

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

KODY HARLAN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed  
Mar 10 2021 02:53 p.m.  
Case No. 80318  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S APPENDIX  
Volume XIV**

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**Harlan v. State Case No. 80318**

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1 BY MR. HELMICK:

2 Q And Kody, in fact, was the one to give you that password  
3 for Jaiden's phone because he gave you the wrong one, right?

4 A Him giving me the wrong one, not Kody -- you're not  
5 talking about Kody.

6 Q Right. Sorry. Let me rephrase. Kody gave you the right  
7 password in order to get into Jaiden's phone because Jaiden gave  
8 you the wrong one.

9 A That is correct.

10 Q Okay. And you getting in the phone allowed you to see  
11 those videos, right?

12 A Yes, it did.

13 Q Okay. Now Jaiden's interview was much different than  
14 Kody's, isn't that right?

15 A I don't know that I would categorize it as much different.

16 Q Okay. Well didn't you say it was much different when you  
17 testified at the preliminary hearing?

18 A It's possible that I did.

19 Q Okay. And I'll just follow up on that. Didn't you --

20 THE COURT: Can you guys approach, please?

21 MR. HELMICK: Sure.

22 [Bench conference transcribed as follows.]

23 THE COURT: So here's the concern. They didn't go into  
24 that interview at all, so the original question that you asked I think it  
25 goes beyond the scope. If you're going to try and go into Jaiden's

1 interview with him where Jaiden's not a witness and they haven't  
2 gotten into it their case in chief, then I would say that's beyond the  
3 scope.

4 MR. HELMICK: Okay. I got you. That's fair. Are you  
5 waiting to go into it or are you not going into it?

6 MR. PESCI: No, we're not --

7 MR. HELMICK: Oh, okay. Very well.

8 All right. Let me look at my notes and figure out how to  
9 move forward from that.

10 THE COURT: Okay.

11 MR. HELMICK: Okay.

12 THE COURT: Thank you.

13 [End of bench conference.]

14 MR. HELMICK: Well actually, Your Honor, sorry, one  
15 more question. I got to ask one more question.

16 THE COURT: Okay.

17 [Bench conference transcribed as follows.]

18 THE COURT: Go ahead.

19 MR. HELMICK: But can I talk about what the detective --  
20 there's a claim that the detective made in his interview with Jaiden  
21 and I just want to talk about what he said. Not what Jaiden said.

22 THE COURT: What's -- what did he say?

23 MR. HELMICK: Well I'm sure they're going to object to it.  
24 Said -- he said that he was only charging with murder but not Kody.  
25 That's important.

1 THE COURT: You're saying something that the detective  
2 said to Jaiden?

3 MR. HELMICK: That's what he said to Jaiden. He's like --  
4 he's asking about what he's been charged with. I'm like I'm only  
5 charging you with murder but not Kody.

6 THE COURT: I know but what's the endpoint -- what's the  
7 relevance of putting the detective's statement in front of a jury?

8 MR. HELMICK: To show that his position in this  
9 investigation, looking at the evidence was to charge -- at that  
10 particular time was to only charge Kody --

11 MR. YAMPOLSKY: If he was telling the truth.

12 THE COURT: What the police decide to charge is  
13 irrelevant to what the jury decides on his guilt or innocence.

14 MR. HELMICK: Well I guess arrest then; I can say arrest.  
15 Change it to arrest.

16 THE COURT: Well but -- I mean, you can go into that, but  
17 the State still has the right to issue whatever charge -- go in front  
18 of the jury.

19 MR. HELMICK: Sure.

20 THE COURT: So what a detective thinks about what  
21 somebody should be charged, sometimes they charge them with all  
22 this, and the State says not that.

23 MR. HELMICK: Of course.

24 THE COURT: Sometimes they charge that and the State  
25 says this. But what he thinks about it isn't -- that would be like if

1 the State wanted to ask him do you think the guy's guilty? Well I  
2 mean, that's -- it's irrelevant what the detective decided to arrest for  
3 or what his opinion is, particularly since you're trying to bring it up  
4 in the context of an interview that the State hasn't gone into and  
5 not any answers. It's just his statement. You can't really go into  
6 just his statement.

7 MR. HELMICK: Okay. All right.

8 THE COURT: Okay.

9 MR. PESCI: Giancarlo Pesci for the record. The State  
10 objected to the concept of that.

11 THE COURT: Okay. And you objected as well?

12 MR. YAMPOLSKY: And I objected as well.

13 THE COURT: Thank you.

14 MR. YAMPOLSKY: This is Mace Yampolsky.

15 [End of bench conference.]

16 THE COURT: Okay. Ryan, you can go ahead.

17 MR. HELMICK: All right. Thank you.

18 BY MR. HELMICK:

19 Q In regards to the videos, Detective, that you viewed, Kody  
20 was not visible in any of those videos, right?

21 A That's incorrect.

22 Q That's incorrect.

23 A Yes, sir.

24 Q Okay. Which video particularly was he visible on, do you  
25 recall?

1           A     I believe it's the video in which the Defendant Jaiden says  
2     bro, I just caught a body.

3           Q     Okay. So you see him at some point in the background of  
4     that video?

5           A     Yes.

6           Q     Okay. But in those videos, particularly there's no mention  
7     of the word robbery or lick at all, right?

8           A     No, there is not.

9           Q     Okay. Now you also found out -- let me back track a tad.  
10    Did you huddle up with all the detectives in this case, right, to talk  
11    about what they learned from everything, right?

12          A     Yes.

13          Q     And you are considered the lead detective on this case,  
14    right?

15          A     I am.

16          Q     Okay. And it was vital to your investigation that Jaiden  
17    had sent a text to Nathan Planells. You said that was vital to your  
18    investigation because it showed that Kody did not kill Matt and that  
19    it was all Jaiden. Isn't that what you said?

20               MR. YAMPOLSKY: Objection, beyond the scope.

21               THE COURT: Well, approach the bench, please.

22               [Bench conference transcribed as follows.]

23               MR. HELMICK: That's in his declaration of arrest.

24               MR. YAMPOLSKY: It's irrelevant.

25               THE COURT: I know but it still -- you're going into things



1 beyond what they've gone into. And so it impacts his case because  
2 I don't know what you all will do in your cases.

3 MR. HELMICK: Sure.

4 THE COURT: I mean, whether you're going into other  
5 things, with other people and recalling people. But usually I'm  
6 pretty kind of lenient on look, if it's a little beyond the scope, you  
7 don't want to recall witnesses.

8 MR. HELMICK: Right.

9 THE COURT: But we're impacting two different cases  
10 here. So I would say --

11 MR. HELMICK: I'll move on. Sure. Yeah, no problem.

12 MR. PESCI: I apologize, can we stop -- is there anything  
13 else that's going to be like that because this was moving on and it  
14 went to this. So the State objects because going into any charging  
15 decisions is the State's Prosecution's decisions, not the officer.

16 MR. HELMICK: I didn't say that. I said was it vital to your  
17 investigation. I didn't talk about charging or arrest or anything like  
18 that, okay? He's -- he does the investigation.

19 THE COURT: So are there any other things that are  
20 beyond what they have gone to --

21 MR. HELMICK: Yeah.

22 THE COURT: -- that you want to go into?

23 MR. HELMICK: Yeah. There was an allegation in regards  
24 to Kody being the one who spray painted. Jaiden specifically says  
25 that his fingerprints will be on the spray paint can and I have to use

1 that for impeachment.

2 THE COURT: That's a codefendant's statement, he's not a  
3 witness. So --

4 MR. HELMICK: Okay.

5 MR. YAMPOLSKY: It's beyond the scope and I'm  
6 objecting as prejudicial.

7 MR. PESCI: Also for the record -- for perfection of the  
8 record, it's a *Bruton* concern. That's why -- it's partially one of the  
9 reasons why -- I just want to make my record, I apologize, Judge.  
10 One of the reasons why the State did not introduce Jaiden's  
11 statement was so that we would not get into this.

12 THE COURT: My recollection is that Jaiden's statement is  
13 a lot of blaming Kody for everything.

14 MR. HELMICK: Yes.

15 THE COURT: Because nobody can cross-examine Jaiden  
16 unless he decides to take the stand. You can't go into those things.  
17 So his interview with Jaiden and what Jaiden said is essentially  
18 all --

19 MR. HELMICK: Irrelevant for right now.

20 THE COURT: It's not that it's irrelevant. I get why you  
21 think --

22 MR. HELMICK: Yeah.

23 THE COURT: -- there's issues of it that are relevant but  
24 there's all kinds of legal problems going into that. Number one  
25 being that it's --

1 MR. YAMPOLSKY: Bruton. It's prejudicial.

2 THE COURT: -- beyond the scope of anything the State  
3 did and I'm going to hold you all to maintaining that for this  
4 particular witness.

5 MR. HELMICK: Okay. Understood. I'm not going to talk  
6 about any more of Jaiden's interview.

7 THE COURT: Okay. Thank you.

8 [End of bench conference.]

9 THE COURT: Okay. Mr. Helmick.

10 MR. HELMICK: Thank you very much.

11 BY MR. HELMICK:

12 Q Okay. I want to talk to you about the spray paint can for a  
13 moment. As the lead detective in this case, you wanted to figure  
14 out whose fingerprints were on that spray paint can, right?

15 A Yes, sir.

16 Q Okay. You wanted to figure out wrote that evil comment  
17 on the door, right?

18 A Yes, I did.

19 Q Yeah. And you had it sent out for testing for fingerprints,  
20 right?

21 A Ultimately it was, yes.

22 Q Yeah. And you have a bunch of crime scene analysts who  
23 look at those things and who gather those fingerprints, right?

24 A That is correct.

25 Q Okay. Unfortunately though, the results of that testing

1 showed to be inconclusive as to whose fingerprints were on that,  
2 right?

3 A That is correct.

4 Q Okay. Now since you are the lead detective in this case,  
5 you have crime scene analysts at your disposal, right?

6 A Yes, sir.

7 Q Okay. You have other detectives at your disposal, right?

8 A Yes, sir.

9 Q Okay. Fingerprint people, DNA people, right?

10 A That is correct.

11 Q So why didn't you, detective -- why didn't you -- well let  
12 me ask you this. You didn't consult with a writing expert as to who  
13 wrote Fuck Matt on that door, isn't that right?

14 A A writing expert?

15 Q A writing -- handwriting recognition expert.

16 A No, I did not, sir.

17 Q Okay. And you could have. You interviewed all the kids  
18 in this case, right?

19 A I would say --

20 Q All the kids that were in the house in this case?

21 A I --

22 Q For the most part.

23 A I would say the majority.

24 Q Majority. And you could have taken a piece of paper and  
25 handed it to them and told them to write Fuck Matt on that piece of

1 paper, right?

2 A I could have, yes.

3 Q Yeah. But you didn't do that, isn't that right?

4 A That's correct.

5 Q Okay. Now in regards to the wallet that was allegedly  
6 taken out of Matt's pants, I want to talk to you about that for a  
7 second. There were other things in the house that you tested for  
8 fingerprints such as the kitchen spray nozzle, the disinfecting can,  
9 and obviously the spray paint can, right?

10 A Yes, sir.

11 Q Okay. And the wallet was found in the back of the  
12 Mercedes Benz, the back right back seat of the car, right?

13 A Yes, sir.

14 Q Okay. The wallet was important to your investigation,  
15 right?

16 A It was.

17 Q Because the only thing that was in the wallet was the ID  
18 Matthew Minkler, right?

19 A Yes, sir.

20 Q And you presumably assumed that there was some cash  
21 in there, right?

22 A I would.

23 Q Sure. I mean, most people don't just carry a wallet with  
24 just an ID in it, right?

25 A I would agree.

1 Q Okay. And so you never tested -- you never sent the  
2 wallet out for testing for fingerprints or DNA, isn't that right?

3 A That's correct.

4 Q Okay. It would have been very important though for us to  
5 be able to figure out whose fingerprints were on that wallet besides  
6 Matthew's obviously, right?

7 A It would have been an extra layer to the investigation; I  
8 don't know that it would have been crucial.

9 Q But it would have been crucial for you -- I mean, wouldn't  
10 you agree it would have been a relevant and important fact for you  
11 to figure out who took that wallet out of his pants?

12 A I don't know that I would agree with that. You're saying  
13 that would assume who took it from the pant. I'm looking at the  
14 totality to include where that wallet was located to begin with.

15 Q Sure.

16 A Which was in the stolen Mercedes in the back seat.

17 MR. HELMICK: May we approach?

18 THE COURT: Yeah.

19 [Bench conference transcribed as follows.]

20 MR. HELMICK: Oh geez.

21 THE COURT: So I can either admonish them or not draw  
22 their attention to it or whatever you want me to do.

23 MR. HELMICK: Well I'm going to -- I'm just going to make  
24 the motion for the record of a mistrial.

25 THE COURT: Well I don't think it's going to warrant a

1 mistrial right now.

2 MR. HELMICK: Sure.

3 THE COURT: We'll make a bigger record once we're  
4 done.

5 MR. HELMICK: Okay.

6 THE COURT: But just from the standpoint of it I don't  
7 believe it warrants a mistrial, do you want me to admonish the jury  
8 to disregard it and have it stricken or not say anything about it.  
9 What's your pleasure?

10 MR. HELMICK: Well I see some pages getting torn  
11 already. Ah, dang it. I would say just move on from it.

12 MR. YAMPOLSKY: I'm not asking any questions.

13 THE COURT: Okay. But I mean just in terms of that  
14 statement, do you want me to have the jury disregard it or just not  
15 draw any attention to it?

16 MR. HELMICK: Well he's going to admonish -- the  
17 problem is --

18 THE COURT: [Indiscernible].

19 MR. HELMICK: Yeah.

20 MR. YAMPOLSKY: Yeah.

21 MR. HELMICK: It just makes it bigger.

22 THE COURT: I know. I mean, it's a Catch-22, I get that  
23 when these things occur but sometimes people say no, no, no, I  
24 want you to jump in and admonish the jury and tell them to  
25 disregard it. Other times people say no, I don't want to draw any

1 more attention to it. Just leave it. It was just one reference and  
2 hopefully now --

3 MR. HELMICK: Just leave it. Then we'll do the argument.

4 MR. YAMPOLSKY: Yeah.

5 MR. HELMICK: Mace, you okay?

6 MR. YAMPOLSKY: You're just going to --

7 MR. HELMICK: I'm just going to --

8 MR. YAMPOLSKY: We're just going to -- it never  
9 happened, okay.

10 THE COURT: You guys good with that?

11 MR. YAMPOLSKY: I don't know if I'm well but that's what  
12 I think we should do.

13 THE COURT: In terms of Ryan's position is don't  
14 admonish --

15 MR. YAMPOLSKY: Right, right.

16 THE COURT: -- the --

17 MR. YAMPOLSKY: no, I do not believe they should be  
18 admonished.

19 THE COURT: Okay. All right.

20 [End of bench conference.]

21 THE COURT: Okay. Yes, Mr. Helmick, you can continue.

22 MR. HELMICK: All right. Thank you very much.

23 BY MR. HELMICK:

24 Q Now you were aware in the ride -- that Trae did ride with  
25 Kody and Jaiden to the mall, right?



1           A     That's correct.

2           Q     You became aware of that in your investigation, right?

3           A     I did.

4           Q     And the -- and you were aware in your investigation that  
5 Trae Meadows was seated in the right rear back seat of that car on  
6 the way to the mall, isn't that right?

7           A     That is correct.

8           Q     Okay.

9                 MR. HELMICK: Court's indulgence.

10                THE COURT: Okay.

11           BY MR. HELMICK:

12           Q     Now the video -- I want to go to video that Mr. Pesci was  
13 showing you in regards to Matt going through all the money, just  
14 for a moment. That was taken on June 7th, right?

15           A     It was posted on June 7th.

16           Q     Sure. Posted, taken on June 7th.

17                 And if you recall during the video Matt was saying  
18 something about putting the money in the bank, right? Do you  
19 recall hearing that?

20           A     I do hear -- I do recall.

21           Q     Okay. In regard to your two interviews with Kody, the first  
22 one was the evening of June 8th, right?

23           A     Yes, sir.

24           Q     Okay. And then the next one was early morning June 9th,  
25 3:06 a.m., to be exact.

1           A     That is correct.

2           Q     Okay. And so -- I mean, there were sometimes where you  
3 felt that Kody was maybe a little lethargic and you had to tell him  
4 to, you know, stay with me, stay awake, right?

5           A     Yes.

6           Q     Okay. And you understand now after reading all the  
7 reports in this case, that a lot of these kids, including Kody were  
8 under the influence of Xanax, right?

9           A     Yes.

10          Q     Okay. And some of them even alcohol, right?

11          A     Yes.

12          Q     And then marijuana of course as well, right?

13          A     That is correct.

14          Q     Okay. You're familiar then with a Ghunnar Methvin in this  
15 case, right?

16          A     Yes, I am.

17          Q     Okay. Were you present with Mr. Pesci when he  
18 interviewed Ghunnar Methvin in this case?

19          A     No, I was not.

20          Q     Just about a week ago?

21          A     No, I was not.

22          Q     When was the last time you had your interview with  
23 Ghunnar Methvin?

24          A     June 12th, 2018.

25          Q     June 12th, okay. Did he meet with any of your detectives

1 that were working on this case with you just a couple weeks ago, if  
2 you can recall?

3 A I don't recall.

4 Q Okay. Do you recall being made aware that he met with  
5 one of the other detectives or Mr. Pesci in this case?

6 A This year?

7 Q Yeah, this year. Just recently.

8 A I'm unaware of that.

9 Q Okay. Thank you, Detective.

10 A Thank you, sir.

11 THE COURT: Mr. Yampolsky?

12 MR. YAMPOLSKY: I have no questions.

13 THE COURT: Mr. Pesci?

14 MR. PESCI: No. Thank you.

15 THE COURT: All right. Anything from our jurors?

16 All right. Detective, Thank you very much for your time.

17 You are excused, sir.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Okay. And did I understand that was the  
20 last witness for the State in their case in chief?

21 MR. PESCI: Yes. The State rests, Your Honor.

22 THE COURT: Okay. Save and except for -- well actually, I  
23 think all of the exhibits were admitted, right? Correct.

24 All right. So we're going to take a lunch recess, Ladies  
25 and Gentlemen. During the recess you're admonished not to talk or

1 converse among yourselves or with anyone else on any subject  
2 connected with the trial. Or read or watch or listen to any report of  
3 or commentary on the trial by any medium of information  
4 including, without limitation, newspapers, television, the internet,  
5 and radio. Or form or express any opinion on any subject  
6 connected with the case until it's finally submitted to you. No legal  
7 or factual research, investigation, or social media communication  
8 on your own.

9 And I will see you back at -- let's say we'll start back at  
10 1:45, okay? Thank you very much.

11 THE MARSHAL: All rise for the jury.

12 [Outside the presence of the jury]

13 THE COURT: All right. You guys can all be seated.

14 Okay. Mr. Helmick, you want to make a record of that?

15 MR. HELMICK: Yes. Thank you very much.

16 Your Honor, when I was questioning Detective Nichols, he  
17 had mentioned about the Mercedes Benz that my client Kody  
18 Harlan was driving being stolen. We specifically agreed not to get  
19 into that in that case and that was an error on the detective's part  
20 that prejudiced Mr. Harlan. Especially being that he was the one  
21 who was driving the car and I don't want them to point the finger at  
22 him as if to imply that Kody was the one who actually stole this car.

23 And so on that statement, we're moving for a mistrial on  
24 behalf of Mr. Harlan.

25 THE COURT: Okay. Mr. Yampolsky.

1 MR. YAMPOLSKY: And Your Honor, I wasn't doing the  
2 questioning thankfully, but it's not like -- Mr. Helmick didn't ask the  
3 question saying oh yeah well something about the vehicle being  
4 stolen and you know, he'd asked the question -- and this is a very  
5 experienced homicide detective who's been obviously involved in  
6 this case from the beginning. And between the parties we made  
7 sure we structured our examination previously about the accident  
8 that there was nothing that came in front of the jury about this  
9 stolen vehicle.

10 So even though the Prosecution was not questioning, the  
11 detective is part of the Prosecution team, shall we say, and this  
12 particular detective brought that up. And because of that I think it  
13 should be a mistrial and I think it should be prosecutorialy-caused  
14 mistrial, even though neither of these prosecutors did anything  
15 wrong.

16 However, because this detective said that fully knowing,  
17 fully being involved in this process that we went all -- that we made  
18 painstaking efforts not to bring this in front of the jury, he knew  
19 what he was doing, and he did it deliberately, and I think there  
20 should be a mistrial because of that.

21 THE COURT: All right. Mr. Pesci.

22 MR. PESCI: Thank you, Your Honor.

23 This was not deliberative; this was not something that the  
24 State asked. There's no way on God's green earth it could be  
25 imputed to the Prosecution because we, the State of Nevada did

1 not ask that question. It was the cross-examination by Mr. Helmick  
2 on behalf of his client Kody Harlan that brought that up when he  
3 was impugning the detective for not having done DNA and for not  
4 having done that specifically, the detective gave that response.  
5 That's their question, not the State's.

6 Then we shift to whether or not this is something that  
7 rises to the level of a mistrial. I believe that it does not. I believe  
8 that the jury can easily be instructed. Your Honor provided the  
9 Defense with a chance to ask if they wanted to have an instruction  
10 because to me that simplest thing to do would be to tell this jury to  
11 disregard it.

12 However, they have every right in the world to choose not  
13 to highlight it and not do that. But as far as a curative instruction --  
14 because that would be the first step, not mistrial, is a curative  
15 instruction. If there's a strategic reason why they don't utilize that  
16 or avail themselves of that that's on them and that's a good  
17 strategic decision. But this is not something that should cause this.

18 No one from the State of Nevada is going to argue to this  
19 jury that the Defendants should be found guilty because they were  
20 involved, touched, or were in a car that was stolen. It's never going  
21 to be heard from us in closing arguments. So there's never going  
22 to be the impermissible argument, which is why these things don't  
23 come in done by the State. A mistrial is not appropriate.

24 MR. HELMICK: Just briefly. I mean, the problem with the  
25 curative instruction is once it's out, it's the pink elephant in the

1 room, right? The bell's already been rung. So you can't take it  
2 away. And that's what -- that's the problem.

3 THE COURT: Well no, no, I get that. But I would have  
4 been willing to listen to any suggestions, even -- I mean, if I was to  
5 say to the jury it was an incorrect reference, that wasn't the  
6 evidence in the case, which is factually not correct but I mean, I  
7 would listen to anything that I --

8 MR. YAMPOLSKY: I would like --

9 THE COURT: I get it. Sometimes you guys don't want to  
10 make any reference to the jury, sometimes people want them  
11 admonished them right away. That's why I was asking repeatedly.

12 MR. YAMPOLSKY: Well I mean, I think what the  
13 suggested was kind of a -- kind of a midlevel approach which  
14 makes sense. You know, there's been -- no one's been charged  
15 with possession of a stolen vehicle, blah, blah, blah, blah. The jury  
16 should disregard that. Something like that I think would be  
17 appropriate.

18 MR. HELMICK: Well it's --

19 THE COURT: Well hold on.

20 Would you all have any objection if we fashion something  
21 like that?

22 MR. PESCI: No objection at all.

23 THE COURT: All right.

24 MR. HELMICK: What was the thing that you first said  
25 because I kind of liked the -- if you put a little spin on that, but --

1 THE COURT: What I was --  
2 MR. MARGOLIS: The factual inaccuracy.  
3 MR. HELMICK: Yeah.  
4 THE COURT: -- saying was I've had occasions before  
5 where look, factually it isn't correct, but we tell a jury that was in --  
6 an incorrect reference in this case. There is no evidence of that  
7 that's being put before you.  
8 MR. HELMICK: That I would prefer.  
9 THE COURT: The detective made a mistake.  
10 MR. HELMICK: That I would prefer.  
11 THE COURT: Okay. All right.  
12 MR. HELMICK: Yeah.  
13 THE COURT: So why don't you guys talk about that a  
14 little over the lunch hour, okay?  
15 MR. HELMICK: Okay.  
16 THE COURT: And see if you can come up with some way  
17 you want me to put that to the jury that's in line with what I just  
18 said and I'll be happy to say you know what, the detective made a  
19 reference during his testimony, he was incorrect that's not the  
20 evidence in this case so please disregard that.  
21 MR. HELMICK: Okay.  
22 THE COURT: Okay.  
23 MR. HELMICK: Yeah.  
24 THE COURT: Or something --  
25 MR. PESCI: The State has no objection to that --



1 THE COURT: -- along those lines.

2 MR. PESCI: -- exact wording.

3 THE COURT: Okay. That sounded good?

4 MR. PESCI: Yes.

5 MR. YAMPOLSKY: Yeah.

6 THE COURT: All right. But I'll let you -- I want to give you  
7 an opportunity to think about that obviously.

8 And then I need to go through the admonition with the  
9 two gentlemen about their rights to testify since we're going to be  
10 moving over to Defense case when we get back after lunch.

11 So Mr. Harlan and Mr. Caruso, you all can remain seated  
12 but I'm sure your attorneys have talked to you about that. But  
13 there's just a couple things under the Constitution that I need to go  
14 through each of you and make sure you understand about your  
15 rights to testify, okay?

16 Under the Constitution of the United States and the under  
17 the Constitution of the state of Nevada, nobody can compel you to  
18 testify in a case. Do you each understand that?

19 DEFENDANT HARLAN: Yes, sir.

20 DEFENDANT CARUSO: Yes, Your Honor.

21 THE COURT: All right. You may, however, at your own  
22 request give up your right not to testify and decide to take the  
23 witness stand and testify. If you do that, you will not only be  
24 subject to questioning by your attorneys, but you'll be subject to  
25 questioning by the prosecutors as well. Do you each understand

1 that?

2 DEFENDANT HARLAN: Yes, sir.

3 DEFENDANT CARUSO: Yes.

4 THE COURT: Furthermore, anything that you say when  
5 you are testifying, just like any other witness, it would be available  
6 to the attorneys to make comment upon when they give their  
7 closing arguments. You understand that?

8 DEFENDANT HARLAN: Yes, sir.

9 DEFENDANT CARUSO: Yes.

10 THE COURT: Furthermore, if you choose to testify I will  
11 give the jury a jury instruction which tells them that: It is a  
12 constitutional right of a Defendant in criminal trial that he may not  
13 be compelled to testify and they may not draw any inference of  
14 guilt or discuss that fact in any way when they testify.

15 So if you all and your attorneys want me to give that, we  
16 will give that as a written jury instruction, okay?

17 DEFENDANT HARLAN: Yes.

18 DEFENDANT CARUSO: All right.

19 THE COURT: Yes? All right.

20 Furthermore, I don't know that this applies to you all  
21 because of your age at the time, but if you are -- if you have any  
22 felony convictions and more than ten years has not elapsed from  
23 the date you were convicted or discharged from prison, parole, or  
24 probation, whichever is the most recent date, then if you testified  
25 the prosecutors could ask you, as well as your attorneys could ask

1 you whether you've ever been convicted of a felony, what was the  
2 felony, and when did it occur. They cannot go into the  
3 circumstances of any felonies, however. Do you each understand  
4 that as well?

5 DEFENDANT HARLAN: Yes, sir.

6 DEFENDANT CARUSO: Yes.

7 THE COURT: Okay. All right. Thank you. In terms of  
8 potential Defense case, are you all intending on calling any  
9 witnesses at this time?

10 MR. HELMICK: From our side, we're not.

11 THE COURT: Okay.

12 MR. YAMPOLSKY: The only one, Your Honor, and I've  
13 spoke -- Mr. Helmick was going to call this expert. He's determined  
14 that based on his case, he doesn't need it; however --

15 THE COURT: Okay.

16 MR. YAMPOLSKY: -- I determined -- and based on my  
17 case I would need it. We've spoken to Mr. Pesci.

18 THE COURT: Okay.

19 MR. YAMPOLSKY: Unfortunately there was a -- I don't  
20 know logistical glitch shall we say.

21 THE COURT: Okay.

22 MR. YAMPOLSKY: My understanding was that he was  
23 going to testify today, this afternoon, which would have been  
24 wonderful.

25 THE COURT: Right.

1 MR. YAMPOLSKY: Unfortunately, that wasn't his  
2 understanding. His understanding was that he was going to testify  
3 tomorrow. And this particular expert, Mr. Donelson does not fly  
4 commercial so he's taking a bus from Sacramento at 6:00 a.m.  
5 today, to get here 9:00 p.m. tonight. So we want to put him on at  
6 1:00 when we start tomorrow and then -- he's not going to be very  
7 long and then we can do final argument and finish tomorrow. So  
8 that's the one --

9 THE COURT: Did you notice there was a witness?

10 MR. YAMPOLSKY: Huh?

11 THE COURT: Did you notice there was a witness?

12 MR. YAMPOLSKY: No.

13 THE COURT: Because I didn't have anything --

14 MR. YAMPOLSKY: He did. And then --

15 THE COURT: I know.

16 MR. YAMPOLSKY: -- when this went wrong, we let the  
17 State know and --

18 THE COURT: Okay.

19 MR. YAMPOLSKY: -- everything I think --

20 THE COURT: All right. Mr. Pesci?

21 MR. PESCI: We're not objecting to the notice requirement  
22 not having been fulfilled.

23 THE COURT: Okay. All right.

24 Yeah, I thought he was supposed to be at 1:00 today.

25 MR. YAMPOLSKY: So did we.

1 MR. HELMICK: So did I. I didn't know he was taking a bus  
2 and all that stuff. I thought he was just -- I knew he didn't fly but I  
3 thought he was driving, and he was going to be here Monday  
4 afternoon.

5 THE COURT: Well, okay.

6 MR. HELMICK: So that kind of just -- I apologize.

7 THE COURT: So I would like to do him in the morning  
8 then. What is it that you have?

9 MR. YAMPOLSKY: Your Honor, can we please do it at  
10 1:00, we'll have it --

11 THE COURT: What is it that you have?

12 MR. YAMPOLSKY: I have a settlement conference about  
13 this one case, and it's been moving heaven and earth to actually get  
14 it done and there was a problem with changing counsel with  
15 carriers and everything. And we can finish at -- he won't take long,  
16 we can finish by 5:00 with everybody arguing, Your Honor, with  
17 time to spare.

18 THE COURT: What about if we start at noon then? Is  
19 that --

20 MR. YAMPOLSKY: Noon, okay.

21 THE COURT: All right. So I'll tell the jury to go to an early  
22 lunch and we'll start at noon tomorrow with this gentleman and  
23 then roll into closing arguments thereafter. Just because I'm  
24 always worried that it takes a little longer and then we also have to  
25 read the jury instructions to them and then I don't want anybody

1 being in a position whether it's a Defense argument or a rebuttal  
2 State's argument, getting later into the evening. So I want to make  
3 sure you can get all that done while the jury's still attentive for  
4 everybody. So we'll plan on starting at noon tomorrow then.

5 MR. YAMPOLSKY: Okay.

6 THE COURT: Okay. In which case, why don't you guys go  
7 to lunch and then we'll come back and -- you don't necessarily need  
8 to come back at 1:45. I'll give you plenty of time for lunch. I'm  
9 just -- when the jury gets back, we will tell them they're going home  
10 for the day, and to be back tomorrow at noon.

11 You guys, I'll give you an hour or so for lunch and then  
12 you'll come back and we'll finish settling the instructions, okay?

13 MR. PESCI: Thank you.

14 MR. HELMICK: When do you want to give that instruction  
15 that we just talked about? Right when we get back?

16 THE COURT: Oh. You know what, yeah. Actually I do  
17 need you back at 1:45.

18 MR. HELMICK: Okay.

19 THE COURT: I do need to give them that instruction then  
20 we'll send them home.

21 MR. HELMICK: Okay.

22 THE COURT: Okay. All right. I'll see you back here in a  
23 little over an hour.

24 MR. PESCI: Thank you.

25 [Court recessed at 12:43 p.m., until 1:53 p.m.]

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[Outside the presence of the jury]

THE COURT: All right. Mace, you can go ahead.

MR. YAMPOLSKY: We're on the record?

THE COURT: Yeah.

MR. YAMPOLSKY: All right. Your Honor, after -- I made my motion for a mistrial based on the detective's reference to a stolen vehicle; however, at this time I know Mr. Harlan made a Motion to Sever and Mr. Helmick did a very good job briefing that and I did join in. But at this time I would like to make -- to renew my Motion to Sever because based on his questioning of that detective, when I didn't ask anything, I think that the fact that the --

THE COURT: I'm listening.

I just thought you had --

MR. YAMPOLSKY: You're listening?

THE COURT: -- something quick. That's why I didn't come around here. I'm sorry. Go ahead.

MR. YAMPOLSKY: All right. But based on -- due to his questioning my client was prejudiced and it seems like it's a -- almost a *Bruton* problem and obviously because of the facts, I can't get up there and say hey, I didn't steal this car or anything like that. Both Defendants are not planning to testify, and it seems like I've been -- Mr. Caruso's been prejudiced through no fault of his own because they're being tried together.

THE COURT: Based on this singular question that had the response about the stolen vehicle?

1 MR. YAMPOLSKY: Yes.

2 THE COURT: Okay. Mister --

3 MR. YAMPOLSKY: I mean, I made the -- you know, I  
4 made the other arguments previously and they are what they are  
5 but I mean, this additional piece of evidence -- I mean, this --  
6 because of what the detective said I think that I'm incumbent to  
7 renew my Motion to Sever right now.

8 THE COURT: All right. Mr. Pesci.

9 MR. PESCI: So the prejudice analysis you've already done  
10 in denying the motion. As far as *Bruton* goes, this was not the  
11 detective introducing a statement from Kody Harlan against Jaiden  
12 Caruso. It was a statement that applied to both of them and -- the  
13 evidence that is. And it was not statement against the other. So  
14 *Bruton* really does not apply to this particular incident.

15 You've already gone over the prejudice aspect and we're  
16 going to have this crafted instruction that they've agreed upon and  
17 the State does not object in order to address it. So there's not a  
18 reason to --

19 THE COURT: Well, I would agree that it's not a *Bruton*  
20 issue and that's why I called everybody to the bench when Ryan  
21 started to ask some questions that were -- I thought were going to  
22 go into Mr. Caruso's statement. And then I said at the bench, the  
23 State didn't go into that so it's beyond the scope and there would  
24 be *Bruton* issues to go into that statement, so that halted and to his  
25 credit, Ryan, moved on from that. I mean, he made argument



1 about why he thought that he could be allowed to go into it, but he  
2 moved on from it. So I don't think there's any *Bruton* issue

3 So in the terms of severance in the middle of the trial, that  
4 would be kind of a little awkward but the only basis for it is the  
5 allegation that that was prejudicial that that came out. And I agree  
6 that I made a ruling, but I don't think that's anything that would  
7 warrant a mistrial and that would similarly apply to any kind of  
8 severance. But I'm also about to cure it when I tell them that it was  
9 just a completely inaccurate statement and the detective made a  
10 mistake and that's not the evidence in the case --

11 MR. YAMPOLSKY: Okay.

12 THE COURT: -- that they can disregard that.

13 Okay. We got them all here?

14 THE MARSHAL: Jury's all here.

15 THE COURT: Okay. You can go ahead and get them in.

16 [In the presence of the jury]

17 THE MARSHAL: All rise for the jury.

18 THE COURT: All right. You all can be seated. Thank you.

19 We'll be back on the record. The Defendants are both  
20 present. The attorneys and jurors are all present as well.

21 Okay. Before we move on, I need to correct something.  
22 When Detective Nichols was testifying before we took our lunch  
23 break, he made a mistake and said something that was inaccurate  
24 in reference to a vehicle in this case being stolen. As I said, that  
25 was an error, that was inaccurate, that is not the evidence in the

1 case, and I want you to disregard any alleged allegation he made  
2 about that, okay?

3 We rested the State's case in chief before we took our  
4 lunch break, which moves us over to the Defense, on behalf of Mr.  
5 Harlan, Mr. Helmick.

6 MR. HELMICK: Thank you. Your Honor, the Defense rests  
7 at this time.

8 THE COURT: Thank you. And then Mr. Yampolsky, on  
9 behalf of Mr. Caruso, my understanding is there is a witness that  
10 you wish to call, correct?

11 MR. YAMPOLSKY: Yes, Your Honor. Alan Donelson, he is  
12 an expert and wants to talk about pharmacology, the --

13 THE COURT: And we'll --

14 MR. YAMPOLSKY: -- and everything --

15 THE COURT: We'll get into all that when we get the  
16 witness here. But my understanding is the witness, not you all, not  
17 on behalf of the attorneys, the witness misinterpreted the Court's  
18 schedule and thought he was testifying tomorrow and not today?

19 MR. YAMPOLSKY: Correct.

20 THE COURT: All right.

21 MR. YAMPOLSKY: We all thought he was testifying  
22 today --

23 THE COURT: Understood.

24 MR. YAMPOLSKY: -- but there was a --

25 THE COURT: Understood.

1 MR. YAMPOLSKY: And so he will be here tomorrow  
2 and -- at noon.

3 THE COURT: Okay.

4 MR. YAMPOLSKY: And then as I said, I don't believe his  
5 testimony's going to take very long.

6 THE COURT: Okay. We'll still be able on schedule with  
7 having closing arguments and everything tomorrow. Instead of  
8 starting at 1:00, we're going to start at noon, and we'll do the  
9 witness and then we'll move into arguments later in the afternoon.  
10 So I'm just going to tell you to go to an early lunch tomorrow and  
11 then get here and we'll get started at noon.

12 But that also means we're now done for today. I  
13 apologize that I had to bring you back here after lunch just to tell  
14 you that, but I did need to correct the record as to that error from  
15 the witness. And then you're done for the afternoon, okay?

16 So again, during the recess you're admonished not to talk  
17 or converse among yourselves or with anyone else on any subject  
18 connected with the trial. Or read or watch or listen to any report of  
19 or commentary on the trial by any medium of information  
20 including, without limitation, newspapers, television, the internet,  
21 and radio. Or form or express any opinion on any subject  
22 connected with the case until it's finally submitted to you. No legal  
23 or factual research, investigation, or social media communication  
24 on your own.

25 Thank you very much for today and I will see you

1 tomorrow at noon, okay?

2 THE MARSHAL: All rise for the jury.

3 [Outside the presence of the jury]

4 THE COURT: Okay. You all can be seated.

5 Does the Defense have any jury instructions other than  
6 the packet that we have? My understanding was that this is all that  
7 we were working off of. There might be some objection to certain  
8 of them or requests in regard to the language but there aren't any  
9 that you all have submitted, correct?

10 MR. HELMICK: Not on behalf of Mr. Harlan.

11 THE COURT: Okay. And have you all had a chance to go  
12 through them all together? Does everybody have a packet?

13 MR. PESCI: I sent them electronically Friday and --

14 THE COURT: Okay.

15 MR. PESCI: -- I've got them electronically in case there's  
16 any kind of change that needs to be made.

17 THE COURT: Do you have a packet?

18 MR. HELMICK: I do. I went -- I printed it out.

19 THE COURT: Okay. Do you have your packet?

20 MR. YAMPOLSKY: I have not printed it out.

21 THE COURT: All right. Then we'll get another packet.

22 Hold on.

23 MR. HELMICK: Oh, do I have packet here with me?

24 THE COURT: Yeah.

25 MR. HELMICK: No, I don't.

1 THE COURT: Do you want a packet?

2 MR. HELMICK: Please.

3 THE COURT: Okay.

4 Do you guys want your clients to sit around while we  
5 settle the instructions. We won't make a formal record of the  
6 numbering of them until tomorrow. If you want them to stick  
7 around --

8 MR. HELMICK: Sure, he can stay.

9 [Pause in proceedings]

10 THE COURT: All right. We will be on the record. Mr.  
11 Harlan, Mr. Caruso, attorneys are all present.

12 We're just looking at jury instructions. So I'm probably  
13 going to put them in a different order than they're in, but we'll just  
14 go through this order for right now so just if we get to one where  
15 there's an objection then we'll talk about it.

16 So we obviously have Instructions Number 1, Members of  
17 the Jury.

18 The second one in our packet is, If in these instructions.

19 The third one is, An Information is but a formal method.

20 And then, To constitute the crime charged.

21 The Defendant is presumed innocent.

22 In your deliberation, you may not discuss punishment.

23 You are here to determine from the evidence in the case.

24 That one I tabbed because evidence was --

25 MR. YAMPOLSKY: Evidence is misspelled.

1 THE COURT: -- misspelled.

2 MR. PESCI: Sorry. Thanks.

3 THE COURT: That's okay. On the first line.

4 And then on Line 6, I always change that to believe one or  
5 more other persons are also guilty. That's just me kind of being an  
6 English teacher. I think the way that sentence reads that if you're  
7 convinced that a Defendant is guilty you should so find, even  
8 though you may believe one or more other persons are also guilty.

9 MR. PESCI: Okay.

10 THE COURT: And then the next one is, The evidence  
11 which you are to consider.

12 Are you all going to want the constitutional right not to  
13 testify?

14 MR. YAMPOLSKY: The *Carter* instruction, yeah, we want  
15 that.

16 THE COURT: And Mr. Helmick nodded --

17 MR. HELMICK: Yes, Your Honor.

18 THE COURT: -- his head yes as well.

19 So it is the constitutional right of a defendant.

20 And the next one, In this case the Defendants are accused  
21 in an Information. And obviously we'll talk about manslaughter  
22 and everything in a moment but that's just a transition instruction.

23 Murder is the unlawful killing.

24 Malice aforethought means.

25 Express malice is.

1 Murder of the first degree is.  
2 The State is not required to present direct evidence.  
3 Murder of the first-degree is murder which is perpetrated.  
4 The law does not undertake to measure.  
5 There is a kind of murder which carries with it conclusive  
6 evidence of premeditation.

7 One of the factors you may take into consideration. This  
8 is one of the voluntary intoxication defenses. So I'm going to set  
9 that aside for a second and then get back to that.

10 The next one, All murder is not -- that is not murder --  
11 which is not murder of the first-degree is murder of the second  
12 degree.

13 You are instructed that if you find the State has  
14 established the Defendant has committed first-degree murder.

15 Manslaughter is the unlawful killing.

16 The heat of passion which will reduce homicide to  
17 voluntary manslaughter.

18 If you find that the State has established the Defendant  
19 has committed murder.

20 You are instructed that if you find a Defendant guilty of  
21 first or second-degree murder or voluntary manslaughter. That one  
22 I think -- I may have got a postey note that got pulled off there. We  
23 need to have robbery in there as well, right?

24 MR. PESCI: Yes. I just did the robbery after because of  
25 the *mens rea* elements between murder and robbery --

1 THE COURT: Okay.

2 MR. PESCI: -- being different.

3 THE COURT: I would just probably do the -- just so you  
4 know, all the instructions and then do the deadly weapon  
5 instruction at the end.

6 MR. PESCI: Okay.

7 THE COURT: Does that make sense?

8 MR. PESCI: Uh-huh.

9 THE COURT: And just say if you find him guilty of first or  
10 second-degree murder or voluntary manslaughter or robbery, you  
11 have to determine whether a weapon was use.

12 MR. PESCI: Okay.

13 THE COURT: Deadly weapon means.

14 In order to us a deadly weapon.

15 Involuntary is the killing of a human being without an  
16 intent to do so. I know that the State's of the belief that if this is  
17 going to be given you wanted to add a sentence to it?

18 MR. PESCI: Yes. I apologize. Which one did you just  
19 read, Your Honor? I was trying to make notes from your last  
20 comment.

21 THE COURT: That's okay. Involuntary manslaughter is  
22 the killing of a human being without any intent to do so?

23 MR. PESCI: Correct.

24 THE COURT: So does that last sentence that was in the  
25 e-mail, does that come from a case?



1 MR. PESCI: Yes. I attached a case.  
2 THE COURT: To the e-mail.  
3 MR. PESCI: I believe so.  
4 THE COURT: Okay. I may not have --  
5 MR. PESCI: *Miller v. State*.  
6 THE COURT: I may not have printed that out, I'm sorry.  
7 MR. PESCI: No, I -- it could be my fault that I didn't send  
8 it. I apologize if I didn't. I thought I did.  
9 THE COURT: What is it?  
10 MR. PESCI: *Miller v State*. One second, Your Honor.  
11 MR. YAMPOLSKY: Miller, M-I-L-L-E-R?  
12 MR. PESCI: M-I-L -- yes. It's 125 Nev. 1062. Also it's 281  
13 P.3rd 1201.  
14 THE COURT: Will you e-mail Jackie and ask her to print  
15 that case out. Maybe make like three copies of it.  
16 MR. YAMPOLSKY: And what's the actual language that  
17 you wanted?  
18 MR. PESCI: So --  
19 THE COURT: Well, I'll tell you what , let's -- were you  
20 getting ready to talk about the case?  
21 MR. PESCI: Yeah. He just asked me about that  
22 particular --  
23 THE COURT: What the language was.  
24 MR. PESCI: We can skip and come back to it, Judge.  
25 THE COURT: Let me get the case printed out and I'll let

1 everybody look at that.

2 MR. PESCI: Okay.

3 THE COURT: I'm just right now trying to see if -- we  
4 haven't decided what all theories and everything are going to be  
5 part of the instructions but just to the extent we're giving any of  
6 these, if there's any request to change language on any of them.

7 And I know the State wants to add that one sentence to  
8 this one, but I want to look at that case before we talk about that  
9 any further.

10 The next one in my packet is, Robbery is the unlawful  
11 taking.

12 No act committed by a person while in a state of  
13 involuntary intoxication.

14 I had a postey on this one too, I must have pulled all those  
15 off. But I think we probably need an instruction that just specifies  
16 specific intent crimes and general intent crimes because I know  
17 there's a couple of different areas that this has come up. And first-  
18 degree is obviously a specific intent crime, second-degree and  
19 robbery are general intent crimes. I don't know whether there's  
20 really an issue with accessory because that's not part and parcel of  
21 this part -- kind of a discussion.

22 MR. PESCI: Yeah, I tried to -- I put the first instruction  
23 after the murder instructions --

24 THE COURT: Right.

25 MR. PESCI: -- because that's the specific intent and then I

1 put this one right after the robbery but we have no objection to  
2 what Your Honor is saying, which is at some location saying  
3 specifically, you know, first-degree murder is a specific intent and  
4 then robbery's a general intent. We were concerned without that  
5 language, people wouldn't know to apply voluntary intoxication  
6 language.

7 THE COURT: Right.

8 MR. PESCI: Because it talks about species of crimes and  
9 things of that nature and so if we can spell it out -- like our intent is  
10 to argue to them, look voluntary intoxication you can consider  
11 when you're talking first versus second.

12 THE COURT: Right.

13 MR. PESCI: But not when it talks to robbery because  
14 robbery's a general intent crime.

15 THE COURT: Well second-degree murder is a general  
16 intent crime.

17 MR. PESCI: Right. So that they can take it into  
18 consideration. It doesn't reduce it down to a manslaughter.

19 THE COURT: Correct.

20 MR. PESCI: If you think it's there, if you think they could  
21 deliberate it's second --

22 THE COURT: Right.

23 MR. PESCI: -- not a first.

24 THE COURT: Okay.

25 MR. PESCI: But our argument is it's not applicable to

1 robbery -- if they find that the killing occurred during the robbery,  
2 any degree of intoxication does not alleviate them of legal  
3 responsibility of first-degree murder by way of felony murder.

4 THE COURT: Well that's why I think you might need one  
5 bigger instruction or a more, you know, fully worded instruction --

6 MR. PESCI: Sure.

7 THE COURT: -- that kind of works through that. That  
8 voluntary intoxication is a defense to premeditated and deliberate  
9 first-degree murder, it's not -- or excuse me, doesn't -- well is a  
10 defense to the state of mind element of premeditated and  
11 deliberate first-degree murder but it's not a defense to felony  
12 murder on a theory of robbery.

13 MR. PESCI: Okay.

14 THE COURT: Because robbery is a general intent crime.

15 MR. PESCI: Okay.

16 THE COURT: So we're just going to have to kind of work  
17 on that one. But I would -- I mean, my preference is to do one thing  
18 based on voluntary intoxication and general and specific intent  
19 crimes, rather than have multiple instructions in multiple places  
20 dealing with those. So we'll just have to figure that out.

21 MR. PESCI: Okay.

22 THE COURT: So I'm going to kind of set that one aside  
23 with that other involuntary -- or the other voluntary intoxication one  
24 from the murder instructions.

25 When two or more persons are accused of committing a

1 crime together. So that's a aiders and abettors.

2 Conspiracy is an agreement.

3 Whenever a conspiracy exists.

4 Each member of a criminal conspiracy.

5 Every person who after the commission of a felony  
6 destroys or conceals.

7 The flight of a person after the commission of a crime.

8 The verdict must be unanimous to the charge; however,  
9 you do not need to be unanimous on the theory.

10 Credibility or believability of a witness.

11 A witness who has special knowledge.

12 You have heard testimony from Traceo Meadows. This is  
13 in line with the case law about that.

14 Conviction shall not be had on the testimony of an  
15 accomplice.

16 Although you are to consider only the evidence in the  
17 case.

18 When you retire to consider your verdict.

19 During your deliberations.

20 MR. HELMICK: Sorry, Your Honor.

21 THE COURT: Yep.

22 MR. HELMICK: Back on Traceo's instruction --

23 THE COURT: Sure.

24 MR. HELMICK: -- can we add to the list destruction of  
25 property too.

1 THE COURT: Yeah.

2 MR. HELMICK: Because that's what -- that was part of the  
3 deal.

4 MR. PESCI: Right. But you're only an accomplice for an  
5 exact charge of the other person. So the hypertechnicality of  
6 Traceo Meadows is he only has to be corroborated as to the  
7 accessory charge, that's it.

8 MR. HELMICK: Okay.

9 MR. PESCI: Because he's not charged with murder.

10 THE COURT: So -- yeah, so what was your --

11 MR. HELMICK: I think he cleared it up. I mean, I was --

12 THE COURT: Okay.

13 MR. HELMICK: I was -- that's fine. We'll move on.

14 THE COURT: All right. Consider only the evidence in  
15 reaching a verdict.

16 When you retire to consider your verdict.

17 During your deliberations you are not to communicate.

18 If during your deliberation, playbacks of testimony.

19 Now you'll listen to the arguments of Counsel.

20 So I assume since you guys didn't stop that there aren't  
21 really any objections to the language of any of those instructions.

22 MR. YAMPOLSKY: Well the only one thing and -- it's just  
23 that there's no charge of conspiracy. And there's a lot of -- you  
24 know, there's a lot of instructions regarding conspiracy.

25 THE COURT: Well there's the theory of liability --

1 MR. YAMPOLSKY: Well I understand that.

2 THE COURT: -- in the charging document it was pursuant  
3 to a conspiracy.

4 MR. YAMPOLSKY: Right. But there's no charge of  
5 conspiracy.

6 THE COURT: Well I mean, look, I get it. Sometimes they  
7 may charge felony murder without charging --

8 MR. YAMPOLSKY: Yeah.

9 THE COURT: -- with a predicate felony. Sometimes they  
10 charge conspiracy and they charge a conspiracy theory of liability. I  
11 think the instructions are appropriate because there's a conspiracy  
12 theory of liability that is noticed in their charging document.

13 All right. So let's talk about -- first off, about murder,  
14 manslaughter and what all instructions we're going to give on that.  
15 So who wants to go first?

16 MR. PESCI: Judge, as far as the manslaughter,  
17 specifically to the involuntary manslaughter, so that one starts off:  
18 Involuntary manslaughter is the killing of a human being.

19 So the State's position is that you legally cannot have an  
20 involuntary manslaughter with a deadly weapon and the *Miller* case  
21 that we cited to references that. Because there was an earlier case  
22 in which someone pled guilty to involuntary manslaughter with the  
23 use of a deadly weapon. It went up on appeal and the Supreme  
24 Court said you can't double dip, you can't enhance an involuntary  
25 manslaughter because the concept is, is that an involuntary

1 manslaughter is a nonpurposeful act. And the idea behind the use  
2 of a deadly weapon is that it's purposely utilized to create the  
3 outcome.

4 And so in a case somewhat --

5 THE COURT: Hold on.

6 MR. PESCI: -- similar.

7 THE COURT: Hold on. I'm sorry. Hold on a second.

8 This is not --

9 MR. PESCI: You know, the trickiness is when you pulled  
10 up that cite, there are multiple cases per that page, so that might be  
11 what happened.

12 THE COURT: Because this is a possession of marijuana  
13 case.

14 MS. OVERLY: I can -- Your Honor, I actually have the pdf  
15 of the case, I can send it in an e-mail.

16 THE COURT: Okay. Yeah, please do because the cite you  
17 guys gave us, Jackie printed it out exactly and this is a plea -- guilty  
18 plea to possession of more than ounce of marijuana.

19 MR. PESCI: Yeah. So when you pull up that cite, multiple  
20 cases show up on that same page --

21 THE COURT: Okay.

22 MR. PESCI: -- and so it's this specific one. But we can  
23 e-mail it to you. If I could, I can --

24 THE COURT: Is that a published opinion?

25 MR. PESCI: It is not -- it's not published.



1 THE COURT: Okay.

2 MR. PESCI: But I wanted to point it out to Your Honor so  
3 you can see --

4 THE COURT: But it's a Supreme Court, not a Court of  
5 Appeal?

6 MR. PESCI: It's a State Supreme Court case.

7 THE COURT: Got it. Okay. So yeah, pull up the pdf and  
8 e-mail it to Jackie and then print out whatever she e-mails.

9 THE CLERK: Okay.

10 THE COURT: Thank you.

11 Okay. That's okay.

12 [Colloquy between Counsel]

13 THE COURT: So as you continue your argument, just so I  
14 understand, are you objecting to any manslaughter and we're just  
15 talking about involuntary right now?

16 MR. PESCI: I'm objecting to involuntary.

17 THE COURT: Okay.

18 MR. PESCI: I think that they have a right to voluntary. I  
19 think arguably when the evidence came in that Matthew stood up,  
20 grabbed the gun, walked over and said you're lucky I'm friends with  
21 you or I'd blow your effin head off, someone could try to  
22 extrapolate some sort of provocation in that regard.

23 THE COURT: Okay.

24 MR. PESCI: I asked Defense Counsel if they wanted self-  
25 defense based on that, they said they did not, so that --

1 THE COURT: Okay. Correct?

2 MR. YAMPOLSKY: Right. And Your Honor, just --

3 THE COURT: And Ryan, is that correct with you as well?

4 MR. HELMICK: Yes, that's correct.

5 THE COURT: Thank you.

6 Okay.

7 MR. PESCI: So I --

8 THE COURT: All right. So hold on, let him finish and then

9 I'll let you go, Mace.

10 MR. PESCI: So I put this in the packet involuntary because

11 the Defense requested it. I understood that's where they were

12 going. So when you look at the case specifically in a case

13 reviewed, the *Miller* case, the State Supreme looked over it and

14 here's what happened. So since the court reviews proffer jury

15 instructions de nova, it's talking about the standard.

16 It says, Jury Instruction Number 15, which was given in

17 this trial properly tracked NRS 200.070, which is what currently we

18 have before Your Honor as the involuntary manslaughter

19 instruction because it's straight out of the statute.

20 THE COURT: Okay.

21 MR. PESCI: The last sentence however, stated -- this was

22 what was added by the State. Quote: Involuntary manslaughter

23 does not involve the conscious use of a deadly weapon in the

24 commission of a crime, close quote.

25 This statement is act -- this statement accurately reflects

1 the relationship between the deadly weapon enhancement and  
2 involuntary manslaughter as stated in, I'm not sure how to  
3 pronounce this, but Buschauer, B-U-S-C-H-A-U-E-R, which I believe  
4 is a published opinion. Thus, the District Court correctly stated the  
5 law of involuntary manslaughter.

6 So the State's position is if you are consciously using this  
7 deadly weapon, you don't get to argue involuntary manslaughter.

8 THE COURT: Okay.

9 MR. PESCI: Now, I understand where the Court may go, I  
10 understand the Defense's argument, that's why I asked if Your  
11 Honor gives the involuntary, we'd ask for that added caveat so we  
12 can say to a jury, listen, if it's a conscious choice to pull that trigger,  
13 it's not involuntary manslaughter.

14 However, if you think that somehow it was not a  
15 conscious, then involuntary would apply. I think legally speaking,  
16 you know, in the abstract, not to the facts of this case.

17 I've always just been perplexed by the concept of using a  
18 deadly weapon and an involuntary manslaughter. I just -- I mean, I  
19 don't understand -- when I was taught if you have gun don't point it  
20 at anything you don't intend to kill or destroy.

21 THE COURT: Right.

22 MR. PESCI: Never put your finger on the trigger until  
23 you're ready to shoot somebody, so I just don't get it.

24 But if it's legally possible, I think we have the right and it's  
25 been allowed in prior situations specifically tailored to the

1 involuntary instruction to say well look, Ladies and Gentlemen, if  
2 you think it was a conscious choice to pull the trigger, you don't get  
3 involuntary manslaughter as a result of that conscious act.

4 THE COURT: Okay. Mace.

5 MR. YAMPOLSKY: Well, Your Honor, a deadly -- gun's  
6 not the only deadly weapon. Gun, knife, an automobile. I think if  
7 you use an automobile -- I think someone could be driving an  
8 automobile and kill someone and not make the conscious choice to  
9 kill someone. If you're going to use it in that situation, why can't  
10 you use it in this situation? It seems like that is a lesser included  
11 and we should be able to argue it. Especially in view of all the  
12 evidence about the intoxication, the drug use, the Xanax, the  
13 alcohol, the marijuana that we should be able to argue that.

14 THE COURT: All right.

15 MR. PESCI: And it's interesting that --

16 THE COURT: Hold on one second.

17 Ryan, did you have anything on this?

18 MR. HELMICK: No, I'm okay.

19 THE COURT: All right. Are you also proposing  
20 involuntary manslaughter or are you just leaving this fight for  
21 them?

22 MR. HELMICK: Just leaving the fight for them.

23 THE COURT: Okay. So you're in favor of first, second,  
24 and voluntary, but involuntary is nothing that you -- you don't feel  
25 like you have a dog in that fight.

1 MR. HELMICK: I don't.

2 THE COURT: Okay. Thank you.

3 Mr. Pesci.

4 MR. PESCI: So then should we take it off of the Kody  
5 Harlan jury form? Verdict form?

6 THE COURT: The verdict form?

7 MR. PESCI: Yeah.

8 THE COURT: Well we haven't got to figuring out whether  
9 it's going to be given on anybody yet.

10 MR. PESCI: Okay. All right. I apologize.

11 THE COURT: Yeah.

12 MR. PESCI: But just maybe that's something we'll keep in  
13 mind if he's not asking for it.

14 THE COURT: Okay. Well -- so that raises a good question  
15 though. If I give it, do you guys want it on your guys --

16 MR. HELMICK: Well -- yeah, I mean, so if you're going to  
17 give it out there then I want the verdict form to be equal.

18 THE COURT: Got it. Okay.

19 MR. PESCI: So it's interesting that Mr. Yampolsky  
20 brought up a vehicle and I get that analysis but when you look at  
21 the actual statute, NRS 200.070, it cuts out caveats, voluntary  
22 manslaughter in the context of the car. It's taking that completely  
23 out. There's a statute on point for that. That's why we go back to  
24 this concept and set aside cars. You got people using a gun and  
25 then in the course of someone using a gun, somebody's dead. And

1 to me, the only thing that they could potentially argue is that this is  
2 some sort of an accidental discharge.

3 Now, Judge, it wasn't just to avoid *Bruton* that we didn't  
4 introduce Mr. Caruso's statement. It wasn't just because of that.  
5 So there's no evidence in front of this jury that it was an accident  
6 from the Defendant's mouth.

7 THE COURT: Well, hold on. Let me take a look at this  
8 case and then I'll give you a couple of thoughts.

9 [Pause in proceedings]

10 THE COURT: Is there a certain page referenced in the --

11 MR. PESCI: Yes --

12 THE COURT: -- citation?

13 MR. PESCI: -- I apologize.

14 THE COURT: It's okay.

15 MR. PESCI: So page 11, I believe, Your Honor.

16 THE COURT: Okay.

17 MR. PESCI: And then it'll be -- there'll be a nice little  
18 Number 6 with an asterisk on the righthand side of the column with  
19 an indented paragraph.

20 MR. YAMPOLSKY: Where are we?

21 MR. PESCI: Page 11.

22 THE COURT: Of what we have printed out, I think it's  
23 actually page 7.

24 MR. PESCI: Oh, sorry.

25 MR. HELMICK: On page 7.

1 MR. YAMPOLSKY: What page? Page 6?  
2 THE COURT: Page 7 of what we just got from Jackie.  
3 MR. HELMICK: Okay. Thanks.  
4 MR. YAMPOLSKY: Where are we?  
5 [Pause in proceedings]  
6 THE COURT: Oh so in this case, they gave the instruction  
7 with that extra sentence that you're requesting?  
8 MR. PESCI: Correct. I anticipate --  
9 THE COURT: The Court ruled favorably on that.  
10 MR. PESCI: Correct.  
11 THE COURT: Okay.  
12 MR. PESCI: Sorry, I keep interrupting, I apologize.  
13 THE COURT: No, no, no, that's okay.  
14 MR. PESCI: Anticipating that Your Honor may give it, the  
15 State's request -- we wanted the record to be made that we think  
16 it --  
17 THE COURT: Okay.  
18 MR. PESCI: -- doesn't apply, they shouldn't get it. But if  
19 you do, we want that added sentence.  
20 THE COURT: So here's what I would say with involuntary  
21 manslaughter because we had a case recently where a young man  
22 shot and killed his girlfriend.  
23 Did you try that with Michelle?  
24 MS. OVERLY: Yes. I was just mentioning that to him.  
25 THE COURT: Yeah. And we gave first-degree, second-

1 degree murder, and involuntary manslaughter. The distinguishing  
2 factor being that his defense, including his testimony and his  
3 statements to the police were that he did not know the gun was  
4 loaded when he aimed it at her head, and he was just joking around  
5 with her.

6 So I think that is conscious use of a deadly weapon but  
7 not I would say in furtherance of a crime because he didn't think the  
8 gun was loaded and he was doing anything wrong; he just pointed  
9 it at her.

10 In this case -- and that's kind of what I was trying to listen  
11 to as all of the evidence was coming out. In this case there is no  
12 doubt and you all conceded that Mr. Caruso was the one that shot --

13 MR. YAMPOLSKY: Right.

14 THE COURT: -- the gun in the case. That he -- all the  
15 evidence seems to be that he also deliberately fired the firearm into  
16 the ceiling earlier, that he was pointing the gun at people. The  
17 video shows that the gun was loaded, that there was a round in the  
18 chamber of the gun; one of the videos that were admitted. That the  
19 messages -- and I would disagree somewhat, Mr. Pesci, I think there  
20 is some evidence from the Defendant in terms of some of that  
21 phone extraction information saying that I shot Matthew or I killed  
22 and it was an accident, things of that nature.

23 There's some issue about, you know, this idea of playing  
24 Russian Roulette, which is a loaded gun being pointed at people  
25 and the trigger being pulled. So I don't think -- look, I understand



1 you're not opposing voluntary manslaughter but well, even  
2 voluntary manslaughter is somewhat of a stretch here because  
3 there isn't really any evidence of self-defense or heat of passion or  
4 anything like that in terms of what's being produced.

5 But more specifically as to involuntary, I think the state of  
6 the evidence in the light most favorable to Mr. Caruso is that it's a  
7 loaded gun being pointed deliberately at somebody and the trigger  
8 being pulled. So I don't see how that can fit into --

9 MR. YAMPOLSKY: Well, Your Honor --

10 THE COURT: -- involuntary manslaughter.

11 MR. YAMPOLSKY: Well here -- the one thing -- and I was  
12 going over this and I don't have the whole transcript and even if I  
13 could have gotten it, I wouldn't have enough time to review  
14 everything, but I thought there was -- some people had said oh  
15 yeah, he took out all the bullets but one and then there was  
16 somebody who said he took out all the bullets.

17 So if he had taken out all of the bullets, then I can make  
18 the argument saying hey, he thought he took out all the bullets  
19 when he pointed at him. My under -- and I could be wrong, but I  
20 thought that there was some testimony that said oh, he took out all  
21 the bullets before he pointed the gun at some people and his own  
22 head. And then there was some testimony that said he took out all  
23 the bullets but one.

24 So if there is this -- you know, it's not the be all, end all  
25 that there was always one bullet, that there was maybe no bullets

1 in the gun, then I think we should be able to argue involuntary.

2 THE COURT: But I think the only way you're getting that  
3 is if there was some testimony about that.

4 MR. YAMPOLSKY: I thought that someone said -- and I  
5 could be wrong, I have reviewed everything, you know, hundreds  
6 of times and sometimes it all runs together but I'm almost positive I  
7 thought that someone said the he took out all the bullets before he  
8 pointed to his own head. I mean, I could be wrong but that's -- it  
9 stuck in my own head.

10 THE COURT: Well I don't know because he points the  
11 gun -- in one of those videos, he's pointing the gun right at his own  
12 head --

13 MR. YAMPOLSKY: I understand that.

14 THE COURT: -- with a bullet in the chamber.

15 MR. YAMPOLSKY: But I'm almost --

16 THE COURT: I mean, since it's a revolver, we can all see  
17 that.

18 MR. YAMPOLSKY: Ryan, did -- because I'm almost  
19 positive some -- well in my head I thought that was said.

20 THE COURT: Okay.

21 MR. MARGOLIS: I thought Kymani Thompson testified  
22 that he took all of the bullets out of the chamber when he pointed it  
23 to his own head, but didn't go that extra mile when he pointed it at  
24 other people.

25 THE COURT: Pointed at everybody else.

1 MR. YAMPOLSKY: But he said he pointed --

2 MR. MARGOLIS: That was --

3 MR. YAMPOLSKY: But I thought he said he --

4 THE COURT: That's probably more damaging for your  
5 case.

6 MR. YAMPOLSKY: Well no. But I thought he took it on --  
7 in addition to his own head, I thought he pointed it at some other  
8 people when all the bullets were gone.

9 MR. PESCI: So, Judge, if I could. Let's just assume for the  
10 sake of argument that Counsel's rendition of -- his memory of it is  
11 accurate, right?

12 THE COURT: I think that Jason is actually accurate about  
13 what Kymani said that he took them out when he pointed it at  
14 himself but not at other people.

15 MR. PESCI: Right.

16 THE COURT: Okay.

17 MR. PESCI: So let's just assume that that's true, right?  
18 Here's the rub -- and this is more an intellectual conversation in  
19 some senses but let's look at the instruction, right? The actual  
20 statutory instruction which talks about involuntary and then it talks  
21 about murder, right?

22 THE COURT: Right.

23 MR. PESCI: It says first part's involuntary, second part's  
24 murder. The crux on line 4, after the comma, it says --

25 THE COURT: Right.

1 MR. PESCI: -- but where the involuntary killing occurs in  
2 the commission of an unlawful act.

3 We -- I -- the State's position is that aiming your firearm at  
4 a human being is an unlawful act.

5 THE COURT: Correct.

6 MR. PESCI: Assault with a deadly weapon is an unlawful  
7 act. And we go on: Which in its consequences, naturally tends to  
8 destroy the life of a human being or is committed in the  
9 prosecution of a felonious intent if the offense is murder.

10 So if I aim at a person's face, am I committing a felonious  
11 act?

12 THE COURT: Well -- but there's a specific case on point  
13 that assault with a deadly weapon cannot be a felony for purposes  
14 of second-degree felony murder.

15 MR. PESCI: Agreed for second-degree felony purposes.  
16 But let's set that outside --

17 THE COURT: Okay.

18 MR. PESCI: -- because I'm not trying to bootstrap a  
19 second-degree felony murder.

20 THE COURT: Okay.

21 MR. PESCI: I just look at the statute the way it's written  
22 and I think it's poorly written because I think if you read it literally, if  
23 I commit a felony, if I'm pointing a firearm at a human being and  
24 then someone dies, it's murder. It's not involuntary. And so I don't  
25 understand how anybody can argue I have a gun, I point it at

1 somebody and then they are shot and killed that it's involuntary  
2 because I've committed a felonious act in pointing the gun.

3 That's why you can't point guns at people unless it's in  
4 self-defense, which --

5 THE COURT: Well look, I agree. The only question in my  
6 mind is whether -- well here's what I will say. In my mind as a --  
7 what I would consider myself to be if I put my shoes as a  
8 reasonable juror, I would never in a hundred years think pointing a  
9 loaded gun at someone was anything other than an act which could  
10 naturally tend to destroy the life of another human being, such that  
11 involuntary doesn't apply at all.

12 But in my in my mind trying to say could a reasonable  
13 juror make some determination on that or whether I by law exclude  
14 that instruction, that's where I am kind of right --

15 MR. YAMPOLSKY: Well right in the --

16 THE COURT: -- now trying to figure out.

17 MR. YAMPOLSKY: -- case this --

18 MR. PESCI: *Miller*.

19 MR. YAMPOLSKY: -- *Miller* case that Mr. Pesci cites right  
20 in there. It says: If the Defense presents evidence to support a  
21 theory, no matter how weak or incredible that evidence may be --

22 THE COURT: True.

23 MR. YAMPOLSKY: -- the District Court may not refuse to  
24 give a proper jury instruction on that theory. So based on that, I  
25 think you should give it.

1 THE COURT: Well I -- look I agree with you that you tend  
2 to give instructions no matter how weak or incredible evidence is.  
3 But if there is no evidence, that's a little different, right?

4 MR. YAMPOLSKY: Well I --

5 THE COURT: It's --

6 MR. YAMPOLSKY: I --

7 THE COURT: Hold on. Hold on.

8 MR. YAMPOLSKY: The way I remember it --

9 THE COURT: I --

10 MR. YAMPOLSKY: -- there is

11 THE COURT: I understand that. Go ahead, Mr. Pesci.

12 MR. PESCI: Judge, thank you so much. I really appreciate  
13 being able to make a record.

14 I anticipated that you'd probably give it, right. I'm just  
15 asking first and foremost as strange as this sounds, I wanted to  
16 make the record of the objection.

17 THE COURT: Okay.

18 MR. PESCI: Because when I get to the Supreme Court, I  
19 want to be able to say no, no, we don't think this applies and we  
20 want an answer out of you --

21 THE COURT: Right.

22 MR. PESCI: -- Supreme Court, right? So that's really why  
23 I'm doing that.

24 THE COURT: Yeah, I agree that this wasn't written very  
25 well.

1 MR. PESCI: And secondarily, if you give it, then we ask  
2 you follow what's already been deemed appropriate --

3 THE COURT: Understood

4 MR. PESCI: -- because as you just explained a reasonable  
5 juror could look at this and say from this instruction, which is  
6 accurate law, involuntary manslaughter does not involve the  
7 conscious use of a deadly weapon in the commission of a crime.  
8 That provides the Defense with the opportunity to say -- I don't  
9 know how but to say it wasn't a conscious act. And the State to be  
10 able to say well if it was, you're no longer dealing with  
11 voluntary - or sorry, involuntary, you're dealing with a murder.

12 So that's why our hope -- and I think I sent the second  
13 e-mail that had the proposed with the added language.

14 THE COURT: You did. You did.

15 MR. PESCI: Thanks.

16 THE COURT: I just didn't have the case citation, so I  
17 wanted to see the case, so.

18 MR. PESCI: And I really hope we get some clarity from  
19 this in the future.

20 THE COURT: All right. Well I'm going to go ahead and  
21 give it. You know, at the end of the day -- and this is one that's less  
22 about what I think about the quality of evidence that's been  
23 presented, not saying the Defense has any burden, but more about  
24 I do think that deciding what the act was and whether its  
25 consequences would or would not intend to destroy a life is a

1 factual question that the jury needs to decide, such that we'll give  
2 the involuntary manslaughter instruction. But I am going to give  
3 with that extra sentence because that's what I believe was very  
4 clearly approved by the Supreme Court in 2009 in the *Miller* case, in  
5 saying that that was an appropriate statement of the involuntary  
6 manslaughter instruction and that it accurate -- quote: Accurately  
7 reflects the relationship between the deadly weapon enhancement  
8 and involuntary manslaughter.

9 All right. So we got that part, I think, settled.

10 And then so the transition instruction needs to include --  
11 well, it already has manslaughter, okay. So that's fine.

12 MR. PESCI: Yeah, we had one that covers first to second,  
13 and then to voluntary but we didn't have one for voluntary.

14 THE COURT: Okay. So let me see.

15 So the one that I wrote redo on was because I was  
16 anticipating that we may give involuntary manslaughter. So that's  
17 one where I'm going to make some changes to it in a minute that  
18 just basically says, you know, if you find him guilty of murder,  
19 select the degree of murder as your verdict. The crime of murder  
20 may include the crimes of voluntary or involuntary manslaughter,  
21 and then I'll work through all that transition language, okay?

22 MR. PESCI: Thank you, Your Honor.

23 THE COURT: And then the deadly weapon, however, we'll  
24 just stay with first or second-degree murder, voluntary  
25 manslaughter and robbery because involuntary cannot have a



1 weapon enhancement.

2 And then -- so let's get back to the voluntary intoxication  
3 instructions. So the State's not objecting, obviously to voluntary  
4 intoxication, correct?

5 MR. PESCI: No, we're not objecting to the voluntary  
6 intoxication instructions.

7 THE COURT: Okay. Just we need to come up with one  
8 that's kind of covers everything here.

9 MR. PESCI: And the one that says one of the factors, I  
10 believe is straight from the statute.

11 THE COURT: The second paragraph in the first voluntary  
12 intoxication instruction that begins, element of malice?

13 MR. PESCI: Uh-huh.

14 THE COURT: Is that -- I don't know that I've seen that  
15 before.

16 MR. PESCI: No, that -- I added that in because I was trying  
17 make it clear as to which crimes it applied to.

18 THE COURT: Got it. Okay.

19 MR. YAMPOLSKY: Where are you?

20 MR. PESCI: So the one that starts off and says one of the  
21 factors.

22 [Colloquy between Counsel]

23 THE COURT: Okay. Sit tight. I'm going to go play with  
24 this for a second and make some changes to it.

25 MR. PESCI: Thank you.

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[Pause in Proceedings]

THE COURT: You guys can remain seated, thank you.

Although -- actually can I have one of you come up and grab some of these for me?

So I'm going to give you all --

MR. YAMPOLSKY: Who's quicker?

THE COURT: -- each four instructions that we're going to go through. There's two, one for you and Sarah and one for Mace, and Jason, and then one for Ryan as well.

MR. PESCI: Thank you.

MR. HELMICK: Thank you.

THE COURT: So the first one -- and are we still on the record?

Yeah? All right.

The first one in the packet is the voluntary intoxication, which I added in specific intent/general intent crime information. So why don't you take a look at that real quick.

Let me know what you think.

MR. HELMICK: Looks good from us.

THE COURT: All right.

MR. PESCI: The State has no objection to the first one, Your Honor.

THE COURT: Okay. Mace?

MR. YAMPOLSKY: Jason?

MR. MARGOLIS: No.

1 MR. YAMPOLSKY: The first one's fine.

2 THE COURT: Okay. The second one is just the  
3 involuntary manslaughter instruction that we discussed already  
4 that has that sentence approved in *Miller*. That may have been in  
5 the packet you provided; I don't recall so I just made sure that we  
6 had that there.

7 MR. PESCI: The State isn't --

8 THE COURT: The third one is a -- the lesser grade or  
9 offense instruction with all of the permutations that we're talking  
10 about. So it's just one instruction. So take a look at that. It also  
11 includes that first paragraph -- I don't think you all had it in your  
12 first that just tells him what a lesser offense is.

13 MR. PESCI: No, you're correct, we did not have that.

14 THE COURT: Okay.

15 MR. YAMPOLSKY: That one's fine as far as we're  
16 concerned.

17 THE COURT: Okay.

18 MR. HELMICK: Yeah. No objection from us either.

19 THE COURT: Okay.

20 MR. PESCI: See I don't -- Judge, I apologize, but --

21 THE COURT: Go ahead.

22 MR. PESCI: Lines 23 through 26, I don't know that there is  
23 a mandatory reduction to an involuntary.

24 THE COURT: Well that's a good question.

25 MR. PESCI: I think it's --

1 THE COURT: Whether involuntary stands as a separate  
2 crime from voluntary manslaughter?

3 MR. PESCI: Right. So I don't --

4 THE COURT: Not a lesser.

5 MR. PESCI: I don't think that's a mandatory if it's not this,  
6 it's that. I would --

7 THE COURT: Okay.

8 MR. PESCI: -- object to 23 through -- Lines 23 through 26  
9 but agree with the remainder. Or the above, I should say.

10 MR. YAMPOLSKY: We agree with everything.

11 THE COURT: How would we include something then for  
12 involuntary? Or are you just saying it wouldn't be included since  
13 it's not a lesser to murder or voluntary manslaughter?

14 MR. PESCI: Correct.

15 MR. YAMPOLSKY: So you're saying involuntary's not a  
16 lesser to murder?

17 MR. PESCI: Correct.

18 THE COURT: Involuntary is not a lesser to murder or  
19 voluntary manslaughter because it stands alone --

20 MR. MARGOLIS: It would -- separate -- stand alone.

21 MR. YAMPOLSKY: Oh okay.

22 THE COURT: Unlawful act or even a lawful act given in an  
23 unlawful manner.

24 MR. PESCI: And --

25 THE COURT: Which I get that. I hadn't thought about that

1 actually.

2 Gentlemen?

3 MR. HELMICK: We're okay with the Court's --

4 THE COURT: You're okay either way.

5 MR. HELMICK: The Court's -- yeah, either way.

6 THE COURT: Okay.

7 MR. PESCI: Mace, is that your position?

8 THE COURT: Okay.

9 MR. YAMPOLSKY: Well if in fact it is a standalone, then I  
10 don't object. I do like the instruction the way it's written.

11 MR. PESCI: See, the reason why the State objects is also  
12 it's -- they could find that it's not voluntary, but also find that it does  
13 not qualify for involuntary and this could be read to mean that they  
14 must come back with an involuntary.

15 THE COURT: They must find him guilty of something.

16 MR. PESCI: Correct. just that last paragraph.

17 MR. HELMICK: I like the instruction, I'm just going to  
18 say --

19 THE COURT: Well thank you.

20 MR. HELMICK: -- but I don't know if it's -- yeah, that's  
21 great.

22 THE COURT: I haven't done an instruction transitioning  
23 all of them, including involuntary, so.

24 MR. PESCI: I've never either in 20 years.

25 THE COURT: And I don't recall, quite honestly if in that

1 case, Sarah that we include a lesser with involuntary? And you or  
2 Michelle just didn't raise the issue that Giancarlo just raised, or did  
3 we not include it in there?

4 MS. OVERLY: I think we -- I can actually look and see.  
5 Pull it up --

6 THE CLERK: I can pull up the jury instructions.

7 THE COURT: Pardon?

8 THE CLERK: I can pull up the jury instructions.

9 THE COURT: Do you remember the case?

10 THE CLERK: It was Casey Sandoval [phonetic].

11 THE COURT: Casey Sandoval, yeah.

12 Okay. While we're doing that, the fourth one is just first  
13 or second-degree murder, voluntary and robbery with a deadly  
14 weapon. We didn't have robbery in there since we were going to  
15 have a second one.

16 MR. PESCI: No objection from the State.

17 THE COURT: Okay.

18 MR. HELMICK: Yeah, no objection.

19 MR. MARGOLIS: No objection.

20 MR. YAMPOLSKY: No objection.

21 THE COURT: Great. So let's figure this out real quick.  
22 But I think I tend to agree with Mr. Pesci that may be error on my  
23 part to believe that involuntary would be a lesser of voluntary.

24 [Colloquy between the Court and the Clerk]

25 THE COURT: Well I did give it there, but we did not have

1 voluntary. So the language in the instruction is just if you have a  
2 reasonable doubt as to whether a murder was committed but you  
3 all agree that an involuntary manslaughter occurred, then you have  
4 to find him guilty of that.

5 So it's a little different but I agree that I -- as I sit here and  
6 think about it, involuntary manslaughter by the very nature of being  
7 involuntary, it can't be a lesser included at voluntary manslaughter.

8 All right. So I'm going to take out the last paragraph on  
9 that third one, so Lines 23 through 26.

10 Okay. And other than that I don't think we had anything  
11 else in controversy, right?

12 MR. YAMPOLSKY: Right.

13 MR. PESCI: No. It'd just be a question of whether the  
14 verdict forms are acceptable.

15 THE COURT: Any objection to any of the verdict forms,  
16 guys?

17 MR. HELMICK: Let me just look through for a second.

18 THE COURT: While you do that, I'm going to start getting  
19 these in an order for you so you'll know --

20 MR. PESCI: Would it be possible --

21 MR. YAMPOLSKY: Do we have the verdict form?

22 MR. PESCI: Yeah, it's attached to the end of the packet.

23 MR. MARGOLIS: They're at the end of the packet.

24 THE COURT: Somebody -- would it be possible?

25 MR. PESCI: Whenever you're done, whatever order you

1 put them in, if we could get an electronic version.

2 THE COURT: Yeah. I'm going to go back and type the  
3 numbers into them and everything --

4 MR. PESCI: Thank you.

5 THE COURT: -- and then I'll e-mail them out to everybody.

6 MR. YAMPOLSKY: Perfect.

7 MR. PESCI: Wonderful. Thank you very much.

8 MR. HELMICK: No objection to the verdict form.

9 THE COURT: Mace.

10 MR. YAMPOLSKY: It's fine.

11 MR. MARGOLIS: Looks pretty straightforward, right?

12 MR. YAMPOLSKY: Yeah, it's fine. No objection.

13 THE COURT: Okay.

14 MR. PESCI: The only other thing -- I'm sorry, while  
15 you're --

16 THE COURT: I'm listening, it's okay.

17 MR. PESCI: I just wanted to make a record that in the  
18 State's felony murder instruction, we included the nay language.  
19 There was conversations between Defense Counsel and myself, we  
20 went to that portion and double checked it and I believe there's no  
21 objection by the Defense as far the requirement of it being not an  
22 afterthought, as it's reflected in the State's proposed instruction.

23 THE COURT: Okay.

24 MR. HELMICK: No objection.

25 MR. YAMPOLSKY: Right. No objection.



1 MR. PESCI: Thank you.

2 THE COURT: On the transition instruction, it just says  
3 manslaughter right now. Do you want that to be specific with  
4 voluntary manslaughter?

5 MR. PESCI: I left it that way because I wasn't sure what  
6 was going to be given.

7 THE COURT: Okay.

8 MR. PESCI: To me, I mean, it encompasses both but if  
9 you want to add voluntary and involuntary, like the original one.

10 THE COURT: Well I guess it's because -- the reason I ask  
11 is because the language here says the charge may include.

12 MR. PESCI: Right.

13 THE COURT: And if we're saying involuntary  
14 manslaughter isn't included in the murder charge, then --

15 MR. PESCI: Well I think it can be included in murder, I  
16 don't think it's included in involuntary.

17 THE COURT: Oh, I get it. Okay. All right.

18 MR. PESCI: So I just had a --

19 THE COURT: No, that's fine. We'll leave that as it is.

20 [Pause in Proceedings]

21 THE COURT: Okay. I think I got. This is a varied group of  
22 instructions.

23 So I think what we're going to do is Number 1 -- and just  
24 stop me if I start going too fast as you guys try and get them all into  
25 the order as well. But as I said I'll get you an order e-mailed to you.

1 MR. PESCI: Thank you.

2 THE COURT: Number 1 will be, Instructions to the jury.

3 Members of the jury.

4 Number 2, If in these instructions.

5 Number 3, An Information is but a formal method.

6 Number 4, To constitute the crime charged.

7 Number 5, The Defendant is presumed innocent.

8 Number 6, You are here to determine from the evidence.

9 Number 7, The evidence which you are to consider.

10 Number 8, The credibility or believability of a witness.

11 Number 9, A witness who has special knowledge.

12 Number 10, It is a constitutional right of a Defendant.

13 Number 11, You have heard testimony from Traceo

14 Meadows.

15 Number 12, Convictions shall not be had on the testimony

16 of accomplice.

17 Number 13, Where two or more persons are accused.

18 MR. YAMPOLSKY: 13's what?

19 MR. PESCI: Where two or more persons are accused.

20 THE COURT: Yep.

21 MR. YAMPOLSKY: What?

22 MR. PESCI: Where two or more persons are accused.

23 MR. YAMPOLSKY: Oh.

24 THE COURT: Number 14, Conspiracy is an agreement.

25 Number 15, Where a conspiracy exists.

1                   Number 16, Each member of a conspiracy.  
2                   Number 17, In this case the Defendants are accused.  
3                   18, Murder is the unlawful killing.  
4                   Number 19, Malice aforethought.  
5                   Number 20, Express malice is.  
6                   21, Murder of the first-degree is.  
7                   22, Murder of the first-degree is murder which is  
8                   perpetrated.  
9                   23, The law does not undertake to measure.  
10                  24, The State is not required to present direct evidence.  
11                  25, There is a kind of murder which carries with it  
12                  conclusive evidence.  
13                  26, Your verdict must be unanimous to any charge.  
14                  27, All murder which is not murder of the first-degree.  
15                  28, Manslaughter is the unlawful killing.  
16                  29, The heat of passion which will reduce.  
17                  30, When a person is accused of committing a particular  
18                  crime.  
19                  And obviously I'll take that last paragraph off before I give  
20                  it to you all.  
21                  31, Involuntary manslaughter is.  
22                  32, Robbery is.  
23                  33, You are instructed that if you find a Defendant guilty.  
24                  34, Deadly weapon means.  
25                  35, In order to use a deadly weapon.

1           36, One of the factors you may take into consideration is  
2 the state of the accused.

3           37, Every person who after the commission of a crime.

4           38, A flight of a person.

5           39, Although you are to consider only the evidence.

6           40, In your deliberation.

7           41, When you retire to consider your verdict.

8           42, During your deliberations.

9           43, If during your deliberations; playbacks.

10          And 44, Now you will listen to the arguments of Counsel.

11          So save and except for them being numbered and me  
12 removing that one paragraph, State has a copy of the 44?

13          MR. PESCI: Yes, Your Honor.

14          THE COURT: Mr. Yampolsky, as well?

15          MR. YAMPOLSKY: Yes, Your Honor.

16          THE COURT: And Mr. Helmick?

17          MR. HELMICK: Yes, Your Honor. Thank you.

18          THE COURT: Other than objections that we've discussed  
19 on the record, are there any other objections to any of the 44?

20          MR. PESCI: None on behalf of the State, other than  
21 what's already been stated?

22          MR. YAMPOLSKY: No, Your Honor.

23          MR. HELMICK: No, Your Honor.

24          THE COURT: Anybody have any instructions that they  
25 want to have marked as being proposed but not given?

1 MR. PESCI: No, Your Honor.  
2 MR. YAMPOLSKY: No, Your Honor.  
3 MR. HELMICK: No, Your Honor.  
4 THE COURT: Okay. Everybody's had an opportunity to  
5 review the verdict form as well. Any objection, State?  
6 MR. PESCI: No, Your Honor.  
7 THE COURT: Mace?  
8 MR. YAMPOLSKY: No, Your Honor.  
9 THE COURT: Ryan?  
10 MR. HELMICK: No, Your Honor.  
11 THE COURT: All right. Then I think that -- I think that's it.  
12 Okay. I'll get the numbers and everything typed up and that last  
13 change made and then I'll get them sent out to everybody.  
14 MR. PESCI: Thank you very much.  
15 MR. YAMPOLSKY: Great, thanks.  
16 THE COURT: All right, guys, we will see --  
17 MR. HELMICK: Is the courtroom going to be open a little  
18 bit before noon tomorrow?  
19 THE COURT: Sure.  
20 MR. HELMICK: Okay.  
21 THE COURT: I should be done with my calendar pretty  
22 early actually.  
23 THE CLERK: It's 19 pages.  
24 THE COURT: 19 pages. So I would say maybe 10:30.  
25 MR. HELMICK: All right.

1 THE COURT: 10:30/11:00. So we'll open it up by 11:00 at  
2 the latest.

3 MR. HELMICK: Okay. Thanks.

4 THE COURT: Is that good?

5 Okay.

6 MS. OVERLY: Your Honor, is it possible when we get an  
7 electronic copy to have those in Word format?

8 THE COURT: Yeah.

9 MR. YAMPOLSKY: In what format?

10 THE COURT: That's all I have is Word.

11 MS. OVERLY: Word.

12 MR. YAMPOLSKY: Oh yeah. We like Word.

13 MS. OVERLY: Thank you.

14 THE COURT: Okay.

15 MR. PESCI: Thank you.

16 THE COURT: Thank you, guys.

17 [Evening recess at 4:03 p.m.]

18 \* \* \* \* \*

19  
20  
21 ATTEST: I do hereby certify that I have truly and correctly  
22 transcribed the audio/video proceedings in the above-entitled case  
23 to the best of my ability.

24 

25 Brittany Mangelson  
Independent Transcriber



TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JAIDEN CARUSO &  
KODY HARLAN,

Defendants.

CASE NO. C-18-333318-1  
C-18-333318-2

DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,  
DISTRICT COURT JUDGE

TUESDAY, AUGUST 06, 2019

**TRANSCRIPT OF PROCEEDINGS**  
JURY TRIAL - DAY 6

APPEARANCES:

For the State:

GIANCARLO PESCI, ESQ.  
SARAH E. OVERLY, ESQ.  
Chief Deputy District Attorneys

For the Defendant  
Jaiden Caruso:

MACE J. YAMPOLSKY, ESQ.  
JASON R. MARGOLIS, ESQ.

Kody Harlan:

RYAN K. HELMICK, ESQ.

RECORDED BY: JILL JACOBY, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

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1 Las Vegas, Nevada, Tuesday, August 06, 2019

2  
3 [Trial began at 12:06 p.m.]

4 [Outside the presence of the jury]

5 THE COURT: All right. We will be on the record. Mr.  
6 Harlan and Mr. Caruso are present. All the attorneys are present.

7 Before we get our jurors in, as I mentioned when I was in  
8 the courtroom just a little bit ago, we had an issue arise where Ms.  
9 Evans who is Alternate Number 1 called to indicate that her  
10 husband had been admitted to the emergency room at a local  
11 hospital which I'm not going to name on the record.

12 Anyway, be -- normally I probably would have tried to get  
13 you all into court to have some discussion about it but since she's  
14 an alternate and we're going into closing arguments today, I told  
15 her don't worry about court, take care of your husband, let us know  
16 if there's anything we can do, and I told her that she did not need to  
17 report. So I'm not going to expect that she's going to be here since  
18 the gentleman was still in the emergency room, okay?

19 MR. YAMPOLSKY: That's fine.

20 MR. PESCI: No objection from the State.

21 MR. HELMICK: No objection.

22 MR. YAMPOLSKY: No objection.

23 THE COURT: Thank you very much.

24 Okay. Anything outside the presence before we continue  
25 on with the witness this morning?

1               Yeah.

2               MR. HELMICK: Yes, Your Honor. Did you see the  
3 proposed --

4               THE COURT: About the jury instructions?

5               MR. HELMICK: Yes.

6               THE COURT: Yeah, we'll talk about that --

7               MR. HELMICK: Oh, okay.

8               THE COURT: -- as soon as we finish with the witness.

9               MR. HELMICK: Oh, okay.

10              THE COURT: Your witness is here, correct?

11              MR. DONELSON: Yes.

12              MR. YAMPOLSKY: My witness?

13              THE COURT: Yeah. There he is he just raised his hand.

14              Well, yeah, yours is the only witness we have left.

15              MR. YAMPOLSKY: I'm here, I'm here.

16              THE COURT: Okay. Well I know you're here.

17              MR. YAMPOLSKY: The case didn't settle because of you,  
18 but that's fine.

19              THE COURT: Okay.

20              MR. YAMPOLSKY: No, I'm only kidding.

21              THE COURT: All right. Anything from the State?

22              MR. PESCI: No, Your Honor.

23              THE COURT: Okay. Then Greg, we can go ahead and get  
24 our jurors in.

25                               [In the presence of the jury]

1 THE MARSHAL: All rise for the jury.

2 THE COURT: All right. You all can be seated. Thank you.

3 We will be on the record. Mr. Harlan and Mr. Caruso are  
4 present with their attorneys, States' attorney, all of our jurors are  
5 present.

6 Good afternoon, Ladies and Gentlemen. We're going to  
7 continue on with the Defense case of Mr. Caruso. So Mr.  
8 Yampolsky, Mr. Margolis, you all can call your witness.

9 MR. MARGOLIS: Thank you, Your Honor.

10 Mr. Caruso calls Doctor Alan Donelson.

11 THE COURT: Thank you.

12 **ALAN DONELSON**

13 [having been called as a witness and being first duly sworn,  
14 testified as follows:]

15 THE CLERK: Thank you, please be seated.

16 If you could state and spell your name for the record,  
17 please.

18 THE WITNESS: Alan Charles Donelson; A-L-A-N,  
19 D-O-N-E-L-S-O-N.

20 THE COURT: Thank you very much, sir.

21 All right. Mr. Margolis.

22 MR. MARGOLIS: Thank you, Your Honor.

23 **DIRECT EXAMINATION**

24 BY MR. MARGOLIS:

25 Q Good afternoon, Mr. Donelson.

1           A     Good afternoon.

2           Q     Tell us a little bit about your education and background.

3           A     Sure. I started out in chemistry in college and graduated  
4 with a BA degree with a major in chemistry. Went to University of  
5 California for a year or so to study organic chemistry at the  
6 graduate level and then switched horses in midstream and went  
7 back to school, not in chemistry but pharmacology, which is  
8 essentially the science of dropping a chemical into a living system  
9 of some sort and finding out what happens; how the system with  
10 the drug and how the drug affects the system.

11                   So I earned a PhD in 1976. Spent a year at the University  
12 of Michigan writing my thesis and doing research on the effects of  
13 marijuana on the brain of rats.

14          Q     If you could, tell us a little bit about your professional  
15 experience in pharmacology.

16          A     Well after completing my education, I joined the Highway  
17 Safety Research Institute at the University of Michigan. Going from  
18 an animal laboratory to a research organization that studied road  
19 accidents. And the bridge was alcohol, other drugs, and road  
20 accidents.

21                   There was an increased interest in drugs, other than  
22 alcohol and motor vehicle crashes at the time and the National  
23 Highway Traffic Safety Administration released to us and gave to  
24 us a series of contracts that led eventually to a report to Congress  
25 on marijuana, other drugs, and highway safety. That was in 1980.

1 Q And what did you do following the highway safety studies  
2 you were involved in?

3 A Well after that I joined the Traffic Injury Research  
4 Foundation of Canada. I moved from the United States to Canada,  
5 to Ottawa and continued my research. We then within a few years  
6 pulled off the then largest study of alcohol and marijuana and  
7 traffic fatalities in the province of Ontario. And I continued that  
8 work through, oh, 1989.

9 One special project was studying every single fatal  
10 accident in the province of British Columbia for two whole years to  
11 determine just what percentage of those crashes, but for alcohol,  
12 would not have happened.

13 Q Have you had occasion before based on your work in  
14 pharmacology to be called as a witness in court?

15 A I have. I went from Canada to a company called Failure  
16 Analysis Associates in Menlo Park, California. It was an  
17 engineering scientific consulting company and I began work there,  
18 not so much in pharmacology but in the study of how and why and  
19 the risk of accidents; motor vehicle accidents in particular. And that  
20 company's core business was litigation. So in that period of time I  
21 was serving as an expert witness in court.

22 Now since retiring from Failure Analysis Associates, since  
23 2005, the last 14/15 years I've been serving as an independent  
24 consultant doing research and testifying, both in criminal and civil  
25 cases investigation drugs, including alcohol.

1 Q So it's fair to say that you are pretty well experienced in  
2 the capacity of discussing the effects of marijuana and alcohol and  
3 other drugs on the human brain?

4 A Yes, sir.

5 Q Have you specifically studied the effects of alcohol, Xanax  
6 and marijuana on the human brain and on cognitive functioning?

7 A I have not personally done those experiments. There are  
8 a thousand plus drugs, there are a thousand plus experiments for  
9 each one of them. Our work generally involves reviewing the  
10 research done by others, published as peer review papers, building  
11 on what is known, and applying principles of both pharmacology  
12 and toxicology to the case. And the case may involve toxicology  
13 results chemical testing or they may not. But we know enough  
14 about the dosing and the effects of drugs to be able to speak from  
15 first principles, given facts of a case.

16 Q And along those lines, do you have an approximate  
17 number of times that you've been called on to testify about the  
18 effects of alcohol and other drugs on the cognition and on the  
19 ability -- on accidents?

20 A I have an estimate. I have given sworn testimony 200  
21 times. I've had approximately 800 cases since I've retired. The vast  
22 majority of which do involve drugs, and in particular the most  
23 commonly found; benzodiazepines like Xanax, marijuana, alcohol,  
24 not to mention methamphetamine.

25 Q So that was kind of my next question. Have you had

1 occasion to actually investigate the effects of Xanax or  
2 benzodiazepines on human beings?

3 A Well I have not given the drug to human beings --

4 Q Right.

5 A -- and studied their response.

6 Q Right.

7 A However, there have literally been dozens, if not hundreds  
8 of such studies, thousands for alcohol, very many hundreds for  
9 marijuana. And out of that comes an understanding of the dose  
10 and the response that can be expected, taking into account  
11 personal characteristics, experience with the drug, possible  
12 tolerance.

13 Q What are some of the commonly cited symptoms of  
14 Xanax intoxication in these studies that you've been exposed to?

15 A Well the word intoxication is a little bit extreme --

16 Q Okay.

17 A -- because in the human studies done, the greatest  
18 interest of clinicians and other investigators is what effects do  
19 prescribed doses of these chemicals have on people. In other  
20 words, is it safe for patients to drive given you've got a prescription  
21 say for Xanax? And so the doses given to human subjects are  
22 generally within the range of those prescribed.

23 For example, in studying just where the threshold of bad  
24 effects from Xanax is, they give doses ranging say from half a  
25 milligram to one milligram. And what has been found often in the

1 literature is that as soon as you get about one milligram of Xanax,  
2 your ability to drive is determined to be impaired. People do not  
3 think as quickly, they have less emotions, less concerns, which is  
4 very consistent with a drug. It's an anti-anxiety drug. It's given to  
5 people who have crowd fears, agoraphobia.

6 And so it's expected that it will reduce your cognitive  
7 skills to the point where you stop worrying. So that's the nature of  
8 the drug.

9 Q And in your experience and in your study, have -- would  
10 you conclude that if a dose approaching one milligram could cause  
11 some impairment that substantially higher doses would cause  
12 substantially greater impairment?

13 A That is the rule of pharmacology. Dose makes the poison.  
14 It may be quite a good drug, it may help a lot of people, but if you  
15 take too much of it, it becomes poisonous and deleterious.

16 Q And have you also had occasion to review studies that  
17 involved the ingestion of Xanax in combination with other  
18 substances, let's say alcohol and/or marijuana?

19 A That trio has been also well studied. The initial concern  
20 back in the 1980s, I can fairly tell you that it was alcohol plus  
21 marijuana. That was the real concern. Since then though  
22 benzodiazepines have basically been prescribed to so many people,  
23 both Xanax plus marijuana, and Xanax plus alcohol have been  
24 studied independently.

25 Q Does alcohol exacerbate the adverse effects, or the



1 impairment effects brought about by Xanax?

2 A Absolutely.

3 Q Does marijuana similarly exacerbate these effects?

4 A Not similarly, but it will definitely make the effects more  
5 strong, therefore worse. And I can explain briefly, if it's  
6 appropriate.

7 Q Please.

8 A Alcohol -- well let me back up one -- just one step. The  
9 brain essentially functions with two controls; one is like the  
10 accelerator on a car. If you increase the acceleration, your system  
11 is going to work harder, faster, stronger. Now for the same car, if  
12 you put on the brakes, your car is going to reduce its speed, lose its  
13 function and you're not going to travel so quickly.

14 Alcohol basically puts the brakes on sequentially from  
15 your upper brain, all the way down to your brain stem and can take  
16 you from feeling a little bit buzzed to dead.

17 Now Xanax is a very, very selective drug that kind of does  
18 the same thing as ethanol but not exactly. What it does is increase  
19 your braking power. So if you have ethanol plus Xanax, you got a  
20 double whammy, both of them slamming on the brakes to your  
21 brain, which means you're not going to think as well, react as well,  
22 make sensible decisions, et cetera. Because you're taking off layer  
23 after layer of what makes you human.

24 Q Fair to say though substances in combination depress  
25 central nervous system activity?

1           A     Ethanol and Xanax are both CNS depressants. The  
2 difference being that Xanax will not kill outright. In other words it  
3 can't take you to general anesthesia, coma, and death. Alcohol  
4 could do that. But Xanax is much more selective and will take you  
5 basically to the point where you put yourself to sleep.

6           Q     Turning now to this case, what, if anything, did you  
7 review in preparation for your testimony here today?

8           A     I reviewed the statements that were given or taken by -- or  
9 interviews by detectives --

10           MR. PESCI: Judge, I apologize for the interruption. Can  
11 we approach?

12           THE COURT: Yes.

13           [Bench conference transcribed as follows.]

14           MR. PESCI: He can't say that he reviewed Jaiden's  
15 statement because that hasn't been introduced into evidence.

16           THE COURT: So where are we going because I know the  
17 witness noticed by Ryan said he's going to talk about effects of  
18 drugs on the human body, not specific to [indiscernible] or  
19 anything like that. He's going to say the Defendant was under  
20 intoxication and [indiscernible].

21           MR. HELMICK: I was using just for educational purposes,  
22 that's all.

23           THE COURT: Okay.

24           MR. YAMPOLSKY: We did have him review the discovery,  
25 so.

1 THE COURT: I know but you can't take him beyond what  
2 he was noticed on. You didn't notice him on --

3 MR. YAMPOLSKY: Right.

4 THE COURT: -- but if he -- you can't start talking about  
5 things like I reviewed a guy's statement and I'm going to express an  
6 opinion about something.

7 MR. PESCI: Yeah, yeah, yeah.

8 THE COURT: You can't examine the guy about that.

9 MR. MARGOLIS: Okay.

10 MR. YAMPOLSKY: Okay.

11 THE COURT: So where were you trying to go?

12 MR. MARGOLIS: I'll change tacts.

13 THE COURT: Okay.

14 [End of bench conference.]

15 THE COURT: All right. Jason, you can continue.

16 MR. MARGOLIS: Thank you.

17 BY MR. MARGOLIS:

18 Q Just returning to the effects of Xanax in combination with  
19 other substances on the brain. In your studies, in your work, have  
20 you noticed any difference in these effects of these substances on  
21 younger individuals; for instance teenagers versus grown adults?

22 A The best thing I can say as a quick answer to that is that  
23 younger people, say adolescents, young adults, have experienced  
24 and manifest more frequently the deleterious effects of alcohol and  
25 other drugs, partly because of the effects of the drugs but also

1 partly based under immaturity, lack of experience, and in the  
2 context of driving, their lack of driving experience.

3 So if you combine the characteristics of an adolescent  
4 with the effects of these drugs, the effects of the drugs are much  
5 greater than on say an older, more mature individual.

6 Q And that's in part because there's differences between a  
7 teenage brain and a fully formed adult brain, isn't that right?

8 A Yes.

9 Q Okay. And I would imagine that if Xanax has deleterious  
10 effects on critical thinking, reasoning ability, speech and the like,  
11 those effects would be more pronounced with a younger individual  
12 without a fully formed brain?

13 A Well the thing is that the adolescents tend to engage in  
14 recreational drug use to a degree that many adults do not. And  
15 they're taking doses that are heck of a lot higher than therapeutic  
16 doses. So if you are a mature person taking the drug as prescribed  
17 for anxiety or helping you go to sleep, you're not going to be  
18 abusing the drug, you're taking your pill. Adolescents don't do it  
19 that way, in general.

20 Q And what ways -- if you could, what are a couple ways in  
21 which Xanax would manifest itself in an individual's behavior? You  
22 said something about less care about consequences. You  
23 mentioned that it's used to treat agoraphobia. How would a person  
24 that had ingested Xanax appear to the uninitiated versus the --

25 THE COURT: Just to be clear, are you asking a

1 therapeutic taking of Xanax or an abusive amount?

2 MR. MARGOLIS: I would say maybe both. I think the  
3 effects are shown even in a therapeutic dose, but I think they're  
4 more pronounced when the drug is taken in an abusive manner.

5 BY MR. MARGOLIS:

6 A The dose is related to the response. In a therapeutic  
7 dose -- and a therapeutic dose could be one milligram -- as high as  
8 one milligram, perhaps even two milligrams, depending on the  
9 severity of the condition, and depending on the extent to which a  
10 patient has developed tolerance.

11 After a while drugs don't work as well because your body  
12 gets used to them and therefore the doctor has to prescribe a  
13 higher dose. But in the therapeutic range, you definitely find what  
14 we would call anti-anxiety effects. People who have this feeling of  
15 tension and worry all of the sudden are relieved of it.

16 Now that also relieves them of a certain degree of  
17 sensitivity to their environment so they may not respond as well  
18 say to a hazard or a threat. They're a little bit laid back, you know,  
19 they're not as excitable. And therefore, they may not rise to the  
20 occasion as quickly as needed.

21 Now as you increase the dose to two, to three, to four  
22 times the therapeutic dose, you are now going to move into  
23 essentially a range of effects that we're familiar with, with alcohol.  
24 It's -- Xanax is a depressant. It's going to depress you, it's going to  
25 reduce your psychomotor coordination, your ability to think clearly.

1 You could become appearing drunk. If nobody knew any different,  
2 they'd think you'd been drinking.

3 Q So these individuals are going to be sluggish, they're  
4 going to be ill-equipped to deal with changing circumstances and  
5 then -- I mean, they're basically going to be lead-footed effectively,  
6 right?

7 A Lead-footed and blind drunk.

8 Q Thank you, Doctor.

9 THE COURT: Mr. Pesci.

10 MR. PESCI: Yes, thank you.

11 **CROSS-EXAMINATION**

12 BY MR. PESCI:

13 Q Sir, if I heard you correctly, you have a PhD?

14 A I earned the PhD in pharmacology.

15 Q Okay. So you're not a medical doctor, you're a doctor by  
16 way of your PhD?

17 A Yes --

18 Q Okay.

19 A That is so. Although I did take two years of medical  
20 school in order to study pharmacology. That's the requirement.

21 Q Okay. But as you sit here today, you're not a medical  
22 doctor?

23 A No, sir.

24 Q So you can't speak medically as to the effects on these  
25 specific two individuals, as far as drugs on that.

1           A     That's correct.

2           Q     All right. And now speaking with the generalities because  
3 as you just explained earlier you rely on other people's actual  
4 firsthand tests, correct?

5           A     Partly, yes.

6           Q     And you review that body of information to apply, as you  
7 said, general principles of pharmacology to those studies?

8           A     Not exactly. If I could expand, I could explain.

9           Q     No.

10          A     Okay.

11          Q     What I want to ask is this, you personally did nothing with  
12 these two Defendants?

13          A     That's correct. We already established that.

14          Q     And then when you reviewed things in this case, did you  
15 review any video?

16          A     I looked at some of the videos, but I did not study them.

17          Q     So you didn't watch the video of the Defendants walking  
18 through the Galleria Mall?

19          A     No.

20          Q     You didn't watch the video of the Defendants purchasing  
21 items from a store? A Foot Locker store?

22          A     No.

23          Q     You didn't watch the video of the three Defendants  
24 walking out of the Galleria Mall?

25          A     No.

1 Q All right. So you have no firsthand knowledge of their  
2 actual gaits because just a moment ago Defense Counsel talked  
3 about being, I think it was lead-footed. You don't have any  
4 personal knowledge as to how these individuals were walking  
5 literally after the events in this case?

6 A That's true.

7 Q Okay. Separate from videos, let's talk about some maps.  
8 Did you review any maps in this case?

9 A No.

10 Q All right. Are you familiar -- you're from out of town,  
11 right?

12 MR. HELMICK: Could we approach, Your Honor, please?

13 THE COURT: Yeah.

14 MR. HELMICK: Thank you.

15 [Bench conference transcribed as follows.]

16 THE COURT: So --

17 MR. HELMICK: I know this is not my --

18 THE COURT: -- your earlier objection I thought was that  
19 he couldn't talk about things that he reviewed in the case because  
20 that wasn't what he was noticed about.

21 MR. PESCI: My objection was as to statements. The last  
22 word he said before my objection was, I reviewed the statements  
23 and I approached and my objection he can't talk about what Jaiden  
24 said because that's not in evidence.

25 THE COURT: Okay.



1 MR. PESCI: Now I'm asking about specific evidence --

2 THE COURT: All right. But just to be clear, when they go  
3 back on redirect, you're not objecting then to him talking to the  
4 specifics about the case, just not about the specifics of any  
5 statement of the Defendant.

6 MR. PESCI: Correct.

7 THE COURT: Okay. All right. And I apologize, maybe I  
8 should have clarified all that, but I had him noticed generally to talk  
9 about things in general, not about anything specific to the case.

10 MR. HELMICK: Right.

11 THE COURT: [Indiscernible] go into specificity they can --  
12 I understand about the statement. But in any event, okay?

13 MR. HELMICK: Can I say something?

14 THE COURT: Yeah.

15 MR. HELMICK: So -- because I know it's not my witness  
16 but Giancarlo and -- you talked about Kody just now, so I had to  
17 object. I mean, the reason that we noticed him was to talk about  
18 the educate -- educate the jury in regards to what Xanax and  
19 alcohol and marijuana does to the human body.

20 THE COURT: Right.

21 MR. HELMICK: That's it. I wasn't -- I was not -- if this was  
22 my witness, I wasn't going to get into any of this other stuff.

23 THE COURT: Okay.

24 MR. HELMICK: And so I don't think that that's appropriate  
25 because of the reason that we noticed him for. He -- Jason didn't

1 get into any of that stuff.

2 THE COURT: So what all are you wanting to get into?  
3 Because what I hear a little bit is that if you use him beyond what  
4 he was noticed for, particularly when a Defendant that didn't notice  
5 him has called him and the Defendant that noticed him has decided  
6 they don't want to call him and we start using case-specific stuff  
7 with him, there's prejudice to the Defendant that decided I don't  
8 want to call this guy at all.

9 MR. PESCI: So the State's position is as follows. Even if  
10 Mr. Caruso had not been the one to call him --

11 THE COURT: Okay.

12 MR. PESCI: -- Mr. Harlan did --

13 THE COURT: Okay.

14 MR. PESCI: -- the State would still be able to go into the  
15 specifics of the case because they're talking in generalities to lay it  
16 over the case as if there's this effect in these defenses. I'm  
17 countering with the evidence to say --

18 THE COURT: But --

19 MR. PESCI: -- this effect is not borne out by the evidence.

20 THE COURT: -- isn't that really argument though --

21 MR. PESCI: Well --

22 THE COURT: -- as opposed to -- I mean, the witness -- if  
23 the witness is saying I'm not expressing any opinion on when  
24 anybody did it in this case, then going into the specifics of the case  
25 to say it's different than what you expect to see in people, I mean --

1 MR. PESCI: All right. I'll back off the specificity just in  
2 case. I'll talk in generalities as far as pharmacology and say how it  
3 can affect one person different than another.

4 THE COURT: Where are going with the maps?

5 MR. PESCI: To show that there were various ways to get  
6 to locations and that they were able to think through this, even  
7 though I have all this onboard, that they have the capacity to be  
8 able to figure out how to get to a place.

9 THE COURT: And then what else did you want to do that  
10 was specific?

11 MR. PESCI: That was it. It was the videos, the map, and  
12 then I was going to talk about like, you know, some people get  
13 affected by drugs differently than others.

14 THE COURT: All right. So let's move off the map issue  
15 then. You can go into those other things; you're talking about how  
16 the effects are different on other people.

17 MR. PESCI: Okay.

18 THE COURT: All right.

19 [End of bench conference.]

20 THE COURT: All right. Mr. Pesci.

21 MR. PESCI: Thank you.

22 BY MR. PESCI:

23 Q Sir, when you talked about the effects of these particular  
24 drugs on an individual, you would agree with me that it could be  
25 different from one person to the next?

1           A     Not different qualitatively, but certainly different  
2 quantitatively.

3           Q     Okay. So let's say for example I don't drink and then I  
4 take a shot of whiskey. Could the effects of that shot of whiskey be  
5 more severe, as opposed to my brother who drinks all the time and  
6 he takes that shot of whiskey?

7           A     Well if you had a sensitive enough test, you could  
8 probably detect a difference.

9           Q     I mean, as far as they behave. How I behave versus my  
10 brother. If I'm a non-drinker and I take a shot of whiskey, the effects  
11 of that shot of whiskey versus my brother, who drinks and takes  
12 that whiskey.

13          A     Well if you're both engaged in the same behavior and  
14 you're both sitting there watching a football game, you probably  
15 couldn't distinguish them. But if you have a sensitive test that  
16 could pick up the effects of alcohol after a few drinks, they could  
17 probably say yeah, your brother's more affected than you.

18          Q     Okay. So your testimony is, is that it affects us both the  
19 same way?

20          A     Well, you had only one drink. One drink may not do much  
21 for you even if you are a teetotaler.

22          Q     Oh.

23          A     But if you have several whiskeys, even if you are a  
24 drinker, you can be more affected.

25          Q     Let's shift out of drinking and let's --

1       A     Okay.

2       Q     -- apply it to a different situation where you talked about  
3 earlier; introducing a drug to a person's system to see the effects of  
4 that drug, fair?

5       A     Sure.

6       Q     All right. So let's say there's a woman that goes to have a  
7 baby, right, and has to have an epidural. Would you agree with me  
8 that an epidural might affect one woman differently than another?

9       A     Possibly.

10      Q     Like one dose of an epidural on one woman could only  
11 really numb the pain to the knees, whereas for another woman it  
12 might go all the way up to her waist.

13      A     It's possible.

14      Q     So somebody could be affected by that one does  
15 differently because they're different people.

16      A     It is possible. But again, qualitatively the effects will be  
17 there --

18      Q     Sure.

19      A     -- it's the matter of degree.

20      Q     You're saying the effects are there but the degree or the  
21 effects on one person is lesser or greater than another.

22      A     For that, one has to appeal to other factors. For example,  
23 experience, age, gender, how big you are. All these factors come  
24 into play but if the dose is so high that it's so far above therapeutic  
25 level, you can predict that a person even like yourself would be just

1 as affected as somebody who has taken the drug for a while.

2 Q All right. So with that analysis, let's say I'm going to have  
3 a surgery and I'm going to be put under anesthesia. Don't  
4 anesthesiologists have different anesthesia there in case my  
5 reaction to this particular anesthesia is negative versus somebody  
6 else's reaction?

7 A Well there's a whole workup to anesthesia with  
8 preoperative anesthetics and -- that's a very complex subject. I --

9 Q Well would you agree with me --

10 A -- don't think it's simple --

11 Q -- that some people react differently to anesthesia than  
12 others?

13 A Most of them are put out. Anesthetics work pretty  
14 uniformly.

15 Q Okay. But what I'm saying is a negative reaction. Some  
16 people can have a negative reaction to a particular anesthesia that  
17 works on 75 other people but for this person, they have a negative  
18 reaction. Maybe they go into anaphylactic shock.

19 A Very unlikely. It's possible, but it's not a good example.

20 Q Okay. Thank you.

21 MR. PESCI: Nothing further.

22 THE COURT: Mr. Helmick, any questions?

23 MR. HELMICK: No, Your Honor. Thank you.

24 THE COURT: Mr. Margolis, anything further?

25 MR. MARGOLIS: Just a couple.

1 **REDIRECT EXAMINATION**

2 BY MR. MARGOLIS:

3 Q Doctor, Mr. Pesci kept asking don't different substances  
4 affect -- or the same substance, excuse me, might have a different  
5 impact on Individual A versus Individual B, correct?

6 A Sure.

7 Q Now, would you agree that if the therapeutic dose of let's  
8 say Xanax is one milligram, if Individuals A, B, C, all the way to Z,  
9 took three, four, five, six times that dose, regardless of their  
10 tolerance, there would be a deleterious impact on their cognitive  
11 function, correct?

12 A That is correct.

13 Q Thank you.

14 THE COURT: Anything further?

15 MR. PESCI: No. Thank you.

16 THE COURT: Anything Ryan?

17 MR. HELMICK: No, Your Honor. Thank you.

18 THE COURT: Anything from our jurors?

19 Yes.

20 [Bench conference transcribed as follows.]

21 MR. YAMPOLSKY: Gee, what a surprise.

22 THE COURT: I think the first question is what he's just  
23 testified to for the last half an hour. The second question though I  
24 get.

25 MR. YAMPOLSKY: What does it say?