1 MR. LALLI: Do you give that one? I thought you
2 didn't give that one.
3 THE COURT: Well, I'm going to -- you wanted me to
4 give it? I don't care.
5 MR. LALLI: It doesn't -- it's up to you. It
6 doesn't --
7 THE COURT: I really don't. But you know, I don't
8 have a trial every week anymore, and I really don't --
9 MR. LALLI: Right. Well, I may as well give it.
10 THE COURT: All right. Give it. All right. And
11 the last one is, "Now, you will listen to argument." So,
12 there are the instructions.
13 MR. LALLI: We'll have to change --
14 THE COURT: I don't know if we're on the record, are
15 we?
16 MR. LALLI: -- the verdict form also.
17 MR. O'KEEFE: And the verdict form, Your Honor, the
18 last one.
19 MR. LALLI: We'll have to --
20 THE COURT: That's the instructions.
21 MR. LALLI: -- change the verdict.
22 THE COURT: Now, this is the verdict form I have in
23 my hand.
24 MR. LALLI: We'll have to eliminate the --
25 THE COURT: You have to eliminate that.

1 MR. LALLI: -- manslaughter verdicts.
2 THE COURT: Right. Guilty of second degree with
3 use, without use, and then you got to scratch out guilty of
4 voluntary, and guilty of voluntary with or without a weapon,
5 all right?
6 MR. LALLI: Yes.
7 THE COURT: So, we're only going to have three
8 verdict -- three boxes, right?
9 MR. LALLI: Correct.
10 MR. O'KEEFE: That's what we had at the second
11 trial. Yes, sir.
12 THE COURT: Okay. So, that's what we're going to do
13 then. So, let me get my book, and --
14 MR. O'KEEFE: Now can I back up a moment, Your
15 Honor, on the -- since we completed this -- the State's -- I
16 don't want to -- I'm sorry, Your Honor.
17 THE COURT: No, what --
18 MR. O'KEEFE: I'm speaking out of turn. I don't
19 want to --
20 THE COURT: What do you want to back up? What do
21 you mean?
22 MR. O'KEEFE: I don't want to disrespect you, and I
23 don't want to speak out of turn. The weapon instruction in
24 this, can we back up now, since we --
25 THE COURT: No, no. I'm going to go to that right

1 now.

2 MR. O'KEEFE: Yes, sir.

3 THE COURT: Yeah. This is what we do now. All

4 right.

5 MR. O'KEEFE: Yes, Judge.

6 THE COURT: All right. For the record now -- we're

7 on the record, outside the presence of the jury. This is the

8 time to settle instructions in open court, outside the

9 presence of the jury.

10 Now, but I think -- before that, I think we should

11 number these. And then, this way, you can allude to the

12 number that you don't like or anything, all right? Because

13 I'm going to give that. That's a typical instruction we give.

14 But I might not. I might delete it. All right. Let's --

15 MR. LALLI: Well --

16 THE COURT: Let's number these now.

17 MR. LALLI: We haven't -- I don't know if the

18 defendant is offering any instructions.

19 MR. O'KEEFE: Yeah.

20 THE COURT: Oh, okay. Do you have any instructions

21 to offer?

22 MR. O'KEEFE: Yes. That's what we were going to get

23 to. But I wanted to --

24 THE COURT: Let's get to it now.

25 MR. O'KEEFE: I love this Judge. I wanted the -- if

1 I may approach the bench to --

2 THE COURT: Do you have a copy --

3 MR. MANINGO: Actually, I could give the whole --

4 THE COURT: -- for Mr. Lalli?

5 MR. MANINGO: Keep your copy all together, okay,

6 Brian?

7 MR. O'KEEFE: Okay, yeah.

8 MR. MANINGO: Keep your copy all together.

9 THE COURT: Do you have a copy for me?

10 MR. MANINGO: I do.

11 MR. O'KEEFE: Oh, great.

12 THE COURT: What is this? What in the world is

13 this?

14 MR. O'KEEFE: Basically, what it was, Your Honor --

15 MR. MANINGO: Your Honor, just for the record -- I

16 don't know if we're on or off. But Your Honor, this is --

17 these are the defendant's proposed jury instructions from the

18 second trial. Just using those as reference for right now.

19 MR. O'KEEFE: Yeah.

20 THE COURT: All right. What do you propose?

21 MR. O'KEEFE: Okay. On number 10, page 10, Your

22 Honor, with the foldie (phonetic) at the bottom, Judge Villani

23 had her supply a copy with an authority, and one without for

24 each instruction. So, it doesn't matter.

25 Page 10, on the abandoned and malignant heart,

1 implied malice murder theory, I'm asking -- requesting that
2 that be appropriately put into the State's instructions for
3 that -- mens rea. It is an unintentional murder, based on an
4 unlawful act. It has to have conscious knowledge and
5 disregard. You know it better than me, Your Honor. I'll say
6 no more.
7 THE COURT: Mr. Lalli?
8 MR. LALLI: Your Honor, we object to it. The malice
9 aforethought instruction that we give has been approved
10 routinely and repeatedly by the Nevada Supreme Court.
11 MR. O'KEEFE: In rebuttal, Your Honor --
12 THE COURT: Yeah.
13 MR. O'KEEFE: This is the third trial, Your Honor.
14 They've had -- there are three types of men rea -- of malice
15 murder, the mens rea. They've had intentional -- intent to
16 kill. They have had now the felony murder, mens rea. And
17 now, this is the last one remaining.
18 In Nevada, we all know -- you know better than me;
19 abandoned and malignant heart is the equivalent to depraved
20 heart murder. That is sufficient for second degree implied
21 malice murder. It states it clearly in Coleman vs. State. In
22 2000, the Nevada Supreme Court stated this. It's on page 19.
23 I even remember it in the authority.
24 It quite clearly states, the abandoned and malignant
25 heart instruction must be pretty well given on an implied

1 malice murder charge. If it was the first trial, I mean, Mr.
2 Lalli could foresee it on simple malice aforethought. But
3 I've already been acquitted of intentional -- the intentional
4 stabbing, is my argument, being acquitted by the first degree
5 intentional stabbing.
6 And, okay, so then they return to second degree
7 murder. Okay, was it on theory 1, or theory 2? I guess we
8 don't know, since they got it with duplicity. Was it the
9 simple malice murder, second degree; or was it a felony
10 murder, second degree? Still, my argument in the Ninth
11 Circuit is, it didn't matter whether it was simple murder or
12 felony murder. Second degree murder is still second degree
13 murder for double jeopardy.
14 THE COURT: All right.
15 MR. O'KEEFE: Okay. So, they took out the felony
16 murder. Now, they're trying to just proceed back on the
17 malice aforethought murder. Expressed malice is gone. It's
18 in Byford vs. Nevada. Again, I'll use that authority; you
19 were the judge. Mr. Lalli happened to be the prosecutor.
20 They quite clearly state, expressed malice goes with first
21 degree murder. And you know it better than me. 994 P.2d,
22 page 700, Your Honor, 2000.
23 THE COURT: Well, we have an instruction in here,
24 "Malice may be implied when no considerable provocation
25 appears, or when all the circumstances of the killing show an

1 abandoned and malignant heart." That's one of the
2 instructions I'm going to give. That's a stock instruction.
3 I'm not going to deviate from this in this case.
4 So, I'm going to mark this as defense proposed A.
5 And I'm not going to give it, but it's going to be part of the
6 record, all right? So, when it goes on appeal --
7 THE CLERK: A court's?
8 THE COURT: Defense -- this is defense proposed A.
9 However you mark instructions that I'm not giving. How do you
10 do that?
11 THE CLERK: I mark them as court's exhibits.
12 THE COURT: Well, then do it. Court's Exhibit A.
13 Is that -- you want to do A?
14 THE CLERK: It will be 10.
15 THE COURT: But is that going to indicate that's a
16 defense proposed exhibit?
17 THE CLERK: Yes.
18 THE COURT: All right. That will be marked as
19 Court's exhibit, not given, all right? What else on this --
20 MR. O'KEEFE: Okay. There was a -- Court's
21 indulgence. And we are -- the non-flight instruction, Your
22 Honor . This --
23 THE COURT: The what?
24 MR. MANINGO: Page 27.
25 MR. O'KEEFE: Page 27 in your packet, Your Honor.

1 THE COURT: Okay.

2 MR. O'KEEFE: There's ample evidence that qualifies
3 for me asking for this instruction at least. I mean, I did
4 not try to flee the scene. In fact, it's perfect, because I
5 was asking, and then, I know, with profanity and wrongfully, I
6 was demanding for them to come in. I didn't try to flee. I
7 mean, I'm asking for the instruction. I think I'm entitled,
8 Your Honor.

9 THE COURT: Mr. Lalli?

10 MR. LALLI: Your Honor, there is no jurisprudence in
11 the State of Nevada to give a non-flight instruction. In
12 fact, when flight instructions are given, the Supreme Court
13 has urged district courts to utilize caution to make sure that
14 they were appropriately given.

15 This California instruction would certainly be, you
16 know, problematic if given. There's no legal authority in
17 Nevada for this sort of instruction. I don't believe it's the
18 law in this state.

19 THE COURT: Well, in 38 years, I've never seen a
20 non-flight -- not that this thing couldn't come up new. I'm
21 not saying that. But I've -- even when the State wants a
22 flight instruction, I'm very reticent to give it, because --
23 so, but it's a good -- maybe they'll make new law. You know,
24 I don't know. It's a unique instruction. But I'm going to
25 mark it -- I put here defense proposed B, not given, and it

1 will be made a court exhibit. All right? Is that what you
2 want to do?
3 THE CLERK: I can do it too, is I can put a cover
4 sheet on it and file it as a document, or I can mark it as a
5 court's exhibit.
6 THE COURT: Mark it as a court exhibit. May as
7 well, right?
8 THE CLERK: Okay.
9 THE COURT: All right. What else?
10 MR. O'KEEFE: Your Honor, I don't know. On page
11 28 --
12 THE COURT: Page 28?
13 MR. O'KEEFE: Yeah. Does this already -- has this
14 been covered by the State's instruction? You would know by a
15 quick look.
16 THE COURT: No, it's not.
17 MR. O'KEEFE: Well, then I would request that this
18 be -- be entered.
19 THE COURT: Mr. Lalli? Page 28, or 29?
20 MR. O'KEEFE: Page 28, Your Honor. It's this --
21 THE COURT: Oh, I'm sorry. I was looking at 29.
22 MR. MANINGO: I'm looking for theirs.
23 THE COURT: Well, we have a voluntary -- we have an
24 intoxication instruction.
25 MR. O'KEEFE: Okay. And I was just trying to --

1 THE COURT: Well, it might not be the same one.
2 It's --
3 MR. O'KEEFE: Yes.
4 MR. LALLI: It's not.
5 THE COURT: I'm going to read it here. It says, "No
6 act committed by a person while in the state of voluntary
7 intoxication shall be deemed less criminal by reason of his
8 condition. Voluntary intoxication does not negate the element
9 of malice inherent in the crime of murder."
10 MR. LALLI: That is the law in Nevada.
11 THE COURT: Right.
12 MR. LALLI: Malice murder, second degree murder is a
13 general intent crime. The state of the law is that
14 intoxication can be used to negate the specific intent of a
15 crime. So, in the case of first degree murder, the standard
16 instruction that we give is that -- it's that language, and we
17 also add the line that says, "And in all cases, intoxication
18 will only reduce a first degree murder to a second degree
19 murder."
20 MR. O'KEEFE: Your Honor, with all --
21 MR. LALLI: What the defense is saying is that
22 intoxication is a defense to second degree murder. That's the
23 gist of what this instruction says that he's --
24 THE COURT: But it's not. That's not the law.
25 MR. LALLI: -- proffering, and that's not the state

1 of the law.
2 THE COURT: All right. What else?
3 MR. O'KEEFE: Number 29, Your Honor, the one you
4 were on. That one.
5 THE COURT: Well, I'm going on 28 now. I'm not
6 going to --
7 MR. O'KEEFE: Oh, okay.
8 THE COURT: I'm going to mark that as proposed C.
9 MR. O'KEEFE: Okay.
10 THE COURT: And I'm not going to give it, all right?
11 MR. O'KEEFE: Okay, Your Honor.
12 THE COURT: We'll make it part of the record.
13 MR. O'KEEFE: All right. 29 is the last one, Your
14 Honor, that I would like to try at least to get one, Crane vs.
15 State (phonetic).
16 THE COURT: Mr. Lalli?
17 MR. LALLI: Your Honor, it's probably when you were
18 a young lawyer in these cases back in the 70's, you know, this
19 might have been the law. However, the Nevada Supreme Court
20 has repeatedly said that this is not an appropriate
21 instruction to give. This is the dubious alternative
22 reasonable doubt instruction. So, we would oppose it. We
23 give a reasonable doubt instruction.
24 THE COURT: I'm not going to quantify reasonable
25 doubt to the Supreme Court. I really don't like that. And I

1 think this instruction is -- if it ever applied, is no good
2 anymore. So, defense proposed D, not given, but we'll make it
3 part of the record. Anything else?
4 MR. O'KEEFE: No, Your Honor.
5 THE COURT: All right. All right. Let's mark
6 these, then you can argue the -- for whatever you want on the
7 deadly weapon.
8 Instruction number 1 is, "It is now my duty." 2,
9 "If in these instructions." 3, "An information is but a
10 formal method of accusing a crime." 4, "Murder of the second
11 degree is." 5, "Malice aforethought means." 6, "Expressed
12 malice is at the [inaudible] or intention."
13 7, "The prosecution is not required to present
14 direct evidence of the defendant's state of mind." 8, "You're
15 instructed that if you find the defendant guilty of murder" --
16 MR. LALLI: And we'll have to replace this, Your
17 Honor.
18 THE COURT: Yeah.
19 MR. LALLI: This is the one we'll have to replace.
20 We'll have that for the Court --
21 THE COURT: All right.
22 MR. LALLI: -- in the morning.
23 THE COURT: Okay. You just correct that and give it
24 to me, all right? All right. And 9, "Deadly weapon means."
25 That's 9. 10, "The killing of another person in

1 self-defense." And we got the self -- 11, "The bare fear of
2 death."
3 MR. MANINGO: Your Honor, Court's indulgence.
4 (Pause in the proceedings)
5 MR. O'KEEFE: All right. All right. I'll go on so
6 we can speed this up, Your Honor, for your sake.
7 THE COURT: Yeah. No, that's all right. Okay. So,
8 I did -- we're on to self-defense. "The killing of another
9 person in self" -- and that's 10. And 11 is, "A bare fear of
10 death with great injury is not sufficient." That's 11. And
11 12 is, "An honest but unreasonable belief." That's 12. And
12 13, "The right of self-defense is not available to an original
13 aggressor."
14 14, "Actual danger is not necessarily to justify a
15 killing in self-defense." 15, "If evidence of self-defense is
16 present, the State must prove beyond a reasonable doubt the
17 defendant did not act in self-defense." 16 is the, "No act
18 committed by a person while in the state of voluntary
19 intoxication."
20 Then we go back to the stocks. 17, "Evidence of
21 other crimes." That's the limiting instruction. 18, "To
22 constitute the crime charged." 19, "Defendant is presumed
23 innocent of the contrary of proof." 20, "You are here to
24 determine the guilt or innocence."
25 21, "The evidence which you are to consider in this

1 case consists of the testimony, witnesses, exhibits, any facts
2 admitted or agreed to by counsel. That's 21. 22, "The
3 credibility or believability." 23, "Statements of the
4 defendant that are not made in court, but has been has been
5 admitted, it is the jury to determine that voluntariness
6 [inaudible]."
7 24, "A witness who has special knowledge." 25, "You
8 are only to consider the evidence." 26, "In arriving at your
9 verdict, don't discuss punishment." 27, "When you retire to
10 consider your verdict." 28, "If during your deliberation, you
11 should desire any point of law." And finally, 29, "The
12 evidence which you are to consider."
13 So, we have 29 instructions that the Court is
14 indicating will be given. And we have the proposed
15 defendant's instructions that are made part of the record.
16 So, just settle these instructions outside the presence of the
17 jury. This is time set for settlement of instructions.
18 Does the State object to any of the instructions
19 that the Court is indicating will be given, specifically,
20 these 1 through 29?
21 MR. LALLI: No, Your Honor.
22 THE COURT: Does the defendant, Mr. O'Keefe, object
23 to any of these instructions the Court has indicated will be
24 given, which is 1 through 29?
25 MR. O'KEEFE: I would like to highlight -- I have to

1 do it for the record, Your Honor. Please forgive me. On
2 instruction number 8, on the deadly weapon.
3 THE COURT: Right.
4 MR. O'KEEFE: Okay. Can I give a little argument on
5 that?
6 THE COURT: Sure.
7 MR. O'KEEFE: NRS 193.165, the weapon --
8 MR. LALLI: I think he's -- I'm sorry, Your Honor.
9 I apologize, Mr. O'Keefe. I think he's arguing instruction
10 number 9, which is the actual deadly weapon.
11 MR. MANINGO: That's correct.
12 MR. O'KEEFE: Oh, yes. I'm -- because I had one
13 missing, Mr. Lalli. You're right. Number 8, and this was
14 missing. I don't --
15 MR. MANINGO: I have it.
16 THE COURT: 9 is, "A deadly weapon means any
17 instrument which is used in the ordinary manner contemplated
18 by it's design and construction, will or is likely to cause
19 substantial bodily harm or death, or any weapon, device,
20 instrument, material substance, which under the circumstances
21 in which it is used, attempted to be used, or threatened to be
22 used is readily capable of causing substantial bodily harm or
23 death."
24 Usually, it says a gun is a deadly weapon. I don't
25 know if you ever say that with a knife. I guess you don't.

1 MR. LALLI: I knife is not --
2 THE COURT: All right.
3 MR. LALLI: -- a deadly weapon under --
4 THE COURT: So, but that's the --
5 MR. LALLI: -- specifically. But that is --
6 THE COURT: That's the specific thing --
7 MR. LALLI: That is the statute.
8 THE COURT: -- of what a deadly weapon is.
9 MR. LALLI: That is right. That is --
10 THE COURT: All right.
11 MR. LALLI: -- the statute, Your Honor.
12 THE COURT: Mr. O'Keefe?
13 MR. O'KEEFE: Okay. Your Honor, I'll be real quick.
14 You know, I know I've learned one thing, that the instructions
15 become the law of the case, and it's your change to argue and
16 object, and not object, and it's a very delicate part of the
17 case; correct, Your Honor? You know what I'm saying.
18 THE COURT: It really is.
19 MR. O'KEEFE: Okay.
20 THE COURT: A lot of people take it [inaudible].
21 But that's where --
22 MR. O'KEEFE: Okay.
23 THE COURT: -- a lot of reversals come about. And
24 quite frankly, that's where a lot of new laws come about. If
25 something's -- sometimes the Supreme Court will make new law,

1 because that --

2 MR. O'KEEFE: Yes.

3 THE COURT: -- happens a lot.

4 MR. O'KEEFE: Okay. So, having said that, Your

5 Honor, with all due respect -- and I appreciate your patience,

6 sir. My reading of NRS 193.165, provision 4, quite clearly

7 states that if the weapon is a necessary element to commit the

8 alleged crime, provisions 1, 2, and 3 do not apply. In

9 addition, I know you don't like my -- I keep beating it down.

10 They've already said I did no unlawful act in the commission

11 of no crime.

12 THE COURT: Who said -- they?

13 MR. O'KEEFE: In the reversal order.

14 THE COURT: Oh, okay. Which I disagree with you,

15 but go ahead.

16 MR. O'KEEFE: Right. But I have to -- again, and

17 you understand. But also, the NRS 193.165 is quite -- it

18 seems it's ambiguous. It's quite clear. They just stated

19 yesterday in the testimony, the cause of the death was by the

20 knife. The knife in this case is being declared as the deadly

21 weapon. Okay.

22 There's no other crime that was committed. There's

23 no other -- it's -- it doesn't -- if you read subsection 4 of

24 the NRS that I cited, it does quite clearly state that. If

25 the weapon -- if there wasn't a knife, the death couldn't have

1 happened. So, you know, it doesn't make sense to me, Your
2 Honor. That's just my argument. I'm sorry. I just have to
3 make it for the record.
4 THE COURT: Mr. Lalli?
5 MR. LALLI: Your Honor, what the defendant is
6 referring to are those crimes where possession of a weapon is
7 part of the crime itself, such as battery with the use of a
8 deadly weapon. That is not an element -- or the deadly weapon
9 is the element of the offense; it's not an enhancement.
10 Murder does not work like that. Murder is an enhanceable
11 offense, and therefore, his -- I know he doesn't understand
12 it, but his interpretation is an improper one.
13 THE COURT: All right. Well, the Court agrees with
14 you, State. So, over the defendant's strenuous objections, I
15 am going to give instruction number 9.
16 MR. O'KEEFE: Yes, Your Honor.
17 THE COURT: Now, does the State request the giving
18 of any instructions in addition to those the Court has
19 indicated will be given?
20 MR. LALLI: No, Your Honor.
21 THE COURT: Now, does the defense request the giving
22 of any instruction in addition to those the Court has
23 indicated will be given? And specifically, I have -- what,
24 defense proposed A, B, C, D? And we've already made records
25 on those.

1 MR. O'KEEFE: Yes, Your Honor. Just the exhibits --
2 THE COURT: You made arguments --
3 MR. O'KEEFE: -- that have already been provided.
4 THE COURT: -- and they're going to be made part of
5 the record. All right.
6 MR. O'KEEFE: Other than that, I'm good, Your Honor.
7 THE COURT: You're good. All right. Does the -- do
8 counsel -- Mr. Lalli and defendant, Mr. O'Keefe, you'll
9 stipulate we settled these instructions in court, here in open
10 court, outside the presence of the jury, and they will be
11 given to the jury prior to the argument?
12 MR. LALLI: Yes, we would.
13 THE COURT: You -- we give these prior to the
14 argument, all right?
15 MR. O'KEEFE: Your Honor, I'm so -- I'm so -- I
16 apologize.
17 THE COURT: No. Do you stipulate that I could give
18 these instructions of law prior to the arguments, that they
19 need to --
20 MR. O'KEEFE: Absolutely, Your Honor.
21 THE COURT: Yeah. Good. Okay.
22 MR. O'KEEFE: I apologize.
23 THE COURT: And then, again, just specific for the
24 record, the defense does not want the instruction, "It is a
25 constitutional right of a defendant in a criminal case that he

1 may not -- that he may not be compelled to testify;" you don't
2 want that? You're not requesting that?
3 MR. O'KEEFE: No. That's correct, Your Honor.
4 THE COURT: All right, then it's your right. And
5 then of course, it's very important, because sometimes, a jury
6 will compromise, and say it's not -- it may not be second
7 degree, but it may be voluntary. Sometimes, they don't like
8 to -- you want all or nothing? You want either guilty or not
9 guilty. You don't want them to compromise. But it means a
10 lot in sentencing. I mean, what's the voluntary manslaughter?
11 What's the sentence on that?
12 MR. LALLI: It's a one to ten, plus a one to ten.
13 THE COURT: So, but you're saying to me on the
14 record here, Mr. O'Keefe, that you do not want any lesser
15 included, specifically voluntary manslaughter?
16 MR. O'KEEFE: That is correct, Your Honor.
17 THE COURT: All right.
18 MR. O'KEEFE: It's all or nothing, and I -- that's
19 all I need to say, Your Honor.
20 THE COURT: What about the other trials; did they
21 have voluntary manslaughter?
22 MR. O'KEEFE: They had --
23 THE COURT: I mean -- yeah, involuntary
24 manslaughter.
25 MR. O'KEEFE: The State at the first --

1 THE COURT: No, voluntary manslaughter.

2 MR. O'KEEFE: The State at the first time, I call,
3 used a fishing net, Your Honor. They had nine verdicts to
4 choose from, and they returned a second degree with the deadly
5 weapon.

6 THE COURT: Okay.

7 MR. O'KEEFE: Then, at the second trial, it was just
8 solely what we gave today, Your Honor --

9 THE COURT: All right.

10 MR. O'KEEFE: -- the second degree.

11 THE COURT: Okay. So, you're going to give me a few
12 instructions that you're either going to change, take away?

13 MR. LALLI: Yes.

14 THE COURT: The voluntary, and a new --

15 MR. O'KEEFE: The verdict.

16 THE COURT: -- verdict form.

17 MR. LALLI: Right. Instruction number 8 needs to be
18 replaced, and the verdict form need to be replaced, Your
19 Honor.

20 THE COURT: That's all? Just 8 and the verdict
21 form?

22 MR. LALLI: That's my understanding.

23 THE COURT: Yeah. Me, too. I'm just looking -- I
24 wanted to make sure. All right. Well, what else do we have
25 to do here now? So, 9:00 o'clock.

1 Let's get a little ground rules. I don't like to,
2 you know, interrupt people. I thought it would be fair -- but
3 we don't want to go on and on. How -- who's going to -- as
4 you know, the State has two arguments. Do you understand
5 that, Mr. O'Keefe?
6 MR. O'KEEFE: Yes, sir. First and last. Yes, Your
7 Honor.
8 THE COURT: First and last. Now, who's going to do
9 the first one? Have you made up your mind? Is it --
10 MR. LALLI: We've talked about it, Your Honor. That
11 will be Ms. Mercer.
12 THE COURT: All right. And then, you're going to do
13 the rebuttal?
14 MR. LALLI: Yes, sir.
15 THE COURT: And then, in between, you get to do --
16 how long is your arguments going to be, for --
17 MR. LALLI: Well, Your Honor, you know, it's --
18 THE COURT: I don't want to limit you. I'm just
19 saying, you know, I --
20 MS. MERCER: Probably 30, 35 minutes, tops.
21 MR. LALLI: We think that the first argument will be
22 about 30 to 35 minutes. And depending what Mr. O'Keefe --
23 THE COURT: [Inaudible].
24 MR. LALLI: -- says, you know, probably 30 minutes
25 in rebuttal.

1 THE COURT: That's what I thought. All right. Now,
2 Mr. O'Keefe, you are going to have a right to argue. And I
3 hope we don't have a lot of objections. I'm not sure what
4 objections could be -- maybe a little groundwork on that.
5 MR. LALLI: Sure.
6 THE COURT: See, we don't want to -- I don't want to
7 interrupt your flow of everything. Is it -- so, maybe we
8 could have a few ground rules here now to, you know, try to
9 keep away from -- if you want. If you don't, then I'm going
10 to have to -- I'm going to have to listen to the objection,
11 and either sustain it, or overrule it.
12 MR. O'KEEFE: Okay. Could I finish before he goes
13 into the new subject of the -- as far as how long do I plan
14 on?
15 THE COURT: Well, I don't --
16 MR. O'KEEFE: I'll share. I'm going to be real
17 brief. Keep it -- I think less is more. Simple. So, I'll
18 share that. I'll let them know. So, I guess Mr. Lalli just
19 clearly stated that, depending on how long I go, what I go
20 into --
21 THE COURT: Yeah.
22 MR. O'KEEFE: -- which is going to depend on his,
23 I'm going to keep it short and sweet.
24 THE COURT: Okay. Good. All right, all right.
25 That's --

1 MR. LALLI: Your Honor, I think the Court has been
2 extremely indulgent of Mr. O'Keefe during this trial.
3 THE COURT: I don't think overly indulgent, but I
4 try to --
5 MR. LALLI: No, but I think appropriately indulgent,
6 as is the State. I've tried not to object, even though, many
7 objections, I just have to. And I'm not sure that Mr. O'Keefe
8 understands that he is only allowed to argue evidence that is
9 in the record. His questions are not evidence, his opening
10 statement is not evidence.
11 And in his opening statement, he advanced this
12 theory about how he went into his house, his apartment, and
13 that Victoria Whitmarsh came out of the bathroom and attacked
14 him with a knife, none of which is in evidence. And he --
15 it's our position he cannot argue that. He cannot testify in
16 closing argument. He can only argue the facts that are in the
17 record. And so, if he does that, we will be objecting to it.
18 THE COURT: He can of course go into the bad
19 investigation, the --
20 MR. LALLI: Of course.
21 THE COURT: -- we went to the Paris. I don't know.
22 MR. LALLI: Of course.
23 THE COURT: And the vacuum cleaner, because --
24 MR. LALLI: Yes.
25 THE COURT: -- he has a receipt to that effect.

1 And --

2 MR. LALLI: Yes.

3 THE COURT: -- I don't know. Vons. I guess

4 [inaudible]. I'm not sure they did or not. I don't know -- I

5 don't know. [Inaudible]. But you just don't want him to go

6 into evidence that is not part of the record?

7 MR. LALLI: Correct. Anything that's on the

8 recording that he told to the police --

9 THE COURT: That's good.

10 MR. LALLI: -- that's all fair game. He can argue

11 that, reasonable inferences to be drawn from that. But he

12 can't argue evidence that he said in his opening statement,

13 because it's not -- it hasn't been produced during the course

14 of the trial.

15 THE COURT: Well, do you understand that, Mr.

16 O'Keefe? I mean, is it going to be a problem, or what? I

17 mean --

18 MR. O'KEEFE: Can I argue, Your Honor, it's the

19 third trial and I took a polygraph?

20 THE COURT: No.

21 (Pause in the proceedings)

22 MR. O'KEEFE: Okay. Your Honor, you're going to be

23 surprised. It's going to be short and sweet. And I'm just

24 going to --

25 THE COURT: Well, again, I'm not limiting you. I'm

1 just sort of --

2 MR. O'KEEFE: And I --

3 THE COURT: You know, it's good to go beforehand.

4 Because I don't -- what I don't want to do is have you just --

5 your thoughts interrupted, and you're going to look at me, and

6 you're going to -- you know. I want you to have a nice,

7 concise, clear argument, where you're going. As you say,

8 short and sweet, to the point. But that's up to you.

9 But try to keep away from -- you know the state of

10 the evidence. You could argue the state of the evidence, what

11 you said on the tape, or all the witnesses. You know, but

12 keep away from something that really is not part of this case,

13 because I have to I guess sustain an objection. You know,

14 that's not part of the record. All right?

15 MR. O'KEEFE: Duly advised, Your Honor. I

16 appreciate that. Just if I can state, since we are on the

17 record, I'm just trying to -- the State's whole theory and

18 motive is just ludicrous, ridiculous, and --

19 THE COURT: You can say that.

20 MR. O'KEEFE: -- that's all I was -- I was just

21 trying to clarify that, why would I do all the things I did?

22 You understand what I was doing.

23 THE COURT: You could say that, as long as it's part

24 of the record, which is --

25 MR. O'KEEFE: And just -- you know, it's going to be

1 short and sweet.

2 THE COURT: All right.

3 (Pause in the proceedings)

4 THE COURT: I want to thank you so much. You know,

5 I think everybody -- the case is not over yet. But everybody

6 acted professional. And hopefully, the jury will get it

7 tomorrow, and they'll deliberate.

8 And I keep on saying, Mr. O'Keefe, it's probably a

9 win-win situation for you. You're under sentence anyway. If

10 they come back, you're going to be very, very disappointed

11 with a guilty. But I mean, you still have -- you still have a

12 lot of issues here. You have your federal court that can't

13 take away from the -- and that's all we can do now, all right?

14 All right. Thank you.

15 MR. O'KEEFE: And Your Honor, I want to thank you

16 very much.

17 THE COURT: It's not over yet. Something might

18 happen. So, don't thank me until the end of the case.

19 (Proceeding concluded at 3:32 p.m., until Friday,

20 June 15, 2012, at 9:17 a.m.)

21

22

23

24

25

INDEX

WITNESSES

NAME	DIRECT	CROSS	REDIRECT	RECROSS
STATE'S WITNESSES:				
Ed Guenther	21	35		
Jeremiah Ballejos	38	57	66	67
Martin Wildemann	67	106	120/124	122/124

* * * * *

EXHIBITS

DESCRIPTION:	ADMITTED
Exhibit 134	104

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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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,	CASE NO. C-250630
Plaintiff,	DEPT. NO. XVII
vs.	
BRIAN KERRY O'KEEFE,	**TRANSCRIPT OF PROCEEDINGS**
Defendant.	

BEFORE THE HONORABLE SENIOR JUDGE JOSEPH BONAVENTURE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 3

WEDNESDAY, JUNE 13, 2012

APPEARANCES:

FOR THE PLAINTIFF: CHRISTOPHER LALLI, ESQ.
ELIZABETH A. MERCER, ESQ.
Chief Deputy District Attorneys

FOR THE DEFENDANT: BRIAN KERRY O'KEEFE
Pro Per

LANCE MANINGO, ESQ.
Stand by counsel for defendant

COURT RECORDER:
MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:
VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110

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

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1 LAS VEGAS, NEVADA, WEDNESDAY, JUNE 13, 2012, 9:53 A.M.
2 (In the presence of the jury)
3 THE MARSHAL: Sir, if you will remain standing.
4 Please, sir, raise you right hand.
5 DANIEL FORD, STATE'S WITNESS, SWORN
6 THE MARSHAL: You may be seated. And if you would,
7 please state and spell your name for the record.
8 THE WITNESS: Daniel Ford. D-a-n-i-e-l, F-o-r-d.
9 MS. MERCER: May I proceed, Your Honor?
10 DIRECT EXAMINATION
11 BY MS. MERCER:
12 Q Sir, are you currently employed?
13 A No, ma'am, I'm not. I'm retired as of January 1st.
14 Q January 1st of 2012?
15 A This year. Yes, ma'am.
16 Q And where did you retire from?
17 A Las Vegas Metropolitan Police Department,
18 criminalistics bureau.
19 Q Were you a crime scene analyst with Metro?
20 A Yes, ma'am. 20 years, 3 months, and 22 days.
21 Q Okay. I want to direct your attention to November
22 of 2008; specifically, November 5th, early morning of the 6th.
23 Were you assigned to an incident involving an individual by
24 the name of Brian O'Keefe?
25 A Yes, ma'am, I was.

1 Q And what specifically were your duties with respect
2 to that investigation?
3 A My supervisor called me and asked me to respond to
4 the homicide bureau to meet with the homicide detectives, take
5 photographs of the suspect, and collect the suspect's
6 clothing.
7 Q Okay. And actually, before I proceed, can you
8 explain for the jurors some of the duties of a crime scene
9 analyst?
10 A To respond to crime scenes when requested by patrol
11 officers or detectives. Document that scene through the use
12 of photographs, notes, diagrams. Search for items of
13 evidence. Identify those items of evidence, if possible.
14 Collect those items of evidence for examination at a later
15 date.
16 Process the scene for latent fingerprints. Collect
17 those latent fingerprints, and submit those to the latent
18 print section. Come back to the lab, do -- complete our
19 reports, and submit any evidence that we collected at the
20 scenes.
21 Q Okay. And you indicated that your supervisor
22 requested that you respond to the homicide office?
23 A Yes, ma'am. That's correct.
24 Q Where is that located?
25 A At that time, it was West Oakey Boulevard, just east

1 of Decatur.

2 Q Do you recall about what time you were asked to

3 respond to that location?

4 A I was around -- I was in -- close to the area. I

5 was -- it was about 3:40, 3:44 that he called me, and I got

6 there within three minutes.

7 Q Are we talking A.M.?

8 A Yeah, 3:47 in the morning. Yes, ma'am.

9 Q Okay. When you arrived on scene, who did you make

10 contact with?

11 A Homicide Detective -- if I could look at my report.

12 Q Would that refresh your memory?

13 A Yes, ma'am, it would.

14 THE COURT: Please.

15 THE WITNESS: Okay. Marty Wildemann.

16 BY MS. MERCER:

17 Q You made contact with Marty Wildemann?

18 A Yes, ma'am.

19 Q And when you made contact with him, what was the

20 purpose of your contact?

21 A To photograph the suspect, collect any evidence from

22 the suspect, collect his clothing. Photograph the suspect,

23 show his condition at the time of the arrest. And then,

24 complete my reports, and go back to the office.

25 Q Okay. And that was what -- or Detective Wildemann

1 requested that you do?
2 A Yes, ma'am.
3 Q Did you in fact photograph Brian O'Keefe on that
4 night?
5 A Yes, ma'am, I did in one of the --
6 Q Or early morning?
7 A -- in one of the interview rooms.
8 Q Okay. And do you see Brian O'Keefe in the
9 courtroom?
10 A Yes, ma'am. He's sitting at the defense table
11 there, on the left hand -- my left.
12 Q Could you point to him, and describe an article of
13 clothing that he's wearing?
14 A Wearing a blue tie, with a light shirt, and a dark
15 coat.
16 MS. MERCER: Your Honor, may the record reflect that
17 he's identified the defendant?
18 THE COURT: The record will so reflect.
19 BY MS. MERCER:
20 Q And I believe you indicated that he was in an
21 interview room; is that correct?
22 A Yes, ma'am. That's correct.
23 Q Is that where you went to actually photograph him?
24 A Yes, ma'am, it was.
25 MS. MERCER: And Your Honor, may I approach the

1 witness at this time?
2 THE COURT: Yes.
3 BY MS. MERCER:
4 Q Okay. I'm handing you what have been marked for
5 identification purposes as State's proposed Exhibits 60
6 through 64. Could you please look at those and tell me
7 whether you recognize them?
8 A Yes, ma'am, I do recognize them. They're
9 photographs of the defendant that were taken early that
10 morning of the 6th.
11 Q Okay. And you in fact took these photographs?
12 A Yes, ma'am, I did.
13 MS. MERCER: Your Honor, I would move for the
14 admission of State's Exhibit 60 through 64 at this time.
15 THE COURT: Any objection, Mr. O'Keefe?
16 MR. O'KEEFE: No, Your Honor.
17 THE COURT: Thank you. 60 through 64 will be
18 admitted.
19 (Exhibits 60 through 64 are admitted)
20 MS. MERCER: Permission to publish, Your Honor?
21 THE COURT: Yes.
22 BY MS. MERCER:
23 Q With respect to State's Exhibit 60, is this just an
24 overall photograph of the defendant on that night -- or that
25 early morning?

1 A Yes, ma'am, from the waist-up.
2 Q And that's how he appeared when you responded to the
3 homicide division?
4 A Yes, ma'am, it is.
5 Q With regards to State's Exhibit 61, what is depicted
6 in this photograph?
7 A It's a close-up photograph of bruising, an abrasion
8 to the forehead, with a scale, with my initials and P number,
9 D4244F.
10 Q 4244 is your P number?
11 A Yes, ma'am. It was my --
12 Q And what is a P number?
13 A A P number is a number assigned to an employee of
14 Metro when they're hired. It remains the same with them until
15 they retire.
16 Q And is that basically your way of documenting that
17 you took this photograph?
18 A Yes, ma'am.
19 Q With regards to State's Exhibit 62, what is depicted
20 in this photograph?
21 A It's a close-up photograph of the right index
22 finger, the inside -- the palmar side of the index finger.
23 There was a laceration on the index finger, and dried blood.
24 Q And that's what you were attempting to document with
25 this photograph?

1 A Yes, ma'am.
2 Q With regards to State's Exhibit 63, what is this a
3 photograph of?
4 A Just the photograph of the right hand of the
5 defendant, showing -- asking him to extend the right index
6 finger to show what the outside of the hand looked like.
7 Q Okay. And there appears to be blood on his thumb as
8 well?
9 A Yes, ma'am, there was.
10 Q And State's exhibit -- here let me move this.
11 State's Exhibit 64, what is this a photograph of?
12 A Just a close-up of the right hand with the index
13 finger extended.
14 Q And let me zoom-in for a second. Does there appear
15 to be an injury to his thumb as well?
16 A Yes, ma'am. There was a slight laceration.
17 Q After you took the photographs of the defendant, how
18 did you proceed?
19 A We had the -- I asked the uniformed officers that
20 were at the interview room at the time to assist the defendant
21 removing his clothing. We placed them in paper bags that I
22 use for evidence collection, and then took those back to the
23 lab with me.
24 Q Okay. Do you do anything to ensure that the
25 evidence isn't tampered with?

1 A The -- each piece of clothing went in a separate
2 bag. The bags are sealed. Once they get back to the lab,
3 evidence tape is placed on them. My initials and P number,
4 and date is placed on those seals, and they remain that way
5 until they're opened by the forensic lab personnel.
6 Q Okay. And that's to preserve the chain of custody?
7 A Yes, ma'am. Correct.
8 Q So, you didn't take any photographs of the clothing
9 at the homicide unit, correct?
10 A No, ma'am, I did not. That was done at the
11 criminalistics bureau.
12 Q Okay. While you were at the homicide unit, did you
13 do anything else, as far as the investigation?
14 A I took a buccal swab kit from the defendant, which
15 is for DNA purposes, and swabbed the right index finger for
16 the bloodstain on the right index finger.
17 Q Okay. Can you explain for the jury what a buccal
18 swab kit is?
19 A Buccal swab kit is like a -- contains two swabs, or
20 two small toothbrush-like objects. You swab the inside of the
21 cheek with one, place it into a box. Swab the inside of the
22 other cheek, place it into a box. You write the person's
23 name, date of birth on the tube, so that that's available for
24 the forensic personnel to be logged. And that's used for the
25 DNA bases.

1 Q Okay. And so, it's used as a standard for --
2 A Yes, ma'am.
3 Q -- DNA analysis? How do you go about impounding a
4 buccal swab?
5 A You -- once the box is sealed, you place it into an
6 envelope, place all the pertinent information on the outside
7 of the envelope. Place an evidence seal on that envelope, and
8 drop it into the evidence vault.
9 Q Okay. And when you impound evidence in a case, is
10 it listed as a certain package number and item number?
11 A Yes, ma'am, it is.
12 Q Do you recall what the package number and item
13 number were assigned to the buccal swab in this case?
14 A No, ma'am, I don't. If I could look at my report.
15 Q Would that refresh your memory?
16 A Yes, ma'am, it would. The buccal swab was item 7,
17 and package 4.
18 Q Okay. And you followed all the standard procedures
19 as far as impounding that buccal swab in this case?
20 A Yes, ma'am, I did.
21 Q To ensure that it wasn't tampered with?
22 A Yes, ma'am. That's correct.
23 Q Now, you indicated that you also took a swab of his
24 right index finger, where the blood was?
25 A Yes, ma'am. That's correct.

1 Q And how did you go about doing that?
2 A We wet the cotton tipped swab with distilled water,
3 two or three drops of water, and then swabbed the area that we
4 want to collect blood with. Placed that into an envelope,
5 seal it; again, in an envelope with the label on the outside
6 of the envelope, and place it in the evidence hold.
7 Q Okay. Do you recall what item number and package
8 number were assigned to the swab of the right index finger?
9 A The blood was placed as item 5 in package 4, along
10 with the buccal swab kit.
11 Q Okay. After you collected the swabs in this case,
12 did you then take the clothing to the evidence lab -- or the
13 forensic lab? I'm sorry.
14 A Yes, ma'am, I did.
15 Q And what did you do with the clothing once you were
16 there?
17 A Laid out brown butcher paper on the floor of the
18 blood room. Took photographs of each of the items that were
19 going to be impounded; the shoes, the socks, the jeans, and
20 the shirt.
21 Q And is that something you typically do in each case?
22 A Yes, ma'am, we do.
23 MS. MERCER: Your Honor, may I approach the witness?
24 THE COURT: Yes.
25 MR. O'KEEFE: Your Honor, may I request to approach?

1 THE COURT: Yes.
2 (Off-record bench conference)
3 MS. MERCER: May I proceed, Your Honor?
4 THE COURT: Yes.
5 BY MS. MERCER:
6 Q Sir, handing you what's been marked as State's
7 proposed Exhibits 65 through 76. Could you please look at
8 those and tell me whether you recognize them?
9 A Yes, ma'am, I do. They're photographs of the
10 clothing that the defendant was wearing the night of the
11 arrest.
12 Q These are --
13 A Early morning.
14 Q Are these the photographs that you took in the lab?
15 A Yes, ma'am, they are.
16 MS. MERCER: Your Honor, move for the admission of
17 65 through 76.
18 THE COURT: Mr. O'Keefe, again, I appreciate you
19 wanting to speed this up. Thank you. But they want to
20 present this, and --
21 MR. O'KEEFE: No objection, Your Honor.
22 THE COURT: You don't have any objection?
23 MR. O'KEEFE: No, Your Honor.
24 THE COURT: Thank you very --
25 MR. O'KEEFE: Absolutely not.

1 THE COURT: All right. Thank you. Well, we'll
2 admit 65 through 76.
3 (Exhibits 65 through 76 are admitted)
4 MS. MERCER: Permission to publish, Your Honor?
5 THE COURT: Yes.
6 BY MS. MERCER:
7 Q With regards to Exhibit 65, what is this a
8 photograph of?
9 A It's a photograph of the t-shirt that the defendant
10 was wearing the morning of the arrest.
11 Q Okay. And State's Exhibit 66, what is this a
12 photograph of?
13 A Photograph of the jeans that the defendant was
14 wearing, showing the apparent reddish stains on both legs.
15 Q Okay. And the reddish stains; did you do anything
16 to confirm whether or not that was blood?
17 A Yes, ma'am. I took a clean swab, wet it with two or
18 three drops of distilled water, rubbed it over the area of the
19 stain. Then, tested it with phenolphthalein, which is a field
20 test for the presence of blood. If it's blood, it turns a
21 pink color immediately. This swab did turn a pink color,
22 showing that it was -- there was a presence of blood on the
23 clothing.
24 Q Okay. And State's Exhibit 67; is this just a
25 closer-up photograph of that apparent blood?

1 A Yes, ma'am, it is.
2 Q On his jeans?
3 A Yes, ma'am. That's correct.
4 Q Specifically, like the middle part of his jeans?
5 A Yes, ma'am. Just below the in-seam area.
6 Q And State's Exhibit 68. Is this a photograph of the
7 lower portion of his pants?
8 A Yes, ma'am, that is.
9 Q And again, it depicts the areas of apparent blood?
10 A Yes, ma'am, it does.
11 Q With regards to State's Exhibit 69, what is this a
12 photograph of?
13 A It's a view of the back of the jeans, showing
14 apparent blood on the back right leg, and a little on the
15 inside of the back left leg.
16 Q Could you circle the areas of apparent blood on here
17 for the jury, please? Thank you. And with regards to State's
18 Exhibit 70, what is this a photograph of?
19 A It's a pair of the athletic shoes that the defendant
20 was wearing on the morning of the arrest.
21 Q And is there anything -- I'm sorry. Is there
22 anything significant about those shoes?
23 A The reddish stains on the right shoe, the inside of
24 the left shoe were tested for the presence of blood, and they
25 all tested positive.

1 Q And could you circle those areas for me, please?
2 And you tested both areas?
3 A Yes, ma'am, I did.
4 Q And they were both positive for apparent blood?
5 A Yes, ma'am, they were.
6 Q With regards to Exhibit 71, what is this a
7 photograph of?
8 A It's a photograph of the soles of the shoes, showing
9 the condition and areas of apparent blood on the soles of the
10 shoe.
11 Q Did you test those areas as well?
12 A Yes, ma'am, I did.
13 Q And could you identify those areas for me with a
14 circle? And were those tests also positive?
15 A Yes, ma'am, they were.
16 Q And State's Exhibit 72; what is this a photograph
17 of?
18 A It's a view of the reddish stain on the outside of
19 the shoe.
20 Q Okay. And could you circle it for me, please? Did
21 you test that stain?
22 A Yes, ma'am, I did.
23 Q And what were the results?
24 A Those were positive as well.
25 Q State's Exhibit 73, what is this a photograph of?

1 A The outside of the shoe, showing the reddish stain
2 again.
3 Q And could you circle it for the jury, please? Did
4 you also test that stain?
5 A Yes, ma'am, I did.
6 Q And what was the result?
7 A It was positive for blood.
8 Q Okay. And with regards to State's Exhibit 75, what
9 is this a photograph of?
10 A This is a view of the socks that the defendant was
11 wearing.
12 Q Is there anything significant about the socks?
13 A There was one small area on one sock that was
14 reddish in color, and it tested positive for the presence of
15 blood.
16 Q And once you were done photographing the clothing,
17 what did you do with it?
18 A Kept -- I put it back into the bags, sealed the
19 bags. Placed the evidence seal on the bags with my initials,
20 and P number, and the date, and put them in the evidence hold
21 room.
22 MS. MERCER: Court's indulgence, Your Honor. Pass
23 the witness, Your Honor.
24 THE COURT: Thank you. Any cross-examination, Mr.
25 O'Keefe?

1 MR. O'KEEFE: Yes, ma'am.
2 THE COURT: Thank you.
3 MR. O'KEEFE: Very brief.
4 CROSS-EXAMINATION
5 BY MR. O'KEEFE:
6 Q Hello, Mr. Ford.
7 A Good morning, sir.
8 Q How are you?
9 A Not too bad.
10 Q Okay. I'm going to be real quick, straight to the
11 point. A tragedy happened, without a doubt. I'm not
12 disputing the blood and all that. Prior testing all has
13 declared that, without a doubt.10:11:10
14 I just want to get to the point of the matter
15 though, here. There was a couple photos shown of the fingers.
16 And you did take that photograph, right?
17 A Yes, sir. I did.
18 Q Okay. Were you told to properly like, take a
19 picture of the thumb; you know what I mean?
20 A No, sir. They just wanted a photograph of the hand,
21 and basically, at the time, the laceration on the right index
22 finger.
23 Q They didn't specify then to clearly -- for the
24 record, not to really get the thumb? You were told about the
25 finger, don't worry about the thumb, correct? Yes or no.

1 A No. It just said that there was a laceration on the
2 index -- on the inside of the right index finger. They didn't
3 say anything about the thumb, or to disregard it.
4 Q Okay. But don't you feel that would be very
5 important to clearly take each finger, something as important
6 as that? And like, you know, maybe get a little better photo,
7 and then --
8 A To show the laceration? Yes, sir.
9 Q That's very important; wouldn't you think, Mr. Ford?
10 A Depending on how the laceration occurred; yes, sir.
11 Q Very important. Was it apparent to you that I was
12 extremely intoxicated?
13 A Yes, sir. You had problems standing that morning.
14 They had to help you stand, and turn you.
15 Q [Inaudible]. Did you take any photos of the bed,
16 Mr. Ford?
17 A No, sir. I was not at the crime scene. I was only
18 at the homicide bureau with --
19 Q Okay.
20 A -- you that morning.
21 Q Were you told when they tested me -- was there like
22 a caution that was possible hep. C, HIV, all that? Was there
23 word put out?
24 A No, sir.
25 Q Okay. Will you clearly tell this jury again -- I

1 wasn't very stable, was I?

2 A No, sir, you were not. The officers had to hold you

3 up to keep you from falling over while I took the photographs.

4 Q So, that's kind of -- do you think -- I'm just

5 asking your opinion. That's pretty solid proof that I wasn't

6 so agile and athletic, and motor skills were perfect; just

7 common sense, correct?

8 A Not while I was there. No, sir.

9 MR. O'KEEFE: I have no further questions.

10 THE COURT: Thank you, Mr. O'Keefe.

11 MR. O'KEEFE: Thank you, Mr. Ford.

12 THE COURT: Any redirect?

13 THE WITNESS: Thank you, sir.

14 MS. MERCER: Just briefly.

15 REDIRECT EXAMINATION

16 BY MS. MERCER:

17 Q Sir, were you aware at what time the initial call

18 came out to 9-11 in regards to this incident?

19 A No, ma'am, I was not.

20 Q Okay. And when you responded, again, it was what

21 time in the morning?

22 A I arrived at the homicide bureau at 3:47 in the

23 morning.

24 Q And approximately how long were you on scene?

25 A Maybe an hour.

1 Q Okay. So, you --
2 A And that's just a guess. I don't have my notes from
3 that scene that night.
4 Q You left approximately 4:45, 5:00 A.M.?
5 A Yes, ma'am.
6 Q Is it possible that Mr. O'Keefe was tired?
7 A Possibly also. Yes, ma'am.
8 MS. MERCER: No further questions.
9 THE COURT: That completes the testimony then?
10 MR. O'KEEFE: I'll recross, Your Honor --
11 THE COURT: Sure, sure.
12 MR. O'KEEFE: -- real briefly.
13 THE COURT: Sure.
14 RECROSS-EXAMINATION
15 BY MR. O'KEEFE:
16 Q Mr. Ford, one last thing. I tend to forget. I'm
17 very tired and stressed. Did you take any photos of the car
18 again?
19 A No, sir, I was not at the scene at all. Just at the
20 homicide bureau.
21 Q Okay.
22 MR. O'KEEFE: I would like to show a couple photos,
23 I think the State has stipulated, of the car, Mr. Lalli?
24 MR. LALLI: May I have the Court's indulgence, Your
25 Honor?

1 THE COURT: Yeah.
2 (Pause in the proceedings)
3 MR. O'KEEFE: Court's indulgence.
4 THE COURT: Sure, sure.
5 MR. O'KEEFE: One thing, and I'll make it real fast.
6 THE COURT: No problem. Take your time.
7 (Pause in the proceedings)
8 THE CLERK: Those aren't marked.
9 THE COURT: Are these -- okay.
10 (Pause in the proceedings)
11 THE MARSHAL: Court's indulgence, Your Honor.
12 THE COURT: Sure.
13 MR. LALLI: Your Honor --
14 THE COURT: Go ahead, Mr. Lalli.
15 MR. LALLI: Mr. O'Keefe -- Mr. O'Keefe is going to
16 have some photographs marked as --
17 THE COURT: Okay.
18 MR. LALLI: -- potential defense exhibits. We will
19 stipulate to their admissibility.
20 THE COURT: Okay. They're not marked. So, we're
21 going to mark these photos as defense Exhibit A through, what?
22 MR. LALLI: A, B, C, D, and E.
23 THE COURT: All right. Let's -- defense Exhibits A
24 through E, these will be admitted as defense exhibits.
25 (Exhibits A through E are admitted)

1 one.

2 MR. LALLI: Thank you.

3 THE COURT: Now, Mr. O'Keefe, I'm going to make a
4 ruling on this. I'm either going to do one of two things.
5 This is the excerpts of the medical records of Victoria
6 Whitmarsh. Now, you and Mr. Lalli stipulated -- stipulated
7 these facts. And Mr. Lalli just wants me to read them to the
8 jury. You want me to, what?

9 MR. O'KEEFE: I would ask that you would read it --

10 THE COURT: I can't read -- I can't read -- if I
11 mark it as an exhibit, and then let the jury go back, now, I
12 can't read it, because that's giving one exhibit more weight
13 than any other.

14 So, I'm either going to say I'm going to read it,
15 and it's going to be a stipulation, they don't see this when
16 they deliberate; or I'm not going to read it. I'm just going
17 to mark it as defendant's exhibit next in order, and it's
18 going to go in [inaudible], but I'm not going to read it.

19 Now, you could -- if I do that, you could get -- I
20 want to -- ladies and gentlemen, I want to bring your
21 attention to a defense exhibit that Judge Bonaventure
22 admitted. But I'm not going to read it to the jury and make
23 an exhibit. I can't do both. I can't do both.

24 MR. O'KEEFE: Well, the only thing I would ask then,
25 Judge, coming from you, I think it would hold more merit. I

1 mean, coming from you -- I would just ask that at the close of
2 the case in chief then --
3 THE COURT: Right.
4 MR. O'KEEFE: -- that you say, okay, Jurors, pay
5 attention, I'm going to read this --
6 THE COURT: I will.
7 MR. O'KEEFE: -- get your pens ready.
8 THE COURT: All right.
9 MR. O'KEEFE: Because last time, they were kind of
10 -- I feel they were ambushed, and they didn't even know what
11 was going on.
12 THE COURT: I will, believe me.
13 (Pause in the proceedings)
14 MR. O'KEEFE: Another parachute, Your Honor, like
15 you said.
16 THE COURT: But you understand, I can't -- you
17 understand? I can't admit it also. You've got to have one or
18 the other.
19 MR. O'KEEFE: I can't have both?
20 THE COURT: No.
21 MR. O'KEEFE: Okay.
22 THE COURT: I can't take an exhibit out, Exhibit 28,
23 then read it. I can't do that. It gives undue weight to that
24 exhibit.
25 MR. O'KEEFE: Okay. I thank you for that.

1 THE COURT: What would you prefer?
2 MR. O'KEEFE: I'd just have you read it, Your Honor.
3 THE COURT: All right.
4 MR. O'KEEFE: I submit on that.
5 THE COURT: All right. Thank you.
6 MR. LALLI: Thank you, Your Honor.
7 MR. O'KEEFE: Thank you, Your Honor.
8 (Court recessed at 11:59 p.m. until 1:14 p.m.)
9 THE MARSHAL: Officers and members of the Court, 17
10 jurors.
11 (Within the presence of the jury panel)
12 THE MARSHAL: All right. You may be seated, ladies
13 and gentlemen. Let's make sure all cell phones are turned
14 off, please.
15 THE COURT: All right. Parties, stipulate to the
16 presence of the jury?
17 MR. LALLI: Yes, Your Honor.
18 MR. O'KEEFE: Yes, Your Honor.
19 THE COURT: All right, Mr. Lalli.
20 MR. LALLI: Thank you. May I approach the witness,
21 Your Honor?
22 BY MR. LALLI:
23 Q Detective Wildemann, I'm going to show you what
24 we've marked as State's proposed 134 for identification
25 purposes. Is this a DVD containing the interview that you

1 conducted with Mr. O'Keefe?
2 A Yes, it is.
3 MR. LALLI: Your Honor, move for the admission of
4 State's proposed 134.
5 THE COURT: All right. Other than your prior
6 objection, anything else, Mr. O'Keefe?
7 MR. O'KEEFE: No, that's all right, Your Honor.
8 THE COURT: All right. It is admitted.
9 (Exhibit 134 is admitted)
10 MR. LALLI: Your Honor, I actually had this
11 downloaded on a presentation program. So, with the Court's
12 permission, I'll just play it from my computer.
13 THE COURT: That's fine. It's the same thing; is
14 that --
15 MR. LALLI: Yes.
16 THE COURT: Yes.
17 MR. LALLI: Correct.
18 (Taped interview of Brian O'Keefe played)
19 BY MR. LALLI:
20 Q Now, Detective Wildemann, during the course of your
21 interview with the defendant, there were times that the
22 defendant apparently displayed some sort of emotion. You were
23 actually there, sitting across the table from him. Can you
24 explain for us what you actually saw?
25 A Well, he would make the loud noises, like you heard

1 several times, and he'd grab a tissue and cover his face. I
2 never saw tears. I never really saw mucus flowing. He was
3 just, to me, acting.
4 Q Acting?
5 A Yes.
6 Q Toward the end of the interview, there was the part
7 where Detective Kyger tells the defendant that you had checked
8 -- that Metro had checked to determine whether or not he had
9 in fact made a 9-11 call. How were you all able to learn that
10 information?
11 A Well, I called back to the scene. I talked to
12 either my supervisor, or Detective Bunn. They had called the
13 Metro call center, and found out what numbers had called in.
14 And it was, I just believe Toliver. But I'm not sure. I
15 think it was the apartment manager that had called, and there
16 were no calls from his phone number, or the other phones
17 located in that apartment.
18 Q Brian O'Keefe never called the police regarding
19 Victoria Whitmarsh?
20 A No.
21 MR. LALLI: Your Honor, that concludes direct
22 examination.
23 THE COURT: All right, thank you.
24 Cross-examination, Mr. O'Keefe?
25 MR. O'KEEFE: Yes, Your Honor.

1 (Pause in the proceedings)
2 MR. O'KEEFE: First of all, may we approach the
3 bench, Your Honor --
4 THE COURT: Sure.
5 MR. O'KEEFE: -- on something?
6 THE COURT: Sure.
7 (Off-record bench conference)
8 CROSS-EXAMINATION
9 BY MR. O'KEEFE:
10 Q How are you, Detective Wildemann?
11 A Wildemann. I'm fine, thank you.
12 Q Wildemann. Okay.
13 A Yes.
14 Q Like I've told all the other witnesses and stuff,
15 I'm going to be very straight to the point; attempt no tricks
16 or anything like that, okay, Detective? I just want to be
17 forward with you, okay?
18 A Okay.
19 Q There was a tragic confusion -- okay. I want to
20 start with one thing first, while it's fresh in my mind, if
21 that's okay, Detective.
22 A Sure.
23 Q Okay. At the very end of the 9-11, the other
24 detective clearly states that there was no calls made or
25 whatever, and you said, you called, Mr. O'Keefe, yourself --

1 there was no 9-11 call basically by you, right? Do you
2 remember if she said that at the end?
3 A She said that you did not make a 9-11 call.
4 Q Yes.
5 A Yes.
6 Q Okay. Earlier in the testimony -- and let me back
7 up real quick there. You admit that I was extremely
8 intoxicated?
9 A In my testimony?
10 Q Yeah, or do you feel I was extremely intoxicated?
11 A I felt that you were drunk, yes.
12 Q Okay. Do you know that the 9-11 dispatch states
13 that when they made this call, they already announced on the
14 radio that the defendant was extremely 408 six minutes before
15 they apprehended me?
16 A I saw that in the CAD, yes.
17 Q Okay. And so the jury knows still, the interview
18 started around 0130 hours?
19 A I believe so, yes.
20 Q Okay. And I was apprehended about 11:15?
21 A I believe so, yes.
22 Q A couple minutes?
23 A Yes.
24 Q So, it was still over two hours, and I was in that
25 kind of condition? Okay. Now, getting back. In the

1 voluntary statement, would you remember that you asked me the
2 question --
3 MR. O'KEEFE: Your Honor, may I read it from here,
4 and just --
5 THE COURT: Absolutely, absolutely.
6 MR. O'KEEFE: Okay. You said --
7 MR. LALLI: May I ask what page he's referring to?
8 MR. O'KEEFE: It's 18, Mr. Lalli, on my voluntary
9 statement.
10 THE WITNESS: Of yours, Mr. O'Keefe?
11 BY MR. O'KEEFE:
12 Q Yes, yes.
13 A I'm going to open mine also.
14 Q Oh, you have it?
15 A Yes.
16 Q Fantastic.
17 A 22, I'm sorry? Page 22?
18 Q Page 18.
19 A 18.
20 Q And I left my glasses. So, I can see, but not real
21 --
22 A Okay.
23 Q Page 18.
24 A Okay.
25 Q And the second question -- or actually, we could

1 start at the top. I'll read it, if you don't mind. There was
2 no response from the previous answer from the previous page.
3 Then it says, "Why didn't you call 9-11?" Answer, and I said,
4 "Check the phone." And TK, the other detective, right? She
5 says, "I will."
6 Then, the next question from you was, "Answer my
7 question. Don't order her around, answer my questions. Did
8 you call?" Little break. My answer was, "No." And then,
9 amazingly, it says, "Unintelligible." And I said, "I called,
10 I called," a big blank, both talking. And you said, "And
11 that's all you got to do is answer the question." Does it not
12 state that verbatim?
13 A It does on this, yes.
14 Q So, at that time, 45 minutes earlier, I did make it
15 clear that I didn't mean that I called 9-11. I was calling --
16 I made it clear that I didn't make call?
17 A Well, when we listen to -- this is just how the
18 statement is transcribed. But when you listen to the actual
19 statement itself, I mean, I clearly ask you, did you call
20 9-11? And you clearly state, yes.
21 Q Okay. But it does state what I just stated, what we
22 read?
23 A Yes. Yes.
24 Q It states that clearly? Okay. So, I did make some
25 type of admission, I'm extremely intoxicated, or intoxicated.

1 It shows, no doubt. And earlier, I do try to make amends, and
2 I did mean me. Would you agree that -- or, let me back up.
3 And I apologize. And I will try to be brief with this.
4 You've done your job for how many years, Detective?
5 A I've been a police officer for 24 years.
6 Q 24 years?
7 MR. O'KEEFE: Excuse me. Court's indulgence.
8 BY MR. O'KEEFE:
9 Q Okay. So, you have a lot of experience?
10 A Yes.
11 Q Okay. You testified -- they allowed you to
12 [inaudible] a little bit as an expert. It was testified to
13 yesterday by the photographer for the fingerprint -- for the
14 photos, that he wasn't necessarily instructed to, you know,
15 maybe get better views of my finger and my thumb. And that
16 wasn't done. He said that was stated by you that he was not
17 told; is that correct?
18 A I asked him to take pictures. He did. And those
19 are the pictures that we observed earlier.
20 Q Okay. But you just testified that you're pretty
21 experienced in knife situations, and you claimed -- you made
22 the claim right here in front of this jury that you feel
23 wounds would be -- that would be consistent from a knife
24 slipping -- hands slipping off the knife, correct?
25 A Correct.

1 Q The totality of this case, don't you think it would
2 be imperative to maybe get a little bit better pictures of,
3 you know, comparison? Because the wound indications, it's a
4 practical -- physical impossibility.
5 I mean, basically, to clarify, do you feel maybe you
6 could have took a few extra pictures to maybe show as
7 evidence, to be shared by the State and the defense? Since
8 you felt in your mind already something had happened, do you
9 feel maybe you should have been obligated to take a few more
10 pictures?
11 A I think we got pictures both at the scene that shows
12 the wounds, and Mr. Ford came back in at the homicide offices,
13 showing those same two wounds.
14 Q Okay. And I'm just asking. I mean, no tricks. I'm
15 just trying to get an answer from you, and I appreciate it,
16 Detective. I clearly asked you finally that -- we had gone to
17 Paris, and I had told you that, honestly. "Please check,"
18 repeatedly, "check." Correct?
19 A Correct.
20 Q You could have got that video from Paris. I even
21 said I knew it from a previous -- they heard it, that you
22 know, video only lasts for four days, and they re-write over
23 it. And I even tried to say, hey, look, please get it now,
24 you know, verify my story. And I did clearly -- was honest,
25 and I told you, finally, check Paris, correct?

1 A Correct.

2 Q Okay. I even told you I remembered, as we all seen

3 (sic), there was a shooting -- another victim at a store, a

4 tragedy happened. And we all know the stores have video

5 cameras, at the Walmart's, and all that. And I even told you,

6 please go to Vons and verify my story, did I not? That she

7 had gone there and purchased --

8 A Yes.

9 Q Okay. I'm just asking. That's all. I even told

10 you during the interrogation that --

11 MR. O'KEEFE: Court's indulgence.

12 MR. LALLI: Your Honor, can we approach, please?

13 THE COURT: Yes.

14 (Off-record bench conference)

15 MR. O'KEEFE: Okay.

16 BY MR. O'KEEFE:

17 Q I quite clearly told you that she was ill, and there

18 was some records that should be procured, correct?

19 A Correct.

20 Q Don't you think that would be important in a case

21 like this, to maybe check that out?

22 A That she had hepatitis C, and I believe you said

23 liver damage?

24 Q Okay. Did I not mentioned that she was a cutter,

25 and suicidal, and eight documented suicides, and many others

1 undocumented, and she was a cutter, she did self-mutilations,
2 and had a host of mental illnesses?
3 A No.
4 Q You weren't aware?
5 A You said that -- I believe that you said -- I don't
6 even know if you used the word "suicide." I think maybe,
7 "stabbed herself." But you never told me she was a cutter.
8 You never said she had eight suicide attempts, and many others
9 undocumented.
10 Q Well, I'm not going to waste the Court's time and
11 [inaudible] the jury. But don't you remember in the
12 beginning, it's quite clear, I said, you should get the
13 records from Montevista Psychiatric Hospital? Montevista?
14 A Yes.
15 Q Are you aware what Montevista is?
16 A Yes.
17 Q How much more clear could that be? Did I not say
18 that she was --
19 MR. LALLI: Objection, argumentative.
20 THE COURT: Yeah. Just -- you got to ask him what
21 he thinks Montevista is, if you want.
22 MR. O'KEEFE: I think I've done enough argument.
23 Thank you, Judge. I'll move on. Okay.
24 BY MR. O'KEEFE:
25 Q You just stated earlier, Detective, that, quite

1 clearly, you're experienced, 24 years. This is a homicide
2 case. There was even a detective at Las Vegas Metropolitan
3 Police Department in a homicide case, says that you can -- you
4 don't have to, but you can.
5 Now, they put out on the air that I was extremely
6 intoxicated. There was -- you knew what's going on. They're
7 going to see the video over and over. I want them to watch it
8 multiple times and see -- see if I was so called faking it, as
9 you made an assumption. But you know, it was quite clear --
10 and all the other officers, they all say he was extremely
11 intoxicated.
12 Don't you think maybe that you should have maybe in
13 a case this serious had my blood and breath drawn? Don't -- I
14 mean, don't you think that was important to pull it, so in a
15 definitive number --
16 MR. LALLI: I'm going to object, Your Honor. It's
17 argumentative now.
18 MR. O'KEEFE: It's not.
19 THE COURT: Well, just ask him --
20 MR. O'KEEFE: Okay.
21 THE COURT: -- do you think it was important --
22 MR. O'KEEFE: Don't you think --
23 THE COURT: -- in the police investigation to have
24 your blood drawn.
25 BY MR. O'KEEFE:

1 Q I mean, don't you think it was huge, important?
2 A No. I've never done it before. I haven't done it
3 since. My assessment of you while we were doing our interview
4 is that you were not intoxicated to the point of being not in
5 control of yourself. You manipulated your way through the
6 interrogation. And I felt that there was no reason at all to
7 have you tested.
8 Q Okay.
9 A And I'm under no obligation to do so.
10 Q Okay. And you noticed, I let you expand on that. I
11 didn't cut you off. I have nothing to hide.
12 A Okay.
13 Q However, later, wasn't there photographs taken of
14 me?
15 A Yes.
16 Q And isn't there several photos where they're holding
17 my head up? Yes, or no?
18 A When you're getting into the suit; is that what
19 we're talking about, sir?
20 Q Yes, sir. And when they had me against the wall,
21 there was photos where someone's holding my head up, and you
22 can see the arm, it's been -- in prior testimony, it's seen.
23 A Yes.
24 Q Do you remember that?
25 A Yes.

1 Q Okay. Do you remember when you were having me put a
2 suit on, and I was falling over and they had to grab me; I
3 couldn't even put my leg in the pants?
4 A Yes.
5 Q Okay. I'm just asking to be honest. I'll be
6 honest, you be honest.
7 MR. LALLI: I'm going to object, Your Honor.
8 THE COURT: Yeah. Don't make comments like that.
9 MR. O'KEEFE: Okay.
10 THE COURT: Just ask -- answer the questions.
11 Listen and answer them, and move on.
12 BY MR. O'KEEFE:
13 Q I asked -- or I told you earlier, too, I made a ton
14 of phone calls that day. This whole pag of that day -- this
15 -- I mean, you verified that? You checked the phone. I kept
16 saying, check the phone, check the phone. This was all for
17 that day, like 30 calls. Each one is a call?
18 A Yes.
19 Q Okay. I mean, I'll save it for argument. Got what
20 I needed.
21 MR. O'KEEFE: Thank you, Your Honor. Okay.
22 BY MR. O'KEEFE:
23 Q Victoria's purse was taken from the bedroom, and
24 moved into the kitchen; is that correct, Detective? Do you
25 remember that? You've seen photos of that, where they laid my

1 wallet out -- you know?

2 A Yeah. I believe that's true, yes.

3 Q Okay. They had take receipts out, and all that.

4 And do you remember there was a receipt -- and it was put in

5 the subpoena, "Receipt from O'Keefe's wallet." I'm sure --

6 because you did the closing on the case, so you would remember

7 that, correct?

8 A Yes.

9 Q And it shows clearly -- it does say -- if you need

10 to see it, it says, 5:46 p.m. on the same day at the A-1

11 Vacuum and Sewing shop. You wont dispute that, right? So --

12 A No.

13 Q Okay. And that was en route to Paris. Thank you.

14 MR. O'KEEFE: For argument, I'll save it, Your

15 Honor.

16 BY MR. O'KEEFE:

17 Q Is it policy in the subpoena that items of

18 importance, such as for possible motive and all that, money,

19 jewelry, and all that, ID; isn't that supposed to be

20 apprehended? I'm asking you. You're the detective.

21 MR. LALLI: I'm going to object, Your Honor. That

22 question was unintelligible.

23 THE COURT: Yeah, apprehended.

24 MR. LALLI: I don't know what he was asking.

25 THE COURT: I'm not sure what that means.

1 MR. O'KEEFE: Okay.
2 THE COURT: Maybe rephrase it.
3 BY MR. O'KEEFE:
4 Q Well, when you take a suspect into custody --
5 MR. O'KEEFE: Is that better, Your Honor? I
6 apologize.
7 BY MR. O'KEEFE:
8 Q And you make a tagging list, aren't you supposed to
9 take -- like you write down the items you take. And isn't a
10 wallet and ID of an alleged suspect supposed to be written
11 down and taken, too?
12 A It was photographed.
13 Q Okay. The wallet disappeared. When they brought me
14 in and charged me, the wallet -- ID, everything. The pictures
15 of my -- everything's gone. But they photographed it. What
16 happened to the wallet?
17 A I don't know, sir. I don't know. I'd have to look
18 through the reports and see if I could figure that one out.
19 Q I mean, again, clearly, you stated the picture --
20 the purse was taken from the bedroom. They opened it up, took
21 the wallets out, laid them out, took our photos. I understand
22 that process. They wrote everything down, but --
23 MR. LALLI: I'm going to object to the form of the
24 question.
25 THE COURT: Yes.

1 MR. O'KEEFE: I'll move on, Your Honor.
2 THE COURT: Compound, and --
3 BY MR. O'KEEFE:
4 Q So, you got some of the records, but you never --
5 you never got the Montevista records, psychiatric hospital?
6 You never got those records; you never checked it out?
7 A No.
8 Q What records did you get?
9 A I believe we got your phone records.
10 Q Do you remember me telling you, you should check the
11 Montevista records; go to Montevista, please?
12 A Yes.
13 Q And still, you didn't get those records?
14 A No.
15 Q You didn't go to Vons?
16 A No.
17 Q You didn't go to Paris?
18 A No.
19 Q You didn't get proper -- as far as I'm concerned,
20 photos of injuries?
21 A I disagree with you.
22 Q Well, you didn't get extra photos.
23 A Okay.
24 Q Okay. You --
25 A I got a number of photos of your injuries.

1 Q Did you -- and you didn't take a blood or breath
2 draw?
3 A No.
4 Q I'm going to ask you this opinion, because you said
5 24 years of experience. Do you feel that you're obligated
6 sometimes -- or do you think that there's just evidence that
7 should -- you should just gather all the evidence possible,
8 and throw it on the table, and you know, present it? And I
9 mean, you're the only -- you're the one that's in control of
10 doing all that, correct, Detective? I mean, it's your call
11 whether to do it or not, right?
12 A It's my call. Absolutely.
13 Q It's your call. So, one person can have quite an
14 impact on someone's case, correct? Just yes or no, please.
15 A Yes.
16 Q Just someone really could if they wanted to.
17 MR. O'KEEFE: No further questions, Your Honor.
18 THE COURT: All right, thank you. Any redirect --
19 MR. O'KEEFE: Thank you, Detective, sincerely.
20 THE COURT: -- Mr. Lalli?
21 THE WITNESS: Thank you.
22 MR. LALLI: Yes.
23 REDIRECT EXAMINATION
24 BY MR. LALLI:
25 Q Detective Wildemann, during the course of your

1 interview with the defendant, did you try to steer him to talk
2 to you about the events that transpired immediately before
3 Victoria Whitmarsh was stabbed?
4 A Yes.
5 Q And what was the tactic employed by the defendant
6 when you did that?
7 A He would become silent. He would say, I don't know.
8 Or he would steer off to a total -- the two days before was
9 his favorite place to go, where he would talk about an event
10 that took place two days prior. But he would not talk about
11 the events just prior to the stabbing, or the stabbing itself.
12 Q He would repeatedly talk about the Paris?
13 A Correct.
14 Q Do you think that had any relevance to the immediate
15 events leading up to him stabbing Victoria Whitmarsh?
16 A No relevance whatsoever.
17 Q He talked to you about the Vons. Do you think that
18 was relevant in this investigation?
19 A No.
20 Q Whether he had had a vacuum cleaner purchased or
21 repaired, do you think that's relevant to why he murdered
22 Victoria Whitmarsh?
23 A No.
24 Q The phone calls he might have made to the Union that
25 day, do you think that had any relevance to why he might have

1 stabbed Victoria Whitmarsh?

2 A None.

3 Q You gave him the opportunity to explain that,

4 correct?

5 A Correct.

6 Q And what did he do when you gave him the opportunity

7 to talk about what happened with Victoria Whitmarsh?

8 A Not explain it. He never did.

9 MR. O'KEEFE: Recross, Your Honor.

10 MR. LALLI: Thank you.

11 MR. O'KEEFE: Just a moment.

12 THE COURT: Do you have any recross?

13 MR. O'KEEFE: Yes, Your Honor, I do.

14 RECROSS-EXAMINATION

15 BY MR. O'KEEFE:

16 Q Conversely, then, Detective, clearly, if I knew a

17 person's condition, that they were a cutter and all that --

18 and I'll back up again.

19 MR. O'KEEFE: And I'll make it real quick, Your

20 Honor.

21 BY MR. O'KEEFE:

22 Q An assault charge with a weapon is a serious charge,

23 Detective, right? It's your line of work.

24 MR. LALLI: I'm going to object. This is beyond the

25 scope.

1 MR. O'KEEFE: He's a detective, Your Honor. He
2 knows.
3 THE COURT: Well, wait a minute. You did mention
4 what was relevant, what's not -- if you want to get into the
5 Montevista, you could.
6 MR. O'KEEFE: Okay.
7 THE COURT: Is that what you're trying to get at?
8 MR. O'KEEFE: All right.
9 THE COURT: That's within the scope, I believe.
10 BY MR. O'KEEFE:
11 Q If you're not quite sure of what somebody did, and
12 you didn't want to get them in trouble, but you knew their
13 history as a cutter, and you truly didn't know what happened,
14 and you didn't want to throw somebody under the bus, and
15 you're trying to really think -- I mean, don't you think
16 that's kind of relevant?
17 Don't you think there's relevancy in -- since the
18 State is trying to say I did something; I killed her, I had
19 motive, intent, payback, why would I that day make calls, and
20 get leads for a job? Why would a person get a vacuum fixed on
21 the way, take her out, and want to take a person out to
22 celebrate? Why would I want to do all those things?
23 MR. LALLI: Objection, this is argumentative.
24 MR. O'KEEFE: No further questions, Your Honor.
25 THE COURT: All right. That completes the

1 testimony.

2 MR. LALLI: Just very briefly.

3 THE COURT: All right.

4 MR. LALLI: Well, the defendant said that the

5 detective was trying to throw him under the bus.

6 FURTHER REDIRECT EXAMINATION

7 BY MR. LALLI:

8 Q Were you trying to throw this defendant under the

9 bus?

10 A No.

11 Q Why did you arrest him for murder?

12 A Because I believed I had enough probable cause, and

13 I was convinced that a murder had occurred, and he had

14 committed it.

15 Q Thank you.

16 MR. LALLI: Nothing further.

17 MR. O'KEEFE: Your Honor, last recross.

18 FURTHER RECROSS-EXAMINATION

19 BY MR. O'KEEFE:

20 Q And Detective, I didn't mean, me. I meant, I didn't

21 want to throw Victoria under the bus. I knew she was a

22 cutter, and I didn't want to make any false claims, because I

23 clearly, as the video shows and they see, I didn't know what

24 happened, and I didn't want to get her in any trouble. And I

25 repeatedly -- on the video, I kept saying I didn't know what

1 happened. Did I not, Detective?
2 A Yes.
3 Q And I continued to stick to my story, and I never
4 gave you an answer. You were trying -- you were trained to
5 get someone to slip, and you would hold them to anything they
6 would say; would you not, Detective?
7 A I would conduct an interview, and try to get the
8 answers to the questions I was asking you.
9 Q Okay. So, in a way, it is kind of trickery,
10 Detective, isn't it?
11 A At times, I have to use those tactics.
12 Q And it's easy, especially on someone who is
13 extremely, extremely intoxicated, and PTSD from a traumatic
14 event, no sleep, tired. And you have all the skills, 24 years
15 you're trained. It's like a -- it's like a --
16 MR. LALLI: I'm going to object, Your Honor.
17 THE COURT: Yeah, this is argument. All right. I
18 think that's enough, right?
19 MR. O'KEEFE: Yes, Your Honor.
20 THE COURT: Thank you. You're excused. All right.
21 The next witness?
22 MR. LALLI: Your Honor, at this point, Mr. O'Keefe
23 and the State have entered into a stipulation regarding
24 certain facts. And we would request that that stipulation now
25 be read to the jury.

1 THE COURT: All right. And then -- and then you
2 rest; is that --
3 MR. LALLI: Yes.
4 THE COURT: I think I'll do that, all right, Mr.
5 O'Keefe?
6 MR. O'KEEFE: Yes, Your Honor.
7 THE COURT: You did enter into a stipulation?
8 MR. O'KEEFE: I did stipulate to that. And I would
9 just ask if you would clearly, as honorably as you are (sic),
10 to ask the jury to be prepared, and --
11 THE COURT: Sure, I will. Absolutely.
12 MR. O'KEEFE: Bless you, Your Honor.
13 THE COURT: Ladies and gentlemen, as Mr. Lalli
14 pointed out -- and I'm going to give you an instruction later
15 on, or tomorrow. The evidence which you are to consider in
16 this case consists of the testimony of the witnesses, the
17 exhibits that were admitted and you were shown, and any facts
18 admitted or agreed to by counsel and Mr. O'Keefe. So, that's
19 really what you have to consider.
20 The testimony, the exhibits, and any facts that they
21 admit to. They have admitted to certain facts. And I'm going
22 to read this admission or stipulation to you right now. I'd
23 like you to pay as much attention to this admission and
24 stipulation as you paid to the testimony of the witnesses and
25 the exhibits.

1 So, I want you to get your pencil and paper, if you
2 take any notes. This is not going to be an exhibit. It's
3 just a matter of, this is stipulated between the -- these are
4 excerpts from medical records of Victoria Whitmarsh as
5 stipulated by the State and Brian O'Keefe.
6 "Records from October 2001, admission to Montevista
7 Hospital, show that Victoria Whitmarsh was admitted 'because
8 she had tried to cut her wrist in an attempt to hurt herself.'
9 When Victoria Whitmarsh was brought to Sunrise Hospital prior
10 to transfer to Montevista, documents indicate the patient
11 comes in by EMS with bilateral wrist cuts. Patient states,
12 had fight with husband, got depressed, tried to cut wrist with
13 a knife. Plaintiff (sic) states, 'Was trying to kill
14 myself.'"
15 Triage nurse assessment sheet. "She was diagnosed
16 with 'laceration of both wrists.' Psychiatric evaluation by
17 Dr. DeKay (phonetic) shows, 'The patient was brought in after
18 she tried to cut her wrist in an attempted suicide. This has
19 been the fourth suicide attempt, and I was just recently made
20 aware of this.'"
21 Those are the records from October 2001 admission to
22 Montevista Hospital. It goes on, the stipulation between the
23 State and the defense.
24 Records from September 2006, admission to Montevista
25 Hospital, show that Victoria Whitmarsh 'had self-inflicted

1 wrist lacerations.' Admission certification by Dr. Slagel
2 (phonetic) reports, 'Ms. Whitmarsh has made at least three
3 suicide attempts. Recent attempt could have been lethal.'"
4 Emergency admission form. "Discharge summary by Dr.
5 Adakuli Ayashi (phonetic), M.D., states, 'She had to be
6 intubated after she overdosed with morphine, after an argument
7 with her estranged husband. She has been self-mutilating for
8 the past 15 years, and stated that she cuts herself when she
9 is angry. And the last time she cut her left wrist was with a
10 pair of scissors on September 22nd, 2006. She complained of
11 irritability, mood swings, difficulty sleeping at night
12 because of racing thoughts. Poor appetite, anxiety, low
13 energy, and difficulty sleeping, and difficulty concentrating.
14 She also reports episodic euphoria, anger outbursts, and
15 decreased need for sleep.' (Discharge summary, page 1)."
16 "Victoria Whitmarsh reported that on -- that the
17 October 2001 admission to Montevista Hospital occurred
18 'because she was angry, screaming, and she went berserk after
19 an argument with her husband, and overdosed on pills, and cut
20 her wrist.' Dr. Anakunla Aja, M.D., evaluated Whitmarsh, and
21 noted that 'She has a long history of poor anger management,
22 and very impulsive behavior.' (Discharge summary, page 4)."
23 "Montevista Hospital assessment and referral
24 screening, dated October 29th, 2006, indicates, chief
25 complaint in patient's own words, 'Why are you here today?'

1 Answer, 'I have been depressed. I cut myself when I am
2 depressed. I also got angry with my husband. That is why I
3 took the pills.'"
4 "Under heading of precipitating events which
5 occurred in previous 72 hours, which prompted assessment.
6 Patient also admits to a history of self-mutilation. Most
7 recently, she stabbed herself on her hands, August 22nd, 2006,
8 'because I'm not happy with myself.' Patient admits, 'poor
9 impulse control,' as evidenced by 'cuts self when angry.'"
10 Again, I reiterate, you'll get an instruction. The
11 evidence which you are to consider in this case consists of
12 the testimony of the witnesses, the exhibits, and any facts
13 admitted or agreed to by counsel. So, these -- this excerpt,
14 as stipulated by the State and Brian O'Keefe, are admitted to
15 by counsel -- stipulated to by counsel. Okay?
16 All right. That completes the reading of the
17 stipulation. And Mr. Lalli?
18 MR. LALLI: Your Honor, at this point, the State of
19 Nevada rests.
20 THE COURT: Thank you, Mr. Lalli. That completes
21 the State's case in chief, ladies and gentlemen. I'm going to
22 ask Mr. O'Keefe. Mr. O'Keefe, what is your pleasure?
23 MR. O'KEEFE: Your Honor, with all due respect, if I
24 could approach the bench on this matter briefly --
25 THE COURT: Yeah.

1 MR. O'KEEFE: -- before I answer that question?
2 THE COURT: Yeah.
3 (Off-record bench conference)
4 THE COURT: All right. Mr. O'Keefe, what is your
5 pleasure? I know you have a motion, and you're going to
6 reserve that. But --
7 MR. O'KEEFE: Right. The defense rests.
8 THE COURT: So, you have no witness to present,
9 and --
10 MR. O'KEEFE: No witness.
11 THE COURT: -- you rest?
12 MR. O'KEEFE: I rest.
13 THE COURT: All right. That completes the testimony
14 in this case, ladies and gentlemen. And I want to thank you
15 very much. So, you can go a little early today. And I have a
16 lot of work to do, various issues and instructions. So,
17 rather than keep you here, I -- you know, I'm used to working
18 late, so I work, right?
19 So, that being said, I want to give you the
20 admonition. And then, tomorrow at 9:00 o'clock is good?
21 MR. LALLI: Yes, Your Honor.
22 THE COURT: 9:00 o'clock?
23 MR. O'KEEFE: Yes, Your Honor.
24 THE COURT: I think at 9:00, because I have a motion
25 calendar at 8:45, which will take me five minutes. And so, I

1 think at 9:00 o'clock tomorrow, we'll read you the
2 instructions, and we'll hear some closing arguments, and the
3 case will be submitted to you tomorrow. All right?
4 Again, I want to thank you very much. I keep saying
5 this is an important case, both to the State of Nevada and to
6 the defense. So, appreciate your attentiveness, and we're
7 going to recess now.
8 During this recess, it is your duty not to converse
9 among yourselves, or with anyone else, on any subject
10 connected with the trial; read, watch, or listen to any report
11 or commentary on the trial, by any person connected with the
12 trial, by any medium of information, including, without
13 limitation, newspaper, television, radio. You are not to form
14 or express any opinion on any subject connected with the trial
15 until this is finally submitted to you.
16 Thank you. We're going to just take a five-minute
17 recess, and then come back, and we'll figure things out, all
18 right? Thank you very much. We'll see you tomorrow. Be out
19 there about five minutes to 9:00, and we should get in there
20 hopefully quick enough, all right?
21 (Court recessed at 2:31 p.m. until 2:42 p.m.)
22 (Outside the presence of the jury panel)
23 THE COURT: Are we on the record now?
24 THE COURT RECORDER: On the record.
25 THE COURT: All right. This is outside the presence

1 of the jury. It's my understand that Mr. O'Keefe properly --
2 or did properly and timely object to the 9-11 tape's now being
3 admitted; should be admitted because the State opened the
4 door. But -- so, I just want you to make a quick record on
5 that. We're going to have to do it again because we had no
6 record.
7 MR. O'KEEFE: Okay. Your Honor, again, I just -- at
8 the end of the State's case in chief, before it closed, their
9 last witness's testimony was about my voluntary statement they
10 had taken. And at the end of that voluntary statement,
11 discussion and evidence was brought up about 9-11 calls being
12 made, and who, and all that.
13 But the defendant's position is, it kind of clearly,
14 I felt, opened the door, because a prior court ruling by you
15 was made that a foundation wasn't laid enough for me to bring
16 those 9-11 calls in, and I feel they're very imperative, Your
17 Honor.
18 THE COURT: Mr. Lalli, again?
19 MR. LALLI: Your Honor, it's the State's position
20 that the Court did not prohibit the defendant from admitting
21 any 9-11 tapes. It was just a matter of his inability to lay
22 the foundation for them. He hasn't been able to lay the
23 foundation for them. They're hearsay. And so, they're still
24 not admissible. It's not an opening the door issue.
25 THE COURT: The Court agrees with the State that I

1 don't think the State opened the door to anything, and the
2 proper foundation still was not laid. So, my prior rulings
3 stands on the 9-11 tape.
4 All right. And you have another motion?
5 MR. O'KEEFE: Yes, Your Honor. I had to try, Your
6 Honor. You understand.
7 THE COURT: Absolutely.
8 MR. O'KEEFE: Thank you, Your Honor. Okay. Per --
9 THE COURT: But that was just a little parachute,
10 you know.
11 MR. O'KEEFE: Little parachute?
12 THE COURT: We might have had some big ones in this,
13 but that was just a little one.
14 MR. O'KEEFE: I [inaudible] big ones, Your Honor.
15 Thank you, Your Honor.
16 THE COURT: [Inaudible] big one.
17 MR. O'KEEFE: The State of Nevada vs. Colmes
18 (phonetic), you'll know quite well, Your Honor, I'm sure.
19 THE COURT: So, this is under NRS 175.380 --
20 MR. O'KEEFE: 381, Your Honor. Subsection --
21 THE COURT: 381. Court may advise -- sub 1.
22 MR. O'KEEFE: Subsection 1. Yes, sir.
23 THE COURT: "Court may advise jury to acquit," which
24 is a directed verdict, as indicated, "when evidence on either
25 side closed, motion for judgment of acquittal after verdict of

1 guilty, or guilty by mentally, subsequent motion for a new
2 trial." And we're going onto subsection 1. "If at any time
3 after the evidence on either side is closed, the Court deems
4 the evidence insufficient to warrant a conviction, it may
5 advise the jury to acquit the defendant, but the jury is not
6 bound by such advise." All right.
7 MR. O'KEEFE: Okay. Your Honor, okay. Thank you,
8 Your Honor. Okay. The evidence utilized in this case, Your
9 Honor, was identical, and less than the evidence presented in
10 the first trial in this instant matter. The Nevada Supreme
11 Court has already ruled and seen all this evidence. And in
12 actuality, there was a little bit more that the State
13 presented.
14 My point is, they use less, but it was absolutely
15 the identical evidence used. On an alleged second degree
16 murder instruction, which we're here again today for, second
17 degree murder still, they use the same evidence.
18 Again, quickly, the point being made is, the
19 evidence has already been seem. They've ruled that the
20 instruction was wrong. But however, in the reversal order,
21 they said, even if the instruction was proper, it didn't
22 matter, because all the evidence presented didn't support that
23 theory of second degree murder, period.
24 THE COURT: I think fact here is the key issue.
25 MR. O'KEEFE: But that theory --

1 THE COURT: We don't have that theory there anymore.
2 MR. O'KEEFE: But that theory still constitutes for
3 equal second degree murder, Your Honor. Now, Mr. Lalli is
4 proceeding on simple implied malice murder, which is a lesser
5 included, basically. It's actually a lesser included of the
6 first degree murder, that the jury of -- like, being the
7 {inaudible} of the fact in the first trial acquitted me of
8 first degree intentional stabbing.
9 Actuality, this case now has proceeded on an
10 unintentional charge, based on an unlawful act. I'm still at
11 a loss of what act Mr. Lalli is going to base this homicide
12 on. Because hear me out, Your Honor, and I appreciate your
13 patience. Whether it would have been an alleged felony
14 battery or not, or a misdemeanor battery, battery is the
15 ultimate element of the homicide. All the elements are
16 subsumed in it.
17 My whole point is, when they acquitted me of that
18 theory then, Your Honor, that theory was saying the felony of
19 battery. They acquitted me of the battery act. They know --
20 the Supreme Court of Nevada knows exactly what they were
21 doing. It was an artificial battery, whatever. It was a
22 little trickery, I do believe; duplicity being used. It was a
23 way for the case to get reversed and come back, and the State
24 gets to do it again. It was a dry run.
25 But my whole point is, all this evidence was already

1 in the record of the appeal on the first trial. They've seen
2 it all. They're going to see this again, if I get convicted
3 of second degree murder, and they're going to say, what they
4 heck? A third --
5 THE COURT: They're not going to see the same
6 instruction that was --
7 MR. O'KEEFE: Well -- yes, sir, Your Honor. But I'm
8 just trying to get -- I'm trying to clarify that there has
9 been no newly (sic) evidence. It's all the same evidence.
10 Some of that evidence was wrongfully used. You know, I've
11 made my continuing objections. You have helped me and saved
12 me, and preserved those for appellate issue, if needed.
13 There's nothing new.
14 They have -- Your Honor, you've seen, without a
15 doubt, the evidence does not support the big M, murder. They
16 got to prove the intent, the knowledge, the act, the -- I had
17 to have the conscious knowledge, knowing that the unlawful act
18 they said I didn't do, that I hadn't -- I knew that this act
19 was without a doubt going to kill her. The unlawfulness of
20 the stabbing, the intent, and with conscious knowledge.
21 This case should not, Your Honor, be -- there should
22 be no more time wasted on this. This should not be turned
23 over to the jury to deliberate. I have to make my record.
24 I'm trying my best.
25 And it's -- like, again, I must reiterate one last

1 time, and I will sit down and shut up, Your Honor. It's the
2 same evidence, it's less evidence, it doesn't support murder.
3 They have proved nothing. You are a wise -- you worked on the
4 Supreme Court.
5 And again, I said -- you know, when they recharged
6 me with second degree murder, that theory, Your Honor, that
7 he's proceeding on now, simple malice murder with that
8 premeditation and deliberation, second degree murder, the
9 theory; that theory was already on the first trial. It was
10 theory 1, supposedly. Then to theory 2, that theory that
11 you're talking about they acquitted.
12 Okay. The Supreme Court knows if they said it
13 didn't support number 2, number 1 was already there. Any
14 remaining theory available or left for the second degree -- if
15 there's any remaining theory left available, the Supreme Court
16 of Nevada couldn't reverse it. They could have said, well, it
17 didn't support number 2; but okay, it supports number 1. You
18 well know; you've probably wrote opinions.
19 Well, the evidence was so overwhelming, it didn't
20 support this. You're right, we'll agree with that, we'll drop
21 the felony deal. But it supported the malice -- simple malice
22 murder -- simple murder. It supported that. They already had
23 the simple murder. I think my argument's quite clear, and
24 I'll --
25 THE COURT: Yeah.

1 MR. O'KEEFE: -- submit on that.

2 THE COURT: And it was made many times during this
3 trial, and I appreciate always having -- making a record. Mr.
4 Lalli?

5 MR. LALLI: Your Honor, I would just -- I have
6 responded to it many times. I oppose the motion.

7 THE COURT: Well, just a couple sentences. Just get
8 it in there.

9 MR. LALLI: Sure. The Nevada Supreme Court struck,
10 or did not find that there was evidence presented on a felony
11 second degree murder theory. The State is still free to
12 proceed on a second degree murder based upon an unlawful
13 killing with malice, aforethought. And that is the theory
14 upon which we proceeded. We have proven that guilt beyond a
15 reasonable doubt now, and are looking forward to arguing that
16 tomorrow.

17 THE COURT: All right. Anything else, Mr. O'Keefe?

18 MR. O'KEEFE: No. No, Your Honor.

19 THE COURT: Well, again, I appreciate you making
20 your record. But I don't feel compelled to rule that the
21 Court deems the evidence insufficient to warrant a conviction.
22 This can go either way. The jury has heard all the evidence.
23 And you know, you did your job with Mr. Maningo's help, you
24 know, in your cross-examination, got out the points you wanted
25 to, and you made your record.

1 But I just feel compelled to leave this to the jury.
2 Hopefully this will be the last time, who knows. But we'll go
3 from there, all right? But your motion is denied, and
4 respectfully denied though, all right?
5 MR. O'KEEFE: Thank you, Your Honor, for hearing it.
6 THE COURT: All right. Now, you have -- I'm going
7 to just take a few minutes to look through these instructions.
8 You have your copy of the jury instructions, Mr. Lalli?
9 MR. LALLI: I've got the copy that I have. I don't
10 have any offered instructions by Mr. O'Keefe.
11 THE COURT: Well, [inaudible]. Do you have Mr.
12 Lalli's jury instructions?
13 MR. O'KEEFE: I just need a minute. I haven't had a
14 chance. When I came in today, they were -- this morning, they
15 were here.
16 THE COURT: Well, we're going to look at them
17 together, all right? Get your copy --
18 MR. O'KEEFE: That's great, Your Honor.
19 MR. O'KEEFE: Get your copy there. All right. I'm
20 not going to number them yet. I'm just going to look at them.
21 And you make a pencil if you object to any of them, or you --
22 all right? So, the first one --
23 MR. MANINGO: Your Honor, I'm sorry. Could I
24 trouble your clerk to make a copy of this for Mr. Lalli?
25 THE COURT: No.

1 MR. MANINGO: Thank you.
2 THE COURT: For Mr. Lalli?
3 MR. MANINGO: This is a copy of proposed -- I think
4 we have two. We just need one.
5 MR. O'KEEFE: From the second trial, the defendant's
6 proposed instructions.
7 MR. MANINGO: Just in case we use those by reference
8 for when Mr. O'Keefe goes through jury instructions he might
9 want to propose.
10 THE COURT: Can we --
11 MR. MANINGO: Yeah, we can proceed with this.
12 THE COURT: Oh, okay. All right.
13 MR. MANINGO: Absolutely.
14 THE COURT: "It is now my duty as Judge." That's
15 just a stock instruction. Are we all together now? Are you
16 with me?
17 MR. MANINGO: Yes, sir.
18 MR. LALLI: Yes.
19 THE COURT: "If in these instructions, any rule;"
20 that's just a stock instruction. The next one is, "An
21 information is but a formal method of accusing a person, not
22 of itself any evidence." Go through the charge. Okay, that's
23 [inaudible]. Then, the next one goes to what murder of the
24 second degree is, all right? "It's the unlawful killing of a
25 human being with malice aforethought, either expressed or

1 implied." All right? And it defines malice aforethought, "An
2 intentional doing of a wrongful act." Okay. That's just a
3 standard one that I see all the time, but we'll talk about it.
4 Then it goes on to define expressed malice, or implied malice.
5 In the next instruction, "The prosecution is not required to
6 present direct evidence of the defendant's state of mind."
7 Then, I guess this is the lesser included; is that correct,
8 voluntary manslaughter?
9 MR. LALLI: Yes, Your Honor.
10 THE COURT: And do you want a lesser included?
11 MR. O'KEEFE: No, Your Honor.
12 THE COURT: You don't want a lesser included?
13 MR. O'KEEFE: No. It wasn't on the -- they denied
14 it at the -- no, Your Honor. Just second degree or nothing,
15 Your Honor.
16 MR. LALLI: No problem. Take it out.
17 THE COURT: All right, we'll take it out.
18 MR. O'KEEFE: Take out.
19 THE COURT: We'll take voluntary, the heat of
20 passion --
21 MR. O'KEEFE: Take it out.
22 THE COURT: "If you find the State has established;"
23 take it out. "You are instructed if you find the defendant
24 guilty of voluntary;" take it out.
25 MR. LALLI: Well, this is the deadly weapon. This

1 instruction, Your Honor, will have to be modified.
2 THE COURT: Okay. How would you modify it?
3 MR. LALLI: Well, we'll just have to take it, "If
4 you find the defendant guilty of murder;" where it says, "or
5 voluntary manslaughter," we'll have to take that out.
6 THE COURT: All right. So, you'll make note of
7 that? That will be --
8 MR. LALLI: Yes.
9 THE COURT: You'll give me a clean copy tomorrow,
10 all right?
11 MR. LALLI: We will.
12 MR. O'KEEFE: And Your Honor, you know, I have an
13 argument on the deadly weapon. I've been advised by standby
14 --
15 THE COURT: Well, we're going to --
16 MR. O'KEEFE: Yes, sir.
17 THE COURT: You can argue whatever you want.
18 MR. O'KEEFE: Thank you, Your Honor. I'm just --
19 THE COURT: So, you make notes to yourself; what do
20 you --
21 MR. O'KEEFE: All right.
22 THE COURT: -- want to argue on.
23 MR. O'KEEFE: Bless you, Your Honor.
24 THE COURT: So, the record reflect he doesn't want
25 the lesser included. And that's already ruled upon, I'm not

1 going to give it. And you -- whatever you want to -- whatever
2 you want to make an argument on, make a note.
3 MR. O'KEEFE: Yes, sir.
4 THE COURT: All right. The next one is, "Deadly
5 weapon means any instrument, which if used" -- all right? So,
6 that's deadly weapon. The next bit of instructions are
7 self-defense. Is that correct, Mr. Lalli?
8 MR. LALLI: Yes.
9 THE COURT: Did you want to have a self-defense
10 instruction here, Mr. O'Keefe?
11 MR. O'KEEFE: One --
12 THE COURT: Yeah, sure.
13 MR. MANINGO: Your indulgence, Your Honor.
14 THE COURT: Sure. There's a whole bunch of
15 self-defense. I mean, there's 1, 2 -- the right of
16 self-defense, actual danger.
17 MR. LALLI: Those are the Runyan instructions, Your
18 Honor.
19 THE COURT: Yes. I mean, this is -- if somebody
20 wants self-defense, these are the proper -- six of them; is
21 that right?
22 MR. LALLI: Yes.
23 MR. O'KEEFE: Your Honor, I'm ready. I know, you're
24 very, very patient. I'm ready to give -- and I agree on the
25 thankful help of the standby counsel, Mr. Maningo. I will

1 claim, it wasn't -- this is for us, and for my record. I'm
2 not claiming I killed her intentionally in self-defense. It
3 was an accident. So, I don't think this is -- I don't want
4 this, because I'm not claiming I killed her in self-defense.
5 I'm -- you know, I'm begging the Court's indulgence for a
6 little understand.
7 THE COURT: You know, I don't -- Mr. Lalli, what's
8 your position on that?
9 MR. LALLI: Well, here's what I'm concerned about.
10 The defendant's opening statement is not evidence. What he
11 chooses to argue, he has to argue the evidence that's in the
12 record. The only statements that are in the record that he's
13 allowed to argue are statements that the State has offered.
14 And he -- there is some evidence on the video
15 pertaining to, she attacked me, she introduced the knife;
16 which if he -- if that was his theory, I think legally, he'd
17 be entitled to them. If he starts arguing self-defense, based
18 upon the evidence that's adduced, I think the jury needs to be
19 instructed as to what the law is there; what they need to find
20 before they can return a -- or analyze self-defense.
21 If he's saying he's not arguing self-defense, and
22 it's not his theory and he doesn't argue it, then, fine.
23 Don't -- if he doesn't want it, then don't give the
24 instructions. However, if he starts to argue self-defense, I
25 am going to want this jury instructed on the law of self-

1 defense.

2 THE COURT: Well, I mean --

3 MR. LALLI: Does the Court understand my position?

4 THE COURT: Well, I do, sure. But --

5 MR. LALLI: I think there's some evidence in the

6 record -- his statement -- I don't believe it's -- it is a

7 viable defense. But his statements to the police I think are

8 enough evidence that, if he had requested self-defense

9 instructions, he'd be entitled to those legally.

10 THE COURT: But he's indicating --

11 MR. LALLI: If it's not --

12 THE COURT: -- he's not going to argue self-defense.

13 MR. LALLI: That's fine.

14 THE COURT: Whatever -- if whatever he argues, it

15 was accidental, whatever it is, that's his business.

16 MR. LALLI: That's fine. If he doesn't, he -- you

17 know --

18 THE COURT: But you understand, you can't even utter

19 those words, "self-defense." I did it because she was coming

20 at me with a knife; what could I do? (Inaudible), what could I

21 do? I don't know, what could I do? She had a knife in her

22 hand, I don't know what to do.

23 And you got to be careful. It's a fine line there.

24 It's a fine line. It's up to you to -- I mean, but I'm

25 really going to be strict on that, that you can't argue

1 self-defense, or even something like that; she had the knife
2 in he hand, ladies and gentlemen.
3 (Pause in the proceedings)
4 THE COURT: So, understanding that, what do you want
5 to do?
6 MR. O'KEEFE: Well, Your Honor --
7 THE COURT: If you're going to tell me, Judge, I'm
8 not even going to mention she stabbed herself, or it was an
9 accidental stabbing by herself, well, that's fine. We don't
10 need self-defense. But you can't have it both ways. I guess
11 if you slip up, then we're going to have to give these
12 instructions. I don't know.
13 MR. O'KEEFE: My closing might be very brief. I
14 mean, i don't feel the State proved their case, and folks,
15 look at it.
16 THE COURT: We're just talking about this issue now.
17 MR. O'KEEFE: I know. And I'm just -- I mean --
18 THE COURT: I mean, is anything going to be uttered
19 in your -- she had the knife, and she was coming after me, and
20 I just tried to protect her and get -- I don't know. I don't
21 know what you're going to say, but you can't really say that
22 unless I instruct the jury on self-defense. And you could
23 even -- Mr. O'Keefe?
24 MR. O'KEEFE: Yes, Your Honor.
25 THE COURT: Even if I give these, you could say, you

1 know, Judge Bonaventure -- I'm not claiming self-defense,
2 ladies and gentlemen. You could even say that.
3 MR. O'KEEFE: That -- we'll leave it at --
4 THE COURT: You know, you could say that.
5 MR. O'KEEFE: We'll leave it in, Judge. Okay.
6 THE COURT: So, you want to leave it in then?
7 MR. O'KEEFE: I like that. Yes, Your Honor.
8 THE COURT: Yeah. You don't have to -- you can even
9 blame me. Say, Judge Bonaventure -- I'm not even claiming
10 self-defense, but it's there just in case. All right. So --
11 MR. LALLI: Well, I don't want him to be able to
12 blame you, Your Honor, and say --
13 THE COURT: Well, I don't [inaudible].
14 MR. LALLI: -- that you're the one who said he's --
15 you know, the jury's going to be instructed on it. I mean, I
16 want to be fair to Mr. O'Keefe, but you know, I still have a
17 job to do in representing the State.
18 THE COURT: All right. Well, don't blame me. Just
19 say -- you know, don't -- say -- you can always say, ladies
20 and gentlemen, this is not a self-defense case. My argument
21 is this, and my theory -- whatever you want to say. But do
22 you want it in now?
23 MR. O'KEEFE: We'll leave it in, Your Honor.
24 THE COURT: All right.
25 MR. O'KEEFE: I just -- [inaudible].

1 THE COURT: All right. We'll leave these six in,
2 then. All right. Then, the next one is, "No act committed by
3 a person while in the state of voluntary intoxication to be
4 less criminal." It does not negate the element of malice
5 inherent in the crime of murder," which is the law, all right?
6 All right.
7 Then, you have that limiting instruction that I
8 gave, "Evidence of other crimes, wrongs, or acts is not
9 admissible;" which I've given, and we're going to give another
10 limiting instruction. All right?
11 Then we go back to the stock instructions. You
12 know, "To constitute the crime charged;" that's just a stock
13 instruction given. Now, do you want this other one, "It is a
14 constitutional right of a defendant in a criminal trial that
15 he may not be compelled to testify. Thus, the decision as to
16 whether he should testify is left solely to the defendant,"
17 you put, "on the advice of counsel."
18 MR. LALLI: Your Honor, that should probably be
19 eliminated.
20 MR. O'KEEFE: Yeah, I --
21 MR. LALLI: Just left to the defendant.
22 THE COURT: Yeah. All right.
23 MR. O'KEEFE: I don't think --
24 THE COURT: "You must not draw any inference --
25 MR. O'KEEFE: -- take it out.

1 THE COURT: -- of guilt from the fact that he does
2 not testify, nor should this fact be discussed by you until
3 your deliberation." It's up to you if you want this. If you
4 don't want it, you don't want it.
5 MR. O'KEEFE: On the constitutional right of a
6 defendant, Your Honor?
7 THE COURT: Right, that's --
8 MR. O'KEEFE: I'd like to take that out, Your Honor.
9 THE COURT: Sure. It's up to you. We'll take it
10 out.
11 MR. O'KEEFE: Yes, sir. Less is more. Less is
12 more.
13 THE COURT: You're probably right. The truth takes
14 few words.
15 (Pause in the proceedings)
16 THE COURT: All right. Then we go back to the
17 stocks, "Defendant is presumed innocent." "You are here to
18 determine the guilt or innocence of the defendant." "The
19 evidence which you are to consider;" that's what we talked
20 about.
21 And you could allude to this when you -- you heard
22 Judge Bonaventure, the stipulation, and he said to you the --
23 you have to consider this; and you could argue that, all
24 right? And you could even allude to it if you want. You have
25 a copy of it, right? I'm not going to --

1 MR. O'KEEFE: Yes, Your Honor.
2 THE COURT: -- prevent you from doing that. But
3 you're all right with it?
4 MR. O'KEEFE: Yes, Your Honor.
5 THE COURT: "The credibility or believability."
6 "Statements of the defendant not made in court" -- this is the
7 one where the jury has to determine if that statement was
8 voluntary or not. That okay? That should be okay.
9 MR. O'KEEFE: Yes, Your Honor.
10 THE COURT: And then, "A witness who has special
11 knowledge;" they were all the expert witnesses. The common
12 sense instruction, "You are to consider only the evidence."
13 "When arriving at your verdict;" "subject to penalties not to
14 be discussed."
15 "When you retire" -- now, I took one or two out.
16 "When you retire to consider your verdict, [inaudible] your
17 verdict must be unanimous." I think I'm striking that --
18 we're striking read-backs, because we have, what, video?
19 UNKNOWN MALE SPEAKER: Yeah, it should be
20 play-backs.
21 THE COURT: We have video?
22 UNKNOWN MALE SPEAKER: Right.
23 THE COURT: Or, it should be "play-backs." So, "If
24 during your deliberation you desire play-backs of testimony,"
25 all right?

1 was kind of waving his hand, "don't look at her;" trying to
2 keep us at bay.
3 Q So, he was still trying to prevent you from getting
4 to her --
5 A Yes.
6 Q -- to render aid?
7 A Yes.
8 Q And were you all giving him commands?
9 A Yes.
10 Q What commands were you giving him?
11 A Officer Conn was telling him -- it's normal practice
12 that only one person's going to be directly speaking with the
13 individual. So, officer Conn was giving him instructions to
14 put his hands up, and get away from Ms. Whitmarsh.
15 Q And did he obey those commands?
16 A No, he did not.
17 Q How many times were those commands repeated?
18 A At least two or three.
19 Q At that point, what did you all do?
20 A I saw an opportunity where Mr. O'Keefe's torso was
21 exposed. That keeps -- for the taser to be used, it keeps --
22 it's an area that's away from the vital organs -- you know,
23 the soft tissue, where you might damage the eyes or the groin
24 area. And I deployed my taser.
25 Q Okay. And why did you deploy your taser?

1 A Basically, the taser gives us a window of
2 opportunity by overriding the individuals' muscle control.
3 And it allows us a five-second opportunity, basically, to try
4 and take them into custody without, you know, fights or, you
5 know, punches, or anything like that.
6 Q When you deployed your taser, what happened?
7 A A good cycle -- or a good contact will require that
8 -- there are two probes that are fired from the cartridge;
9 that they both make good contact with that individual.
10 Otherwise, you're going to get partial control. And in this
11 case, Mr. O'Keefe -- there was not a complete contact. So, he
12 was still able to fight during that first five seconds.
13 Q Okay. So, only one of the probes made contact with
14 him?
15 A Yes. That's what we assumed.
16 Q That's what you assumed?
17 A Because it wasn't customary that, you know, an
18 individual would still be able to --
19 Q Struggle with you?
20 A -- control their muscle responses.
21 Q Okay. So, he was not incapacitated?
22 A No.
23 Q And what happened at that point?
24 A There was a second cycle of the taser. And Officer
25 Sean Taylor stepped in to grab control of his hands, put them

1 behind his back, and place him in handcuffs.
2 Q Okay. So, you ultimately were able to handcuff him
3 after the second taser cycle?
4 A Yes.
5 Q And after you handcuffed him, what did you all do
6 with him?
7 A He was lifted, I believe it was by his -- either
8 shoulders and feet, and removed from the bedroom. And just
9 taking him -- you can -- the way the apartment was situated,
10 just moving him to this -- the doorway, or somewhere in the
11 living room, wasn't going to -- it wasn't giving clear access
12 to the paramedics. So, we just removed him from the entire
13 apartment, out onto the catwalk.
14 Q Okay. Did you at some point have you set him down
15 in the living room?
16 A You know, when -- I think one time, they ended up
17 losing grip of Mr. O'Keefe, and he did actually -- it wasn't
18 intentional, but he did fall to the carpet.
19 Q And was that because he was still struggling as you
20 all were trying to carry him out?
21 A Yeah.
22 Q Okay.
23 A You indicated that he was ultimately removed to the
24 outside patio, balcony area?
25 A That's correct.

1 Q Did you have any further contact with him once he
2 was moved outside?
3 A Yes, I did.
4 Q And what was the nature of that contact?
5 A At this point, we had no idea -- we didn't know
6 Victoria's name, her date of birth, any of her medical
7 history. So, it was to elicit some of that information so
8 paramedics knew who they were dealing with.
9 Q And what -- did you actually speak with him
10 personally?
11 A Yes.
12 Q And you indicated that one of the things you were
13 trying to figure out was her name?
14 A Yes.
15 Q Did he give you a name?
16 A I believe it was Veronica Whitmore or Whitmarsh.
17 Q Okay. So, it wasn't Victoria Whitmarsh?
18 A No, it was not.
19 Q And would he -- you indicated that one of the other
20 items you were trying to elicit from him was her blood type?
21 A Yes.
22 Q Were you able to get that information from him?
23 A No.
24 Q How did he respond to your questions?
25 A He was just kind of making utterances, not directly

1 answering the questions. But he said something to the effect
2 of, "You guys are mad at me, aren't you?"
3 Q Did you become aware that at some point, he was
4 moved downstairs?
5 A Yes.
6 Q And did you have further contact with him once he
7 was downstairs?
8 A Yes.
9 Q And what was the nature of that contact?
10 A It was still at this point -- we had taken the
11 information that Mr. O'Keefe had given us. We ran it through
12 several databases, and could not establish that information as
13 an identity for a real person. So, at this point, we started
14 to believe that the information that we were given was --
15 whether it was intentional or unintentional, it was incorrect.
16 Q And you're referring to the information you were
17 given regarding the identity of the female?
18 A Yes.
19 Q And so, you went to confront him with that
20 information?
21 A Yes.
22 Q And how did he respond?
23 A Never really got -- I never got good information --
24 or he ended up giving me the real name, Veronica.
25 Q And what was --

1 A Or Victoria, sorry.
2 Q What was his demeanor at this point?
3 A He smelled heavily of alcohol. Just kind of had a
4 gaze in his eyes. And if I recall, eventually just ended up
5 falling asleep.
6 Q Okay.
7 MS. MERCER: Court's indulgence.
8 BY MS. MERCER:
9 Q Did -- during the course of your interaction with
10 the defendant that night, did he seem pleased that the police
11 were present?
12 A No. He seemed annoyed that we were there.
13 Q How could you tell?
14 A Just in the way he wouldn't answer a question -- or
15 you know, provide information, rather. And he just kind of
16 had a -- all of his responses to us were short, choppy, in an
17 abusive -- you know, abusive manner; abusive responses.
18 Q How long do you think you had to observe the
19 defendant that night?
20 A Initially, probably about 30 to 45 minutes.
21 Q And during that 30 to 45 minutes, did he ever ask
22 you how Victoria was?
23 A No.
24 Q Did he ever express any concern for her?
25 A No.

1 Q Did he ever try to convey any sadness to you?
2 A No.
3 MS. MERCER: Court's indulgence. Pass the witness,
4 Your Honor.
5 THE COURT: Thank you. Any cross, Mr. O'Keefe?
6 MR. O'KEEFE: Yes, Your Honor, briefly.
7 CROSS-EXAMINATION
8 BY MR. O'KEEFE:
9 Q Good morning, Detective Ballejos.
10 A Yes, sir. How are you?
11 Q Okay. I'm sorry?
12 A How are you?
13 Q Okay. Fine, sir. Listen. I've been straight-up
14 with all the witnesses, and the Court, and the jurors, you
15 know. There's going to be no tricks or anything. It's going
16 to be short, straight. Okay?
17 A Okay.
18 Q And it's just the best way. Okay. I do believe,
19 Detective -- okay, first of all -- and like I said, I'm just
20 going to ask some questions. And just, you know, yes or no,
21 and just -- we'll keep it real simple.
22 A Sure.
23 Q No tricks. Okay. Did you realize that I was
24 extremely intoxicated, sir?
25 A Yes.

1 Q Okay. You did hear that the 9-11 call was put out
2 that -- from dispatch to everyone, right at the beginning,
3 that the defendant was extremely 408?
4 A I don't recall.
5 Q You don't recall? If I let you read this to refresh
6 your memory, would that be okay?
7 A Sure. That would be great.
8 MR. O'KEEFE: Mr. Maningo. And I'm just going to
9 put a little X. You can see -- and [inaudible] Mr. Lalli.
10 BY MR. O'KEEFE:
11 Q And just read it, not out loud.
12 MR. MANINGO: May I approach, Your Honor?
13 THE COURT: Yes.
14 THE WITNESS: And I didn't -- your instruction is to
15 just read it, but not out loud?
16 BY MR. O'KEEFE:
17 Q Yeah, just to refresh. You see that, where it was
18 made out that it was a --
19 A Okay.
20 Q What I just -- okay. So, now, having asked the
21 question, you do see that the call was put out that they
22 already was aware that I was extremely 408?
23 A Yes.
24 Q Thank you. And I'm just -- okay. Now, also, just
25 to simplify again -- I mean, I have the report right here. Do

1 you remember like the time of the event, by any chance, and
2 the time that the call was made, you got there, and I was
3 apprehended, actually placed in handcuffs, and they called it
4 code 4? Do you remember that it was basically just like --
5 A It was sometime after 11:00.
6 Q Right. Would you agree, Officer -- or Detective,
7 excuse me, that it was like five and-a-half, six minutes? The
8 whole event, from the time commands were being issued, to when
9 I was placed in handcuffs, and they called code -- that it was
10 six minutes?
11 A Yeah, I would say it was close to that.
12 Q Okay. And I'm just clarifying. Okay. Now, having
13 admitting you realized that I was extremely intoxicated kind
14 of explains maybe a little bit like, maybe why I was
15 incoherent. Would you agree that maybe that might -- in your
16 opinion, you were observing that I was not really aware, you
17 know, of what was going on?
18 MS. MERCER: Objection, Your Honor, calls for
19 speculation.
20 MR. O'KEEFE: Okay. I'll move on, Your Honor.
21 THE COURT: Yeah, because that's a --
22 MR. O'KEEFE: Yes, Your Honor.
23 THE COURT: -- calls for speculation [inaudible].
24 MR. O'KEEFE: Yes, sir, Your Honor. I don't mean
25 any -- okay. I'm --

1 THE COURT: No, I know. I know.
2 MR. O'KEEFE: -- very tired, and I apologize.
3 THE COURT: Thank you. Thank you, Mr. O'Keefe.
4 MR. O'KEEFE: Okay.
5 BY MR. O'KEEFE:
6 Q Let me back up a minute then. Okay. The Crisis
7 Intervention Team is called when somebody is disclaimed as
8 maybe being mentally ill, or under the influence; is that
9 correct? They assist in a call like that?
10 A They would, yes.
11 Q Okay. Did you guys know that Ms. Whitmarsh was
12 mentally ill? Did you already know that?
13 A No, I did not. And just to clarify, Crisis
14 Intervention Team officers, they do specialize in that, but
15 they answer everyday 9-11 calls, traffic stops. They do
16 basically the normal functions of a patrol officer. It just
17 happened in that case that Officer Conn responded to that
18 call, and was a CIT officer.
19 Q Okay. Okay. In prior testimony, would you remember
20 -- or would you agree that -- at least at first, Detective,
21 that I did respond several times with saying, "come in here,"
22 without any profanity at first?
23 A When I arrived, Officer Conn was already in
24 communication with you. When I arrived, the statements that I
25 heard are on record.

1 Q Okay. At any time, did you ever hear me say, "get
2 out"?
3 A No.
4 Q Did you ever hear me say, "get the fuck out"?
5 Excuse my language.
6 A No.
7 Q Okay. So, at no time I was ever saying, get out of
8 here; but I was saying, rudely, wrongfully, under extreme
9 intoxication, "Get the F in here," is what you heard?
10 A Yes.
11 Q Okay. Now, you testified that the call was made,
12 and then you finally determined yourself that I smelled of,
13 and was pretty intoxicated?
14 A Yes.
15 Q Okay. And that you in fact tased me multiple times?
16 A Yes, I did.
17 Q Okay. Okay. After the tasing, would you disagree
18 -- I'm not going to sit here and rehash it, and go over it,
19 Detective. Work with me, I'll work with you. Keep it simple.
20 There was a lot of confusion, would you agree with that?
21 Positioning of bodies and people, and who went where and here,
22 and it was a tragic moment. A lot was happening, Detective;
23 would you agree? I mean, you were cued on your --
24 A Yes, it was a dynamic situation. Yes.
25 Q Okay. That's all -- and prior testimony was given

1 that it was never conclusively made -- or stated if someone
2 did go over the bed, or didn't, and actually -- and I'm
3 keeping it very clean; if I was dropped in the bedroom, or
4 dropped in the hallway in the front, and dragged? There's
5 been just a couple -- you know, it was a dynamic situation.
6 There was just a couple versions given; would you agree to
7 that?
8 A It was a dynamic situation, yes.
9 Q Would you agree that there was prior testimony given
10 that at one time, I fell in the bedroom; and then one time, I
11 was dropped in the living room?
12 MS. MERCER: Objection, Your Honor. I'm not sure
13 that's a proper question.
14 THE COURT: Well, I don't think he knows about any
15 prior -- do you know anything about prior testimony?
16 THE WITNESS: I can only give my -- or to --
17 THE COURT: Yeah. All right.
18 MR. O'KEEFE: Okay, okay. I'll move on.
19 THE WITNESS: -- the correct --
20 MR. O'KEEFE: Okay.
21 THE WITNESS: -- accurateness of my testimony.
22 MR. O'KEEFE: Okay.
23 BY MR. O'KEEFE:
24 Q But -- okay. In the event though -- also, though,
25 can you explain what a use of force form is?

1 A Yes. Any time we end up engaging a suspect, or an
2 individual, for that matter, that we have to use a level of
3 force that causes injury to that person, we'll document that.
4 It's on an internal form. It's used for educational purposes,
5 and in some cases where there's wrongdoing, internal affairs
6 might take a look at that.
7 But it shows basically the individual that we
8 encountered, the circumstances of the encounter, and the level
9 of force that was deemed necessary at the time to take the --
10 bring the situation under control.
11 Q Okay.
12 A That's pretty much it.
13 Q And did you fill out a use of force form on me?
14 A Yes, I did.
15 Q Okay. And was this information not necessarily
16 turned over right away, Detective?
17 A You know, like I said, it -- I'm not sure -- or, I
18 guess I'm not sure what your question is, "turned over."
19 Q Okay. And was this information requested, and not
20 turned over somehow, or is -- not turned over?
21 THE COURT: Turned over --
22 MR. LALLI: Can we approach, Your Honor?
23 MS. MERCER: Approach, Your Honor.
24 THE COURT: -- to who?
25 MR. O'KEEFE: By --

1 MR. LALLI: Can we approach?
2 THE COURT: Yeah.
3 (Off-record bench conference)
4 BY MR. O'KEEFE:
5 Q Okay, Detective. Let's just simplify it again,
6 though. A report was filled out. In that report, you stated
7 that the -- I was under -- possibly mentally ill, or -- slash,
8 under the influence?
9 A Yes.
10 Q And then, in a later section on that -- I'll just
11 ask you, so you don't have to read it, if you remember it. If
12 I could show it to you, I will. You state later in a
13 narrative of it that, "Mr. O'Keefe appeared extremely
14 intoxicated, and continued to be erratic and emotional in his
15 behavior."
16 A Yes.
17 Q Okay. And I'm not trying any tricks, I'm just
18 [inaudible]. So -- okay. You do agree that I was extremely
19 intoxicated, stressed out, erratic; that it was a very
20 dynamic, very brief call? You agree with that; five
21 and-a-half minutes, six minutes?
22 A About five to six minutes, yeah.
23 Q Okay. That it was dynamic; do you agree?
24 A Yes.
25 Q That at no time I ever said, get out, or, get the F

1 out. I was saying, get in -- "come in" at first -- or "get
2 the F in," I was saying -- conversely, correct?
3 A You never ordered us or asked us to leave.
4 Q Okay. I never tried to personally swing or hit any
5 of you. You observed -- you stated, as you had, that I was
6 just -- out of a protection mode, I seemed to be like covering
7 -- "don't look"? I was -- correct? That's what you stated.
8 I was trying to like -- "don't look;" cover her.
9 A Yeah, I --
10 Q Something.
11 A I recall you saying, "don't look," trying to pull
12 her shirt down, but also would not respond to our instructions
13 to get away from her, and put your hands up.
14 Q Right. You said you were aware at the time that --
15 you heard for safety matters that she possibly -- hep C, or
16 HIV. There was talk about that going --
17 A Yes, I do remember that.
18 Q -- for safety? That is a safety concern, of course.
19 Nobody would want to get -- contract that, correct? Of
20 course.
21 A That's correct.
22 Q And that's very wise to do, to put out -- okay. So,
23 you state that that's out there. Okay. You said I was placed
24 out eventually on the catwalk on top of the balcony, correct,
25 on the outside?

1 A Yes.
2 Q Could you say, Detective, how long was I out there?
3 A Would have been a few minutes.
4 Q Only a few minutes on the catwalk?
5 A That's what I recall, yes.
6 Q That you recall. Okay.
7 MR. O'KEEFE: I have no further questions, Your
8 Honor.
9 THE COURT: Thank you, Mr. O'Keefe.
10 MR. O'KEEFE: Detective, thank you.
11 THE COURT: Anything else?
12 THE WITNESS: Good day to you, sir.
13 MS. MERCER: Just a couple --
14 MR. O'KEEFE: Thank you.
15 MS. MERCER: -- brief questions, Your Honor.
16 REDIRECT EXAMINATION
17 BY MS. MERCER:
18 Q Officer, is five to six minutes a long time when
19 someone's lying there, bleeding out?
20 A Yes, it is.
21 Q And how many times was it explained to the defendant
22 that he needed to exit that room before medical could get in
23 there?
24 A Upon my arrival, two to three times.
25 MS. MERCER: No further questions.

1 MR. O'KEEFE: And just a quick recross.
2 RECROSS-EXAMINATION
3 BY MR. O'KEEFE:
4 Q But Detective, again, you will admit that it was a
5 very dynamic situation, and I was extremely intoxicated?
6 A Yes, sir. That's correct.
7 Q Thank you, Detective.
8 THE COURT: Thank you for testifying. You're
9 excused.
10 THE WITNESS: Thank you, Your Honor.
11 THE COURT: Next witness, please?
12 MR. LALLI: Your Honor, the State calls Marty
13 Wildemann.
14 THE MARSHAL: Detective, if you will remain
15 standing. Please, sir, raise your right hand and face the
16 clerk.
17 MARTIN WILDEMANN, STATE'S WITNESS, SWORN
18 THE MARSHAL: If you would have a seat, please.
19 THE WITNESS: Thank you.
20 THE MARSHAL: Slide up to the microphone. If you
21 would, please state and spell your name for the record.
22 THE WITNESS: Martin Wildemann. W-I-l-d-e-m-a-n-n.
23 DIRECT EXAMINATION
24 BY MR. LALLI:
25 Q How are you employed?

1 A I'm a homicide detective with the Las Vegas
2 Metropolitan Police Department.
3 Q How long have you been investigating homicides with
4 Metro?
5 A Ten and-a-half years.
6 Q What did you do before that?
7 A I was a robbery detective, a gang unit detective,
8 and a patrolman.
9 Q All right. How long total have you been with Metro?
10 A 24 years.
11 Q How -- and I don't know if you can have this number
12 available. But how many violent crimes do you think you've
13 investigated in your years with Metro?
14 A Violent crimes; 6, 7, 800. I would --
15 Q All right.
16 A -- guess right in there.
17 Q How many homicides have you investigated?
18 A Over 300.
19 Q Were a number of those homicides stabbings?
20 A Yes.
21 Q All right. I want to direct your attention to
22 November 5th of 2008. Were you assigned to investigate a
23 homicide that occurred at 5001 El Parque?
24 A I was.
25 Q Is that here in Clark County, Nevada?

1 A It is.
2 Q Can you -- did you ever respond out to that
3 location?
4 A I did.
5 Q Can you explain to the jury what was happening as
6 you responded to that location?
7 A Well, I got woken up out of sleep, requested out
8 there. We had -- a homicide had occurred. And I was one of
9 the up detectives awaiting a homicide. Myself and my partner,
10 Detective Bunn, responded to the location, along with other
11 homicide detectives to assist us, to begin an investigation as
12 to the death of a woman who was later identified to me as
13 Victoria Whitmarsh.
14 Q Detective, you indicated that you were an up
15 detective. Can you explain what that means for our jury?
16 A We work homicides on a rotation basis. So, you'll
17 have a partnership of two detectives, that are literally
18 awaiting the next homicide. After they catch a homicide, the
19 next team after them on a list awaits the next homicide after
20 that. So, we were the up team awaiting a homicide.
21 Q You and Detective Bunn?
22 A Yes.
23 Q When you get to a homicide location, are the
24 responsibilities routinely divided between various detectives?
25 A Yes.

1 Q Can you please explain how that works?
2 A In this instance, Detective Bunn was responsible for
3 doing the scene investigation, which would be where the
4 homicide took place, and where the body is located. So, his
5 responsibilities were to go through, document the scene, and
6 make sure it was properly preserved, and evidence collected.
7 My responsibilities were interviews of witnesses,
8 finding potential witnesses, and in this case, interviewing
9 Mr. O'Keefe.
10 Q With respect to Detective Bunn going through the
11 crime scene, when homicide detectives arrive on scene and
12 begin to analyze the various crime scenes, do they work with
13 crime scene analysts?
14 A Yes.
15 Q We heard testimony from Jocelyn Maldonado about her
16 involvement at the scene. Would she have been working
17 directly with Detective Bunn?
18 A Absolutely.
19 Q And Detective Bunn directing the evidence to be
20 impounded, and also being part of a team of individuals who
21 scan a crime scene?
22 A That's correct.
23 Q All right. Now, you said that your responsibility
24 was witnesses, to locate witnesses, and to interview certain
25 witnesses?

1 A Yes.
2 Q And as part of that responsibility, it also falls
3 upon you to attempt to interview the suspect; in this case,
4 Brian O'Keefe?
5 A Correct.
6 Q When you arrived at the El Parque residence, did you
7 make contact with Mr. O'Keefe?
8 A I did.
9 Q Can you explain where he was, and what was going on?
10 A When I arrived, we have a briefing with other
11 detectives that are not homicide, just general detectives that
12 arrive on the scene first, and the officers. We had a
13 briefing with them in which they update us, because, as I
14 mentioned before, I had come from my home.
15 They update us on the circumstances, during which I
16 learned that Mr. O'Keefe was in the back of a patrol car. So,
17 at that point, I brought him out of the patrol car, and we
18 took some photographs of him.
19 Q What was the purpose of taking photographs?
20 A I wanted to document his condition of how he was at
21 that time.
22 Q What was his demeanor during that period?
23 A He was not cooperative. Didn't want to listen to
24 our instructions for taking the photographs; turn this way,
25 turn that way. I won't say that he was verbally abusive, but

1 he just was not cooperative.
2 Q All right. During that initial photographing,
3 examination of his body at the scene, did you notice any
4 injuries on his person?
5 A He had a -- he had a large scrape on his forehead.
6 He had a couple miscellaneous bruises. But he had a cut --
7 and I'll call this the meaty part of his index finger on his
8 right hand, that I saw at the scene.
9 Q With respect to the scrape on his forehead, did that
10 look to you to be a rug burn?
11 A Yes.
12 Q All right. Now, I wanted to talk to you about the
13 -- what you saw in his hands. I'm going to show you what
14 we've marked as State's Exhibit number 62. Is that the injury
15 that you saw?
16 A Yes.
17 Q Can you describe it for us?
18 A Well, it looks like an incision injury in that
19 general area of his hand. It's quite bloody at the time, but
20 there's a sharp force injury there.
21 Q And I'm going to show you what we've marked and
22 admitted as State's Exhibit number 64. Does that also show
23 some injury on the thumb?
24 A Yes.
25 Q Can you explain what that was?

1 A This injury is right in this general location there.
2 And once again, it's a sharp force injury on his thumb.
3 Q Now, you've indicated that you've investigated
4 hundreds of violent crimes, and how many homicides?
5 A Over 300. Well over.
6 Q Over 300?
7 A Yes.
8 Q And about a quarter of those involved stabbings?
9 A I believe so, yes.
10 Q Based upon that experience, Detective, how common is
11 it for an individual who stabs another person to receive
12 injury themselves?
13 A It's actually very common. When people stab a human
14 body, often times, they'll meet more resistance than
15 anticipated. And you also have to factor in the circumstances
16 which led prior to the stabbing, is there's sweat or blood
17 involved on the suspect's hand. So, it's a very common
18 injury.
19 MR. O'KEEFE: Your Honor, may we approach the bench?
20 THE COURT: Yes.
21 (Off-record bench conference)
22 THE COURT: All right. So, you're going to elicit
23 now, what, Mr. Lalli?
24 MR. LALLI: I'm going to move onto another area.
25 THE COURT: You objected to something.

1 MR. O'KEEFE: Yes. I objected, Your Honor, to his
2 testimony not being as an expert.
3 THE COURT: All right.
4 MR. LALLI: Your Honor, the foundation was laid that
5 Detective Wildemann has been with Metro, I think he said 23
6 years. He's been in homicide for ten years. He's
7 investigated over 300 homicides; a quarter of those involved
8 stabbings. And based upon that experience, what he has seen
9 with his own eyes, it is not uncommon for a person involved in
10 a stabbing homicide to suffer injuries to the hand.
11 THE COURT: All right. I think he has -- more than
12 a proper foundation has been laid. So, with that, your
13 objection is preserved and denied. Move on, all right?
14 MR. O'KEEFE: Thank you, Your Honor.
15 THE COURT: Yeah.
16 BY MR. LALLI:
17 Q Now, at some point, did you direct that Mr. O'Keefe
18 be transported from the crime scene to a place to be
19 interviewed?
20 A Yes.
21 Q Do you recall how that was done?
22 A I had patrol -- the car that he was in originally, I
23 had that patrolman transport him to the homicide offices,
24 which coincidentally was only a few blocks away, and taken up
25 to the third floor of that building, which is the homicide

1 office. And then, we had several interview rooms there. I
2 had him placed in one of the interview rooms.
3 Q Now, when you interview people, just anyone, is
4 there a requirement that Metro has that the interview be
5 video-recorded?
6 A No.
7 Q Are there occasions when you will elect to
8 video-record an interview?
9 A Yes.
10 Q Can you give us some reasons why you might choose to
11 video-record an interview.
12 A Well, I like to preserve it as much as possible, and
13 video a lot of times in this day and age is your best aspect
14 of that. I also like to video it when I'm concerned regarding
15 a person's demeanor. A lot of times, you know, a picture's
16 worth a thousand words, and video speaks for itself.
17 Q With respect to Mr. O'Keefe, did you make the
18 decision to have his interview video-recorded?
19 A Yes, I did.
20 Q Can you give us some -- we're going to -- we'll
21 watch the video in a moment. But can you give us some sense
22 of the interview room; what does it look like, how is it set
23 up?
24 A It's probably about a six-foot by eight-foot room.
25 It's got a table in it. On the one end of the wall is a

1 restraint. There's a bar that you can put a handcuff to, if a
2 restraint is needed. It's just a standard cinder block
3 drywall room. Nothing fancy to it.
4 Q All right. With respect to restraints, was Mr.
5 O'Keefe restrained during the interview?
6 A Yes, he was.
7 Q How was he restrained?
8 A His right wrist was in a handcuff, and that other
9 handcuff placed to the bar. The bar is to the right side of
10 the table, so he kind of has free reign of the table itself.
11 But as far as being able to get up and move, he would not be
12 able to.
13 Q Why was he restrained?
14 A He was combative, I had learned, when patrol
15 officers originally arrived. And the way his demeanor was
16 when I was trying to take photos of him, being
17 non-cooperative, it was just, in my opinion, the best way to
18 handle it.
19 Q All right. At some point, you begin to advise Mr.
20 O'Keefe of his rights pursuant to Miranda vs. Arizona?
21 A Correct.
22 Q Before that happened, which is where the recording
23 actually starts, can you give us a sense of what was happening
24 in the interview room; who was there, what was going on?
25 A Well, when we initially arrive there, it's myself

1 and Detective Teresa Kyger was also on my squad at the time,
2 working with me. So, she assisted me in the interview itself.
3 We arrived at the room. I tried to see if Mr. O'Keefe needed
4 to use the bathroom. He stated that he did, but he wouldn't
5 right then. He was just -- I would say just argumentative at
6 that point. Just trying to accommodate him was difficult.
7 Q You say that a homicide detective by the name of
8 Teresa Kyger was with you?
9 A Yes.
10 Q Is she visible on the interview?
11 A Yes.
12 Q And just, in general terms, what does she look like?
13 A She's -- she's probably 5 foot, 10 inches tall.
14 She's a white female with long brown hair. And I believe
15 she's wearing a sweatshirt, a -- with a homicide logo on the
16 left side.
17 Q All right. During the time that you were with the
18 defendant on this particular evening, or now into the early
19 morning hours of I believe November 6th, did he appear to you
20 to be intoxicated?
21 A Yes.
22 Q What did you see, both at the crime scene, and in
23 the interview room, that led you to believe that he was
24 intoxicated?
25 A Well, I could smell alcohol. He had bloody eyes --

1 or bloody eyeballs -- bloodshot eyeballs, excuse me. And he
2 was a bit slurred at times. But as far as his drunkenness
3 was, I did not believe him to be intoxicated to the point
4 where an interview wasn't available.
5 Q During the interview, do you actually make a record
6 during the course of that that you believe that he's
7 intoxicated?
8 A Yes.
9 Q Do you also give him the opportunity to talk -- or
10 to say anything he wants to say about his intoxication?
11 A Yes.
12 Q How does that go?
13 A Well, I mean, I just -- in the middle of it, I know
14 I was probably getting frustrated to a point, and I asked him
15 if he was drunk. I also -- during the interview, I believe a
16 made a statement regarding, he just, to me, appeared drunk.
17 Q All right. Did you collect any specimen from him,
18 either urine or blood, to further document his drunkenness?
19 A No.
20 Q Why not?
21 A I'm under no obligation to do so. His demeanor, the
22 way he was acting, and the way he was able to answer my
23 questions led me to believe that he was not intoxicated to the
24 point where I couldn't conduct an interview on him. He was
25 pointed about certain questions, answering them; and

1 absolutely vague on other questions when he, to me, appeared
2 he wanted to be.
3 Q Were there other ways that his intoxication was in
4 fact documented? Through the video --
5 A Yeah.
6 Q -- interview?
7 A Well --
8 Q Through the actual interview --
9 A Once again, I --
10 Q -- that you conducted?
11 A -- asked him if he was intoxicated. He talks about
12 it very briefly, and a video of the entire encounter was done.
13 Q I want to ask you about some specific things that
14 occurred in the interview, and then we will -- then we'll
15 actually play it. You indicated that he was advised of his
16 rights pursuant to Miranda vs. Arizona?
17 A Yes.
18 Q And do we see that on video?
19 A Yes.
20 Q Does he indicate to you in that video that he
21 understood his rights?
22 A Eventually. It took a while.
23 Q All right. Why do you say, eventually?
24 A Because he's just very sarcastic to me regarding
25 that. And I even approach him, saying, listen, this doesn't

1 -- you know, this could go smooth. It doesn't have to -- you
2 know, we don't -- we can talk to each other like human beings.
3 But he's very sarcastic to me.
4 Q All right. Were there any threats made to him prior
5 to beginning the interview to get him to talk to you, any
6 coercive tactics used; anything of that nature?
7 A None whatsoever.
8 Q All right.
9 A We talked a little bit about Detective Kyger.
10 During the interview, does the defendant interact with
11 Detective Kyger?
12 A Yes.
13 Q And in fact, let me ask you this. Do you see Mr.
14 O'Keefe in the courtroom?
15 A I do.
16 Q Can you please point to him, and tell us what he's
17 wearing today?
18 A He's wearing a black suit, seated to my left, with a
19 blue tie, blue shirt.
20 MR. LALLI: Your Honor, may the record reflect the
21 witness has identified the defendant?
22 THE COURT: Yes.
23 BY MR. LALLI:
24 Q Tell us how the defendant interacted with Detective
25 Kyger.

1 A A lot of times, I believe he would deflect to her
2 when I was talking to him. Many times, he would treat her
3 much differently than he would treat me, and in fact would
4 order or ask, depending on the situation, her to do things for
5 him.
6 Q Would he refer to her as a -- using a pet name
7 during the course of the interview?
8 A He referred to her throughout as "young lady."
9 Q At some point, does the defendant refer to Victoria
10 Whitmarsh as V?
11 A Yes. As the interview progressed, I noticed that he
12 was calling her "V." And as a way to try to humanize myself
13 with him, I called her V once, and asked him if I could call
14 her V. And he asked that I wouldn't. He said he was the only
15 one allowed to call her V.
16 Q All right. Are you aware of a witness by the name
17 of Cheryl Morris?
18 A I am.
19 Q Who is Cheryl Morris?
20 A Cheryl Morris is the ex-girlfriend of Mr. O'Keefe at
21 the time of this incident. She had originally rented that
22 apartment where this took place, at 5001 El Parque, with him.
23 And I believe that she's a co-registrant on a vehicle that
24 they were driving.
25 Q During the course of the interview that you had with

1 Mr. O'Keefe, did he refer to her as "the Old Girl"?
2 A Yes.
3 Q All right. So, references to "Old Girl" are
4 references to Cheryl Morris?
5 A Yes.
6 Q During the course of the interview, does the
7 discussion of calling 9-11 come up?
8 A Yes.
9 Q Can you tell us about that exchange?
10 A I asked Mr. O'Keefe if he called 9-11. He wouldn't
11 answer. We asked several times. Finally, I ask a little more
12 assertively, and he says that he did call 9-11.
13 Q So, he tells you during the course of the interview
14 that 9-11 was called by him?
15 A Yes.
16 Q During the course of the interview, did it appear
17 that Mr. O'Keefe was being strategic with the information that
18 he relayed to you?
19 A Yes, I believe that.
20 Q Can you explain why you believe that?
21 A At times during the interview, he would be extremely
22 detailed as to what he and the deceased were doing prior to
23 the incident, what they were doing earlier in the day, what
24 they had done even weeks before. But when we got towards the
25 actual stabbing itself and how it occurred, he would become

1 very, very vague.
2 Q During the course of the interview, are there
3 discussions with respect to the possibility that Victoria
4 Whitmarsh could die?
5 A Yes.
6 Q Does he bring it up at one point during the
7 interview?
8 A Yes. He asked me --
9 Q Can you --
10 A He asked me during the interview how V was doing,
11 what her condition was.
12 Q All right. Does he indicate for you that she
13 suffered from physical ailments?
14 A Yes.
15 Q Hepatitis C?
16 A Yes.
17 Q And did he also in that same breath indicate that it
18 was likely that Victoria would soon die?
19 A Yes.
20 Q What was his demeanor during that?
21 A Matter of fact.
22 Q During the interview, do you eventually tell him
23 that Victoria has in fact died as a result of this incident?
24 A Yes, towards the latter part of the interview.
25 Q What was his response to that?

1 A He asked Detective Kyger for a cup of coffee. She
2 retrieved his cup, left the room. He made some very loud
3 noises, and continued with that.
4 Q All right.
5 A And then, suddenly, switched back to just talking
6 with me.
7 Q All right.
8 MR. LALLI: Your Honor, I'd like to play the
9 interview now. It's about an hour. I'm not -- I know we're
10 15 minutes before lunch. I don't know what the Court wants to
11 do in terms of --
12 THE COURT: Approach the bench a minute. No, no.
13 You know what? I figured they didn't have a break, so we
14 might as well do our lunch. And then, I hope you don't mind
15 coming back, Officer.
16 THE WITNESS: No, sir. No, sir.
17 THE COURT: We'll come back around 1:00 o'clock, all
18 right?
19 MR. LALLI: All right.
20 THE COURT: So, we're going to take our noon recess,
21 then come back at 1:00 o'clock and begin.
22 So, don't -- during this recess, it is your duty
23 converse among yourselves, or anyone else, on any subject
24 connected with the trial; or read, watch, or listen to any
25 report or commentary on the trial, by any person connected

1 with the trial, or by any medium of information, including,
2 without limitation, newspapers, television, radio. And you
3 are not to form or express any opinion on any subject
4 connected with the trial until the cause is finally submitted
5 to you.
6 So, you'll be back at that time, Officer?
7 THE WITNESS: Yes, sir.
8 THE COURT: Thank you.
9 THE WITNESS: You bet.
10 THE COURT: We'll be at ease until the jury leaves.
11 [inaudible], would you remain in the courtroom? Thank you.
12 (Outside the presence of the jury panel)
13 THE COURT: All right. This is outside the presence
14 of the other jurors.
15 Now, the reason I brought you in -- I appreciate it.
16 Thank you for, you know, this note that you sent. I'll read
17 it for the record.
18 Juror number 12, which is you, "I feel like I'm
19 falling asleep. I think I have sleep apnea. I have not been
20 to a doctor, but it does run in the family. I don't feel that
21 it's fair to everyone else if I keep doing this, and I most
22 certainly don't want to jeopardize the case." Nella
23 Humphries. You know, I appreciate that --
24 JUROR NO. 12: I apologize. You know --
25 THE COURT: You don't have to apologize. Thank you

1 for your honesty.
2 JUROR NO. 12: Well, when you made the statement,
3 you know, there's two things to -- well, when everybody was
4 being dismissed --
5 THE COURT: Yeah. I say there's always two things.
6 You have --
7 JUROR NO. 12: And I thought, well --
8 THE COURT: -- on a field of battle in time of war,
9 and serving on a jury, that --
10 JUROR NO. 12: Right.
11 THE COURT: -- you could serve your country.
12 JUROR NO. 12: And I thought, you know, I'm going to
13 try it.
14 THE COURT: Well, what -- all right. I appreciate
15 it.
16 JUROR NO. 12: It's like --
17 THE COURT: But what -- I mean, are you -- I guess
18 the issue is, we have to have --
19 JUROR NO. 12: Sometimes --
20 THE COURT: -- jurors that pay attention, and know
21 all the witnesses.
22 JUROR NO. 12: Right. I'm --
23 THE COURT: Have you been not doing that job?
24 JUROR NO. 12: No, I'm listening, but sometimes I
25 tend to close my eyes.

1 THE COURT: So how many times --
2 JUROR NO. 12: And but I --
3 THE COURT: -- have you done that?
4 JUROR NO. 12: But I know what's going on.
5 THE COURT: When you're awake?
6 JUROR NO. 12: Yes.
7 THE COURT: But not --
8 JUROR NO. 12: I mean, no --
9 THE COURT: -- when you're sleeping?
10 JUROR NO. 12: When I'm -- when I'm closing my eyes
11 and stuff. And you know, I've noticed like, a couple times,
12 she's kind of hit me, you know. But I -- I'm -- you know, I
13 can tell you exactly what's going on while I'm like kind of --
14 you know, like, looking like I'm asleep or whatever. I don't
15 know how to explain it, but --
16 THE COURT: Do you have any questions, Mr. Lalli? I
17 mean, [inaudible]
18 JUROR NO. 12: You know, I mean, it's --
19 THE COURT: -- make a record on this [inaudible] --
20 JUROR NO. 12: It's not that -- I mean, I can tell
21 you everything that's gone on --
22 THE COURT: All right.
23 JUROR NO. 12: -- the whole trial.
24 THE COURT: Well, start from the first witness.
25 What did the first witness testify?

JUROR NO. 12: The very first one, on --

THE COURT: I'm just --

JUROR NO. 12: -- the first day?

THE COURT: I'm just teasing you.

JUROR NO. 12: Oh, I can -- I can --

THE COURT: No, I don't want to hear it. I'm just teasing.

JUROR NO. 12: Okay.

THE COURT: I'm just teasing.

JUROR NO. 12: Okay.

THE COURT: Again, Lalli, I --

JUROR NO. 12: But --

THE COURT: Wait just a minute.

JUROR NO. 12: And I mean --

THE COURT: [Inaudible].

JUROR NO. 12: Today, I'm more alert.

THE COURT: Right, I can see that. You're writing and everything. I've been keeping an eye on you.

JUROR NO. 12: But --

THE COURT: But I just really want to know -- and again, if you need to be excused, you let me know, and I'll consider it. And I'm not going to get mad, because I want a fair trial, both to the State --

JUROR NO. 12: Exactly, so do I.

THE COURT: -- and the defendant. So, I think we're

1 in day -- what, 4 now?

2 MR. LALLI: Yes.

3 THE COURT: And as you sit here, do you think this

4 note, and the fact that you have been falling asleep

5 sometimes, and you have -- is that going to affect your

6 deliberation in this case?

7 JUROR NO. 12: No, I don't feel. But I just didn't

8 want, you know, anybody to feel like I'm not paying attention,

9 or I'm not doing my job as a juror.

10 THE COURT: No.

11 JUROR NO. 12: That's what I --

12 THE COURT: Any questions on behalf of the State?

13 JUROR NO. 12: That's why I was -- thought I should

14 bring it up, you know. I don't -- I haven't gone to a doctor

15 for it. Well, you have to go to a specialist.

16 THE COURT: All right. So, we don't --

17 JUROR NO. 12: [Inaudible] so --

18 THE COURT: -- have time for all of that.

19 JUROR NO. 12: Now --

20 THE COURT: I got to go to lunch. I'm hungry.

21 JUROR NO. 12: Okay. Goodbye.

22 THE COURT: Just a minute. Does the State have any

23 questions --

24 MR. LALLI: No, sir.

25 THE COURT: -- you want to ask this -- Mr. O'Keefe,

1 do you have any --

2 MR. O'KEEFE: No, Your Honor.

3 THE COURT: -- questions you want to ask this

4 witness (sic)?

5 MR. O'KEEFE: No, Your Honor.

6 THE COURT: Thank you very much.

7 JUROR NO. 12: Just if you --

8 THE COURT: Go to lunch. Go to lunch. Go to lunch.

9 JUROR NO. 12: If you hear me snore, throw

10 something. That's all I ask. Thank you.

11 (Pause in the proceedings)

12 THE COURT: All right. Does anybody want to say

13 anything? We're going to mark this as the next Court exhibit.

14 And what's the State's opinion -- I'm going to ask Mr.

15 O'Keefe's opinion. Do you want to get her excused? Do you

16 want me to think about it, you think about it, or what?

17 MR. LALLI: Your Honor, I'm going to defer to Mr.

18 O'Keefe.

19 THE COURT: All right.

20 MR. LALLI: Whatever Mr. O'Keefe wants to do is

21 acceptable with the State.

22 MR. O'KEEFE: I have no objection to anything, Your

23 Honor. Whatever the State decides. Defer to the State, defer

24 to you, whatever. I have no problem whether she stays or

25 goes. Whatever you feel is best, Your Honor. I'll leave it

1 up to you.

2 THE COURT: Okay. All right. Okay, then I will --

3 MR. LALLI: I'll submit it to the Court's

4 discretion, Your Honor. He's not -- I just want the record

5 to be very clear, he is not requesting that the juror be

6 excused. So, I'll submit it to the Court's discretion.

7 THE COURT: Is that correct? You're not --

8 MR. O'KEEFE: That is correct, Your Honor. I have

9 [inaudible].

10 THE COURT: All right. We'll mark this Court

11 exhibit. I guess I won't excuse her now, because in -- I

12 really haven't observed her doze off, and I don't know if any

13 -- have you? Well, you know, I don't think the marshal has

14 brought that to my attention. She's very attentive now,

15 taking notes. So, we'll -- as of right now, I'm going to

16 allow her to stay on the jury.

17 Is there anything else to come before the Court?

18 MR. O'KEEFE: Yes, Your Honor. Could I -- I want to

19 make two for the record. Okay. First -- it's a good time, so

20 we don't have to stop the jury.

21 THE COURT: Well, I got to eat.

22 MR. O'KEEFE: Yeah, I understand that. It will be

23 real quick. But I want to make an objection on the record --

24 THE COURT: Listen to me. I'm not -- I'm just

25 teasing you. You can make any record you want. And I never

1 stopped you from making a record, and I'm not going to stop
2 you now, all right?
3 MR. O'KEEFE: And I appreciate --
4 THE COURT: So, proceed.
5 MR. O'KEEFE: -- that, Judge. You've been very fair
6 to me, and I appreciate it, Your Honor. I mean that. And
7 I'll be brief.
8 First objection is just -- it's the perfect timing
9 for it. I just want to object. I really feel, per Miranda
10 vs. Arizona, that I'm being violated here. The State has
11 documented proof, they're on records and everything that I was
12 not just intoxicated, but that I was extremely intoxicated.
13 Also, throughout the interview, at the end page on
14 32 of the voluntary statement, the Detective Wildemann gets a
15 little bit mad at me, and he says, "You know what, you're
16 incoherent." His own words. Somebody doesn't get like you --
17 and he says the same words, "You're incoherent."
18 Thirdly, he takes a break at the beginning of the
19 interview, stops for over an hour. And then he comes back in,
20 and he's like, go to me, get up. Instantly, start answering
21 me, without refreshing my Miranda rights.
22 You know, at least consider this. At least at that
23 point in the voluntary statement where he did not refresh me,
24 anything from that point on, I don't feel it's valid. I don't
25 think any of it is. But at least, very clearly, he takes an

1 hour break and a minute -- hour and 38 or whatever. He does
2 read me my Miranda, and he says, do you understand? And I'm
3 so intoxicated; yeah, yeah, I know, yeah. I had -- I mean, I
4 didn't really know what was going on.
5 He asks me a little bit. And then he takes -- he
6 stops, and he takes a break. And I'm sitting there waiting,
7 and I pass out. You'll see it, I pass out. He comes back in.
8 Wake up, Mr. O'Keefe, get up. And he instantly starts, answer
9 my question, [inaudible]. I didn't even know what was going
10 on. He did not refresh my Miranda rights over an hour, and
11 that's a clear violation, Your Honor.
12 THE COURT: Now, Mr. Lalli, I don't know, refresh my
13 memory. But tell me, was there a motion to suppress made on
14 this?
15 MR. LALLI: There was. The version of the video
16 that we're playing is heavily edited. In fact, Judge Villani
17 watched the entire interview, and he directed, over State
18 objection, that certain portions be deleted. So, we've kind
19 of been down this road before.
20 What I can tell the Court is, the defendant is very
21 cunning in this interview. And certainly, when you see it,
22 I'm sure you will draw that conclusion. He knew what was
23 going on. He had his wits about him. He was being strategic,
24 as Detective Wildemann indicated. There's no voluntariness
25 issue. And --

1 THE COURT: But this was already ruled upon by Judge
2 Villani?
3 MR. LALLI: It was. And --
4 THE COURT: Motion to suppress denied, but he --
5 MR. LALLI: All right.
6 THE COURT: -- he -- and to be fair to the defense,
7 he redacted a lot of stuff?
8 MR. LALLI: He did.
9 THE COURT: All right. Well, that ruling stands.
10 And it is going to be a -- I'm sure there will be a jury
11 instruction, that statements of the defendant -- it's about
12 the warning, suspect in custody, of his Miranda rights, and
13 the State has the burden of proving the voluntariness of the
14 statement by a preponderance of the evidence.
15 And so, that's going to be up to the jury to
16 determine if it's voluntary also. That's going to be --
17 that's going to be an instruction given to the jury. So, you
18 could argue that wasn't -- you know. You have that -- State
19 has the burden to show it's voluntary. That could be part of
20 your argument. But your motion is denied. I'm going to allow
21 that tape to be played.
22 MR. O'KEEFE: Okay. And my last point of matter,
23 Your Honor, if I may, I don't mean to do this, but I got to --
24 I really believe that Mr. Lalli for the State has violated the
25 ABA Model Rules of Ethics, and his code of ethics. He clearly

1 has allowed yesterday his witness to testify, knowing it was
2 my whole argument, clearly, that Victoria -- Ms. -- the
3 deceased, testified for me in the felony domestic violence
4 case; not against me.
5 Mr. Lalli has repeatedly reviewed the transcripts
6 that have been submitted, but it's never been argued or
7 brought up. I have read case law where it said, if the State
8 is clearly aware that they allow their witness to give --
9 perjure testimony, basically is what it comes down to, it's a
10 violation of the rules of his ethics. It's improper.
11 It was never properly addressed through my last
12 attorney. I kept saying, what is wrong with you guys? Her
13 testimony was not for me.
14 That's what I was trying to get into yesterday, if
15 you remember, with Ms. Morris. You know, did you ever -- were
16 you ever properly told her testimony was for me, or against
17 me? Ms. Morris just knew that she came to trial, and she
18 didn't know whether it was really for me or against me,
19 because we never discussed it. So, she just assumed, since
20 Ms. Whitmarsh was there at that time, it was against me.
21 But the Court records clearly reflect -- and it's
22 been put in, I submitted it, that in a motion to dismiss, I
23 brought up an argument that the testimony was for me, and I
24 provided the certified transcripts of that felony case. And
25 they just keep ignoring it. They don't address that -- he

1 allowed his witnesses to testify. Everyone believes that Ms.
2 Whitmarsh testified against me, and it's the opposite.
3 THE COURT: Mr. Lalli?
4 MR. LALLI: Your Honor, what I can tell the Court is
5 Victoria Whitmarsh testified in that trial. She gave a
6 statement to the police officer; in a written statement,
7 indicating the battery that this defendant had committed
8 against her. Based upon that evidence, he was convicted of a
9 jury. That's what I can tell you.
10 I've not parsed through her testimony from that
11 trial line by line, but I can tell you, those facts I do know.
12 MR. O'KEEFE: And the --
13 THE COURT: It's just --
14 MR. O'KEEFE: The last rebuttal, Your Honor -- and I
15 promise, this will be it, but I need this other parachute,
16 like you stated. I need this.
17 Okay. Her written statement was given -- she was
18 under -- she was intoxicated herself. They did not know her
19 mental status. The [inaudible] of her testimony was done
20 later in a court of law. In a court of law. She got up there
21 and took it, and she -- it was for me; not against me.
22 THE COURT: Well, I don't know what for you and
23 against you is. It could have been -- you know. I don't
24 think I have that transcript in front of me, the whole
25 transcript of the proceeding. But you know, it's your opinion

1 that the testimony was for you. But the fact is, you were
2 convicted by a jury, I believe; is that correct?
3 MR. LALLI: Yes.
4 THE COURT: That's the main fact. For you, a lot of
5 people go, oh, I love him, but he did push me around, and it
6 could be for or against. But the fact that -- the main
7 relevant fact is that you were convicted. You think that it
8 was for you, but sure -- the jury didn't think it was for you.
9 So, your record is preserved, and --
10 MR. O'KEEFE: Thank you, Your Honor.
11 THE COURT: -- I'm going to deny that. I don't
12 think Mr. Lalli was at all -- had any prosecutory misconduct.
13 MR. O'KEEFE: Thank you, Your Honor.
14 THE COURT: So, what do you have? You're going to
15 -- we're going to play that tape?
16 MR. LALLI: Yes, and have just a little more
17 examination after that. And then --
18 THE COURT: And then you're going to rest?
19 MR. LALLI: -- I think we'll be prepared to rest.
20 THE COURT: Make sure your exhibits --
21 MR. LALLI: Yes. I think we've done that, and
22 everything we need is in.
23 THE COURT: All right. And then what --
24 MR. LALLI: Thank you, Your Honor.
25 MR. O'KEEFE: And --

1 THE COURT: You're going to have to do something
2 this afternoon, if you want to do --
3 MR. O'KEEFE: I'm just going to -- I'm going to just
4 be very brief on the recross.
5 THE COURT: Yeah.
6 MR. O'KEEFE: I've made my proper objection. Thank
7 you for preserving it. Let it show what it is. And --
8 THE COURT: I understand. But as far as your case
9 in chief, what are you going to do? I mean, you're not
10 calling any witnesses, you said. I mean, whatever you do, I
11 don't care, but I want you to be ready to do it this
12 afternoon. Because I want to have this case, and then we're
13 going to settle instructions. You got instructions?
14 MR. LALLI: Yes, we provided those --
15 THE COURT: Do you have a --
16 MR. LALLI: -- to the Court.
17 THE COURT: -- copy of those instructions? Mr.
18 Maningo, did you give it to him?
19 MR. MANINGO: Yes, this morning.
20 THE COURT: I want to settle instructions. And the
21 first thing tomorrow morning, I want to read the instructions,
22 and do closing argument. Do you understand?
23 MR. O'KEEFE: So, then if -- after Mr. Lalli does
24 his presentation and his direct, and I do my recross, I'm not
25 going to --

1 THE COURT: I'm going to ask you.
2 MR. O'KEEFE: I'm not going to call any witnesses,
3 I'm not going to testify. I'll let it be known.
4 THE COURT: All right. Then I'll tell you that in
5 open court. And then I'll say, oh, okay, thank you very much,
6 the evidence is completed, I'll see you tomorrow morning. All
7 right?
8 MR. O'KEEFE: Beautiful. Give me a chance.
9 THE COURT: All right.
10 MR. O'KEEFE: And I'll have one argument at the end
11 of the State's closing. One motion --
12 THE COURT: I'm sure you will.
13 MR. O'KEEFE: -- oral. Thank you, Your Honor.
14 THE COURT: Mr. Lalli, so these are the
15 instructions. And I don't know if you have any proposed
16 instructions. If you do, you have to have them ready.
17 MR. MANINGO: We're going to go over that now, Your
18 Honor.
19 THE COURT: Okay. And I don't know. I didn't --
20 because -- and I'm still going to make a decision on this
21 stipulation. Usually, there's an instruction here where it
22 says, the evidence you ought to consider, and then, at times
23 parties stipulate to something, and you're going to accept
24 that stipulation as evidence. I don't see it in here, but I
25 could have missed it.

1 MR. LALLI: May I approach?
2 THE COURT: Yeah. Is it in here?
3 MR. LALLI: It should be. I mean, it's a stock
4 instruction that we give.
5 THE COURT: Yeah, that's what I mean. But I just
6 want to make sure it is in there. Now, my ruling -- and Mr.
7 O'Keefe?
8 MR. O'KEEFE: Yes, Your Honor.
9 THE COURT: Is it in there?
10 MR. LALLI: Well, it doesn't say --
11 THE COURT: It has to have stipulation. Because if
12 it -- I mean, I've never seen a case that didn't have, "At
13 times, parties stipulate to the existence of a fact."
14 MR. LALLI: What it says is, "The evidence which you
15 are to consider in this case consists of the testimony, of the
16 witnesses, the exhibits, and any facts admitted or agreed to
17 by counsel." If --
18 THE COURT: All right.
19 MR. LALLI: -- you want to change it to --
20 THE COURT: Well, no --
21 MR. LALLI: -- "stipulate," I'm happy to do it. But
22 this is the stock instruction --
23 THE COURT: All right. Okay.
24 MR. LALLI: -- that we give.
25 THE COURT: All right. I think that's the right

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

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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
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
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
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
Receipt of Copy filed on 01/03/11	2761
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Receipt of Copy filed on 01/18/11	2876
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State's Opposition to Defendant's Motion for a Reasonable Bail filed on 09/27/10	1452-1461
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
State's Opposition to Defendant's Motion to Dismiss filed on 03/21/12	3407-3411
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
State's Opposition to Defendant's Motion to Seal Records filed on 04/05/12	3431-3433
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
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Raised Per Statute in the First Petition Pursuant to Chapter 34 filed on 06/25/15	5442-5446
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
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
State's Opposition to Defendant's Pro Per Motion to Modify and/or Correct Illegal Sentence filed on 02/24/14	4811-4817
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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, Mandare or Remittatture of filed on 08/07/14	4891-4902
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 Violatio with No Remand Issued Since (Post Conviction), Amended Peition 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
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of Habeas Corpus and Evidentiary Hearing Request, "Motion for Leave to File Supplemental Petition Addressing all Claims in the First Instance Required by Statute for Judicial Economy with Affidavit," "Reply to State's Response to Defendant's Pro Per Post Conviction Petition for Habeas Corpus," and "Supplement with Notice Pursuant NRS 47.150(2); NRS 47.140(1), that the Untied States Supreme Court has Docketed (#14-10093) the Pretrial Habeas Corpus Matter Pursuant 28 USC 2241(c)(3) from the Mooting of Petitioner's Section 2241 Based on a Subsequent Judgment Obtained in Want of Jurisdiction While Appeal Pending" filed on 07/09/15	5455-5458
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,	.	CASE NO. C-250630
Plaintiff,	.	DEPT. NO. XVII
vs.	.	
BRIAN KERRY O'KEEFE,	.	**TRANSCRIPT OF PROCEEDINGS**
Defendant.	.	

BEFORE THE HONORABLE SENIOR JUDGE JOSEPH BONAVENTURE

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 4

THURSDAY, JUNE 14, 2012

APPEARANCES:

FOR THE PLAINTIFF: CHRISTOPHER LALLI, ESQ.
ELIZABETH A. MERCER, ESQ.
Chief Deputy District Attorneys

FOR THE DEFENDANT: BRIAN KERRY O'KEEFE
Pro Per

LANCE MANINGO, ESQ.
Stand by counsel for defendant

COURT RECORDER:
MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:
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Englewood, CO 80110

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

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1 LAS VEGAS, NEVADA, THURSDAY, JUNE 14, 2012, 9:55 A.M.
2 (Outside the presence of the jury panel)
3 (Pause in the proceedings)
4 THE MARSHAL: All rise and come to order.
5 Department 17 of the Eighth Judicial District is now in
6 session. The Honorable Judge Joseph Bonaventure is presiding.
7 You may be seated. Remain in order. Make sure your cell
8 phones are turned off.
9 THE COURT: All right. This is outside the presence
10 of the jury. What's the situation?
11 MR. O'KEEFE: Okay, Your Honor. First of all, we
12 have -- I'm trying to get the State to agree -- there was a
13 prior stipulation on the mental health issues and the suicides
14 of the deceased, Your Honor. There was a prior stipulation
15 that was made that I didn't agree with, that the jury was only
16 read a very redacted, redacted record of the deceased.
17 The jury also was not even advised at the close of
18 the State's case in chief. The judge just said, no, I'm going
19 to read this statement, and the jury wasn't even aware. But
20 first of all --
21 THE COURT: Wasn't aware of what?
22 MR. O'KEEFE: They weren't even aware of what the
23 judge was reading at the time. The judge stated that it was
24 agreed at the close of the State's case in chief, I was going
25 to read this. And the jury was kind of like, what's going on?

1 They wasn't even had (sic) pens, paper. Didn't know. The
2 judge started reading the redacted, redacted version of the
3 mental healths and suicides, and anger management, and all
4 that. And I just thought it was truly unfair.
5 My position now is, since I realize the risk I took,
6 I'm just trying to make a record that I feel it's imperative,
7 based on the facts of the case -- since Mr. Lalli got the
8 battery domestic violence, trying to give the inference that
9 an assault or battery was done, it aids in my case to show a
10 complete defense, a reason of why the knife -- the deceased
11 would have had the knife, and what was going on.
12 I'm asking -- I'm trying to get an agreement with
13 Mr. Lalli to enter, to have you read this to the jury, Your
14 Honor, like they did in the second trial.
15 THE COURT: That's the stipulation.
16 MR. O'KEEFE: Yeah, that's one of the -- yes, sir.
17 And then, not only that, I want to -- I have the right, Your
18 Honor, to enter is as an exhibit for the jury to take back.
19 Now, Mr. Lalli has got the battery domestic violence
20 judgment of conviction, wrongfully, I feel still -- I stand --
21 that's my position. He's got evidence. All through the voir
22 dire and through the trial, he's got them believing right now
23 that this happened in a battery domestic violence. That's
24 wrong. No one's paying attention to what could have happened.
25

1 In 2010, Your Honor, with all due respect, in Vega
2 vs. Nevada, the Supreme Court ruled on a case, and it dealt
3 pertaining with suicides. An alleged victim that had some
4 injuries, and she had prior suicides and all that. To make a
5 long story short, it was two months after my case was
6 reversed, or three months; around there, Your Honor, with all
7 respect.
8 And they ruled that it was relevant evidence, under
9 I do believe NRS 48.025. It was very relevant. It pertained
10 to the case. You know. And also, it's my constitutional
11 right for a complete defense, due process. You know, that's
12 what we're here for, Your Honor, to let the jury hear both
13 sides, and let them decide for themselves.
14 So, again, I'm very adamant, Your Honor, that I
15 never made a prior stipulation. This stipulation was done by
16 -- when I had counsel. Also, this stipulation was done with
17 Mr. -- or Judge Villani, with all due respect. And I'm just
18 trying to [inaudible]. You know, I want to get an agreement,
19 and I'm making an argument that something should be presented
20 for the jury. I do believe I have that right.
21 THE COURT: And that's the stipulation that was
22 entered into last time. Can I have a copy of that?
23 THE CLERK: Here it is, Judge.
24 MR. MANINGO: May I approach, Judge? This is --
25 THE COURT: Well, do you have --

1 MR. MANINGO: Oh.
2 THE CLERK: This is the Court's exhibit.
3 THE COURT: Oh, this is the actual exhibit. All
4 right.
5 THE CLERK: That's the actual exhibit.
6 MR. LALLI: Is that 14?
7 THE CLERK: Yes.
8 MR. O'KEEFE: Now, is that the two-page, with all
9 due respect, Your Honor, or --
10 THE COURT: Yeah, it's the two --
11 MR. O'KEEFE: -- three-page?
12 MR. MANINGO: It's this one, Brian.
13 THE COURT: It's three pages.
14 MR. O'KEEFE: Okay, Your Honor. Thank you. There
15 was two of them. That's why I'm making sure.
16 THE COURT: Well, make sure. Here, show -- Mr.
17 Maningo, here, give this --
18 MR. MANINGO: May I, Your Honor?
19 THE COURT: That's the 14 that was going to be --
20 MR. O'KEEFE: Because --
21 THE COURT: Is that an exhibit?
22 MR. LALLI: It's a Court's exhibit, Your Honor.
23 THE COURT: Right.
24 THE CLERK: [Inaudible].
25 THE COURT: Right, right.

1 MR. O'KEEFE: And just explaining, Your Honor, there
2 has been a --
3 THE COURT: Make sure that's
4 MR. O'KEEFE: -- couple versions.
5 THE COURT: Make sure that's the same one you want.
6 Now, Mr. Lalli, I guess the only issue is he wants that --
7 MR. O'KEEFE: I'm asking for this one.
8 THE COURT: He wants --
9 MR. O'KEEFE: Okay.
10 THE COURT: He wants that admitted.
11 MR. O'KEEFE: This is the one that they utilized.
12 MR. LALLI: He wants more than that.
13 MR. MANINGO: Your Honor, may I approach with what
14 Mr. O'Keefe --
15 MR. O'KEEFE: Okay. That's what we -- we redacted
16 it again with this one, Your Honor.
17 THE COURT: I thought I asked you to go through
18 this. Now the jury's waiting all this time.
19 MR. LALLI: We can't agree. We tried to.
20 MR. O'KEEFE: And it's imperative.
21 MR. MANINGO: May I approach, Judge?
22 MR. O'KEEFE: They got the one that was --
23 MR. MANINGO: Court exhibit. This is what --
24 MR. O'KEEFE: -- with the exhibit.
25 MR. MANINGO: -- Brian wants.

1 THE COURT: And you won't stipulate to what Brian
2 O'Keefe wants on this one here?
3 MR. LALLI: No, I will not, Your Honor.
4 THE COURT: Now, I need to hear your argument.
5 MR. LALLI: Okay.
6 THE COURT: Now, while you stipulate -- but you
7 would stipulate to --
8 MR. LALLI: The Court reading Court's Exhibit number
9 14.
10 THE COURT: But not admitted in evidence?
11 MR. LALLI: Correct.
12 THE COURT: Okay. Give me the reasons why.
13 MR. LALLI: Let me just -- quickly, but --
14 THE COURT: I mean, I don't think you have to
15 stipulate to anything.
16 MR. LALLI: I don't. I don't have --
17 THE COURT: I mean, I think you're doing a favor.
18 He'd have to -- he'd have to present evidence to that effect,
19 and lay foundations. And I don't know how we could do that.
20 I mean --
21 MR. LALLI: I would agree. I agree with all of
22 that.
23 THE COURT: I mean, I think you're being -- I'm
24 looking at you. I think you're being more than generous
25 stipulating, because he'd have to prove it. I don't know how

1 we prove it. But that's --

2 MR. LALLI: Your Honor, just --

3 THE COURT: -- my initial reaction to it.

4 MR. LALLI: Just to give the Court some history, at

5 the last trial, the defendant's attorney wanted to admit many

6 voluminous records on the victim's state of mental health.

7 There had never been a Petrocelli hearing, as was required

8 under Mortenson. There was no real relevance to it.

9 However, I could see that under the Daniels

10 decision, the Supreme Court could say that some acts of

11 violence perhaps should come before the jury. So, to

12 accommodate the defense, Ms. Palm and myself agreed to the

13 stipulation, which is Court's Exhibit number 14.

14 Now, we agreed to that, with the assistance of Judge

15 Villani. He assisted us in coming to that final version.

16 What we did not agree to -- what we could not agree amongst

17 ourselves was whether the stipulation would go back to the

18 jury, or whether it would be read. We argued that.

19 Judge Villani's ruling was, I will read the

20 stipulation into the record. It's coming from the Court, it

21 has a stronger import than if the parties were to read it.

22 But I'm not going to admit the document.

23 So, here today, my position is to do just that, to

24 have Your Honor read Court's Exhibit number 14 to the jury.

25 And that's what I'm willing to agree to.

1 THE COURT: Anything else?
2 MR. O'KEEFE: Well, Your Honor --
3 THE COURT: I mean, he's not going to stipulate to
4 what you want. So, I can't get that in. Because if he won't
5 -- if the State won't stipulate to it, just because you say
6 it's the right thing to do, Judge, I can't be doing that,
7 because it has to -- foundation has to be laid, business
8 records. You know, you have --
9 MR. O'KEEFE: All right, Your Honor.
10 THE COURT: -- to do that. So, I'm going to mark
11 what you want as an exhibit, as a stipulation to be entered.
12 And you preserve that, and this is what you want. But I'm
13 going to mark that as Court's next exhibit, and I can't give
14 that. All right? I can't give that. So, that's -- but you
15 preserve your record on that.
16 MR. O'KEEFE: Okay.
17 THE COURT: And that's the reason why. Because if
18 the State --
19 MR. O'KEEFE: Yes, sir, Your Honor.
20 THE COURT: -- won't stipulate to it, you have to
21 prove it, and you have to -- you can't do it. So --
22 MR. O'KEEFE: Your Honor --
23 THE COURT: Now, a far as the one that Judge Villani
24 gave --
25 MR. O'KEEFE: Yes, sir, Your Honor.

1 THE COURT: -- this is a redacted. And --
2 MR. O'KEEFE: May I --
3 THE COURT: All right. So --
4 MR. O'KEEFE: May I request, Your Honor, at least
5 could that be, since that was -- could they at least take that
6 back to the jury room?
7 THE COURT: That's what I got to rule on now.
8 MR. O'KEEFE: Yes, sir, Your Honor.
9 THE COURT: Let me --
10 MR. O'KEEFE: Thank you, Your Honor.
11 THE COURT: Let me think about that. Let me review
12 it --
13 MR. O'KEEFE: God bless you, Your Honor. Yes, sir.
14 THE COURT: Let me think about it.
15 MR. O'KEEFE: Sure.
16 THE COURT: Since there's a stipulation, you want it
17 marked as defense next Exhibit A, if it's stipulated to. Mr.
18 Lalli doesn't want it as an exhibit, but he's willing to
19 stipulate. Let me think about it, all right?
20 MR. O'KEEFE: Yes, sir.
21 THE COURT: All right.
22 MR. O'KEEFE: Now, I have one other matter -- or two
23 quick matters. Okay. I need a stipulation or an agreement.
24 And this is absolutely imperative. This was done by the
25 police. There was two 9-11 calls on this incident, Your

1 Honor. They were back to back. And testimony has been
2 brought out already about this, and it's in the 9-11 calls,
3 and all this. It's relevant.
4 At the last trial, the State -- at the second trial,
5 the State only played the second 9-11 call. Which it's -- I
6 need -- both 9-11 calls are back to back on my disk. And --
7 THE COURT: All right. Just a minute. Mr. Lalli,
8 could you accommodate that? Or --
9 MR. LALLI: Your Honor --
10 THE COURT: If there's one, why don't we have two?
11 I mean --
12 MR. LALLI: Well --
13 THE COURT: -- unless it's a prejudicial thing
14 that's --
15 MR. LALLI: There's a problem with playing both of
16 them, Your Honor.
17 THE COURT: All right, go ahead.
18 MR. LALLI: First of all, we have marked -- we
19 marked as State's proposed Exhibit number 129 a 9-11 call from
20 a witness by the name of Todd Armbruster. Mr. Armbruster
21 accompanied Mr. Toliver up to the defendant's room, and saw
22 him standing over Victoria Whitmarsh at some point.
23 We attempted to serve Mr. Armbruster, because he
24 offers testimony very favorable to us. We were not able to
25 locate him. Therefore, us simply playing his 9-11 call is

1 going to be hearsay, and we cannot put it into a particular
2 hearsay exception. Mr. Armbruster --
3 THE COURT: But you're going to play that, you said?
4 Is that --
5 MR. LALLI: I'm sorry?
6 THE COURT: Well, that's an exhibit --
7 MR. LALLI: We did not play it. We can't lay the
8 foundation for it. So --
9 THE COURT: Well, if Mr. --
10 MR. LALLI: No, no, I understand that.
11 THE COURT: -- O'Keefe stipulates to that, then will
12 you stipulate to the second one? I guess that would solve the
13 problem.
14 MR. LALLI: No.
15 THE COURT: Oh.
16 MR. LALLI: And I'll explain to the Court why. The
17 other person who called 9-11 was a woman by the name of Robin
18 --
19 MR. O'KEEFE: Kolacz.
20 MR. LALLI: -- Kolacz, who was the apartment
21 manager. She makes some statements to the police about what
22 was occurring in the apartment, and she had never been there.
23 She had never seen what had happened. She's hearing third and
24 fourth-hand from hysterical neighbors what's going on in that
25 apartment.

1 It is not credible information that she imparts to
2 the police, and she's not a witness here. I don't have the
3 chance to cross-examine her about those statements. So, Mr.
4 Armbruster's statement was played in the first two trials. I
5 don't have a problem playing it in this trial if the defendant
6 wants it in. I don't have a problem with that.
7 THE COURT: But if he doesn't want it in, you're not
8 going to play it?
9 MR. LALLI: I can't.
10 THE COURT: Because --
11 MR. LALLI: I can't play it, because I can't lay the
12 foundation for it. I would certainly -- the manager is Ms.
13 Kolacz --
14 MR. O'KEEFE: She was the manager of --
15 MR. LALLI: She --
16 MR. O'KEEFE: -- the apartment complex.
17 MR. LALLI: She has never -- she has -- as far -- I
18 know she didn't testify in the last trial. I don't believe
19 she testified in the first trial. And her 9-11 call has never
20 been played in any proceeding, as far as I know. And I'm not
21 going to agree to just play some unreliable hearsay for the
22 jury.
23 THE COURT: All right.
24 MR. LALLI: So, that's my position.
25 MR. O'KEEFE: Yes, Your Honor. Okay. In the first

1 trial, Robin, the apartment manager, she makes the first call.
2 They run down to her; it's imperative. She states -- you can
3 hear it quite clearly on the call --
4 THE COURT: What do you mean in the first trial?
5 That wasn't played in the first trial.
6 MR. O'KEEFE: No -- yes, it was, Your Honor.
7 THE COURT: Wait a minute. Let me get this
8 straight. Was that played in the first trial, the Robin --
9 MR. LALLI: I don't -- I don't know for certain.
10 MR. O'KEEFE: Yes, Honor (sic) --
11 MR. LALLI: I don't know for certain.
12 MR. O'KEEFE: -- it was.
13 MR. LALLI: I know the Todd Armbruster CD was. I
14 can tell you with certainty that that was, because it's marked
15 that way.
16 THE COURT: Okay.
17 MR. O'KEEFE: Your Honor, in the first trial, the
18 State was under Prosecutor Smith, and a different assistant --
19 second chair. They played both 9-11 calls. They are
20 imperative. Robin on the 9-11 call clearly states she's
21 always outside. She ran the place. She knew everybody. She
22 was outside.
23 They -- and hysterics run down. They said, oh my
24 God, there's a fight going on. And she says -- she's on the
25 9-11 call. And she says, nobody's fighting. What are you

1 even talking about? There's nobody fighting. And they said,
2 yeah -- it was Cookie. There's somebody up there, they're on
3 the floor, they won't let us in, or whatever. And they hear
4 -- and the call gets ended. It's very brief.
5 Then, right after that -- they're very short 9-11's.
6 Right after that, then Todd makes a 9-11 call. And he says,
7 I'm up in this apartment, and man won't let us in. Where are
8 you at? Yeah, we just got a call on that. We got another
9 call right before that. We're being dispatched.
10 And just to sum it up real quick, what's being
11 stated here was Todd never tells the 9-11 call -- dispatch,
12 that Cookie was already in there, and I'm asking him for help,
13 but he runs out on me. Todd tells the 9-11 that he goes into
14 my apartment, and I'm trying to get him out of there. He
15 doesn't tell the 9-11 call that somebody had already been in
16 the apartment, and I was asking for help; help me, help me get
17 her out in the light, and he got scared and ran out.
18 Cookie runs out, runs down to Robin. She makes the
19 first 9-11 call. There's nobody fighting [inaudible] going
20 on. He hooks up with Todd. They run back up there together.
21 Todd supposedly comes in, I supposedly swing at him. He runs
22 out. He makes the second 9-11 call, and he tells them that
23 I'm being combative, I won't let anybody in.
24 And I'm like -- the police didn't -- wasn't aware of
25 was Cookie had already been there, and I asked Cookie to help

1 me. I wasn't trying to get him out. They -- the police was
2 not aware that I was asking for help. I wasn't being
3 combative. Somebody had already been in there, and he ran
4 out. Then he got a second person, and they came back again.
5 Then, at that time, they said something happened. And -- but
6 both calls were played back to back. They're very short.
7 It's imperative, Your Honor, because she states that
8 I'm outside. Nobody is fighting. That's what I was trying to
9 say in my opening statement, evidence will show that the
10 manager knows everybody. It's only about three times the size
11 of this room. If somebody was fighting, they would have heard
12 it. She's always out there. She says, nobody's fighting.
13 There's no shouting, there's no smashing, there's nothing
14 going on.
15 They did play it in the first trial, both calls.
16 But then in the second trial, of course, the State being
17 smart, they realized that that evidence was very prejudicial
18 to their case.
19 So, they got rid of the call number 1, and they
20 played only call number 2. And yes, Todd did testify at the
21 second trial. But Robin didn't testify at either trial. But
22 the whole thing has already been played. It was record of the
23 -- a record of the first appeal. Both calls were played, Your
24 Honor. It was proper, it was right.
25 Then, in the second trial, they edited it. They

1 only played the second call because it makes me look like a
2 bad guy, like I wouldn't let anybody in. And they don't hear
3 that there was no fighting going on. And I'm asking at least
4 that you allow it to be played. Listen to the call yourself.
5 It only takes a minute, during a break. It's imperative, Your
6 Honor. It tells the story. Again, this is --
7 THE COURT: All right. You're repeating yourself.
8 Anything else, Mr. Lalli?
9 MR. LALLI: Your Honor, his remedy was to subpoena
10 Robin, bring her to court, and have her testify. That's how
11 you get the evidence in.
12 THE COURT: Aren't 9-11 calls routinely played in
13 trial?
14 MR. LALLI: If you can lay the foundation for them.
15 If they're an excited utterance, if they qualify, if there is
16 a foundation with the 9-11 operator if the declarant isn't
17 present; sure. Sure, they're played.
18 THE COURT: But you say --
19 MR. LALLI: But you got to lay the foundation for
20 it.
21 THE COURT: -- he has no foundation for it?
22 MR. LALLI: He has no foundation. And more
23 importantly, it's important to cross-examine this witness
24 because she doesn't go there. She is repeating bits and
25 pieces of information from other people.

1 THE COURT: All right.
2 MR. LALLI: It's extremely unreliable.
3 THE COURT: Would you -- would you stipulate to play
4 the Exhibit 129, the Todd Armbruster? I don't think I'm going
5 to allow you to play it, but I'm going to mark that disk as an
6 exhibit, next court in order -- next court exhibit in order.
7 MR. O'KEEFE: Well, if --
8 THE COURT: If you don't want to -- you don't
9 stipulate, don't stipulate. [Inaudible].
10 MR. O'KEEFE: Yes, Your Honor. I guess just to
11 preserve, I appreciate what you're doing. And I would -- my
12 position would be, if you can't play both of them, then none
13 of them need to be played, Your Honor.
14 THE COURT: All right. So, none will be -- give me
15 that disk, Mr. Maningo. We'll --
16 MR. O'KEEFE: And if he could --
17 THE COURT: We'll mark that. That's a court --
18 MR. O'KEEFE: Is that mine? Is that the right one?
19 THE COURT: -- next court exhibit in order.
20 MR. MANINGO: Right.
21 MR. O'KEEFE: Okay.
22 THE COURT: And that's going to be the both 9-11
23 calls. The Court has ruled that it's not going to be --
24 MR. MANINGO: Yes, sir.
25 THE COURT: -- neither one is going to be played,

1 because they're unreliable hearsay. And there's no foundation
2 laid, absolutely no foundation. And so, neither 9-11 call
3 will be played, and that's the ruling of the Court. And Mr.
4 O'Keefe has more than preserved his record on that. All
5 right? So, we'll mark that --
6 MR. O'KEEFE: And --
7 THE COURT: -- next court in order.
8 MR. O'KEEFE: -- the last matter, Your Honor.
9 Court's indulgence, one second. And this will be it, Your
10 Honor. We'll move on.
11 (Pause in the proceedings)
12 MR. O'KEEFE: Okay, Your Honor. After speaking with
13 Mr. Maningo, I'll go ahead and just speed this up and move on,
14 and I'll address it later.
15 THE COURT: Thank you.
16 MR. O'KEEFE: Thank you, Your Honor.
17 THE COURT: You want to address Nella Humphries now?
18 Or -- you know what, we'll do it at the noon recess. I'll ask
19 her to stay. And that's the one where the sister of Juror
20 number 10, she says she has sleep apnea, and we got to make a
21 decision on that.
22 So, we'll bring in the jury now, and do what we can
23 until the noon hour.
24 THE MARSHAL: Officers and members of the court,
25 Department 17 jurors.

1 (Within the presence of the jury panel)
2 THE MARSHAL: All right. You may be seated, ladies
3 and gentlemen. Let's make sure all cell phones are turned
4 off, please.
5 THE COURT: All right. Parties, stipulate to the
6 presence of the jury?
7 MR. LALLI: Yes, Your Honor.
8 THE COURT: Mr. -- you stipulate to the presence of
9 the jury?
10 MR. O'KEEFE: Yes, I do, Your Honor.
11 THE COURT: Thank you.
12 MR. O'KEEFE: Thank you.
13 THE COURT: Again, ladies and gentlemen, I'm sorry
14 that it was delayed, but we had some legal arguments that
15 you're not to be concerned with. And we were working, but
16 unfortunately, we were a little delayed. But I apologize for
17 that. It's nobody's fault.
18 And we're ready to proceed with the State's case in
19 chief now. The State will call it's next witness.
20 MS. MERCER: The State calls Ed Guenther, Your
21 Honor.
22 THE MARSHAL: What was his name?
23 MS. MERCER: Guenther.
24 THE MARSHAL: Mr. Guenther, if you will remain
25 standing. Please, sir, raise your right hand and face the

1 clerk.

2 THE WITNESS: Yes.

3 ED GUENTHER, STATE'S WITNESS, SWORN

4 THE MARSHAL: Have a seat, sir.

5 THE WITNESS: Okay.

6 THE MARSHAL: Slide up to the microphone.

7 THE WITNESS: Yes.

8 THE MARSHAL: And if you would, please state and

9 spell your name for the record.

10 THE WITNESS: Yes, sir. Let me move this back just

11 a little bit. Good morning. My name is Ed Guenther. It's

12 spelled G-u-e-n-t-h-e-r.

13 MS. MERCER: May I proceed, Your Honor?

14 THE COURT: Yes.

15 DIRECT EXAMINATION

16 BY MS. MERCER:

17 Q Sir, where are you currently employed?

18 A I'm employed with the Las Vegas Metropolitan Police

19 Department. My assignment is in the criminalistics bureau,

20 and my -- and in the forensic laboratory. And my area of

21 expertise is latent fingerprints.

22 Q Okay. And how long have you been working in the

23 area of latent fingerprints?

24 A I've been in the area of latent fingerprints about

25 35 years now.

1 Q How much of that time did you spend with Metro?
2 A The last 14 years have been with Metro.
3 Q And prior to that, where did you work?
4 A Prior to that, I was -- I worked for the Florida
5 Department of Law Enforcement in their laboratory system for
6 18 years. I worked for the State of Ohio crime laboratory
7 system for three years. And prior to that, I worked as a --
8 in a non-latent fingerprint aspect; in an inked fingerprint
9 aspect, for the Federal Bureau of Investigation.
10 Q Okay. And can you tell us a little bit about your
11 educational background?
12 A Okay. Well, my training -- I just kind of went
13 backwards then. But I began way back in 1975 with the Federal
14 Bureau of Investigation in Washington. There is where I
15 learned the basics of classifying, searching, and identifying
16 fingerprints.
17 And then, I entered -- in 1977, I did enter into a
18 latent fingerprints training program with the State of Ohio.
19 Completed that training program. Did my routine case work in
20 Ohio for the three years. 18 years more at Florida. And for
21 the last 14 years, here at Metro. So, that's my background
22 that way.
23 My formal education, accommodated with a
24 baccalaureate degree from the University of South Florida in
25 Tampa. I'm also a member of the International Association for

1 Identification, and have been certified by the association to
2 conduct latent fingerprint examinations.
3 Q And do you have to go through continuing education
4 each year?
5 A Yes, as part of our -- as part of my -- retaining my
6 certification, I have to test every five years. And also, I
7 have to show continuing education credits during that
8 five-year period by attending meetings, and -- or teaching, or
9 writing a paper, or some sort of involvement in the community
10 in obtaining, or giving and receiving of training.
11 And then, of course, doing the testing. And then,
12 of course, our laboratory is an accredited laboratory. So, I
13 do a mandatory testing every year as part of our accreditation
14 process. All analysts are tested at least once a year.
15 MS. MERCER: Your Honor, at this time, I'd ask that
16 the witness be allowed to testify in the area -- or offer
17 opinions in the area of fingerprints examination and analysis.
18 THE COURT: O'Keefe, any objection?
19 MR. O'KEEFE: No, Your Honor.
20 THE COURT: He can so testify.
21 MS. MERCER: Thank you.
22 BY MS. MERCER:
23 Q Sir, can you tell the jury what a latent fingerprint
24 is, please?
25 A Okay. Well, a latent fingerprint is an accidental

1 -- it's a mark left by the accidental torching of a surface by
2 the specialized skin on our hands and our feet. This skin has
3 pores along their summits. And through these pores, your body
4 is going to be excreting perspiration and chemical compounds.
5 So, when your hand or your foot come into contact
6 with the surface, you're going to leave the outline of that
7 friction ridge, that skin, and a deposit of the perspiration
8 and the chemical compounds.
9 Now, at times, these prints are visible. More
10 often, they are invisible. So, at that point, that's where we
11 use various processing methods in order to visualize and
12 preserve the latent fingerprints on surfaces.
13 Q Okay. Is it possible to touch an item and not leave
14 a fingerprint?
15 A Yes.
16 Q Can you explain how? What kinds of factors go into
17 whether or not a fingerprint is left behind?
18 A Um-hum. Well, there are several factors. The
19 primary one, in my opinion, is the pressure or the movement.
20 These friction ridges are pliable; they're three-dimensional.
21 So, when you touch a surface, if there's too much
22 force on it, then the ridges have a tendency to either --
23 then, the motion of that force. If your force is up or down,
24 left or right, or a turning motion, instead of getting a nice,
25 clean touch of that friction ridge detail, you're going to

1 get, well, basically a smear or a smudge. So, pressure is
2 very important.
3 Environmental factors are important. Wind, rain,
4 sun, heat. The surface that is touched is important. The
5 substrate. Generally speaking, the smoother a surface is, the
6 more receptive it will be to the fingerprint deposits being
7 left on them.
8 The other is what the print is actually left in. Is
9 the print in -- is it what we call an oily, or a sebaceous
10 print? Is it a print that comes from actual sweat residue?
11 Is it in blood, or grease, or something like that? So, those
12 are the main factors.
13 And then, of course, time. Fingerprints do have a
14 life. At some point, they are not going to be able to be
15 developed for any kind of probative value.
16 Q Okay. And as a latent print examiner with Metro,
17 what are some of your job duties?
18 A Well, my main job duty is to analyze the friction
19 ridge detail that comes to us, either through our crime scene
20 unit, or through evidence that's submitted into the
21 laboratory. To analyze that evidence for latent fingerprints
22 of suitability, of comparison quality. And then, to make
23 comparisons with known's or exemplars of individuals, that are
24 presented to us in the course of an investigation.
25 Q Okay. And you used the term, comparison quality

1 when you were referring to latent prints. What does that term
2 mean?
3 A Well, when we say something is suitable, or is of
4 comparison quality, not all latent prints are going to meet
5 the -- a threshold that we can actually make a comparison
6 with. Oftentimes, we're getting a fragment of a print. In
7 our line of work, in latent prints, we're going to get a
8 fragment of a print. Maybe it's a little tip. And we do an
9 analysis of that.
10 And our determination can be that, well, yes, there
11 is a touch here, and there is some friction ridge detail here,
12 but there just isn't enough to make an association with any
13 individual. So, in that case, we would say that the latent
14 print is not suitable for comparison, so we wouldn't be able
15 to compare it with any human being.
16 Now, there are times when we have print detail that
17 we may be able to make a -- some inference of. Maybe it's a
18 pattern type, or an area of skin, maybe a hand or a finger.
19 But even at that, we're not able to say more than that. So,
20 we have levels of suitability and conclusions that we can rise
21 to, depending on what we have in front of us.
22 Q Okay. You also used the term, known print. What is
23 a known print?
24 A Well, a known is an exemplar. And an exemplar is
25 basically a controlled recording of this friction ridge that I

1 described to you earlier. The -- and the way they're obtained
2 is that the hand, or the foot, or the finger, in today's
3 world, will be rolled onto a platen, a -- which is going to
4 digitally capture that friction ridge.
5 And then, it's of course all stored in a database
6 now for our retrieval, if we would need it for comparison
7 purposes. So, those are exemplars. Those are -- the
8 important part of what we do, we need an exemplar to make a
9 comparison.
10 Q Okay. And going back to the comparison quality.
11 And approximately what percentage of cases do you recover
12 latent prints that are of comparison quality?
13 A Well, I think the last time we did an internal study
14 of some of our case work and our case flow, I believe we were
15 having a recovery -- I believe it was about in one out of
16 three cases, where we're actually getting latent prints of
17 comparison quality that we could actually look at and compare
18 to an individual.
19 Q Okay. Now, I want to direct your attention to early
20 2009. Were you asked to examine some evidence under Metro
21 event number 0811053918?
22 A Yes, ma'am.
23 Q And what specifically were you asked to look at?
24 A All right. Well, I received a package that had been
25 impounded by a Jocelyn Maldonado, who is a crime scene analyst

1 with the Las Vegas Metropolitan Police Department. And inside
2 that package was a Wolfgang Puck black-handled carving knife.
3 And also, I received a package that was impounded by
4 CSA Chelsea Collins, who also works for Metro as a crime scene
5 analyst. And in that package, there were four photographs of
6 ridge detail that she had taken at the crime scene at 5001 El
7 Parque Avenue.
8 Q Okay. And when you received those packages, what
9 condition were they in?
10 A They would have been sealed.
11 Q And what does that mean?
12 A Well, anything that comes to the vault -- well,
13 especially the knife, would have been sealed. Nothing comes
14 into the laboratory without being sealed. It won't be
15 accepted by the main evidence vault. Or we have our own vault
16 in the laboratory, that's a satellite of the main vault. We
17 don't accept anything that isn't sealed properly, and signed,
18 and so forth. So --
19 Q So, basically, that signifies to you that the
20 evidence hasn't been tampered with?
21 A Correct.
22 Q Since it was impounded, correct?
23 A Correct.
24 Q And you indicated that you were asked to examine a
25 knife?

1 A Yes.
2 MS. MERCER: Permission to publish, Your Honor.
3 THE COURT: Yes.
4 MS. MERCER: And for the record, I'm publishing
5 State's Exhibit 44.
6 THE WITNESS: Okay.
7 BY MS. MERCER:
8 Q Is this the knife that you were asked to examine in
9 this case?
10 A Yes.
11 Q And can you identify -- I'm sorry. Let me zoom-in a
12 little bit. Can you identify in this exhibit where -- first
13 off, when you examined the knife, did you find any latent
14 prints?
15 A There was an area of touch on the handle that was a
16 -- there was latent print material there, and it was in a
17 blood-like substance. But the examination of that area in the
18 end was negative. It was not suitable for any kind of
19 comparison. So, while there was a touch on the knife, it did
20 not reach the threshold where I could actually make a
21 comparison to anyone.
22 Q Okay. And can you identify the area of the handle
23 where you --
24 A Yes.
25 Q -- found that?

1 A The area was on the left side of the knife. It was
2 on the handle. And I --
3 Q Just circle it for me.
4 A Yeah. It was right in that area.
5 Q Okay. And you indicated that, ultimately, it wasn't
6 of comparison quality?
7 A Correct. Yes.
8 Q Did you do anything to try to develop the print?
9 A Yes.
10 Q And can you tell the jury what you did?
11 A Well, this is on a knife, on a blood -- what could
12 be a blood-type print. We always do a visual examination,
13 first of all. And so, that was obviously done. There was no
14 other ridge detail noted on the knife at all, except for this
15 one area.
16 So, first, I preserved that area. Then, I proceeded
17 to process it with a series of chemicals that will either
18 enhance of develop blood prints. They will react with a blood
19 substance, the hemoglobins and amino acids, and so forth, and
20 the hemoglobins, primarily, to either develop or enhance the
21 blood surface. That technique was used on the knife, on the
22 handle of the knife, and need to step back one moment.
23 After the visuals, also conducted examinations with
24 our alternate light sources. We have several alternate light
25 sources that sometimes will reflect ridge detail, and make it

1 actually visible. So, the visual test was negative. The
2 alternate light source tests were negative. This chemical
3 test was negative. This is all on the handle. So, all
4 negative.
5 On the blade, I used a separate technique. And of
6 course, this obviously would have involved the handle at this
7 point also. It was subjected to the fumes or super glue, or
8 cyanoacrylate. And what super glue is going to do, if there's
9 a print that you can't see, because we did the visual, the
10 super glue has a -- will adhere and lock onto the moisture
11 content that's in that touch I talked about, that
12 perspiration.
13 And what it will do is it will fix that ridge detail
14 onto that surface. And then, sometimes you can actually see
15 that print at that point. But more often than not, we are
16 going to then follow that up with a chemical dye stain. We're
17 going stain that super glue print, put it under the -- an
18 alternate light source to radiate it or enhance it, and
19 photograph it.
20 So, I did those techniques on the knife also. They
21 all came up negative. So, they're -- I threw the kitchen sink
22 at the knife, we'll say. And all the testing that I did did
23 not enhance, and or develop any additional latent prints on
24 the knife.
25 Q Okay. And the one partial print that you observed

1 was not of comparison quality?

2 A Correct.

3 Q Were you able to reach any opinions as -- you

4 indicated that sometimes, even when a print isn't of

5 comparison quality, you can sometimes tell what part of a hand

6 or foot might have touched the object?

7 A Um-hum.

8 Q Were you able to make any conclusions with regards

9 to the knife in this case?

10 A Yes. Just because of the nature of the touch, you

11 could see that where the hand -- or where the friction ridge

12 had touched the knife, the ridges were rather long and linear,

13 long and stacked upon themselves.

14 But ordinarily, almost always, you're going to find

15 that type of ridge structure in the palm of the hand. And

16 ordinarily, it's going to be in this pad over here that we

17 call the hypothenar, or the outside of the hand.

18 So, in my opinion, the touch that was on that knife

19 was probably -- was more probably from a palm, as opposed to

20 being touched by a finger.

21 Q And again, you're referring to the handle -- the

22 area --

23 A Yes.

24 Q -- on the handle?

25 A Yes, ma'am.

1 Q And then, you indicated that you were also asked to
2 examine -- I'm sorry, some photographs?
3 A Yes, I was.
4 Q And what were those photographs of?
5 A They were photographs of a bed sheet. And there was
6 a mark on the bed sheet that Chelsea Collins took four
7 photographs of. It was on the northeast corner of the bottom
8 flat sheet of the bed in the northwest bedroom.
9 MS. MERCER: Permission to publish, Your Honor?
10 THE COURT: Yes.
11 MS. MERCER: Okay. And for the record, I'm
12 publishing State's Exhibit 47.
13 BY MS. MERCER:
14 Q Does this appear to be the photograph that you were
15 asked to examine?
16 A Yes. Yes, it is.
17 Q And specifically, which area were you directed to?
18 A Well, I would have been directed to this area
19 obviously, right here where this scale is. And this obviously
20 was photograph B that she in her markings.
21 So, this was the area that I was asked to analyze to
22 determine whether it could be a friction ridge touch. Because
23 sometimes, when cloth is touched, you can't actually see a
24 print. If it's touched with a blood transfer, or some kind of
25 grease, or some other transfer, the ridge detail actually will

1 show up on a surface like this. So, I did an examination of
2 -- a visual examination of the photographs that she made.
3 And my conclusion was that it just was not of
4 comparison quality. It probably is a palm touch, based on
5 some of these creases that we see right here. That is one
6 possibility. Or it also could be that the sheet was kind of
7 crumpled right there.
8 So, there really wasn't much I could really say
9 about that. So, in my opinion, it was just not of any kind of
10 comparison value at all.
11 Q Okay. So, again, you weren't able to reach any
12 conclusions?
13 A No.
14 Q And State's Exhibit 48. Is this just a closer up
15 photograph?
16 A Yes.
17 Q Of that area that you were referring to?
18 A Yes. And there are some -- you know, you can see
19 some linear marks through here, which -- and that -- kind of
20 have the appearance of that they fall in line with what could
21 be a palm touch.
22 I don't believe that they're the background of the
23 cloth. As you can see, the crosshatch going this way, going
24 back and forth. And these are going across that. So, what's
25 showing up there is not the background of the sheet itself.

1 There was definitely a touch and a transfer onto that, but it
2 really is not of any kind of comparison quality.
3 MS. MERCER: Court's indulgence. Pass the witness,
4 Your Honor.
5 THE COURT: All right. Do you have any cross, Mr.
6 --
7 MR. O'KEEFE: Yes, Your Honor. Very brief, Your
8 Honor.
9 CROSS-EXAMINATION
10 BY MR. O'KEEFE:
11 Q Hello, Mr. Guenther.
12 A Hello.
13 Q How are you, sir?
14 A I'm doing fine. How are you today?
15 Q I'm surviving. Thank you, sir, for asking. I'm
16 going to be real quick, again, like I've been saying to
17 everyone. You know. This is about just what you have, let's
18 let them see it, you know. Really, that's the best policy.
19 I just want to be clear, you did of course testify
20 of course. You examined the knife thoroughly you said. You
21 threw it under the kitchen sink and all that, I heard you say,
22 correct?
23 A Yes.
24 Q Okay.
25 A We did all the processing techniques that were

1 available to us.
2 Q Okay. And was there every clearly any fingerprints
3 of mine on the knife?
4 A No.
5 Q Was there any fingerprints at all?
6 A Just that one touch that was ridge detail on the
7 handle. But it wasn't -- I couldn't compare it with anyone.
8 It was -- so, I can't say who it belonged to.
9 Q And you know, I can see where the State's trying to
10 go here, but I'm not quite clear if they're assuming that I
11 had the knife or whatever. But you're saying there was one
12 little speck of blood of mine that was determined on the end
13 of the handle; if I'm not --
14 A No. No, I'm not a DNA analyst. I --
15 Q Okay.
16 A I don't testify to any --
17 Q I wanted to clarify that.
18 A -- kind of blood work like that.
19 Q So, through all your testing though, you did do
20 this. I do believe it was testified to previously that -- and
21 again, I want to make sure -- clear for these jurors, that --
22 was that knife wiped off in any way?
23 A I did not see any indication of any wipe marks at
24 all. The only wipe marks that were on there were up on the
25 blade area, where I believe in my presence, the DNA analyst

1 and I had examined the knife, prior to her analysis. And I
2 left the knife in her custody at that time. So, she would
3 have made some little swabs on the blade. And I told her to
4 go ahead and do that, because I couldn't see any ridge detail
5 on the blade at all.
6 So, when -- the only wipe mark that would have been
7 there is in the super-gluing process, sometimes, those kind of
8 marks will show up. But as far as a wipe from like a -- like
9 you would expect, with a cloth or something, no, I did not see
10 any wipe marks on the knife at all.
11 Q And you would think -- I'm just saying your thinking
12 as an expert, and you're looking for fingerprints, you clearly
13 would make the absolute assumption that that knife was not
14 wiped off? Someone -- alleged crime -- committed it (sic);
15 that knife was not wiped off, right?
16 A In my opinion, I saw no evidence that -- I saw no
17 evidence that the knife had been wiped in any way.
18 Q And again, you are -- 35 years you worked for the
19 Las Vegas Metropolitan Police Force. And clearly, you know
20 your job better than I do, or anyone here. And you're saying
21 again, for the last time, absolutely, that knife was not wiped
22 off?
23 A I saw no indication that it was.
24 MR. O'KEEFE: No further questions. Thank you.
25 THE COURT: Anything else?

1 MS. MERCER: No, Your Honor.
2 THE COURT: Thank you very much. You're excused.
3 THE WITNESS: Thank you, Your Honor.
4 THE COURT: Next witness, please?
5 MS. MERCER: I'm sorry?
6 THE COURT: Next witness?
7 MS. MERCER: Officer -- or Detective Jeremiah
8 Ballejos, Your Honor.
9 THE MARSHAL: Please remain standing, and raise your
10 right hand.
11 JEREMIAH BALLEJOS, STATE'S WITNESS, SWORN
12 THE MARSHAL: Officer, if you would have a seat,
13 sir, please. If you would, please state and spell your name
14 for the record.
15 THE WITNESS: Jeremiah Ballejos. J-e-r-e-m-i-a-h.
16 Last is, B-a-l-l-e-j-o-s.
17 MS. MERCER: May I proceed, Your Honor?
18 THE COURT: Yes.
19 DIRECT EXAMINATION
20 BY MS. MERCER:
21 Q Sir, where are you currently employed?
22 A The Las Vegas Metropolitan Police Department
23 robbery/homicide bureau.
24 Q And are you currently a detective with Metro?
25 A That's correct.

1 Q Back in November of 2008, were you -- in what
2 capacity were you employed with Metro?
3 A I was assigned to the problem solving unit of Bolden
4 area command's patrol division.
5 Q Okay. And were you in fact working on November 5th
6 of 2008?
7 A Yes, I was.
8 Q On that night, were you working with any other
9 officers?
10 A Officer Sean Taylor and Sergeant Dan Newberry.
11 Q Were the three of you in the same vehicle that
12 night?
13 A Yes, we were.
14 Q And what specifically were you doing on November 5th
15 of 2008?
16 A We were finishing up some follow up investigation
17 when -- and heading back to the station, when a 9-11 call came
18 out.
19 Q Okay. And that night, were you all in uniform, or
20 were you in plain clothes?
21 A Plain clothes.
22 Q Do you were anything that signifies that you're an
23 officer when you're in plain clothes?
24 A Yes. We would wear this, along with a badge.
25 Q Okay. And what is "this," for the record?

1 A It's the Metro ID, identification card.
2 Q And your badge?
3 A Yes.
4 Q And where do you wear your badge when you're in
5 plain clothes?
6 A It would -- if we were responding to a call, it
7 would be displayed just like this, so it's center on the
8 chest.
9 Q So, it's around the neck?
10 A That's correct.
11 Q And you indicated that you were heading back to the
12 office when you -- when a call came out from dispatch that you
13 all responded to?
14 A That's -- yes, ma'am.
15 Q Do you recall what that call -- or what the details
16 of that call were?
17 A There was details of an open door. There was a body
18 being described that was in a bedroom somewhere in the
19 apartment, upstairs -- in an upstairs apartment; an open door,
20 and blood in the apartment.
21 Q And when you heard that call come out over the
22 radio, did you -- did the three of you decide to respond?
23 A Yes, we did.
24 Q And that -- you would have responded to 5001 El
25 Parque, correct?

1 A Yes, that's correct.
2 Q When you arrived at that location, can you tell me
3 what you saw?
4 A There were patrol -- or patrol vehicles that had
5 already arrived, along with medical staff. And then, there
6 were neighbors that were standing outside their apartments,
7 directing us to I believe it was apartment 35.
8 Q Okay. You indicated that medical was already on
9 scene?
10 A That's correct.
11 Q Where were they?
12 A Waiting in the courtyard.
13 Q Okay. So, they were not up in the apartment?
14 A No, they weren't.
15 Q And why not?
16 A It's standard for them to wait for us to make a
17 scene, or a -- safe, if there's any indication of violence,
18 it's -- or an ongoing dispute. They'll wait until we come in
19 and make the scene safe, and then, so they can come in and
20 just focus on medical care.
21 Q Okay. So, when you arrived at this 5001 El Parque,
22 would you say that the scene was a dynamic scene?
23 A It was dynamic.
24 Q And what does the term dynamic mean for law
25 enforcement officers?

1 A Whatever dispute that's occurring has not been
2 resolved, or brought under control.
3 Q Okay. So, medical will wait to enter a residence
4 until the scene is no long dynamic?
5 A That's correct.
6 Q Until it's static?
7 A Yes.
8 Q What -- how did you all proceed once you arrived at
9 the scene?
10 A Once I arrived upstairs, I came into contact with
11 Officer Todd Conn. And Officer Conn was communicating with a
12 male individual in a back bedroom.
13 Q Okay. Where was Officer Conn situated inside that
14 residence?
15 A Would have been the living room area.
16 Q Okay.
17 MS. MERCER: Permission to publish, Your Honor?
18 THE COURT: Yes.
19 MS. MERCER: And for the record, I'm publishing
20 State's Exhibit 2.
21 BY MS. MERCER:
22 Q Does this appear to be a picture of the outside of
23 the apartment that you responded to?
24 A It is, yes.
25 Q And do you see the actual apartment that you went

1 into on that night in this photograph?
2 A Yes.
3 Q Could you place an X over the door for me? Okay.
4 So, did you and the other two officers that you were with that
5 night all three go in at the same time?
6 A Into the living room area, yes.
7 Q Okay. And now I'm publishing State's Exhibit number
8 1. Can you mark on this exhibit where you observed Officer
9 Conn when you entered the apartment?
10 A That would have been about this location here,
11 trying to look as deep into the bedroom as possible.
12 Q And which bedroom was he trying to look into?
13 A It would be the northwest bedroom here.
14 Q Could you place an X over it for me?
15 A Sure.
16 Q Okay. So, he was standing at the very end of the
17 wall?
18 A Yes, here.
19 Q You indicated that you heard him giving commands
20 into the room.
21 A That's --
22 Q Could you hear anybody in the room responding to his
23 commands?
24 A Yes.
25 Q Was it a male voice, or a female voice?

1 A It was a male voice.

2 Q And what kinds of commands was Officer Conn giving

3 to that male?

4 A Well, Officer Conn is a CIT, or a crisis

5 intervention team officer. So, he was -- when I say commands,

6 he was -- more like they were instructions. He was trying to

7 get the male individual to come out of the -- or out of the

8 bedroom.

9 So, they were more conversational than -- it wasn't

10 like he was shouting, or -- he was trying to, you know, just

11 communicate to him, hey, we want medical to come in, and so we

12 need you to come out.

13 Q Okay. So, he was trying to diffuse the situation?

14 A Exactly.

15 Q He was being nonaggressive?

16 A Right.

17 Q And did you hear him actually explain to the person

18 in the room, I can't -- medical can't get in there to help you

19 until you come out?

20 A Yes, I did.

21 Q And how did the person that was in the room respond?

22 A "Fuck you; you come in here."

23 Q And was the person's voice -- how would you describe

24 the person's voice?

25 A It was confrontational; defiant.

1 Q Okay. And Officer, before I get much further -- and
2 this is State's Exhibit 4, for the record. Is -- can you see
3 the vantage point that Officer Conn had in this photograph?
4 A I guess from -- keep in mind, when we went into --
5 the only light coming in the whole apartment was from this
6 back bedroom. So, I'm guessing -- is this the southwest
7 bedroom here?
8 Q That's what I'm asking you. Is that the bedroom?
9 A I can't really tell. What it -- and I would guess,
10 just from looking at the apartment, he was standing here,
11 looking in the northwest direction, towards the northwest
12 bedroom.
13 Q Okay. How long did Officer Conn attempt to convince
14 this -- the individual in the back bedroom to come out?
15 A It was maybe three or four minutes.
16 Q And at -- did the person in the back bedroom ever
17 cooperate?
18 A No.
19 Q What happened next?
20 A You could see -- my sergeant also ended up going up
21 to the opposite side of that entry -- or that little area that
22 had the bedroom in here.
23 Q Can you place an X there for me?
24 A Yes. Sergeant Newberry kind of posted up on this
25 wall right here to take a -- what was called a quick peek.

1 Just a -- you know, essentially, a quick peek around the
2 corner to see if they can -- what they can -- or what he could
3 see from that vantage point.
4 And even standing where Officer Conn was, looking
5 deep into the bedroom, the sheets were covered in blood.
6 Sergeant Newberry did inform us there was a knife on the bed,
7 and that you could see the feet of two individuals at the foot
8 of the bed, positioned with the head towards the northwest,
9 and feet towards the east side of the bedroom.
10 Q Okay. And so, did he indicate at that point that --
11 A Oh, excuse me. I guess --
12 Q -- it was time to go in?
13 A I did. Can I get -- yes. Because of, you know, it
14 was a substantial amount of blood, we knew that somebody was
15 injured inside there. And because it was -- we had a defiant
16 individual in there, and somebody was injured, we made a
17 decision to enter the bedroom.
18 Q Okay. And at this point, you all didn't know
19 whether the individual lying at the end of the bed was dead or
20 alive, correct?
21 A That's correct.
22 Q And you felt it was important to get her medical
23 treatment as quickly as possible?
24 A Yes.
25 Q What kind of a plan did you all formulate with

1 regards to entering that room?

2 A We set up what's -- what we call -- is a stack. And

3 it's basically anywhere from a three to four-man element,

4 stacked up, going in with your lead man having a lethal

5 option; some type of a firearm in case the individual is

6 armed.

7 The second would have a nonlethal option, which

8 would be something like OC spray, or an electronic controlled

9 device, which -- commonly referred to as a taser. And an

10 arrest team, which would follow up behind that, basically

11 hands-free. Somebody -- a couple -- or officers to get that

12 person into custody.

13 Q Okay. And who all entered the bedroom that night?

14 A I know that Officer Conn was in front of me, with

15 his gun drawn. I was second in the element with the taser.

16 Q And that was the nonlethal --

17 A That's correct.

18 Q -- or the low lethal option?

19 A That's correct.

20 Q And --

21 A And Officer Sean Taylor was behind me.

22 Q Okay. So, you know for sure, those three people?

23 A Yes, I do.

24 Q And I should back up for a second. Were you all

25 concerned for your safety when you entered that room, based on

1 the behavior of the individual that was --
2 A Yes, we were.
3 Q -- shouting back?
4 A Yes.
5 Q And why was that?
6 A Just because of the standoff in the room, we didn't
7 know whether or not he was armed. We knew that -- we were
8 also getting some information that there was possibly exposure
9 -- or the risk of exposure to hepatitis C. So, we didn't --
10 we didn't want to go in there, and just really -- we wanted to
11 go in there and get the situation under control, and get
12 medical in there.
13 Q Okay. And in your experience with Metro, was this a
14 somewhat unusual circumstance?
15 A Yes, it was.
16 Q I mean, is it customary that when you're trying to
17 assist people, someone's not trying to stop you from assisting
18 them?
19 A For a medical need, yes, that was very unordinary.
20 Q Okay. So, I'm sorry; who was in front of you?
21 A Officer Conn.
22 Q And then, Taylor was behind you?
23 A That's correct.
24 Q And did you all enter the room?
25 A Yes, we did.

1 Q How did you enter? Did you form a line?
2 A Yes.
3 Q And when you got into the room, how far into the
4 room did you proceed?
5 A We went -- I recall going here, where this -- the
6 number 4 kind of is marked. I'm just using that as a -- but
7 probably just towards the foot of the bed, so we were in close
8 proximity with Victoria and -- which we later found out was
9 Ms. Victoria Whitmarsh and Mr. O'Keefe.
10 Q Okay. And do you see Mr. O'Keefe in the courtroom
11 today?
12 A Yes, I do.
13 Q Could you please point to him, and identify an
14 article of clothing that he's wearing for me today?
15 A The gentleman with the blue shirt and tie.
16 MS. MERCER: Your Honor, may the record reflect that
17 he's identified the defendant?
18 THE COURT: Record will so reflect.
19 BY MS. MERCER:
20 Q Where was the defendant in relation to Victoria
21 Whitmarsh's body when you entered the room?
22 A Mr. O'Keefe was lying next to her --
23 Q Can you draw a line on the diagram --
24 A Sure.
25 Q -- for me, on the side that he was lying on?

1 A His head was up top, along with Victoria's, and feet
2 were at the bottom. I believe it was his right elbow and leg
3 were in contact with the carpet, left leg was kind of draped
4 over her body, and his other hand was free.
5 Q Okay. And what was he doing with that hand?
6 A Was trying to tug down a shirt over her, to cover
7 her torso.
8 Q When you entered the room and you saw the body of
9 Victoria Whitmarsh, was she clothed -- fully clothed?
10 A No, she wasn't. It was a t-shirt, was the only
11 article of clothing I recall.
12 Q Okay.
13 MS. MERCER: For the record, I'm publishing State's
14 Exhibit 21.
15 BY MS. MERCER:
16 Q Is this the view that you had when you entered the
17 bedroom that night?
18 A Yes, it is.
19 Q And with regards to State's Exhibit 23, is this how
20 you observed Victoria Whitmarsh when you entered the room that
21 night?
22 A Yes, it is.
23 Q When you entered the room, and you got to the end of
24 the bed, how did you all proceed at that point?
25 A Mr. O'Keefe was -- he had his left hand free. He