first degree murder, and I submit to you they
7 have not. In addition the State has the burden of proving,
8 before you consider any of crimes, they have the burden of
9 proving beyond a reasonable doubt the absence of self-defense
10 and accident. They have not done so.

11 And I also submit that Ms. Graham has spoken a little
12 bit as far as implied malice because implied malice in this
13 case does not apply to a first degree murder theory. If you
14 were going to find guilt under a theory of implied malice, you
15 have to only go to second degree murder.

16 And there's another instruction that might be a
17 little confusing to you, and that is instruction 18. It talks
18 about second degree murder. The only part of this instruction
19 that applies to this case is the first part, murder of the
20 second degree is murder which is an unlawful killing of a human
21 being with malice aforethought, the same thing required for
22 first degree murder, but without the deliberation and
23 premeditation for a first degree murder.

24 MR. SMITH: Judge, may we approach?

25 THE COURT: I think it's okay. It's argument. Go

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1 ahead.

2 MS. PALM: Thank you.

3 THE COURT: Go ahead.

4 MS. PALM: I also want to draw your attention to jury
5 instruction number 17. This jury instruction tells you that if
6 all 12 of you think it's a murder, but not all 12 of you think
7 it's a first degree murder -- some of you think first, some of
8 you think second -- you have to go with second. You can't go
9 with first. It tells you that if you think he's guilty between
10 the two degrees, he must be convicted of the lesser offense.

11 And then if you find that he did not commit a first
12 or second degree murder, then you look at manslaughter.
13 There's voluntary manslaughter and involuntary manslaughter.
14 Ms. Graham talked about the instruction for a voluntary
15 manslaughter. And what I want to draw your attention to in the
16 language in here, this middle paragraph, the provocation
17 required for voluntary manslaughter must either consist of a
18 serious and highly provoking injury inflicted upon the person
19 killing sufficient to excite an irresistible passion in a
20 reasonable person or an attempt by the person killed to commit
21 a serious personal injury on the person killing. That does not
22 require a physical injury. An involuntary manslaughter can
23 result after a passion from you walk in and you find somebody
24 sleeping with your husband or your wife. That's the kind of
25 passion we're talking about. It's an injury, but it doesn't

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1 as evidence of motive, if you think that there is motive here.

2 Brian has a severe and chronic disease with his
3 alcoholism. You heard that from Mr. Patisso, who does the
4 MENDS counseling. He has suffered for a long time from it.
5 It's influenced his choices, and he's made some bad choices.
6 And he's paid the price for those just like he has paid the
7 price for his prior crimes. He's lost loved ones, he's lost
8 relationships. It's affected his jobs, and now he's in a
9 criminal situation.

10 I'd ask you to think about the whole person that Brian
11 is because there's some good about him, too. As a very young
12 man, 17 years old, he goes into the service. He serves in
13 combat. He's a combat veteran. He was decorated. He did some
14 good things. And then he succumbed to this disease, and he has
15 battled it every day of his life. It's cost him dearly, and
16 it's a struggle that he's succumbed to over and over.

17 But he is entitled to the protection of the
18 Constitution that he fought to defend, and that Constitution
19 requires that if you convict him of a crime, it must be because
20 every element of that crime is proved beyond a reasonable doubt
21 and not because he's done some bad things or you don't like him
22 or you don't like us or -- these require that you hold the
23 State the burden of the proof because that's what our
24 Constitution requires.

25 Brian told you what happened on November 5th. He

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1 mean it has to be a physical injury.

2 And this has been sort of a long trial for a one week
3 trial. And sometimes as trials go, they get a little bit
4 contentious, and I just want to say right now if I or Mr. Pike
5 have done anything to offend any of you, we do not want you to
6 hold that against our client because we are proud to be
7 representing Mr. O'Keefe. And so please forgive us for any of
8 our transgressions.

9 Brian O'Keefe is not proud of the choices in his life
10 and of things that he can't control. You heard about the three
11 prior felony convictions he has, and there are instructions
12 telling you how you can use those, and they're a little bit
13 confusing, so I just want to point those out to you, too.
14 They're jury instructions number 8 and 9.

15 Number 8 tells you that the fact that he's been
16 convicted of a felony may only be considered for the purpose of
17 determining credibility. It does not necessarily destroy or
18 impair his credibility. It's one of the circumstances you can
19 consider. So that is an instruction telling you how to
20 consider the credibility of a witness. Because Mr. O'Keefe
21 testified, you can consider all three of those convictions for
22 that purpose, but it's not evidence of his guilt.

23 Instruction 9 talks about the one conviction that was
24 let in for the purpose of showing motive, and that's the prior
25 domestic battery conviction. That conviction can be considered

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1 didn't have to. He didn't have to take the stand. A criminal
2 defendant is never required to testify, and he got up there and
3 he told you what happened. The State has offered you
4 absolutely no proof that anything else occurred. On that
5 evening he and Victoria were celebrating the prospect of him
6 going back to work, and he admitted to you that he was looking
7 for a reason to drink. He wanted to have something to
8 celebrate. He wanted to drink again.

9 And they went out and they had a good time, and they
10 were acting as a couple, and that evening did not start out
11 with any intent to harm Victoria. They started drinking wine
12 at home, then they went to the Paris and they drank free drink
13 after free drink. That's why they were there. He doesn't
14 remember who drove home, but he remembers parts of it, and he
15 remembers waking up in the passenger seat, and the State's
16 evidence supports that. This is State's Exhibit CC.

17 If you note from that photograph, the passenger seat
18 in the car is reclined. The driver's seat is moved up. There
19 are even glasses in the center console.

20 When he wakes up, they're having a little bit of an
21 argument. She wanted to go out to eat. He wanted to keep
22 drinking because he wanted to catch up with her. She goes
23 upstairs, he stays down stairs, and he sleeps for a little
24 while longer. He remembers going upstairs. He remembers
25 hitting the rail. He remembers Jimmy Hetches coming out, and

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1 that is supported by Jimmy Hatchcoo's testimony. Jimmy heard a
2 loud noise, came out, and he said Brian's standing out there.

3 He remembers going in the apartment to use the
4 bathroom. Using the bathroom, Victoria's in the master
5 bedroom's bathroom making some noises, apparently still angry.
6 He decides he wants to smoke so more. He goes back outside.
7 He's smoking outside. And then he told you what happened when
8 he went into the bedroom.

9 He goes in the bedroom, was going to hang up his
10 jacket. The lights were off. She comes flying out of the
11 bathroom with the knife, startles him. He uses his jacket to
12 ward off the knife, and that is also supported by the evidence.
13 This is Defense Exhibit W. This is his jacket laying there on
14 the other side of the bed. The blinds are falling down because
15 the jacket hit them.

16 He tells you about the struggle that they had and how
17 she was holding the knife. If you imagine this as the sharp
18 blade of the knife, the edge of this ruler, she's jabbing the
19 knife at him. He grabs it, she grabs it out of his hand and
20 cuts his hands. You would cut your hands where his hands cut
21 where he said he grabbed it, and the evidence supports that.

22 And Dr. Schiro told you that his hand wounds are most
23 likely a defensive injury. From all the options that there
24 are, Dr. Schiro came in here and told you the most likely
25 option is that they are consistent with defensive injury.

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1 given of the issue of self-defense as raised. Brian's defense
2 is not that he intentionally killed her in self-defense, which
3 would be the normal self-defense. Brian's defense is that he
4 acted in self-defense when she's coming at him with a knife,
5 and that she was killed in an accident during that
6 self-defense. So it's not the usual self-defense. So some of
7 those instructions might be a little confusing, but that is the
8 defense that we are putting forth is that this happened during
9 his response to her attack, but the stab itself was an
10 accident.

11 What Brian told you is actually the only thing that
12 makes sense, given all the evidence. It explains the noises
13 heard by the Tolivers. And the Tolivers cannot be right in
14 their descriptions of time if you want to believe the rest of
15 the State's case because Joyce told you she started hearing
16 noises around 9:00, and she knew that because that's when her
17 stories played. And she was annoyed, her stories were playing,
18 and she couldn't hear them because there's noise going on
19 upstairs.

20 Well, she say Cookie wake up at 10:00, went up
21 shortly thereafter. Cookie said he went up about 10:15, and
22 that does not jibe with the 911 calls. Those 911 calls are
23 made at 11:02. So what's happening for 45 minutes? If you
24 believe the State's evidence, apparently a two hour beating.
25 Is that what they're trying to allege because yes, Victoria has

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1 So he's grabbing her wrists and he gets ahold of both
2 wrists, and he's trying to fight with her, and they're moving
3 around that tiny little area by the bed, and you saw the
4 photographs. It's a tiny area. They fall down on the bed, and
5 from the weight of his arms, the knife goes in. And it goes
6 in, and the way it goes in is the same angle as

7 (Indiscernible). It goes in like this. Or actually,
8 the sharp part is to the back. So she's holding it, he has her
9 hand, it would go in just like this, sharp part to the back.
10 It makes sense. And the State cannot disprove it, as is their
11 burden. They have to disprove that.

12 He told you that he didn't realize that the knife
13 went in. He didn't realize it went in. He didn't realize it
14 went out. All he understood in his drunken stupor was that she
15 stopped moving and then the bed started getting wet, and he
16 starts looking for an injury, and he doesn't know what's
17 happening. He doesn't understand it. And he's moving her
18 around the bed trying to find out where is the injury. And he
19 takes the pillowcase off, and he's trying to hold that up to
20 the injury that he does find, and her pants are bloody, so he's
21 taking them off looking for is there a different kind of
22 injury. He doesn't know what's happened. And he is drunk out
23 of his mind, and we all know that.

24 There are a lot of instructions on self-defense, and
25 this is not a classic self-defense. But those instructions are

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1 some bruises, but as you hear from Dr. Benjamin, she can't date
2 any of those bruises. They could be up to three weeks old.
3 She doesn't know.

4 And if you look at the bruises and not the multiple
5 pictures of the same bruises. Some look older. Some look
6 newer, and none of them look like a two hour beating. None of
7 them look like a one hour beating. That would have been some
8 serious damage if it's constant beating going on for one hour.
9 And Victoria had cirrhosis and that affects your bruising
10 ability. And she was also in a drunken stupor herself.

11 We don't know that she's not walking into chairs,
12 walking into tables, bumping into things, that she doesn't have
13 a lot of bruises ordinarily on her feet which she -- when she
14 walks into a wall. Cirrhosis affects your bruising, and you
15 would bruise, according to their own expert, upon less than
16 forceful contact and you would bruise easier.

17 Jimmy Hatchcoo, who lived right next door to Brian
18 and Victoria didn't hear any noises until 10:00 o'clock, and
19 that's when he heard a loud noise outside on the rail, and
20 that's when he went out, and that's when Brian was out there.
21 You would think that Jimmy Hatchcoo would have heard some kind
22 of moaning going on. And with Victoria's bleeding problem, Dr.
23 Benjamin said she would have bled out quickly, it was probably
24 fast. She wouldn't have been up there moaning for an hour or
25 two hours or any length of time.

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