

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK BANKA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE CAROLYN
ELLSWORTH, DISTRICT JUDGE,

Respondent,

and

THE STATE OF NEVADA,

Real Party in Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 79014

D.C. NO: C-18-333254-1

OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e)

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his chief deputy, Jonathan VanBoskerck, and submits this pleading under NRAP 27(e). This opposition is based on the following memorandum and all papers and pleadings on file herein.

Dated this 21st day of June, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

This Court should deny Petitioner's Emergency Motion Under NRAP 27(e) because he will not be harmed if a stay is denied, the State could suffer injury if a stay is granted, and Petitioner is unlikely to prevail on the merits.

In determining whether to grant a stay of a criminal matter, this Court considers "(1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant will suffer irreparable or serious injury if the stay is denied, (3) whether the respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits in the appeal." State v. Nobles-Nieves, 129 Nev. __, __, 306 P.3d 399, 402-03 (2013) (citing, NRAP Rule 8(c)).¹

The object of any possible appeal will not be defeated, and Petitioner will not suffer irreparable harm because he will be able to allege deprivation of counsel of his choice on appeal, *if* he is convicted. Such complaints are appropriate for direct appeal. Rimer v. State, 131 Nev. __, __, 351 P.3d 697, 711-12 (2015). As such, the first two Nobles-Nieves factors do not warrant a stay.

The third factor also does not support a stay since the State could be prejudiced if a stay is granted. Importantly, **both victims are 87 years old.**

¹ "[A] party must ordinarily move first in the district court for ... a stay[.]" Nevada Rules of Appellate Procedure (NRAP) Rule 8(a)(1)(a). The State concedes that Petitioner requested and was denied a stay below.

(Exhibit A, Reporter's Transcript of June 28, 2018, Preliminary Hearing, p. 18, 28, filed February 12, 2019). Additionally, any delay makes it that much harder to carry the State's heavy burden of proof at trial. Witnesses' recollections fade with time. Witnesses can become unavailable. Evidence can be lost or inadvertently destroyed. Imposing these risks upon the State is patently unfair since Petitioner can pursue his issue on direct appeal, *if* he is convicted.

The fourth Nobles-Nieves factor also weighs against granting a stay. Petitioner is unlikely to prevail in securing extraordinary relief from this Court because his eve of trial attempt to switch attorneys is a thinly veiled attempt to unduly delay trial. Further, his specific claim is insufficient to support relief. Petitioner alleges that he and current counsel disagree over "how to defend against the allegations of proximate cause." (Affidavit of Thomas Foley, attached to Petition for Writ of Mandamus, filed June 20, 2019). Such a strategic conflict should have come to light much sooner and cannot support extraordinary relief at this late date:

Rimer claims that the district court interfered with his constitutional right to counsel of his choice by denying his motion for a continuance. Although the Sixth Amendment right to counsel includes the right to retain counsel of one's own choosing, this right is not absolute. United States v. Gonzales-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). For example, "the denial of a continuance may infringe upon the defendant's right to counsel of choice, '[but] only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.' " United States v. Carrera, 259 F.3d 818, 825 (7th Cir.2001)

(citation omitted) (quoting Morris v. Slappy, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983)). Here, Rimer informed the district court on the eve of trial that he was substituting his court-appointed counsel with private counsel. He explained that *private counsel had a different strategy* and asked for a 90–day continuance. The district court denied the continuance because the case was old and had been pending since 2008, a firm trial date that fit everyone's schedules was set on November 4, 2010, and Rimer had known since November that his case would go to trial on February 14, 2011. We conclude that the district court did not abuse its discretion in this regard. See United States v. Garrett, 179 F.3d 1143, 1144–45 (9th Cir.1999) (reviewing a district court's decision to deny a continuance that implicated defendant's right to counsel of choice for abuse of discretion).

Rimer, 131 Nev. at ___, 351 P.3d at 711-12 (emphasis added).

Current counsel has been with Petitioner since at least the June 28, 2018, preliminary hearing. (Exhibit A, Reporter's Transcript of June 28, 2018, Preliminary Hearing, p. 1, filed February 12, 2019). Thus, any conflict should have come to light earlier. Petitioner's failure to explain why this did not happen should preclude a grant of extraordinary relief since a silent record is presumed to support the decision below. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996); M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987); Raishbrook v. Bayley, 90 Nev. 415, 416, 528 P.2d 1331 (1974); Kockos v. Bank of Nevada, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

Further, Petitioner's contention that Judge Ellsworth "refused to allow the substitution" of attorneys Michael D. Pariente and John Glenn Watkins misrepresents the record. Judge Ellsworth did not deny substitution. Instead, she

specifically indicated that Petitioner had the right to counsel of his choice and that Pariente and Watkins could participate at trial, but that trial was going forward on June 24, 2019.² Petitioner's substantial misstatement of fact should preclude extraordinary relief. See, Truck Ins. Exch. v. Swanson, 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008) (doctrine of clean hands precludes equitable relief where a litigant has "engaged in improper conduct in the matter in which that party is seeking relief"). Regardless, claims belied by the record do not warrant relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny Petitioner's Emergency Motion Under NRAP 27(e).

Dated this 21st day of June, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

² Unfortunately, neither a transcript nor minutes of the hearing is available. However, this Court should direct the lower court to transmit a copy of the JAVS pursuant to NRAP 10(b)(2).

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 21, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

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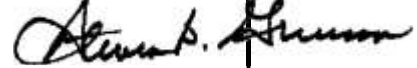
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

BY /s/ J. Garcia
Employee, District Attorney's Office

JEV//jg

EXHIBIT A

EXHIBIT A



TRAN

CASE NO. C333254

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK PAUL BANKA,

Defendant.

CASE NO. 16FH2036X

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE E. LEE THOMSON, PRO TEM

JUSTICE OF THE PEACE

THURSDAY, JUNE 28, 2018

APPEARANCES:

For the State:

MARIA LAVELL

Chief Deputy District Attorney

For the Defendant:

THOMAS BOLEY, ESQ.

Reported by: Lisa Brenske, CCR #186

12:00AM	1	<u>W</u> <u>I</u> <u>T</u> <u>N</u> <u>E</u> <u>S</u> <u>S</u> <u>E</u> <u>S</u>	
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	3	HAMID HAIDER	
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12:00AM 1 HENDERSON, NEVADA, JUNE 28, 2018

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3 * * * * *

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12:00PM 5 THE COURT: Calling 16FH2036X, Jack Paul

6 Banka. This is the time set for preliminary hearing.

7 State states they're ready to proceed.

8 MS. LAVELL: Yes, your Honor, and I'm

9 assuming the defense would invoke the exclusionary

12:00PM 10 rule. I've already asked everyone to step out but the

11 first witness and that is Dr. Hamid Haider.

12 THE COURT: Okay.

13 MS. LAVELL: May I remain seated while I

14 question the doctor?

12:00PM 15 THE COURT: You may.

16 THE CLERK: Raise your right hand.

17 Do you solemnly swear that the testimony

18 that you are about to give will be the truth, the whole

19 truth and nothing but the truth, so help you God?

12:00PM 20 THE WITNESS: Yes.

21 THE CLERK: Please be seated.

22 Please state your first and last name and

23 spell each for the record.

24 THE WITNESS: First name is Hamid,

12:00PM 25 H-A-M-I-D. Last name is Haider, H-A-I-D-E-R. I am a

12:00PM 1 physician.

2 MS. LAVELL: May I proceed, your Honor?

3 THE COURT: You may.

4 MS. LAVELL: For the record, your Honor,
12:01PM 5 the parties have stipulated to the doctor's expertise
6 but I will be asking just a couple of questions for the
7 record.

8 MR. BOLEY: We are going to stipulate that
9 he's an internist and qualified as such.

12:01PM 10 MS. LAVELL: That's correct.

11 THE COURT: Okay. That's the full extent
12 of the stipulation?

13 MS. LAVELL: I will lay a foundation.

14 THE COURT: Right.

12:01PM 15
16 **HAMID HAIDER,**
17 having been first duly sworn, did testify as follows:

18 DIRECT EXAMINATION

19 BY MS. LAVELL:

12:01PM 20 Q. Doctor, where are you currently employed?

21 A. I'm employed at VA right now, but I am
22 also going to hospital as an independent hospitalist.

23 Q. Is one of the hospitals that you have
24 privileges at St. Rose Dominican Hospital on the Siena
12:01PM 25 campus?

12:01PM 1 A. Yes.

2 Q. And as an internist do you have the
3 responsibility of kind of overseeing various other
4 doctors that have specialties?

12:01PM 5 A. Right. Not overseeing, but I depend on
6 their expertise.

7 Q. Ultimately at the end of the day who makes
8 the decision to determine a patient is ready for
9 discharge?

12:02PM 10 A. For ready for discharge it will be my
11 decision, but based on the recommendation of other
12 specialties, if there's another specialty involved.

13 Q. As part of your job, and that doesn't mean
14 in every case, but do you have occasion to review

12:02PM 15 medical reports that were generated by other doctors in
16 regards to patients?

17 A. Yes.

18 Q. And in fact is that part of your
19 responsibility as an internist to at least review

12:02PM 20 medical reports that other doctors have generated?

21 A. Of course.

22 Q. Did I ask you to review the medical
23 reports associated with Maxine Lubner who was admitted
24 to St. Rose Dominion Hospital Siena campus on

12:03PM 25 September 1st, 2016?

12:03PM 1 A. Yes. I reviewed it today.

2 Q. And in regards to this particular
3 individual Maxine Luber did you have any direct
4 responsibility in her treatment or just -- I don't want
12:03PM 5 to say supervising or overseeing, but just determining
6 whether all necessary treatment was done?

7 A. Yes. Because I'm the -- if the case is
8 assigned to me, I'm the attending physician for that
9 particular case.

12:03PM 10 Q. And now this is quite sometime ago and I'm
11 assuming you've seen numerous patients since that; is
12 that fair to say?

13 A. I see 25, 30 patients a day so I don't
14 remember.

12:03PM 15 Q. After reviewing the medical records do you
16 recall what brought her into the hospital?

17 A. Based on the medical record, but, yeah, I
18 do not remember anything.

19 Q. Based on the medical records after your
12:03PM 20 review what brought her to the hospital?

21 A. Correct.

22 Q. Do you know what brought her to the
23 hospital?

24 A. Yeah. According to the record there was a
12:04PM 25 multi vehicle accident.

12:04PM 1 Q. And as a result of the motor vehicle
2 accident was it determined that she suffered various
3 injuries?

4 A. Based on the medical records it says
12:04PM 5 patient had a multi vehicle accident and certain injury
6 happened. But I can't say whether it was related or
7 not. I can't say that for sure.

8 Q. So you can't say whether the injuries were
9 related to the motor vehicle accident?

12:04PM 10 A. Most likely it is, but not a hundred
11 percent for sure.

12 Q. You didn't actually see her injured?

13 A. No.

14 Q. Do you recall the various injuries that
12:04PM 15 she sustained?

16 A. Based on the medical record, yes.

17 Q. And everything I'm asking you based on
18 your prior testimony is just based on your review of
19 the medical records, Doctor, and thank you for being so
12:04PM 20 clear. But we've made that record. What were the
21 injuries that were suffered by Miss Luber?

22 A. Sternum and rib fractures.

23 Q. Where is the sternum on the body?

24 A. The sternum is in the ribcage right here.

12:05PM 25 Q. And you're pointing to the middle of your

12:05PM 1 chest?

2 A. Correct.

3 Q. And do you recall how many fractures the
4 sternum suffered?

12:05PM 5 MR. BOLEY: Judge, I am going to object to
6 this line of questioning in general because I think the
7 doctor has testified that actually the diagnosis and
8 the work and the direct contact with the patient was
9 done by another doctor. So this review of medical
12:05PM 10 records wouldn't meet the Fry standard.

11 MS. LAVELL: Judge, doctors every day in
12 this state and most other states, I assume, can testify
13 in regards to medical records which are deemed to be
14 business records created by another doctor. I don't

12:05PM 15 know of a case where the State brought in very specific
16 doctors that dealt with trauma patients because you
17 have the ER doctor, you have surgeons. You have
18 various other doctors not necessarily connected to this
19 case but connected to cases in general. And the State

12:06PM 20 calls in one doctor that is able to testify to the
21 injuries and treatment based on the medical records.
22 So that would be the State's response. I don't know
23 that it is a legitimate objection. Well, it's a
24 legitimate objection, but I don't believe it's a

12:06PM 25 correct objection.

12:06PM 1 MR. BOLEY: If I may respond.

2 THE COURT: You may.

3 MR. BOLEY: I think what the State is
4 getting at here is there's trying to prove that there
12:06PM 5 was substantial bodily harm of course and this doctor
6 has been very clear that he testified what he remembers
7 from the medical records and I believe to rise to that
8 level beyond a reasonable doubt, which we don't have to
9 do today, but we need to get towards discoverable
12:06PM 10 evidence in a criminal case, we would need the actual
11 trauma surgeon, the diagnoser or somebody that had
12 personal contact with this patient.

13 MS. LAVELL: I guess my response to that
14 argument would be what would the State's position be if
12:06PM 15 the individual that actually treated -- let's just say
16 the emergency room doctor -- doesn't remember this
17 individual but for reviewing the medical reports. And
18 I think its reasonable that in most cases doctors do
19 not remember a specific individual. If I said hey,
12:07PM 20 Doctor, you treated Maxine Luber back in 2012, tell me
21 how she presented, they are going to have to review the
22 medical records. That's why there are medical records.
23 The same thing with the trauma surgeon. It's unlikely
24 that if I had the trauma surgeon involved here, the
12:07PM 25 trauma surgeon would be able to remember what happened

12:07PM 1 without reviewing the records.

2 So there's absolutely nothing in the
3 statute or case law that the State is aware of that
4 says that a doctor cannot testify based on a review of
12:07PM 5 the records. And the doctor did testify that in this
6 particular case he was the primary physician which
7 means he reviewed all of the documents in this case.

8 So would counsel have me bring in the emergency room
9 doctor and the trauma doctor and if she had surgery the
12:08PM 10 surgeon? We're not required to do that. This doctor
11 is in a position to testify he was connected with this
12 case and I think that his testimony as to her injuries
13 after reviewing the report is completely allowable.

14 MR. BOLEY: Judge, my objection is
12:08PM 15 essentially a hearsay objection. If you look at a
16 medical record that you created, of course you can
17 refresh your recollection. But if it's not a medical
18 record that you created, that's hearsay. Pure and
19 simple. This is the statement of another person
12:08PM 20 intended to prove the matter asserted. Thank you.

21 THE COURT: I believe there is the issue
22 here as to a person giving some expert testimony plus
23 they're testifying off of a business record that they
24 are associated with. So at the moment the objection is
12:08PM 25 overruled. Proceed.

12:08PM 1 MS. LAVELL: Thank you.

2 BY MS. LAVELL:

3 Q. Doctor, I believe my question, and I'm

4 very long winded so I may have forgotten it, but I

12:08PM 5 believe my question was how many injuries or fractures

6 did she have to the sternum?

7 A. So first I have to explain what the

8 sternum is. The sternum is kind of like in the middle

9 of the ribcage. So both sides of it is -- the ribs are

12:09PM 10 attached to the sternum and there's like at the top

11 portion of the sternum is called the manubrium and

12 there is -- if I remember correctly based on the

13 records there's a fracture on the manubrium under the

14 sternum and there was like two fracture or three

12:09PM 15 fracture on the right side and there was seven or eight

16 on the left side. Something like that.

17 Q. Now, are we moving from the sternum to the

18 ribs when you're talking about the seven or eight?

19 A. Yes.

12:09PM 20 Q. So in addition to the fractures on the

21 sternum there were multiple fractures to this

22 individual's ribcage?

23 A. On the rib right and left.

24 Q. Was there any to your knowledge medical

12:10PM 25 intervention associated with the fractures?

12:10PM 1 A. No. Because in that kind of fracture you
2 cannot do anything, you cannot -- you don't do
3 anything. It's just leave it like that. But it's
4 going to cause a lot of pain when you breathe in and
12:10PM 5 all these things because you cannot take deep breath
6 and as soon as you take a deep breath it is going to
7 cause more pain. So they just keep it to like heal by
8 itself with pain medication.

9 Q. And was she prescribed pain medication?

12:10PM 10 A. Yes.

11 Q. And what pain medication?

12 A. I'm not sure.

13 Q. Do you want to look at the medical
14 records? Would that help you?

12:10PM 15 A. Yeah.

16 MS. LAVELL: May I approach?

17 THE COURT: You may.

18 THE WITNESS: Yes.

19 BY MS. LAVELL:

12:11PM 20 Q. So in looking at the medical records did
21 that refresh your recollection as to whether or not she
22 was prescribed any pain medication upon release?

23 A. Upon release I know medication was given
24 when she was in the hospital.

12:11PM 25 Q. Well, I am going to tell you, you don't

12:12PM 1 need to find that specifically. Would it make sense
2 that someone -- did you find it?

3 A. No. This is the one that was in the
4 hospital. I'm pretty sure we -- usually I send patient
12:12PM 5 with a pain medication.

6 Q. But she certainly was given pain
7 medication while in the hospital?

8 A. Yes.

9 Q. How long was she in the hospital?

12:12PM 10 MR. BOLEY: Objection. Asked and
11 answered. He said he doesn't remember whether she was
12 given pain medication. He can't remember.

13 MS. LAVELL: In the hospital. I had
14 indicated in the hospital.

12:12PM 15 THE COURT: I think we're talking two
16 different things and he did say that there's evidence
17 in the record of medication and his usual practice of
18 prescribing medication with the person who is being
19 discharged, if I misunderstood that. I don't believe
12:12PM 20 he testified differently than that.

21 MR. BOLEY: Then I would just ask to
22 clarify.

23 MS. LAVELL: I will ask it again.

24 BY MS. LAVELL:

12:12PM 25 Q. So, Doctor, first of all how long was she

12:12PM 1 in the hospital?

2 A. From December 1st to December 3rd,
3 2016.

4 Q. Is it your testimony that while she was in
12:12PM 5 the hospital she was given pain medication?

6 A. Yes.

7 Q. And if given time would you be able to
8 determine whether or not she received medication to
9 take home? In other words, if we waited while you
12:13PM 10 looked through all the medical records? As you sit
11 here today can you say certainly she was or certainly
12 she wasn't or you just can't say one way or another?

13 A. If I say it with this kind of a patient, I
14 usually send it with pain medication.

12:13PM 15 Q. Now, Doctor, based on the injuries that
16 we've discussed in this particular hearing, the sternum
17 fractures as well as the multiple rib fractures, would
18 that be consistent with a traumatic injury as a result
19 of a motor vehicle accident?

12:13PM 20 A. Yes.

21 MS. LAVELL: I'll pass the witness.

22 THE COURT: Cross.

23 MR. BOLEY: Briefly.

24

25

CROSS-EXAMINATION

BY MR. BOLEY:

Q. Doctor, did you ever have personal contact with either Maxine Luber or her husband in this matter?

A. I was the attending physician so I'm pretty sure yes, I did. Because without that I wouldn't write anything.

Q. You don't remember specifically, though?

A. No, I don't remember specifically. I don't remember. If I see them -- even if I see her here I wouldn't know which one the patient was. Because that was two years ago and I see so many patients.

Q. And you testified a little bit about the treatment of a fractured sternum and ribs. You don't have to set that, do you?

A. I don't understand.

Q. So like a broken arm you would have to set?

A. Yes. That's why they usually -- if something happened like that, that's why we depend on the expertise of a consultant which in this case was a trauma surgeon and cardiovascular surgeon. Trauma surgeon for the rib fracture and the sternum fracture. For the vascular surgeon is consulted and pretty sure

12:14PM 1 regarding if there is any issue with cardiovascular
2 system.

3 MR. BOLEY: No further questions.

4 MS. LAVELL: No redirect.

12:15PM 5 THE COURT: Doctor, you're excused. Thank
6 you for your testimony.

7 Is there any further need for this witness
8 by either side?

9 MS. LAVELL: Not the State.

12:15PM 10 MR. BOLEY: No.

11 THE COURT: You're excused, sir.

12 MS. LAVELL: The State calls Martin Luber.

13 THE CLERK: Raise your right hand.

14 Do you solemnly swear that the testimony
12:15PM 15 that you are about to give will be the truth, the whole
16 truth and nothing but the truth, so help you God?

17 THE WITNESS: Yes.

18 THE CLERK: Please be seated.

19 Please state your first and last name and
12:15PM 20 spell each for the record.

21 THE WITNESS: Martin Luber.

22 MS. LAVELL: Mr. Luber has a little bit of
23 a hearing problem. Do we have the head phones?

24 THE CLERK: Yes.

12:16PM 25

12:17PM 1 Q. And we'll get to why it's past tense in
2 just a couple minutes. I want to draw your attention
3 to December 1st of 2016. On that date did you own
4 that vehicle?

12:17PM 5 A. Yes.

6 Q. Can you tell the Court what you were doing
7 on the evening of December 1st, 2016.

8 A. My wife and I were going to dinner.

9 Q. And where were you coming from?

12:18PM 10 A. From our home.

11 Q. I do not want you to give your address,
12 but did something happen as you were going towards
13 dinner?

14 A. Yes.

12:18PM 15 Q. And how far away from your home were you
16 when this took place?

17 A. Possibly a mile.

18 Q. Were you driving?

19 A. Yes.

12:18PM 20 Q. Where were you taking your bride to
21 dinner?

22 A. If I recall it might have been Winchell's
23 or Village Pub. I'm not sure.

24 Q. Winchell's the restaurant, not the
12:18PM 25 doughnut place?

12:18PM 1 A. It's the bar and restaurant.

2 Q. And so did something happen while you were

3 traveling from your home to the restaurant?

4 A. Yes.

12:18PM 5 Q. What happened?

6 A. I got hit by a car.

7 Q. So let's talk about that a little bit.

8 What street were you driving on?

9 A. Anthem Parkway.

12:19PM 10 Q. Which direction were you going?

11 A. North.

12 Q. What was the cross street nearest you?

13 A. Atchley Drive.

14 Q. That's A-T-C-H-L-E-Y?

12:19PM 15 A. Yes.

16 Q. And where was your vehicle on Anthem

17 Parkway in relationship to the intersection at Atchley

18 Drive when you were in the vehicle accident?

19 A. I was on Anthem Parkway. I would be

12:19PM 20 starting to cross.

21 Q. So is it fair to say that you were at the

22 intersection in the number one position?

23 A. Yes.

24 Q. At some point before the accident were you

12:19PM 25 stopped at a red light?

12:19PM 1 A. No.

2 Q. So as you drove down Anthem Parkway you

3 had a green?

4 A. Yes.

12:20PM 5 Q. Did something happen when you began to go

6 through the intersection?

7 A. Yes.

8 Q. What happened?

9 A. I got hit by a car.

12:20PM 10 Q. So describe that. What side of your

11 vehicle was that other car on?

12 A. The left-hand side.

13 Q. So you in your position were going to

14 continue straight through the intersection?

12:20PM 15 A. That's correct.

16 Q. Now, the vehicle on the left-hand side,

17 was that also a lane where you continue straight or was

18 it a left-hand turn lane?

19 A. It was a left-hand turn.

12:20PM 20 Q. So when you realized you got struck on the

21 left-hand side, was it from a car that would have been

22 in the left-hand turn lane to your knowledge?

23 A. To my knowledge yes.

24 Q. And did you see how the vehicle came to

12:20PM 25 strike you?

12:20PM 1 A. No, I did not.

2 Q. When did you first realize where the
3 second vehicle was positioned after it struck your
4 vehicle?

12:21PM 5 A. Well, I didn't see the second car.

6 Q. So explain to the Court what happened upon
7 impact.

8 A. As I was passing through the intersection
9 I got struck and the air bags deployed in my car and
12:21PM 10 the one in the passenger side exploded and threw so
11 much smoke and chemicals, whatever is in the air bag,
12 that you couldn't see. And I finally got out of the
13 car because the door was bent and I had a little
14 problem getting out of my car. And my wife was telling
12:21PM 15 me that she was hurt. And I got out and there was no
16 car there. I said where is the other car? It
17 disappeared. And I had to go around the other side
18 because somebody thought the car was on fire because of
19 the smoke in the cabin.

12:22PM 20 Q. But it was not on fire, it was just the
21 air bags?

22 A. Yes, that's correct.

23 Q. Did anybody help you get your wife out of
24 the car?

12:22PM 25 A. Yes, there was I believe a young lady that

12:22PM 1 helped me try to pull the door, it was kind of stuck,
2 and to get her out. I don't know who she was.

3 Q. Were you able to get your wife out of the
4 car?

12:22PM 5 A. Yes, we got her out.

6 Q. And where did you and your wife take
7 yourselves once out of the vehicle?

8 A. We stayed right there.

9 Q. Next to the vehicle?

12:22PM 10 A. Well, we had to get away from the vehicle
11 because we still didn't know whether it was on fire or
12 not.

13 Q. So did you get out of the intersection and
14 go to a sidewalk?

12:22PM 15 A. To the sidewalk.

16 Q. Do you know who called the police?

17 A. Somebody with a telephone, cell phone
18 dialed 911.

19 Q. You and your wife didn't call the police?

12:22PM 20 A. No.

21 Q. Now, did medical respond?

22 A. Yes.

23 Q. Did medical respond before the police
24 responded?

12:23PM 25 A. Well, I think the medical responded

12:23PM 1 because the fire station was right across the street,
2 same intersection, so they could get there before the
3 police.

4 Q. Did you and your wife both get transported
12:23PM 5 by ambulance to St. Rose Dominican Hospital Siena
6 campus?

7 A. Yes.

8 Q. And, sir, were you treated for injuries?

9 A. Well, they checked me over. They took
12:23PM 10 x-rays and everything because I was bruised across the
11 whole front of my chest.

12 Q. And bruised possibly by the air bag?

13 A. Seat belt or the air bag, I'm not sure.

14 Q. You had your seat belt on?

12:23PM 15 A. Yes.

16 Q. Did your wife have her seat belt on?

17 A. Oh, yes.

18 Q. Oh, good. But you were treated and
19 released?

12:23PM 20 A. Yes.

21 Q. Did they give you any pain killers for
22 your discomfort?

23 A. No.

24 Q. Now, let's talk about your bride. Was she
12:24PM 25 treated and released the same day as you were?

12:24PM 1 A. No.

2 Q. How long was she in the hospital?

3 A. Three days.

4 Q. At some point did she become released from

12:24PM 5 the hospital?

6 A. Yes.

7 Q. And without saying what the injuries were

8 were you made aware that she had various injuries as a

9 result of the car accident?

12:24PM 10 A. Yes.

11 Q. And as a result of the injuries did you

12 have to be her caretaker for a period of time?

13 A. Yes.

14 Q. Approximately how long were you and

12:24PM 15 anybody else in your family helping out caretaking your

16 wife?

17 A. About six months.

18 Q. Can you tell the judge what sort of things

19 that you had to do to accommodate your wife after the

12:24PM 20 injuries.

21 A. Yes. I had to do all the cooking pretty

22 much. I had to help her get dressed. I had to be in

23 the bathroom when she was showering to make sure she

24 didn't fall and to help her in bed.

12:25PM 25 Q. Did you have to help her standing and

12:25PM 1 sitting?

2 A. Yes.

3 Q. Did she appear to be in a lot of pain

4 during those six months?

12:25PM 5 A. Terrible pain.

6 Q. To the point where she cried out at times?

7 A. Yes.

8 Q. Have you ever seen the gentleman sitting

9 to my right and sitting to the first individual to my

12:25PM 10 right's right?

11 A. No.

12 Q. So you didn't see him anywhere near the

13 accident scene once you were able to get out of your

14 vehicle?

12:25PM 15 A. No, I did not.

16 Q. Is this the first time you're seeing him?

17 A. Yes.

18 MS. LAVELL: I'll pass this witness, your

19 Honor.

12:25PM 20 THE COURT: Cross.

21 MR. BOLEY: Briefly.

22

23 CROSS-EXAMINATION

24 BY MR. BOLEY:

12:25PM 25 Q. Mr. Luber, I just want to ask to just

12:26PM 1 shore up some of the facts surrounding the car
2 accident. It seems like you like to go to dinner at
3 Winchell's and Village Pub, right?

4 A. Occasionally, yes.

12:26PM 5 Q. So where are those two places located?

6 A. On Eastern.

7 Q. So you'd have to go north from your home
8 on Anthem Parkway, right?

9 A. Well, I have to get from my home to Anthem
12:26PM 10 Parkway to down to Eastern.

11 Q. Are there any other paths that you might
12 take to those restaurants?

13 A. No.

14 Q. Always Anthem Parkway?

12:26PM 15 A. Yeah.

16 MR. BOLEY: I'll pass the witness.

17 MS. LAVELL: Nothing further.

18 THE COURT: All right. Any further need
19 for this witness?

12:26PM 20 MS. LAVELL: No need from the State.

21 MR. BOLEY: Doubtful. We're done.

22 MS. LAVELL: With Court's permission the
23 State would call Maxine Luber.

24 THE CLERK: Raise your right hand.

12:27PM 25 Do you solemnly swear that the testimony

12:27PM 1 that you are about to give will be the truth, the whole
2 truth and nothing but the truth, so help you God?

3 THE WITNESS: Yes, I do.

4 THE CLERK: Please be seated.

12:27PM 5 Please state your first and last name and
6 spell each for the record.

7 THE WITNESS: Maxine Luber. M-A-X-I-N-E.
8 L-U-B-E-R.

9

12:28PM 10 **MAXINE LUBER,**
11 having been first duly sworn, did testify as follows:

12 DIRECT EXAMINATION

13 BY MS. LAVELL:

14 Q. May I call you Maxine?

12:28PM 15 A. Sure.

16 Q. How is your hearing? Better than your
17 husband's?

18 A. Yes.

19 Q. You don't need the headphones?

12:28PM 20 A. No.

21 Q. Is that no?

22 A. That's a no.

23 Q. Ma'am, what is your date of birth?

24 A. May 8th, 1932.

12:28PM 25 Q. How old are you?

12:28PM 1 A. Eighty-six.

2 Q. I want to draw your attention to
3 December 1st, 2016. Now, that young man that just
4 exited the courtroom, that's your husband Martin,
12:28PM 5 correct?

6 A. Yes.

7 Q. So I want to just ask on December 1st,
8 2016 you and Martin were going to dinner?

9 A. Yes.

12:29PM 10 Q. And Martin was driving your vehicle?

11 A. Yes.

12 Q. Did something happen as Martin was driving
13 on Anthem Parkway going north and just crossing the
14 intersection or entering into the intersection at

12:29PM 15 Atchley Drive?

16 A. Did something happen?

17 Q. Yes.

18 A. Yes. We were hit by a car.

19 Q. Did you see the vehicle before it struck
12:29PM 20 you?

21 A. I did not.

22 Q. After the vehicle struck you what
23 physically happened to you inside the car if you know?

24 A. I was in terrible pain. Should I go on?

12:29PM 25 Q. Yes.

12:29PM 1 A. Because then the car filled with smoke.

2 Q. How come that happened?

3 A. Well, at the time I didn't know, but I was

4 told that probably the air bag, it was the air bag. I

12:29PM 5 didn't know. All I know is the car was filled with

6 smoke.

7 Q. So at the time that the crash occurred you

8 were not aware that the air bag had deployed?

9 A. I didn't know that.

12:30PM 10 Q. But you indicated you were in terrible

11 pain?

12 A. Oh, yes.

13 Q. At some point were you able to get out of

14 the car with assistance?

12:30PM 15 A. With assistance. The car seemed to

16 lock -- we couldn't get out -- I couldn't get out of

17 the car. They had to -- people came and got me out.

18 Q. At some point were you and your husband

19 transported by ambulance to the hospital?

12:30PM 20 A. Yes.

21 Q. Do you remember how many days you had to

22 stay in the hospital?

23 A. Well, I think it was three. I was told it

24 was three.

12:30PM 25 Q. Can you explain to the Court what injuries

12:30PM 1 you had as a result of the accident?

2 A. Well, I had 10 broken ribs -- two
3 fractures in my sternum. Oh, and I didn't know it
4 until I got into the bed but there was a lot of blood

12:30PM 5 and I didn't know where it was coming from, but
6 apparently it was from the air bag and it was on my
7 leg.

8 Q. So the air bag cut your leg?

9 A. Yes.

12:30PM 10 Q. And did you have any injury to your
11 abdomen or your chest?

12 A. My chest, yes.

13 Q. Beyond the fractures did you have any
14 visible injury on your chest that you recall?

12:31PM 15 A. Well, I was black and blue.

16 Q. Now, as a result of the fractures that
17 you've mentioned did you suffer any pain beyond the
18 actual accident itself? In other words, after the
19 accident happened did you have pain after the accident?

12:31PM 20 A. Sure.

21 Q. The next hour, the next day?

22 A. Oh, my goodness, yes.

23 Q. How long did you suffer pain?

24 A. I can't even remember. A very long time.

12:31PM 25 I know it was almost a year before I was really mobile.

12:31PM 1 Q. During the time that you were recovering
2 from the rib fractures and the sternum fracture did you
3 need assistance in your every day activities?

4 A. Absolutely.

12:31PM 5 Q. How come?

6 A. I was in pain and it was difficult to move
7 around to be mobile.

8 Q. Before the accident -- and I know some of
9 these questions seem odd to you because I can see from
12:32PM 10 your face why is she asking me this, but it's just
11 about making a record.

12 A. Sure.

13 Q. This is going to really throw you. Before
14 the accident did you have broken ribs or a broken
12:32PM 15 sternum?

16 A. No, I did not.

17 Q. When you left the hospital were you
18 prescribed pain medication?

19 A. Yes.

12:32PM 20 Q. And how many times did you have to get
21 that refilled, if any?

22 A. Well, I changed it after awhile. I don't
23 know because I asked them to change -- I said I
24 couldn't take what they gave me because it didn't agree
12:32PM 25 with me, all this pain medication. So the doctor gave

12:32PM 1 me something else and I really don't know. After
2 awhile I just resorted to taking over-the-counter
3 things.

4 Q. Like Ibuprofin?

12:33PM 5 A. That's one of them, yeah.

6 Q. As you sit here today you're fully
7 recovered?

8 A. I would say yes.

9 MS. LAVELL: Pass the witness.

12:33PM 10 THE COURT: Cross?

11 MR. BOLEY: No questions.

12 THE COURT: Miss Luber, you're excused.

13 You may leave now. Thank you for your testimony.

14 THE WITNESS: Thank you.

12:33PM 15 THE COURT: Any further need for this
16 witness?

17 MS. LAVELL: No, Your Honor. Thank you.

18 MR. BOLEY: No, Your Honor.

19 MS. LAVELL: Your Honor, with Court's
12:33PM 20 permission the State would like to call Gregory Larson.

21 THE CLERK: Raise your right hand.

22 Do you solemnly swear that the testimony
23 that you are about to give will be the truth, the whole
24 truth and nothing but the truth, so help you God?

10:29AM 25 THE WITNESS: I do.

10:29AM 1 THE CLERK: Please be seated.
2 Please state your first and last name and
3 spell each for the record.
4 THE WITNESS: Gregory Larson.
12:34PM 5 G-R-E-G-O-R-Y. L-A-R-S-O-N.
6 MS. LAVELL: May I proceed, your Honor?
7 THE COURT: You may.
8
9 **GREGORY LARSON,**
10 having been first duly sworn, did testify as follows:
12:34PM 11 DIRECT EXAMINATION
12 BY MS. LAVELL:
13 Q. Do you go by Greg or Gregory?
14 A. Either is fine.
12:34PM 15 Q. May I call you Greg?
16 A. Sure.
17 Q. Greg, how are you employed?
18 A. I work for the City of Henderson as a fire
19 engineer.
12:34PM 20 Q. And is a fire engineer a firefighter but
21 you drive the big trucks?
22 A. That's correct. I'm a firefighter and I
23 operate the apparatus.
24 Q. Were you an engineer on December 1st,
12:35PM 25 2016 or did you hold a different position with the fire

12:35PM 1 department?

2 A. No. I was an engineer then.

3 Q. Continuing to draw your attention to
4 December 1st, 2016 in the evening were you in the

12:35PM 5 area of Anthem Parkway and Atchley Drive?

6 A. Yes, I was. I was just leaving the fire
7 station 99 which sits on the corner.

8 Q. So were you leaving in an official
9 capacity or were you leaving work?

12:35PM 10 A. I was off duty. I had visited the fire
11 station off duty to drop off some stuff for the crew
12 and I was leaving the station headed home.

13 Q. So you were in your personal vehicle in
14 plain clothes?

12:35PM 15 A. Yes, I was.

16 Q. Approximately what time was that if you
17 remember?

18 A. 5:30 or so, 5:45, somewhere in that range.
19 Early evening.

12:35PM 20 Q. Did something catch your attention as you
21 were leaving the fire station?

22 A. Yes. I was sitting basically eastbound at
23 Atchley waiting to turn left to go north on Anthem
24 Parkway to head home. There was heavy traffic so I was

12:36PM 25 sitting there for awhile waiting to have my chance to

12:36PM 1 turn left and I noticed an auto collision in front of
2 me.

3 Q. Can you tell the Court which street and
4 direction had the right of way while you were waiting?

12:36PM 5 A. So Anthem Parkway would have the right of
6 way.

7 Q. Going north or south?

8 A. North or south, yeah. I needed to cross
9 Anthem Parkway to make a left to go north. So

12:36PM 10 obviously the traffic going north and south had the
11 right of way.

12 Q. So you indicated that you saw an accident.
13 Do you recall the vehicles involved, at least the
14 makes?

12:36PM 15 A. There was a Cube, I'm not sure who makes
16 it, but the Cube looking car.

17 Q. So if I said Nissan Cube, would you have
18 any reason to doubt that?

19 A. No. I'd have no reason to doubt that.

12:37PM 20 The other was a dark colored Mercedes.

21 Q. Which one had the right of way, the Nissan
22 or the Mercedes?

23 A. The Nissan.

24 Q. Did you see the actual collision?

12:37PM 25 A. Yes.

12:37PM 1 Q. Can you explain to the Court how it
2 happened.

3 A. The Mercedes was in the turn lane to turn
4 left on Atchley to head eastbound. The Cube was headed
12:37PM 5 northbound on Anthem Parkway. The Mercedes basically
6 just turned into them, into the Cube.

7 Q. And --

8 A. It made a left-hand turn in front of them.

9 Q. It made a left-hand turn in front of them
12:37PM 10 or right-hand turn?

11 A. A left-hand turn.

12 Q. Okay. So let me just understand that
13 again. The Cube --

14 A. I might be mistaken.

12:37PM 15 Q. I might be too. So I want to make sure
16 we're all on the same page. The Cube was going north.
17 Was the Mercedes to the left or the right of the Cube?

18 A. The left.

19 Q. Okay. So he was to the left of the Cube
12:38PM 20 preparing to make a left-hand turn?

21 A. Yes.

22 Q. But he made a right turn into the Cube?

23 A. Yes. Yes. I'm trying to vision the
24 intersection but yes.

12:38PM 25 Q. So he would have had to make a right turn

12:38PM 1 to hit the vehicle to his right, correct? Shall we
2 draw it? Do you want to draw it?

3 A. If you want to draw it, yeah.

4 Q. I don't know the streets there, I'm not
12:38PM 5 very familiar with that area so why don't you just draw
6 the intersection for me. And it doesn't have to be --
7 this is just for demonstrative purposes so it doesn't
8 have to be perfect and we'll let the judge see it too.

9 A. So the Cube is headed this way.

12:39PM 10 Q. So that's going to be north?

11 A. I was sitting here. The impact was here.

12 Q. Oh, I see. Okay. Go ahead and make an
13 arrow and just write Cube on that line. All right.

14 And so I see now you said you were in the left-hand
12:39PM 15 turn lane but not on the same side as the Cube but on
16 the other street?

17 A. I saw the impact here.

18 Q. Do you know where the Mercedes was coming
19 from?

12:39PM 20 A. It was my recollection that he was trying
21 to go this way.

22 Q. So he was going south on --

23 A. He was here, yes. So he turned into them
24 there and then after the collision continued --

12:39PM 25 Q. I see.

12:39PM 1 A. -- this direction.

2 Q. Thank you for clarifying that.

3 Do you want this marked into evidence or

4 just for demonstrative purposes?

12:40PM 5 MR. BOLEY: Just for demonstrative

6 purposes.

7 THE WITNESS: So he continued down Atchley

8 this direction after the collision.

9 MS. LAVELL: Do you want to see it?

12:40PM 10 THE COURT: If it's not in evidence.

11 MS. LAVELL: Well, just for demonstrative

12 purposes if you wanted to see it. Okay.

13 BY MS. LAVELL:

14 Q. So the Cube was heading north?

12:40PM 15 A. Yes.

16 Q. And the Mercedes had been heading south on

17 Anthem Parkway but was making a left-hand turn?

18 A. Yes.

19 Q. Okay. I am completely with you now. And

12:40PM 20 the Mercedes hit the Cube in the intersection?

21 A. Yes.

22 Q. Did the Cube to your knowledge still have

23 the green light or did the Mercedes have the turn?

24 A. There is no light there. There is no

12:40PM 25 signal.

12:40PM 1 Q. So there's no signal. So then the Cube
2 would have been going straight and had the right of
3 way?

4 A. Absolutely.

12:41PM 5 Q. What did you do when you saw the accident?

6 A. First thing I did is I grabbed my cell
7 phone and called the fire station to tell those guys --
8 I knew they were there, I had just left -- to let them
9 know there was a collision in front of the fire

12:41PM 10 station. And I no sooner got on the phone with them,
11 gave them the information and I noticed that the
12 Mercedes was proceeding to leave.

13 I noticed another vehicle started to
14 follow that Mercedes and then about that point in time

12:41PM 15 traffic was clearing. The north and southbound travel
16 lanes of Anthem Parkway had cleared. There was a break
17 in traffic. The other cars that were waiting that were
18 headed southbound waiting to make that left onto
19 Atchley, they had stopped. People had got out of their
12:41PM 20 cars to go over to the accident.

21 I noticed the driver of the Cube had got
22 out of the car so I let the station know -- I was on
23 the phone, I let them know that the driver is out of
24 the car. That alerts them to what potentially other
12:42PM 25 resources they may need. You know, obviously if the

12:42PM 1 guy is pinned in the car, they may need other
2 resources. So I did not stop and I followed after the
3 two vehicles that -- I followed after the Mercedes and
4 the vehicle that was following it.

12:42PM 5 Q. When you initially started to follow in
6 the direction that the Mercedes had gone in, did you
7 actually have a sightline on that vehicle or did you
8 get there some other way?

9 A. I followed them. I could see them going,
12:42PM 10 but Atchley makes a little bit of a curve so as they
11 went around the curve I just followed the trail of
12 fluids. Because Idaho Falls is like two streets down
13 so I'm wondering do I -- whether I go down Atchley or
14 Idaho Falls, you can just see the trail of fluids and
12:42PM 15 some debris left from the Mercedes that had fallen in
16 the street. And so I basically saw that they got to
17 Idaho Falls and they had made a right-hand turn on
18 Idaho Falls and stopped right there. They may have
19 proceeded a hundred feet down Idaho Falls before they
12:43PM 20 stopped, both cars.

21 Q. So the Mercedes that we've been talking
22 about plus the witness that is following the Mercedes
23 and then you in line?

24 A. Yes.

12:43PM 25 Q. Did you ultimately turn onto that same

12:43PM 1 street and stop?

2 A. Yes, I did. And I stopped adjacent to the
3 other witness. So basically right behind the Mercedes.

4 Q. How far away would you say where the
12:43PM 5 Mercedes ultimately stopped and the accident occurred
6 was?

7 A. We could Google it, but maybe a quarter
8 mile. I don't know. I mean, it's not that far. I
9 don't know.

12:43PM 10 Q. If the Mercedes chose to leave the
11 intersection, were there other areas before that
12 right-hand turn that the Mercedes could have pulled
13 over into?

14 A. It could have stopped on Atchley. It
12:43PM 15 could have stopped on Atchley. There was another side
16 street before Idaho Falls that it could have turned
17 onto. But Atchley is a wide open street.

18 Q. Was there anything that you saw in the
19 intersection that would cause you to believe that the
12:44PM 20 Mercedes for the safety of the driver needed to move
21 his car out of the intersection?

22 A. No. Traffic had stopped.

23 Q. When you pulled behind the second car did
24 you get out and make contact with the individual at the
12:44PM 25 Mercedes?

12:44PM 1 A. I did, yes. I pulled up adjacent to the
2 second car and I did get out. The driver of the
3 Mercedes was still in his car.

4 Q. When you stopped and got out?

12:44PM 5 A. Yes.

6 Q. Do you see that individual that you saw as
7 the driver of the Mercedes present in the courtroom?

8 A. Yes.

9 Q. Would you point and describe something
12:44PM 10 he's wearing.

11 A. It's the gentleman in the dark suit with
12 the white shirt.

13 MS. LAVELL: Your Honor, may the record
14 reflect that the witness has identified the defendant?

12:44PM 15 THE COURT: Yes.

16 BY MS. LAVELL:

17 Q. So did you approach the defendant's
18 vehicle at that point?

19 A. I did.

12:45PM 20 Q. And did the defendant remain in the
21 vehicle upon your approach or exit?

22 A. He remained in the vehicle as I approached
23 him.

24 Q. Was there some sort of conversation at
12:45PM 25 that point between you and the defendant?

12:45PM 1 A. There was.

2 Q. And what was that?

3 A. I approached him and I asked him if he was

4 okay. He said he was. He said yes. And I noticed at

12:45PM 5 that point in time he was fumbling with his phone. And

6 I thought -- I respond to traffic accidents so I see

7 these kind of things. But I thought it was

8 entertaining that he seemed disoriented, impaired, he

9 was trying to figure out what he was doing and he was

12:45PM 10 trying to -- I thought he was trying to make a phone

11 call, but he was messing with his phone and it was

12 actually his car talking to him asking him if he was

13 okay, you were involved in an accident, that type of

14 thing.

12:45PM 15 Q. So was it one of those cars if you get in

16 an accident someone --

17 A. Like On Star or something like that.

18 Q. So what you were observing was him trying

19 to figure out --

12:46PM 20 A. Who was communicating with him. So it

21 took me a second to get his attention and I got his

22 attention, asked him if he was okay. He said he was

23 okay. And I just made a funny comment to him.

24 Q. What was the comment?

12:46PM 25 A. I had just told him, I said sir, you've

12:46PM 1 been involved in a hit and run accident and I think
2 you're the runner and he stated to me oh, I didn't mean
3 to leave.

4 Q. So that was his response?

12:46PM 5 A. That was his response to me.

6 MR. BOLEY: Objection to that based on
7 hearsay and move to strike the statement of the
8 defendant.

9 MS. LAVELL: Judge, a defendant's
12:46PM 10 statement is not hearsay. It is an admission by a
11 party opponent. It's absolutely allowable evidence
12 what the defendant says.

13 THE COURT: Objection's overruled.
14 Proceed.

12:46PM 15 BY MS. LAVELL:

16 Q. So after he indicated oh, I didn't mean to
17 leave, was there further conversation?

18 A. I let him know to just sit tight in his
19 car. I said hey, just sit tight in your car.

12:47PM 20 At that point in time I had my phone with
21 me, I called the police, I called dispatch to let them
22 know. And as I was on the phone with them I asked him
23 to sit in his car and wait and --

24 Q. Did you advise him that you were calling
12:47PM 25 the police?

12:47PM 1 A. I did, yeah.

2 Q. Did he remain seated in his vehicle at
3 that point?

4 A. He did.

12:47PM 5 Q. At some point did he exit his vehicle?

6 A. Yes. I didn't stay by his side for that
7 entire second. I went back to check on my daughter who
8 was in my car parked behind him. So I was standing
9 outside of my vehicle. I noticed him kind of fumbling

12:47PM 10 around in his vehicle which kind of made me a little
11 bit nervous because I had my daughter with me. I
12 followed him out of instinct but then I started second
13 guessing this guy could have a weapon or other things.
14 So I was very cautious and kept my eye on him.

12:47PM 15 He got out of his car and he seemed very
16 anxious. He was wandering around checking the damage
17 of his car. Kind of looked like he was just looking
18 around the area or what-not. So I just kind of watched
19 him from a distance. And dispatch knew where we were

12:48PM 20 at, they had officers on the way so I just let him know
21 that. I reminded him again kind of for my own safety
22 that hey, the police are coming.

23 He got back in his car and so then I was
24 kind of watching him. And I heard the car start, I

12:48PM 25 went back up to him and told him sir, can you turn the

12:48PM 1 car off, you just need to stay here and hang out. I
2 wasn't really sure the car would go anywhere anyway but
3 I just told him you need to stay. And he told me --

4 Q. Let me stop you for a quick second. So
12:48PM 5 after he had stopped and he got out of the car, he got
6 back into the car and he turned the ignition on again?

7 A. Yes. He started the car back up.

8 Q. Okay.

9 A. And at that point I told him hey, can you
12:48PM 10 shut it off, just hang out. The cops are coming. I
11 kind of reminded him again. And he told me well, I
12 need to move my car. I wasn't going to argue with him
13 or anything so I just kind of stepped back towards my
14 vehicle which was parked behind his and he proceeded to
12:49PM 15 drive his car around the corner which I was surprised
16 it actually steered and moved that well with the damage
17 that was done in the front of it.

18 Q. And what street did he end up on?

19 A. I believe it was Sandstone. That section
12:49PM 20 of Idaho Falls where we stopped was maybe 200 feet
21 long. It's just an entrance into the neighborhood and
22 Sandstone is the first residential street. So he made
23 that corner so I got back in my vehicle and I followed,
24 moved up and so did the other witness, we both followed
12:49PM 25 up and as soon as we turned the corner on Sandstone I

12:49PM 1 noticed that he had only made it maybe five, six houses
2 down the street. So I stopped right there basically.

3 Q. I am going to stop you. You said he only
4 made it. Was he still in the car?

12:49PM 5 A. Yeah, he was still in his car, but I'm
6 guessing that's as far as the car would make it. It
7 wasn't steering very well. Watching him steer the car
8 it was kind of all over the road and it was leaking
9 fluids and dragging pieces, parts. So he basically
12:50PM 10 stopped five or six houses down.

11 Q. All right. And did you observe him do
12 anything else after he stopped?

13 A. He was in the car for a moment and he sat
14 there. I got back on the phone, I called to let police
12:50PM 15 know where our new location was and right after I got
16 off the phone with them I noticed he got out of his
17 car. I went to the witnesses that had also followed, I
18 let them know hey, just stay in your car, I don't know
19 what this guy's gonna do. I asked police to expedite
12:50PM 20 because it seemed like he was getting unpredictable.

21 And next thing you know he took off
22 running on foot. It was dark. I didn't see exactly
23 where he went. And shortly after that within a minute
24 or two of him leaving on foot the battalion chief from
12:50PM 25 our department as well as a police officer rounded the

12:50PM 1 corner. I told them, I said he just went that way on
2 foot. I said but he can't be very far. I said I would
3 check the bushes or anything around these houses close
4 by because we're talking a minute, 30 seconds of time
12:51PM 5 lapsed between when he left. And so they had officers
6 start looking for him.

7 Q. And at that point or at some point after
8 that did you see the defendant again in police custody?

9 A. I did, yeah. They brought him back up to
12:51PM 10 the scene.

11 Q. Is the individual that they brought up to
12 the scene the same individual that you saw leave?

13 A. Same individual.

14 MS. LAVELL: I pass the witness.

12:51PM 15 THE COURT: Cross.

16 MR. BOLEY: Briefly.

17

18 CROSS-EXAMINATION

19 BY MR. BOLEY:

12:51PM 20 Q. So this intersection we're talking about
21 earlier, Atchley and Anthem Parkway, how is that
22 intersection governed? You said there wasn't a
23 stoplight. How is it governed?

24 A. As far as a traffic control?

12:51PM 25 Q. Exactly.

12:51PM 1 A. There is no stop sign, there is no
2 stoplight. So anyone making a turn would yield to
3 oncoming traffic. I'm not a law enforcement officer so
4 I can't give you the law on traffic control, but as a
12:52PM 5 driver, I've been driving a vehicle for a couple years,
6 and I drive firetrucks for a living, I can tell you,
7 you know at Anthem Parkway north and southbound you
8 have the right of way and if you want to cross traffic
9 or either make a left or a right, what direction you're
12:52PM 10 traveling --

11 Q. Is there a left-hand turn lane on Anthem
12 Parkway turning I guess it would be east onto Atchley?

13 A. There is.

14 Q. So your testimony is that's where the
12:52PM 15 Mercedes was?

16 A. Yes.

17 Q. Okay. So if I were hypothetically in the
18 same scenario, how would I know to turn left -- excuse
19 me. Let me be more specific. If I was going
12:52PM 20 southbound on Anthem Parkway and I wanted to turn left
21 onto Atchley, how would I know when it was safe for me
22 to proceed?

23 A. When there's no traffic. I mean, if
24 traffic is cleared, there's no oncoming traffic, then
12:53PM 25 you'd be safe to turn.

12:53PM 1 Q. Do you remember filling out a witness
2 statement with Henderson Police Department?

3 A. I do.

4 MR. BOLEY: May I approach the witness?

12:53PM 5 THE COURT: Yes.

6 BY MR. BOLEY:

7 Q. I am just going to draw your attention to
8 that page right there. Do you recognize that document?

9 A. Okay.

12:53PM 10 Q. Is that the statement you gave to the
11 Henderson Police Department?

12 A. It is.

13 Q. Could you read the first sentence.

14 A. "I was sitting at the intersection of

12:53PM 15 Atchley and Anthem Parkway and saw a two car motor
16 vehicle accident and it just occurred."

17 Q. You said in that statement -- and those
18 are your words, right?

19 A. Yeah, I wrote this.

12:54PM 20 Q. You said that it just occurred. That
21 seems like in the past tense. Why did you write it
22 that way?

23 A. Well, I wrote this statement probably an
24 hour after it occurred.

12:54PM 25 Q. Okay.

12:54PM 1 A. So I might have used past tense for that
2 reason.

3 Q. Your testimony today is that you actually
4 saw it?

12:54PM 5 A. Yes. I was sitting in the intersection
6 when the collision happened.

7 Q. We'll move on beyond that.

8 A. I guess if I would have come upon
9 something I would have written I came upon an accident.

12:54PM 10 As opposed to it just occurred.

11 Q. Let me ask you this then: If you
12 witnessed an accident, wouldn't you normally write the
13 facts of the accident?

14 A. The fact of like --

12:55PM 15 Q. This car --

16 A. Turned into this car or that car?

17 Q. Yes.

18 A. I guess if I was witnessing -- if I was
19 trying to describe the accident, yes, I would. I felt

12:55PM 20 my witness statement -- when I filled this out I think
21 I felt it was more to what occurred after. I followed
22 here, I did this, I waited for that. I didn't think it
23 was -- I felt that the accident didn't need any
24 justification. It happened. Everybody saw it happen.

12:55PM 25 Q. Everybody who?

12:55PM 1 A. There was a line of traffic and when I
2 drove through, there were multiple people that got out
3 of their vehicles that came over and were coming to the
4 aid of the people in the other car.

12:55PM 5 MR. BOLEY: No further questions.

6 MS. LAVELL: No redirect, your Honor.
7 Thank you.

8 THE COURT: You're excused. Thanks for
9 your testimony.

12:55PM 10 Is there any further need for this
11 witness?

12 MS. LAVELL: No, Your Honor. Thank you.

13 MR. BOLEY: No.

14 MS. LAVELL: The State calls Officer

12:56PM 15 Vargason.

16 THE CLERK: Raise your right hand.

17 Do you solemnly swear that the testimony
18 that you are about to give will be the truth, the whole
19 truth and nothing but the truth, so help you God?

12:56PM 20 THE WITNESS: I do.

21 THE CLERK: Please be seated.

22 Please state your first and last name and
23 spell each for the record.

24 THE WITNESS: Jordan Vargason.

12:56PM 25 J-O-R-D-A-N. V-A-R-G-A-S-O-N.

12:56PM 1 MS. LAVELL: May I proceed, your Honor?

2 THE COURT: You may.

3

4

JORDAN VARGASON,
having been first duly sworn, did testify as follows:

12:56PM 5

6

DIRECT EXAMINATION

7

BY MS. LAVELL:

8

Q. Sir, how are you employed?

9

A. I am a police officer with the City of

12:57PM 10

Henderson.

11

MR. BOLEY: Judge, I'll stipulate that

12

he's a police officer and qualified as such.

13

MS. LAVELL: Thank you.

14

BY MS. LAVELL:

12:57PM 15

Q. Officer, I want to draw your attention

16

back to December 1st, 2016. Were you working on that
day?

18

A. Yes, ma'am.

19

Q. In what capacity?

12:57PM 20

A. I was working patrol.

21

Q. Did you get dispatched or were you made

22

aware of an accident in the area of Anthem Parkway and
Atchley Drive?

24

A. Yes, ma'am. I was dispatched there.

12:57PM 25

Q. And is that in Henderson, Clark County,

12:57PM 1 Nevada?

2 A. Yes, ma'am, it is.

3 Q. In what capacity were you dispatched?

4 A. Not sure I understand the question.

12:57PM 5 Q. Were you primary, the first one to get the

6 call, were you attempting to locate, what was your

7 responsibility upon your initial dispatch?

8 A. I was assigned as the primary officer to

9 the call along with multiple other officers that were

12:57PM 10 dispatched at the same time.

11 Q. So in other words, I don't know if you

12 call it a call sign or P-number, but they advised you

13 of the accident and then other units jump in to assist?

14 A. Yes, ma'am.

12:58PM 15 Q. So ultimately you were responsible for the

16 report and putting together the investigation as far as

17 patrol handles that?

18 A. That's correct.

19 Q. Where did you first arrive at?

12:58PM 20 A. The first location I arrived at was the

21 actual intersection Anthem and Atchley which was where

22 I confirmed that an accident had taken place.

23 Q. Now, were you made aware that this was a

24 two car collision when you were dispatched?

12:58PM 25 A. Yes, ma'am.

12:58PM 1 Q. When you arrived how many vehicles were
2 actually at that location that had been involved in the
3 accident?

4 A. Just one.

12:58PM 5 Q. At some point later did you learn where
6 the second vehicle ended up?

7 A. Yes. When I arrived on scene I was
8 directed to the area of the Idaho Falls and Sandstone
9 Cliffs intersection, just east of that location.

12:59PM 10 Q. Did you respond there?

11 A. Yes, I did.

12 Q. And did you see a vehicle that you later
13 learned had been involved in the accident at the first
14 location?

12:59PM 15 A. Yes, ma'am. A black Mercedes E350.

16 Q. Did you determine who it was registered
17 to?

18 A. Yes. Mr. Jack Banka.

19 Q. Did you yourself ever come in contact with
12:59PM 20 Mr. Banka, the driver of that vehicle?

21 A. I did.

22 Q. Do you see him present in the courtroom?

23 A. I do.

24 Q. Would you point at him and describe what
12:59PM 25 he's wearing.

12:59PM 1 A. He's right there wearing a black suit coat
2 and white button-up shirt.

3 Q. At some point did you perform what is
4 known as an FST or field sobriety test on the
12:59PM 5 defendant?

6 A. Yes, ma'am.

7 Q. How many different tests did you perform?

8 A. There are three standardized field
9 sobriety tests. I performed all three of them.

1:00PM 10 Q. For the record would you provide the name
11 of the three field sobriety tests.

12 A. There's the first horizontal gaze
13 nystagmus test, second is the walk and turn test and
14 the third is the one legged stand test.

1:00PM 15 Q. Are you trained and certified in
16 performing the HGN or the horizontal gaze nystagmus
17 test?

18 A. Yes, ma'am.

19 Q. And are you trained in the remaining two
1:00PM 20 tests?

21 A. Yes, ma'am.

22 Q. Did the defendant pass or fail the
23 horizontal gaze nystagmus?

24 A. He performed it unsatisfactorily.

1:00PM 25 Q. Unsatisfactorily or satisfactory?

1:00PM 1 A. Unsatisfactorily.

2 Q. Did you he pass or fail the walk and turn?

3 A. Also unsatisfactory.

4 Q. Did he pass or fail the one legged stand?

1:00PM 5 A. It was also unsatisfactory.

6 Q. Did you also perform a preliminary breath

7 test?

8 A. Officer Carick performed the breath test

9 in my presence.

1:01PM 10 Q. So you observed it?

11 A. Yes, ma'am.

12 Q. Did you observe the results of that test?

13 A. I did.

14 Q. And what were the results of that?

1:01PM 15 MR. BOLEY: Judge, objection. It's

16 inadmissible. It's not met the Fry standard.

17 THE COURT: You have to give me more than

18 that, counsel.

19 MR. BOLEY: It's been held that the

1:01PM 20 preliminary breath test does not meet the Fry standard.

21 That it occurred is admissible but the results of it

22 are not.

23 MS. LAVELL: I will withdraw that

24 question.

1:01PM 25 THE COURT: Okay.

1:01PM 1 BY MR. BOLEY:

2 Q. In addition to his performance on the

3 three tests as well as whatever the result was of the

4 breath test did you observe any other signs or behavior

1:01PM 5 on the part of the defendant that caused you to believe

6 that he had been driving impaired?

7 A. Yes, ma'am.

8 Q. Could you explain to the Court what those

9 signs or behaviors were.

1:02PM 10 A. Once of the first was his appearance, his

11 eyes were very glassy or watery. His speech was very

12 low and slower than I would expect in conversing with

13 him. His gait was very stiff as well when he walked.

14 In addition to that physical evidence, I

1:02PM 15 also observed later inside the black Mercedes that

16 there was a cup with liquid and ice in it which had

17 been spilled all over the car that had the odor of an

18 unknown alcoholic beverage on it which I confirmed

19 later with the PBT that it had the presence of alcohol

1:02PM 20 in the odor.

21 MR. BOLEY: Judge, I am going to object to

22 that line of evidence and move to strike that because

23 the PBT, there again it's not even admissible for its

24 purpose, but it's definitely not admissible for

1:03PM 25 determining a spilled beverage contains alcohol at all.

1:03PM 1 MS. LAVELL: Well, Judge, I am going to
2 have to just respond to that objection. Obviously the
3 officer is testifying that the test is able to
4 determine the presence of alcohol in liquid. He's just
1:03PM 5 testified that that in fact happened. But the State
6 will stipulate that these are simply presumptive tests
7 and they are not admissible to prove that the defendant
8 was under the influence. But they're being offered to
9 go to the officer's probable cause for arresting the
1:03PM 10 defendant. So I'm not aware of any case law that says
11 that the officer can't testify that he performed the
12 test on a spilled beverage and it tested for alcohol.

13 MR. BOLEY: Clearly he can testify that he
14 performed the test. Just like because he can testify
1:03PM 15 that he performed the test as intended so he had some
16 person blow into a Breathalyzer, but he can't testify
17 to the results. He can testify that, yeah, I waved
18 this thing around a spilled beverage, but he can't
19 testify yes or no or that it contained alcohol.

1:04PM 20 MS. LAVELL: I will withdraw the question
21 and follow up.

22 BY MS. LAVELL:

23 Q. Did you take into consideration the
24 results of the test that you performed on the spilled
1:04PM 25 liquid when making your determination that the

1:04PM 1 defendant was under the influence?

2 MR. BOLEY: Objection. That's assuming
3 the answer to the question that I just objected to.

4 THE COURT: You know, the officer can
1:04PM 5 testify to what he did. He's testified that he did X,
6 Y and Z. Based on the fact that he did it without
7 revealing the results. He moved onto the next move
8 that he chose to do. I will admit it to that purpose
9 only.

1:04PM 10 MR. BOLEY: Yes, sir.

11 MS. LAVELL: Thank you.

12 BY MS. LAVELL:

13 Q. So is it fair to say that there were
14 numerous indicators based on the things that you
1:05PM 15 personally observed, the tests that you performed --
16 did you also talk to witnesses?

17 A. I did.

18 Q. And did you factor what the witnesses said
19 into whether or not you believed him to be intoxicated?

1:05PM 20 A. Intoxicated and in control of the vehicle
21 at the time of the accident as well, yes.

22 Q. And based on the totality of the
23 circumstances you determined that the defendant for
24 this question was under the influence of alcohol and
1:05PM 25 was going to be placed under arrest?

1:05PM 1 A. At that point, yes.

2 Q. Now, did you make a similar determination

3 that this particular vehicle and the defendant were

4 involved in the accident in the intersection that we

1:05PM 5 first mentioned at Anthem Parkway and Atchley?

6 A. Yes, ma'am.

7 Q. Did you speak to the defendant in regard

8 to that accident?

9 A. Yes, I did.

1:05PM 10 Q. Did the defendant admit to you that he was

11 in fact driving the Mercedes?

12 A. He did.

13 Q. Did he admit to you that he did in fact

14 leave the scene of the accident?

1:06PM 15 A. He first claimed that he had never been in

16 an accident and then when I followed up on questioning,

17 he admitted that yes, he had been in an accident.

18 Q. Now, based on the defendant's statements

19 and the evidence that you collected from various

1:06PM 20 witnesses, in addition to being arrested for driving

21 under the influence did you arrest him for leaving the

22 scene of an accident?

23 A. Yes, I did.

24 Q. Now, at the time of the arrest were you

1:06PM 25 aware that one of the individuals that had been in the

1:06PM 1 car, a young lady by the name of Maxine Luber, had
2 suffered substantial bodily injury?

3 A. Yes. I became aware -- at some point
4 while I was speaking with Jack I was informed by other
1:06PM 5 officers that she had injuries, yes.

6 Q. So prior to booking him did you already
7 have enough information that he would be charged with
8 DUI with substantial bodily harm or was it upgraded
9 later after her medical results?

1:07PM 10 A. I knew at the scene that she'd been
11 diagnosed with broken ribs and a sternum and so at that
12 point I decided to use the charge of DUI with
13 substantial bodily harm.

14 Q. Now, when you are dealing with an
1:07PM 15 individual thought to be intoxicated, beyond the
16 presumptive tests that you do at the field, whether
17 they're Breathalyzers or FSTs, HGNS, do you have blood
18 drawn or breath taken?

19 A. Yes. I advised Jack --

1:07PM 20 Q. And when you say Jack, you're referring
21 to?

22 A. Mr. Banka.

23 Q. The defendant?

24 A. Yes, ma'am. I advised him of Implied
1:08PM 25 Consent. He consented to a blood test. I transported

1:08PM 1 him to Henderson Detention Center where a nurse drew
2 the blood from his arm and it was later tested.

3 Q. Did you observe her draw the blood?

4 A. Yes, ma'am.

1:08PM 5 MS. LAVELL: Your Honor, I would like to
6 move -- or it's actually admitted by stipulation and I
7 just want to provide it to the Court after I approach
8 the witness with your permission with State's Exhibit
9 2.

1:08PM 10 BY MS. LAVELL:

11 Q. Are you familiar with the blood draw
12 declaration that the nurses fill out?

13 A. Yes, ma'am.

14 Q. Do you have to witness it?

1:08PM 15 A. Yes. I am there when they fill it out.

16 Q. Would you take a look at State's Exhibit 2
17 and tell me if this is in fact the blood draw connected
18 to this particular case?

19 A. Yes.

1:08PM 20 Q. Do you see the defendant's name on there?

21 A. I do.

22 Q. And is your signature at the bottom?

23 A. Yes, ma'am.

24 Q. On the left or the right?

1:09PM 25 A. It is on the left.

1:09PM 1 Q. And that is just an affidavit indicating
2 that blood was drawn from the defendant on what's the
3 date?
4 A. December 1st, 2016.

1:09PM 5 Q. And that is the same date as the accident?
6 A. Yes, ma'am.

7 MS. LAVELL: Your Honor, it's actually
8 been admitted by stipulation but I need your Honor to
9 admit it, please.

1:09PM 10 MR. BOLEY: There is no objection.
11 THE COURT: State's Exhibit 2 will be
12 admitted.
13 (State's Exhibit 2 was admitted.)
14 BY MS. LAVELL:

1:09PM 15 Q. What is it that you do with the vial or
16 vials of blood that are drawn from an individual?
17 A. Immediately after the nurse draws the
18 blood she provides them to me. I put them back in the
19 kit and I seal it. That kit is then immediately taken
20 to a refrigerated vault at our main station. From
21 there it's provided to our forensic lab for testing.

22 Q. So you kind of talked in generalizations.
23 Is that what you did this in this particular case?
24 A. Oh, yes, ma'am.

1:10PM 25 Q. Did you request that there be a forensic

1:10PM 1 exam conducted on the blood?

2 A. Yes.

3 Q. For the purposes of determining whether or

4 not the defendant was under the influence of alcohol?

1:10PM 5 A. Yes, ma'am.

6 MS. LAVELL: Your Honor, I would move to

7 admit State's Exhibit 3 by stipulation.

8 MR. BOLEY: I am not going to object. So

9 stipulated so no objection.

1:10PM 10 THE COURT: It will be admitted.

11 (State's Exhibit 3 was admitted.)

12 MS. LAVELL: May I approach the witness?

13 THE COURT: You may.

14 BY MS. LAVELL:

1:10PM 15 Q. I am showing you what's titled Forensic

16 Laboratory Report of Examination, State's Exhibit 3.

17 Are you familiar with this form?

18 A. Yes, ma'am.

19 Q. Is this a form that is produced after a

1:10PM 20 forensic analysis is done on various items?

21 A. Yes, ma'am.

22 Q. Specifically in this case what was the

23 exam conducted on?

24 A. A vial of whole blood.

1:10PM 25 Q. Is this also associated with Jack Banka

1:10PM 1 the defendant?

2 A. Yes, ma'am.

3 Q. Is his name on the form?

4 A. Yes, it is.

1:10PM 5 Q. What was the outcome of the examination in

6 regards to the blood alcohol content?

7 A. It indicated that he had a blood alcohol

8 content at the time of withdrawal of .193.

9 Q. What is the legal limit to drive?

1:11PM 10 A. .08.

11 Q. So is that over two times the legal limit?

12 A. Yes, ma'am.

13 MS. LAVELL: I'll pass the witness.

14 THE COURT: Cross.

1:11PM 15 MR. BOLEY: Briefly.

16

17 CROSS-EXAMINATION

18 BY MR. BOLEY:

19 Q. Officer, you testified that you arrived at

1:11PM 20 the scene and there was still a car there, right?

21 A. At Anthem and Atchley?

22 Q. Yes.

23 A. Yes, sir.

24 Q. What car was that?

1:11PM 25 A. It was an orange Nissan Cube.

1:11PM 1 Q. How was that car positioned in the
2 intersection?

3 A. I honestly don't recall.

4 Q. Now, I heard, and this is just me not
1:12PM 5 hearing, you testified that you did field sobriety
6 tests on Mr. Banka?

7 A. Yes, sir.

8 Q. Did you testify that you were not
9 certified in the three field sobriety tests?

1:12PM 10 A. No. I was certified.

11 Q. Never mind. That was just me not hearing.
12 Did you talk to a Gregory Larson at that
13 scene?

14 A. I talked to Gregory I think his last name
1:12PM 15 was Larson. I'm sorry. I can't confirm it off the top
16 of my head.

17 Q. Did he tell you that he saw the motor
18 vehicle accident?

19 MS. LAVELL: Objection. Hearsay.

1:12PM 20 THE COURT: Sustained.

21 MR. BOLEY: No further questions.

22 MS. LAVELL: I have nothing further for
23 this witness.

24 THE COURT: Thank you, officer. You're
1:12PM 25 excused.

1:13PM 1 MS. LAVELL: The State has no further
2 witnesses, your Honor, and with the admission of
3 State's Exhibits 1, 2 and 3 the State rests.
4 THE COURT: What's Exhibit 3?
1:13PM 5 MR. BOLEY: I believe they admitted the
6 affidavit and blood draw results separately and the CAD
7 log was one that was admitted by stipulation but not
8 used for the purposes of the prelim.
9 THE COURT: Formally I'll admit Exhibit 1.
1:13PM 10 I don't think there was actually a motion to admit --
11 MS. LAVELL: Well, we --
12 THE COURT: I understand there was a
13 stipulation, but you never brought it forward on any
14 particular witness.
1:13PM 15 MS. LAVELL: Correct.
16 THE COURT: And it remained in front of
17 the clerk on the bar.
18 MR. BOLEY: There is no objection to
19 admitting it.
1:14PM 20 THE COURT: So it will be admitted.
21 (State's Exhibit 1 was admitted.)
22 MS. LAVELL: With that State rests.
23 THE COURT: Defense.
24 MR. BOLEY: I have advised Mr. Banka of
1:14PM 25 his rights to testify and he will remain silent and we

1:14PM 1 also rest.

2 THE COURT: Any argument?

3 MS. LAVELL: We reserve for rebuttal.

4 MR. BOLEY: If I may?

1:14PM 5 THE COURT: You may.

6 MR. BOLEY: You've heard from several

7 witnesses today. There are a couple problems with this

8 case. First of all you heard from a doctor that he can

9 only testify from reviewing other records that the

1:14PM 10 State's trying to get at substantial bodily harm

11 through that doctor. I don't believe that meets the

12 slight or marginal evidence standard that we're trying

13 to address today because clearly he has no personal

14 knowledge of any of the facts that he testified to,

1:14PM 15 just simply that they're written in -- medical records

16 prepared by somebody else.

17 The other thing is I would contend that

18 there was some -- when the officer was testifying about

19 the preliminary breath test he testified that he used

1:15PM 20 it for a purpose other than the intended purpose of the

21 preliminary breath test which we all know is for

22 somebody to blow on to test for alcohol. I think that

23 calls his entire testimony into question if he was

24 doing that. That being said I would just ask the Court

1:15PM 25 to dismiss these matters.

1:15PM 1 MS. LAVELL: First of all, your Honor,
2 expert witnesses do not have to have direct knowledge.
3 They're able to utilize various sources which they do
4 all the time to draw conclusions. But this particular
1:15PM 5 doctor did in fact have firsthand knowledge. He
6 testified that to the best of his recollection he
7 actually met with the victim in this particular case
8 and reviewed all of the documents and ultimately is the
9 one that decided when it was time to release her. And
1:16PM 10 I kind of gathered from his testimony that when she was
11 released if medication was in fact prescribed he would
12 have been the one to prescribe is it.

13 Having said that even without the doctor's
14 testimony you heard from the victim who testified that
1:16PM 15 she had multiple broken ribs and multiple fractures and
16 the sternum, that she was in pain for she thought she
17 was maybe out of pain within a year. Her husband
18 believed the pain was at least for six months and we
19 know during that time the pain was significant enough
1:16PM 20 that she needed to be taken care of by various members
21 of her family, specifically her husband who had to help
22 her in and out of bed, in the bathroom, help her do the
23 things she'd normally be able to do. And so certainly
24 we have proven substantial bodily harm.

1:16PM 25 As to driving under the influence and

1:16PM 1 having physical control, well, we know the defendant
2 had physical control because you heard testimony from
3 one of the witnesses who followed the defendant, saw
4 the defendant behind the wheel while the vehicle was
1:17PM 5 still running when he first approached him and
6 identified the individual in court today Mr. Banka as
7 the individual that had physical control of that
8 vehicle. We know that he got out of that vehicle at
9 one point and got back into that vehicle, turned it on
1:17PM 10 and drove further away and then ultimately the
11 defendant ran from the scene and was located by law
12 enforcement. So we know that he had physical control
13 of the vehicle. We know it was the same facts that he
14 left the scene of the accident because as I stated he
1:17PM 15 had to be followed by this witness that testified to
16 locate him and then beyond leaving the scene of the
17 accident he left the scene of his own vehicle by
18 running on foot.

19 In addition to that you heard testimony
1:17PM 20 from the officer that just testified that when he
21 responded to the accident scene, which was a two car
22 collision, there was only one car there. So he clearly
23 left the scene of the accident.

24 Finally, we know that this all occurred
1:18PM 25 while he was under the influence of alcohol over two

1:18PM 1 times the legal limit as evidenced by the forensic exam
2 that is State's Exhibit 3. So for all those reasons,
3 your Honor, respectfully the State would ask that you
4 bind him over to answer both Count 1 and Count 2.

1:18PM 5 THE COURT: Last argument? Anything?

6 MR. BOLEY: I don't believe I have the
7 right to.

8 THE COURT: Okay. It appears to me based
9 upon the evidence presented at this preliminary hearing
1:18PM 10 that the alleged crimes have been committed and that
11 the defendant named in the complaint has committed
12 those crimes. I hereby order that said defendant be
13 held to answer to said charges in the Eighth Judicial
14 District Court, State of Nevada, County of Clark.

1:18PM 15 THE CLERK: July 10, 10:00 a.m.

16

17 (The proceedings concluded.)

18

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1:19PM 20

21 ATTEST: Full, true and accurate
22 transcript of proceedings.

23

24 /S/Lisa Brenske

1:19PM 25 LISA BRENSKE, CSR No. 186