IN THE IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI, Appellant, vs. RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS, Respondents.	Supreme Court No. 79752 district court case no. A-18-785145-W department

APPELLANT'S APPENDIX

VOLUME V OF VII

BATES NOS. AA00822 – AA00951

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DISTRICT COURT
CLARK COUNTY, NEVADA
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STATE OF NEVADA, Plaintiff, vs. MAZEN ALOTAIBI, Defendant.	CASE NO. C287173-1 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 8

TUESDAY, OCTOBER 22, 2013

APPEARANCES:

FOR THE STATE:	MARY KAY HOLTHUS, ESQ. Chief Deputy District Attorney JACQUELINE M. BLUTH, ESQ. Deputy District Attorney
FOR THE DEFENDANT:	DON P. CHAIREZ, ESQ.
Also Present:	Mohammad A. Taha, Interpreter

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I N D E X

CLOSING ARGUMENTS:

By Ms. Holthus 7

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By Ms. Bluth 40

LAS VEGAS, NEVADA, TUESDAY, OCTOBER 22, 2013, 1:10 P.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: Welcome everyone. The defendant's here with counsel, the State's present. State of Nevada vs. Mazen Alotaibi, Case C287173. I have an original set of jury instruction -- jury instructions. Has everything been settled?

MS. BLUTH: Yes, Your Honor.

THE COURT: All right. And before, while numbering the jury instructions, did both counsel for the State, counsel for the defendant, make sure that these instructions contain the entirety of what was settled?

MS. BLUTH: Yes, Your Honor.

THE COURT: Mr. Chairez?

MR. CHAIREZ: Yes, Your Honor.

THE COURT: Okay. And then I also have an attached verdict form. Mr. Chairez, did you look at the verdict form?

MR. CHAIREZ: I have. And basically, my client has just informed me with respect to two of the counts to lewdness, he believes I should make a motion to dismiss each of those counts, because he -- based upon what AJ testified, he felt there wasn't enough evidence of that. And at any rate, it was something that he and I had discussed during the weekend and discussed yesterday.

And so, at any rate, we believe, based upon AJ's testimony, it's not a lesser included to the sexual assault on either of the counts, and it's something separate. I'm not sure if we would have to change the verdict form or what we would have to do, or -- but at any rate, just to -- I would be making a -- the motion to dismiss those two particular counts. I guess it's Count -- Count 4 and Count 6.

THE COURT: All right. Ms. Holthus or Ms. Bluth, you want to respond?

MS. HOLTHUS: I believe we provided to the Court as well as the defense the Cossack case. This clearly gives us the ability to charge alternate theories, and that's essentially what we've done. That'd be second -- the counts of lewdness correspond to the sexual assault counts. Obviously, in committing the sexual assault counts, they would necessarily commit the lewdness counts, as well, since consent is not an issue. But to the extent that they found that there was consent for the sexual assault, it would be an alternative count on the lewdness.

If the jury were to come back as to both counts, ultimately it would be a sentencing decision by this Court setting aside the lewdness and sentencing on the sexual assault.

THE COURT: All right. I'm going to deny the request. I do agree with the State that the -- the case law

does give them the ability to plead in the alternative. And obviously, if he's sentenced on -- I mean, not sentenced, if he is convicted on everything, it can be addressed at the time of sentencing or prior to.

Is there anything else we need to address?

MS. BLUTH: No, Your Honor.

MR. CHAIREZ: Well, the only thing is I want to make sure that when we're doing the closing argument, we will argue consent is a defense to sexual assault. Okay. We will argue intoxication is a defense to the lewdness with a minor. All right. And I don't need them jumping up and complaining and saying I'm doing --

THE COURT: Actually, I think Ms. Holthus actually intellectually talked through this the other day --

MR. CHAIREZ: Right.

THE COURT: -- saying, you know, if they believe you on --

MR. CHAIREZ: Right.

THE COURT: -- the consent, then it gets out of the lewdness.

MR. CHAIREZ: Right.

THE COURT: If we believe you on the intoxication as a defense, then you could potentially end up with a not guilty.

MR. CHAIREZ: Correct.

THE COURT: So I think that she doesn't have -- well, I don't want to put words in her mouth, but I don't think --

MS. HOLTHUS: But anyway.

THE COURT: -- she has any objection.

MS. HOLTHUS: That's exactly correct.

THE COURT: Okay. So, is there anything else we need to address before I bring the jury back in?

MR. CHAIREZ: No, Your Honor.

THE COURT: All right. Please bring the jury in.

(Jury reconvened at 1:14 p.m.)

THE COURT: Okay. Welcome back, ladies and gentlemen. Make yourself comfortable.

As we spoke about yesterday, what's going to happen right now, I'm going to give you the law that applies in this case. You'll take that law back with you to the jury room and you'll use it to deliberate upon your verdict. Thereafter, the State is going to present a closing argument. We'll probably take a brief little break so you guys can stretch and be comfortable before Mr. Chairez will have an opportunity to do his closing argument. And then the State has a choice to do a rebuttal.

Now, ladies and gentlemen of the jury, over the next many minutes, I'm going to be reading you these jury instructions. I would love to be able to just recite them to you without having to look down, but I cannot. The reason is,

is everything that's said in these instructions is very, very important.

(Jury instructions read.)

THE COURT: Counsel.

MS. HOLTHUS: Thank you.

THE COURT: Whenever you're ready.

STATE'S CLOSING ARGUMENT

MS. HOLTHUS: May it please the Court, counsel, and ladies and gentlemen of the jury, thank you for your patience. It's been a couple of weeks now out of your busy schedules and we certainly appreciate your coming down.

As we told you in the beginning, we had two things to prove to you. Was a crime committed and did the defendant commit those crimes.

The who: Mazen Alotaibi. It's not a whodunit. We know the victim said the defendant did this to him. The video identified the defendant. DNA identified the defendant. Rashed, the defendant's buddy, identified the defendant as being the one in the bathroom. And the defendant told the police essentially he was the one with the kid. Mazen Alotaibi did whatever happened.

That leaves us with the what. We charged burglary, first degree kidnapping, two counts of sexual assault with a minor, four counts of lewdness, and one count of coercion.

Burglary, you have the jury instruction, every person

who by day or night enters any house, room, apartment, tenement, shop, or other building with intent to commit a felony on any person is guilty of burglary. You're further instructed that sexual assault, lewdness, are all felonies. And if he entered with intent to commit either of those, he would be guilty of the burglary.

The evidence is clear that between 8:00 and 9:00 a.m. on December 31st, the defendant entered Room 631 with the child. And they entered the bathroom therein. And that was with intent to have sex with that 13-year-old boy. AJ himself says that the defendant was making sexual advances before going to the room. That they had a plan, defendant entering the room was for sex and marijuana with this 13-year-old boy, whether going to have sex, either for money or marijuana. But it was clear that the intent, when they crossed the threshold of the room, when they crossed the threshold of the bathroom, was sex with a 13-year-old boy, regardless of for money or anything else.

The video corroborates everything. It shows the defendant and AJ getting off the elevator of the sixth floor, just enough time later to accomplish what we know was done there. It shows AJ essentially running out of the sixth-floor elevator alone thereafter.

Rashed Alshehri says it was a Chinese boy in the room one minute, they told him to leave when he said he was 13.

Everybody in that room knew that kid was 13 years old. And yet the boy came back with the defendant. Rashed tells you they entered the bathroom together, that the door was locked, that the defendant wouldn't answer the door in spite of the knocking two or three times and shouting, Open the door and let him go. Minutes later, the boy leaves. The defendant comes out saying, Oh, the boy wanted money for weed.

The defendant himself says the boy was 11, 12, 13, yes, the boy did it for money. He admits that the boy was on the elevator, he admits that the boy was in the bathroom. He admits that his penis was in the boy's mouth. And he admits that his penis was in the boy's butt. The defendant is clearly guilty of Count 1, burglary.

First-degree kidnapping, that's a person who leads, entices or carries away or contains any minor with the intent to keep, imprison or confine him from his parents, guardians, or other person having lawful custody of the minor, or with intent to hold the minor to unlawful service or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree.

In this case, the facts clearly establish that, as in terms of leading, taking, enticing, or carrying away, the video clearly shows it. You see the defendant leading -- leading him on the elevator, off the elevator, up to the point where we know they disappeared. We know any minor -- we know

that AJ is 13. There is no dispute as to that.

With intent to keep him from his guardians or perpetrate on him an unlawful act, he took AJ to his room. He took him to his locked bathroom. Neither Mom nor Grandma gave permission for AJ to be in the bathroom with the defendant, or in his presence at all, for that matter. The unlawful act being sexual assault or lewdness.

Again, the defendant knew AJ was 13 when he entered the bathroom with him. The intent was obvious from the video. AJ testified about the discussion for sex for weed or money.

The touching occurred outside. It was away from the public, away from the camera when it happened in the alley, taking him to a secret place, clearly his intent from that point was obvious. And then, again, he admits his penis was in his mouth, in his butt. The only thing the defendant denies was the force. But you will notice that consent is not a defense to kidnapping, because AJ's a minor. You have a jury instruction that specifically says it's only a defense to kidnapping if you're talking about an adult. So, on these facts, consent of AJ would never be a -- a defense.

Movement of AJ is required not to be incidental. There's another jury instruction that talks about -- what that basically means is if -- if they were in the room and the defendant took AJ and threw him down on the bed to rape him, well, that movement of taking him from here and throwing him

to the bed is incidental. It's -- it's for the purpose of the sexual assault. It doesn't in any way increase the harm to the child, you know, falling on the bed.

But what we're talking about here is moving him from the public place. Again, not required force, consent is not a defense. But when he led that child through the public casino where everything's being watched and people are monitoring and maybe going to help him or -- or save him, when he moves him to outside in an alley where there's no cameras, where there's no public, where there's no security, when he moves him back inside and he takes him up the elevator and down the hallway where we know there are no cameras in the hallway, and into his locked room where no public, no friends, no grandma, nobody has access to that kid, and then one step further, even, takes him into the locked bathroom, where even Rashed and Mohammed knocking on the door are unable to come to that boy's aid, that's substantially risk -- increases the risk of harm to that child sufficient for the count of kidnapping. And the defendant is guilty of Count 2, First Degree Kidnapping.

Sexual Assault with a Minor Under 14. Person who subjects a minor under 14 to sexual penetration against the minor's will, or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his

conduct, is guilty of sexual assault.

Sexual penetration includes fellatio and intercourse, anal intercourse. Anal intercourse is required to break the plane of the anus, somehow inside, it's clear from the findings here. Fellatio, it just required oral-genital contact. Doesn't have to be all the way in the mouth. Once the -- once the penis touches the mouth, you've got completed count of fellatio.

In this case, every step of the way AJ has told you that while he went along for a minute, he absolutely didn't want what ultimately happened to him to happen to him. He specifically told you, I did not consent. That is also seen in -- under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his conduct.

The defendant knew that this kid was 13 years old. The defendant knew that the acts would be very violent and very painful. To the extent that AJ didn't back up strong enough or run away when he was being kissed or touched or fondled, perhaps there's a belief that that would be consensual on some level, even though it's a 13-year-old boy. But it's patently unreasonable to think that this boy was going to agree to the very violent way in which he forced his penis down his throat, and the way that he forced it into his rectum.

At 13 years old, AJ was not capable of resisting or understanding the nature of defendant's conduct. It's clear from the evidence, when AJ was walking around saying, I'll get some weed for doing a little something-something, that's not what he was talking about, and that's not what he expected, and that is not what he understood to be the nature of the conduct coming up.

AJ was in over his head. AJ was in a strange men's room. He was locked in a bathroom. AJ told the defendant no, he pushed the defendant away, the defendant blocked the door. And again, several men were in the room outside the door.

Count 3, Sexual Assault Under 14, that's the anal. AJ again says he felt he couldn't leave. The defendant was blocking the door. AJ wanted to leave, he told him no. Then he put him to the ground, put stuff on his penis, and put it in AJ's butt. Pushed the penis in the butt, it was very painful. AJ pushed him away and left.

Jeri Dermanelian told you she described the anal penetration that AJ described, anal penetration with lotion, that it was painful. She told you she observed glistening wet regions in the mid-line, which would have been consistent with the lotion or lubricant, that it was painful, very, very painful even with light palpitation. That she saw multiple lacerations, swelling, edema, erythema, ecchymosis, contusions, and bleeding. You saw it yourself. All of those

injuries were consistent with blunt-force trauma. All of those injuries would be painful.

The defendant himself admits that he put his penis in AJ's butt "for a second." There is no time limit required to be guilty. Defendant says, "Yeah, he backed his ass." Defendant is guilty of Count 3, Sexual Assault, Victim Under 14. That's the anal count.

I'm going to do the other sexual assault, Count 5, Sexual Assault with a Minor Under 14, Fellatio. Again, AJ's 5 -- 5'3", 108 pounds. He's a kid. He says, I didn't know what to do, I knew something bad was going to happen, but this just kept going. I was trying to back off, I was trying to step away, trying to say no. Said he didn't want it, told him no. That's when the defendant doubled the money. Defendant was blocking the door. AJ felt he couldn't leave. He pulled AJ's head toward his penis, put his penis into his mouth, his -- it hurt his throat.

Jeri Dermanelian said he was small, immature for his age, prepubescent. She -- he described the fellatio as being painful, gagging and choking. Unreasonable to believe that he would consent to that at 13.

He had a contusion to the soft pallet in the back of his throat that was painful to even the lightest of palpation. He was fragile, he was timid, and he was in pain. The defendant himself says he knows he didn't ejaculate in AJ's

mouth, but he does admit he put his penis in AJ's mouth for "just two seconds." Defendant is guilty of Count 5, Sexual Assault, Fellatio.

The lewdness counts, Lewdness with a Minor Under 14, Counts 4, 6, 7, and 8. A person who commits a lewd act or lascivious act other than sexual assault upon or with a part of a body of a child under 14, this does require the specific intent of arousing, appealing to, or gratifying the lust or passions of that -- that person or of the child. There is no requirement for actual arousal.

Count 4. Count 4 is the defendant using his penis to touch the anal area of the child. This is the count that goes hand-in-hand with the sexual assault Count 3. In committing the sexual assault, necessarily you would commit the lewdness upon touching the -- the outside of the rectus. It's complete. You don't need the penetration. It doesn't matter whether there was consent or reason to believe the consent or any other consent. Necessarily, if you commit sexual assault anally, you're going to commit Count 4, Lewdness. Ultimately, the -- the sentencing would be -- would -- would sort out the difference. But he would be guilty of both counts. Consent is not a defense to lewdness. And again, it's the same evidence as a sexual assault, anal.

Where multiple sex acts occur as part of a single sexual encounter, defendant may be found guilty for each

separate or different act of sexual assault and/or lewdness, so that there's the -- the lewdness is complete upon touching, with or without consent. And once it's -- the penis is forced in, now we've got the sexual assault, assuming it's against the consent of the child. Those are different acts, sexual assault is different from lewdness. So you have two convictions.

On the other hand, where you have, for example, remember, AJ described he put -- pushed his penis in, pulled it out a little bit, and then pushed it in again? Two same acts. He's only charged with one count of sexual assault for anal, because they're two same act, they're not -- there's no interruption, it's -- it's just one -- one continuous of the same act.

Count 6, again, this is the -- this is the count that goes hand-in-hand with the Sexual Assault, Fellatio. Necessarily, if you find him guilty of Sexual Assault, Fellatio, against the consent, you have also found him guilty of the lewdness, assuming you find it with intent to arouse or gratify either the child or the -- the defendant. The evidence is the same as Count 5, Sexual Assault, and consent is not a defense.

Count 7, Lewdness. AJ says the defendant begins talking to him about sexual things. Defendant begins touching him. Defendant moves in on AJ in the elevator and kissed him

on the ear. Defendant took AJ to an alley off-camera where he's touching and kissing. There's DNA of the defendant on AJ's left ear. Julie Marschner, the scientist who did the test, told you it was the defendant, and the defendant's expert agrees. Just as the video shows, the DNA is on AJ's ear.

Count 8, Lewdness Under 14. That's when AJ says he was in the bathroom and it got weird. Weirder, I guess. Defendant was touching and kissing on AJ. Defendant took off his shirt. He continues to kiss and lick on the left chest and face. And again, you have the DNA of the defendant on AJ's chest, consistent with saliva. Julie Marschner told you that, and the defendant's expert agrees. Remember, he said, Good job, good sample. That -- that's a match.

As to the lewdnesses, it requires specific intent again of arousing. The facts are clear that there's no other reason any of these actions would be committed other than for arousal. The defendant had been in a strip club earlier. Per Rashed, defendant was excited. The defendant discusses sex with AJ. Kissing, licking, touching, fondling, rubbing, this is all with intent to arouse.

The injuries to the child's throat and his anus were consistent with the defendant actually being aroused. Not required, but the injuries are such that they are consistent with an erect penis more so than with a flaccid penis.

Defendant is having sex, the purpose which obviously is to gratify his own sexual desires. The sexual assault counts really only causing pain to the child. Defendant is guilty of Counts 4, 6, 7, and 8, Lewdness with a Child under the Age of 14.

Coercion. It's unlawful for a person with the intent to compel another to do or abstain from doing an act which the other person has the right to do or abstain from doing. Where physical force or the immediate threat of physical force is used, the person has committed the offense of coercion, a felony.

Defendant leaves with AJ, keeps him in his sight. He begins touching AJ. Defendant moves in on AJ in the elevator and kissed him. AJ didn't know what to do. AJ knew something bad was going to happen at the end, but he just kept going. Defendant took AJ to an alley off-camera. AJ thinking awkward, trying to back off, trying to step away, trying to say no. As AJ stepped away, the defendant pulled him closer.

In the bathroom, AJ wanted to leave, he tried to back away. AJ said he didn't want it anymore. AJ took off -- the defendant took off his shirt and pulled down his pants, kissing and licking AJ on the left chest and face. AJ told him no. Defendant tried to double up the money. Defendant is blocking the door. Defendant keeps AJ with him for the defendant's own sexual gratification. Defendant is guilty of

Count 9, Felony Coercion.

Laws are created to protect children from themselves, from others, from bad decisions. Assuming a risk doesn't mean that you deserve the result. Did AJ make a bad choice that day? Absolutely. Did he deserve the result? He didn't, anymore than someone who smokes, they might assume the risk of cancer. Do they deserve it? If you get into the car and your kid forgets the seatbelt, does he deserve to be killed by the drunk driver on the road? No. And that's why we have laws, to protect us from ourselves and particularly children, who need extra protection.

In this case, there are eyewitness testimony. The defendant himself, AJ, and Rashed. There is video including an actual count charge of lewdness where you can actually see the defendant kiss that child in the ear. There is physical evidence, both medical examination and documented injuries that you can see with your own eyes for yourself. And there is indisputable DNA. All of which prove the defendant is guilty as charged.

And again, thank you.

THE COURT: All right. Actually, are you guys good to go through the defense's closing or do you need a break? I want to make sure that you're -- you're good? All right.

Mr. Chairez, if you're ready.

MR. CHAIREZ: Can I move the podium?

THE MARSHAL: Sure.

DEFENDANT'S CLOSING ARGUMENT

MR. CHAIREZ: There's really two issues in this case. One, did AJ consent or was it reasonable for Mazen Alotaibi to believe that he was consenting to these sexual acts? And two, whether or not Mazen Alotaibi was intoxicated enough to where he could not form the specific intent to commit burglary, that he could not form the specific intent to commit kidnapping, that he could not form the specific intent to commit coercion, and that he could not form the specific intent to commit lewdness with a minor.

And in order to find Mazen Alotaibi guilty, you have to believe that AJ Dang is an honest person.

One of the jury instructions that you will get, and I'm only going to focus on -- on four or five, is Jury Instruction No. 30, the credibility of a witness. And so go back, I mean, the judge already read it to you, but focus on -- on Jury Instruction No. 30, because it'll say if you believe that a witness has lied about one fact or a material fact, you may disregard all of the testimony that that particular witness has given. So, I will explain later on why we believe that AJ Dang was not being totally candid with you.

Another instruction, and probably the most important instruction, is Jury Instruction No. 21, What is Intoxication. And intoxication in and of itself is not a defense to any of

these crimes. But intoxication is a factor to consider, Can I form the intent to do something wrong? Now, I remember during jury selection talking to some of the jurors, and one in particular who said the reason that people in our church are encouraged not to drink is because it causes you to lose your ability to make sound decisions. We end up doing things that we regret.

And so the issue here will be how much do you have to drink before you lose your ability to think rationally? Is it two drinks? Is it four drinks? Is it six drinks? Is it 10 drinks? And one of the things you didn't hear in Ms. Holthus' presentation is anything about Mazen being intoxicated. And, as a matter of fact, as you listen to all of the testimony that took place last week, the State went to great pains to make sure that all of their witnesses says Mazen Alotaibi was not intoxicated.

It started with the security guards. No, he wasn't intoxicated and he understood everything that was going on. It started with the second security guard.

Yes, he understood everything that I was saying, no, he wasn't intoxicated. I've seen people that are drunk before and there's no way that he was drunk.

Okay. It went with the other detectives. And the worst detective of all was Detective Pool, who plainly told you, Nope, he wasn't drunk. And, of course, he has to say

that, because if Mazen Alotaibi was drunk, he had no right to take his interrogation; he should have waited till he was sober enough to understand what was happening.

Because drunks will say, you know, things that are unreliable. You know, Detective Pool will say, He understood English. And yet simple words like medical exam, prostitute, trick roll, lubricant, these are words that Mazen Alotaibi did not understand.

And so intoxication, they go to great extremes to say Mazen isn't intoxicated. And why? Because they know if he's intoxicated he cannot form the specific intent to commit seven of the nine crimes of which he is charged.

Now, they sit there and say it's undisputed video evidence that Mazen kissed AJ on the ear. And for that they want you to find him guilty of lewdness with a minor. And if you recall, when I asked AJ, How did you feel?

Well, I felt funny. Okay. Well, when the -- when the elevator hit the ground floor, why didn't you take off if you were feeling funny and you thought the guy was coming on to you?

Oh, I wanted marijuana. You know. And that kind of thing. So, how can you say that that was a sexual kiss if AJ himself will sit there and say, I did not run away when I had a chance to? And more importantly, you know, when you look at that videotape -- and the State goes to great troubles to say,

Oh, look at Mazen, he's walking nice and stiff and rigid, like a soldier. No; you know, Mazen is walking, not falling over drunk, but he's walking where he's unsteady on his feet.

And so even his own friend Rashed will say, He was so drunk when we left the night club we wanted to give him food because we could tell that he was sick.

And more importantly, there's another jury instructions about common sense. Don't leave your common sense at the front of the courthouse door. When you look at that videotape, I submit that all of you can tell that Mazen Alotaibi is intoxicated, is wasted, doesn't understand everything that's going on, and continues to talk and talk and talk for an hour and a half, because it'll show that he's had the 7 to 10 shots of Hennessy that he had talked about. And remember, as Jennifer testified yesterday, these weren't just simple shots. These weren't shots diluted with ice. These were not shots diluted with water. These were straight double shots, and -- and Mazen was drunk.

And so this is one of the big disputes in this particular case. Because intoxication does go to state of mind. And state of mind and specific intent are very, very, very important issues with multiple counts in this particular case.

And lastly, I want you to focus on Jury Instructions 13, A Good Faith Belief of Consent. Sexual assault means

against the will. Well, consent is one way to say it's not against the will. And -- or it even goes further, if there is a reasonable good faith belief of consent. And so assuming everything that AJ says is true, you know, what is somebody supposed to think if they go down with you and they smoke marijuana because they want your marijuana? What are you supposed to think? And you saw the video. AJ's walking four or five feet behind Mazen. It's not Mazen dragging him. It's -- it's not Mazen dragging him. It's AJ following willingly. And it's AJ willingly going to the room. And you heard it out of AJ's own voice, I was trying to trick him. I wanted to steal his marijuana, I wanted to steal his money. So these things are important.

And lastly, I want you to focus on the flight instruction. Flight, generally speaking, is a consciousness of guilt. When people do something wrong, they want to get away. And what does Mazen Alotaibi do after AJ leaves the room? He goes and sits in the corner and he starts drinking.

And so that alone is a factor that will let you know my state of mind wasn't to have committed lewdness. My state of mind wasn't to have committed kidnapping. My state of mind was not to have committed coercion or burglary. Not realizing that this was an important factor, what was going to happen. I mean, he didn't realize the seriousness and the danger of which he was about to face. Because he had 20 or 30 minutes

to get away if he really knew that he had done something wrong. So, put all of those factors together and use your common sense.

And so, what do we know and why should you not believe AJ? Because AJ -- and the most important thing that happened in this trial was last Tuesday when I had the mother on the stand and I asked her, Do you realize that AJ went to my client's room to buy marijuana?

And she looked at me like she was stunned. And she goes, What?

I go, Yes, do you realize that AJ went to my client's room to voluntarily buy marijuana?

And she said no. And what did that tell me? Everything that AJ has been telling the State and everything that AJ has been telling his mother has been a lie. Okay. And I hate to call a young boy a liar, but this boy lied.

And he lied, because he admitted that he lied. He lied the very first day that all of this happened. When he exaggerated his story and made it sound as bad as possible. He -- and he admitted on the stand, Yes, I said I was dragged to the room. Yes, I said he was pulling me by the clothes. Yes, I said, you know, this happened and that happened. Yes, I tried to make the defendant look as bad as possible. These are all admissions out of AJ's mouth.

But he never told his mother, even when we were here

in court last Tuesday. And so what is the truth? AJ didn't make -- change his story a few weeks ago because he -- because he was embarrassed originally about having sex. He lied to the DA, he lied to the police, he lied to everybody, because he did not want his mother to know what kind of person he was who would go to somebody's room, voluntarily, a stranger's room, in order to buy marijuana.

And so if he is still being dishonest with his mother, you go back to Jury Instruction No. 30 and say if somebody has lied about one material fact, you can disregard all the other testimony. But -- and that's very, very important to understand what happened.

Now, there's another mother of whom I'm concerned about. And that's Mazen Alotaibi's mother. She doesn't know that his -- that her son came to Las Vegas --

MS. BLUTH: Judge, I'm going to -- I'm sorry, Mr. Chairez, to interrupt you. But I'm going to object to anything in regards to Mr. Alotaibi's mother. I mean, inciting compassion.

MR. CHAIREZ: No, I'm not, Your Honor. I'm just going to talk about all of the bad things that Mazen did when he came to Las Vegas.

MS. BLUTH: I'll just let it go for a little bit --

MR. CHAIREZ: Okay.

MS. BLUTH: -- and then if I have an issue, I'll

object again.

THE COURT: That's fine.

MR. CHAIREZ: Mazen's mother didn't know that Mazen came to the United States and he would go drinking with Jennifer --

MS. BLUTH: Objection. It's not --

MR. CHAIREZ: -- and the other Saudi guys.

MS. BLUTH: It's not in evidence what --

MR. CHAIREZ: Okay.

MS. BLUTH: -- the mother of Mazen Alotaibi knows, she's not here.

THE COURT: Objection's sustained.

MR. CHAIREZ: Okay. There's no question that Mazen Alotaibi, when he came to the United States, like all the other Saudi guys, found themselves in a place where there were no longer the restraints of their culture. And some of them, in order to be American, will do the things that other Americans do. On weekends, they would go out drinking. On weekends, they would go out dancing. On weekends, they would want to have fun.

And when it came around to New Year's, they wanted to come and see the most exciting place to have the best weekend possible, which is Las Vegas, Nevada.

So Mazen rents a car, he drives to Los Angeles, he takes his friend Mohammed, and they give Rashed a ride,

because Rashed doesn't have a way to get out here, even though it's his cousin that's renting a room here at Circus Circus. And they come out to Los Angeles and spend a few days there before they find themselves in Las Vegas, Nevada, at 2:00 in the morning on December the 31st.

And so they meet up with Jennifer, they meet up with some of the other Saudi guys. They go to the Palms Casino and have drinks. And Jennifer remembers three double shots of Hennessy. And from there they want to go to another club where they can drink and dance. But the taxi driver takes them to a strip club. And at the strip club, you know, Mazen is there at the bar drinking and -- and whatever until, like, 6:00 or 7:00 in the morning, when they decide it's time to go back to the room.

And only by chance and bad circumstances do Mazen and AJ Dang happen to cross each other on the sixth floor when AJ is leaving his friend's room, Mary's room, and Mazen and his friends are coming back. Okay. And what did AJ say about the story? AJ said, My friend Mary, we were going to have breakfast and we couldn't have breakfast.

And, of course, when AJ first spoke to the cops, what did he tell the police officers? Well, I didn't report it to security, because I had to have breakfast with Mary first. Of course, he now acknowledges that wasn't true. And you have to determine whether the reason he wasn't honest with the police

was because he was embarrassed, or embarrassed because of the sexual activities that took place, or he was embarrassed because he didn't want his mother to know, I was up in a place where I shouldn't have been trying to get marijuana off of adult men.

Now, legally speaking, sexual assault is against the will. Sexual assault is a completed act. So, and this is tricky, and this is where you're going to put on your thinking caps to understand the difference between lewdness and sexual assault. Sexual assault, the defense is consent. Lewdness, the defense is intoxication.

And so the State is walking a tightrope in charging both of these counts. Because if you believe that Mazen Alotaibi's penis went inside the boy's mouth, that is a completed act, and it cannot be lewdness. If you believe Mazen Alotaibi's penis went inside of the young boy's rectum, that is a completed act and it cannot be lewdness, unless you believe that there was foreplay that was taking place beforehand.

But you remember when I had AJ on the stand and asked him these questions, Did he fondle you with his penis around your buttocks area? Did he rub and touch and do this and that, etcetera, etcetera? AJ said no. It was quick, it was forceful, and it was against my will. Then when it came to the mouth, the same thing. AJ doesn't say there was any

rubbing or fondling.

So, to that degree, out of AJ's own mouth, even though I don't believe everything that he says, that is one part that you should disregard. Because AJ himself says it didn't happen. Now, AJ will say he was kissed on the ear, and AJ will say he was kissed on the neck or on the chest. So now you have to go to not consent, but intoxication. When Mazen leans over and is doing this, is he doing that with the specific intent to commit lewdness? Is he trying to turn himself on sexually? Because AJ says no, this wasn't done for my sexual pleasure.

So, what is Mazen thinking, you know, when he's being -- when he's there touching AJ's body? And we don't deny that AJ's -- that AJ's body was touched with saliva or saliva from Mazen Alotaibi. The DNA expert from the State, Julie Marschner, says that it was found on the left ear, it's found on the left neck, it's found on the chest, it's found on the right hand, and it's found on the genital area of AJ Dang.

But she says all of this is saliva or skin DNA. Nothing is DNA with semen in it. So, in that sense, their own expert will say all of these spots where AJ was touched was touched with saliva.

The other thing that Julie Marschner and the DNA expert agree on is when Ms. Marschner ran the test on the spots of semen from AJ, none of that came -- none of that came

from Mazen Alotaibi. And when she ran the DNA test looking for sperm in Mazen Alotaibi's boxers or shorts or this and that, it all came back to Mazen.

Now, I don't know when the last time was he washed his boxers. But the bottom line is, you know, those semen stains could have been left there from that morning, or it could have been left there from the day before, or even the day before. So, those spots inside of Mazen's underwear, you know, came back to Mazen. But the spots on AJ's underwear don't come back to Mazen.

One other thing to consider is -- use your common sense -- burglary. Do you think -- when you think of a burglary, normally when we think of somebody, you know, breaking in at nighttime, coming in through a -- a store at night or coming in through a house at night. But the way we do it in Nevada is we make almost anytime you enter a building, as long as you have the intent to commit a crime, we make that burglary. And it's a specific intent crime. So, intoxication is -- can be a defense.

So, was there any evidence presented that, while AJ is outside smoking Mazen's marijuana, that Mazen has the intent, I'm going -- I'm going to go inside the building and commit a crime? No. There was no evidence of that. AJ didn't testify to that, and nobody else testified to that. And even Detective Pool, when he's talking to Mazen, Mazen

doesn't say, I entered Circus Circus with the intent to commit burglary. So, on that count, you have to find him not guilty.

I mean, the other thing, kidnapping. We all understand what kidnapping is. But the State, and I don't want to say they're -- the State is going through these old hyper-technical definitions to say kidnapping, as long as AJ's there with the threat of force, then you can find him guilty of kidnapping and you can find him guilty of coercion. But when I asked AJ, Well, did he pull a knife? Did he force you? Did he do this, did he do that? All of those things would imply there's no force involved. So, in that sense, these are almost nothing more than, metaphorically speaking, throwing the book at Mazen Alotaibi to try to get all these extra charges. So this is really about was there lewdness and was there sexual assault.

Was there consent or reasonable mistake of consent or was -- and if there was kissing on the neck and kissing on the ear, was it done while Mazen was intoxicated? So, the strongest evidence that you're going to look at here, because I will contend AJ is unreliable. Okay. There's so much that he has not been honest about, and more importantly, he hasn't been honest with his mother to this day. So why should you believe him? Okay.

So is the confession. And when you look at Mazen talking to this detective, does he look drunk to you? And

we've all, ourselves, have seen people that have been under the influence of alcohol. And I would submit, if this was Mazen Alotaibi driving on the freeway, you would have heard all the police officers talk about how he had pink eyes, you know, his speech was slurred, this and that, etcetera, etcetera. And don't -- I mean, Detective Pool said, Hey, I thought he had a Saudi accent, that's why he had slurred speech.

Well, the more logical conclusion is he had slurred speech because he had these seven double shots of Hennessy rather than his Saudi accent. And so that's where you need to use your common sense when you go back to the jury room to say, based upon the law that has been given to us, you know, what can we find Mazen Alotaibi guilty of? All right.

And Ms. Holthus is correct. There's no question -- in a criminal case, there's usually two issues; who did it and what happened. I mean, in the OJ Simpson case we know two people were murdered. The only issue was who did it, OJ Simpson or somebody else? And so that's what they call an issue of identity.

Well, in this case, there's no issue of identity. We believe whatever happened, happened between Mazen Alotaibi and AJ Dang. So, identity -- and that was -- so, to many degrees, the DNA is not that important, because it ties Mazen Alotaibi to the crime, which we are not denying. The question is, was

there any criminal activity that occurred?

Now, if I'm in an elevator and I'm a little bit drunk and I touch somebody, you know, am I guilty of lewdness? No. Okay. But that's -- that's where you are going to have to spend most of your time deliberating and deciding as to say at what point do we as a community decide people who are intoxicated should be held liable to the same degree that people are -- who are totally untoxicated [sic]? And so that's really a community standard that you, as the 12 people on this jury, will have to decide.

Now, when we started this case, we talked about fairness, we talked about our life experiences, we talked about being mothers, we talked about being parents, we talked about false accusations that had happened to people. Because we wanted to get all of those things onto the table. And so you were 12 different people who came, honored your duty, and unfortunately you've been here almost three weeks, you know, to hear this case, because this is an important case.

And you see reporters in the -- in the room, and one of the reporters back there is with the Associated Press and writing, and this is a story, and this is a case that's going out there internationally. And so we expect your verdict to be unanimous. And that's what the American system, based upon the Anglo-Saxon system, started with 12 jurors hundreds of years ago. And I assume, because we don't know for sure, I

think maybe the 12 -- the system of 12 goes back to the Twelve Tribes of Israel or something magical in the old Anglo-Saxon system to the -- where they thought there was something reliable about the number 12.

But unanimous means, and it comes from the Latin word unum, meaning one. So, you are 12 people, and now you're going to have the opportunity to become of one mind. And it's the same Latin root that we use for the word university, and it's also in our American slogan e pluribus unum: Out of the many, one. So you've all come here with your various life experiences and you are going to be of one mind on each count.

So, in order to find Mazen Alotaibi guilty, all 12 of you have to agree on Count 1. You know, all 12 of you have to agree on Count 2. So if there's various mixtures, you know, it cannot be a unanimous verdict for the State and it cannot be a unanimous verdict for the -- for us. Okay.

And so, again, this case boils down to has AJ been totally honest with you? That's the first issue that you need to decide. Secondly, how intoxicated was Mazen Alotaibi? And thirdly, you know, and with respect to the science, did the science corroborate -- and there is a jury instruction, it does not need to be corroborated, but for the sake of argument, you know, what did the science show? It showed that Mazen Alotaibi had no DNA on his body from AJ, but AJ had the saliva DNA on the various parts of his body or the DNA from

Mazen on the various parts of his body.

So, you have the notes, you remember, I don't remember everything, I don't think the State remembers everything. So, you guys collectively go back and put your heads together to decide what was testified to and what happened.

About 50 years ago a movie was made by a British producer by the name of David Lean. And David Lean had made the movie The Bridge Over River Kwai, and David Lean would also go on to make the movie Dr. Zhivago.

But the greatest movie that he made was a 1962, and it was called Lawrence of Arabia. And in this story, it's the story of a British officer who happens to go get assigned to work with a bunch of bedouins, or a bunch of Saudis who are all from these different tribes. And -- and the challenge for Lawrence, who became Lawrence of Arabia, was, Can I get all these tribes to work together, because we want to do an important battle and fight the Ottoman Turks and attack the seaport of Aqaba, which is on the Red Sea.

And so nobody thought that Lieutenant Lawrence would be able to do this. You know, these were people that had not gone to military school. They were essentially goat herders and rode their camels and that kind of thing. And they're going to go hundreds of miles across the desert of Saudi Arabia to attack this particular seaport.

And so, the story is about the journey, all the picturesque mountains that they saw, and it inspired many Hollywood producers thereafter. And ultimately, they're successful. They come in, there's problems along the way with people fighting with each other. But when it comes the night before the attack, they all get together and they attack Aqaba the next day and they're successful.

And from there, Lawrence needs to go to Cairo, Egypt, to meet with the -- the general to explain how he did this and what can happen and can the Arabs be used to fight. Well, this, of course, is a true story. And as a result of -- of the work of the British Empire, right before they became not so important, you know, Saudi Arabia became a powerful ally of Great Britain and thereafter --

MS. BLUTH: Judge, at this point, I'm going to have to object. I was trying to let it go. But I -- I'm just -- it's not argument, it's not facts in evidence. It's more just a narrative on a movie.

THE COURT: Can you bring it back to the case, please.

MR. CHAIREZ: Okay. So, at any rate, the story talks about going into Egypt and one of the young boys falling into a pit of quicksand. All right. And so Lawrence of Arabia and another guy go and try to help this young man that's fallen into the quicksand and pull him out.

And Mazen Alotaibi by analogy is that young man who's fallen into the quicksand. He came to Las Vegas and essentially, yes, he was with his friends, yes, his friends tried to help him. But it was alcohol and the amount of alcohol that they had that kept him from falling into that pit and quicksand. You know, it was the bad circumstances of running into AJ Dang on that sixth floor and AJ Dang smelling the marijuana on him and his friends that caused him to fall into that pit of quicksand.

And so you, ladies and gentlemen of the jury, you know, we are throwing out this rope to you for you to do justice, for you to evaluate the evidence and for you to apply the facts to the law to decide was it reasonable for Mazen to think that this young boy was coming to his room voluntarily? Was it reasonable for Mazen, with all of the alcohol that he had, to be able to form this issue of committing burglary, the intent to commit kidnapping, the intent to commit coercion. And most importantly, the intent to commit lewdness. I mean... So, at any rate, use your common sense. That's why we give that jury instruction.

So when you go back, take your time, deliberate, think about what you saw, focus on the confession, and more importantly, make your own evaluation. Why would four or five security officers and police officers go to such trouble to say, Oh, he wasn't drunk, he wasn't drunk, he understood

everything. It's simple. Because intoxication is important. And so they want you to rely upon their badges and their uniforms to say I understand when somebody's drunk and the common people of the jury don't understand that.

So, use your common sense. And after you've had a time to soberly -- no pun intended -- to consider all of the evidence in this case, you will find that Mazen Alotaibi was intoxicated. You will find that Mazen Alotaibi was intoxicated to such a degree that he didn't have the good judgment not to help his friends get rid of the boy when that boy kept on coming back to their room.

Now, you will find it was reasonable for Mazen to believe that that boy came to that room and he was looking for trouble. And based on that, your verdict, because of that, if there's a reasonable consent and if there's a belief that the intoxication is to a degree, your verdict has to be not guilty on both counts of sexual assault, on the four counts of lewdness, two of those because AJ himself says they didn't happen, and two of them because of the kissing on the ear and on the neck or chest, you know, were done under the influence of intoxication, and not guilty of burglary, kidnapping, and coercion.

THE COURT: All right. Before the State does a rebuttal, let's give the jury a brief break to use the restroom, stretch, etcetera. Please come back about 2:45.

Until I see you at 2:45, you're admonished not to converse amongst yourselves or with anyone on any subject connected with the trial, or to read, watch, or listen to any report of or commentary on the trial by any medium of inform, including, without limitations, television, newspaper, radio, Internet. I can't look at Ms. Dire. Please do not form or express an opinion on this case until it's submitted to you.

You laugh at me every time.

(Court recessed at 2:33 p.m., until 2:49 p.m.)

(Outside the presence of the jury.)

THE COURT: Are you ready, Mr. Chairez?

MR. CHAIREZ: We're ready, Your Honor.

THE COURT: All right. Ms. Bluth, Ms. Holthus, are you ready?

MS. BLUTH: Yes, Judge.

THE COURT: All right. Let's bring the jury in.

(Jury reconvenes at 2:50 p.m.)

THE COURT: All right. You ready?

MS. BLUTH: Yes, Your Honor.

STATE'S REBUTTAL ARGUMENT

MS. BLUTH: If you think back to almost two weeks ago when we started this process, you heard opening statements from both sides. And in Mr. Chairez's opening statement, he kind of focused on this concept of 60 seconds and happenstance. And he talked about it's kind of eerie to watch

AJ and the defendant before they ultimately meet up and meet up. They're in that same area, they're going up the elevators, down the elevators.

And he asked you what if, in those 60 seconds, they had not have met? And what if, in those 60 seconds, AJ Dang had not approached the defendant and asked him for marijuana? And he told you. If AJ hadn't have done that, then the 14 of you wouldn't be sitting where you're sitting, and Mazen Alotaibi wouldn't be sitting where he's sitting.

The State sees it a little bit differently. What if, when AJ Dang went to the defendant and said, Hey, man, do you have some weed, Mazen Alotaibi was a responsible adult and turned to that 13-year-old child and said, Go home. Go to your parents. Go to your grandparents. You're 13. You shouldn't be going out and looking for weed.

And what if the defendant didn't say, Yeah, man, come with me? And what if he didn't take AJ down to the alley and smoked him out and felt him up and felt his groin? And then, what if he didn't take AJ Dang up to Room 631 and force him to perform oral sex on him and sodomize him for a period of 33 minutes?

This isn't about AJ Dang. This is about Mazen Alotaibi. And those are the decisions he made because of what he wanted. He wanted sex. He wasn't taking no for an answer. And that's why he sits there and you sit there. And he can't

hide behind this cloak of the victim wanted it, he consented to it, or he was drunk. Because the facts and the evidence presented simply show you that he wasn't.

And the intoxication instruction is an important one. And it says that, "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purposes, motive, or intent."

So that's a lot of legal jargon. But what that really means is if a crime is what's called a specific intent crime, it means you had to -- have to have that specific intent to commit that crime. And so then you have to focus on an individual's intent. If they're so drunk that you find they can't form that intent, then they can be found not guilty.

And in this case, you have several charges. Sexual assault is what's called a general intent crime. So it doesn't matter if you're drunk. You don't -- there's no intent there. So that's not a defense in any way, shape, or form to sexual assault. The rest of the crimes, burglary, kidnapping, lewdness, and coercion, those are specific intent

crimes. And so those are the crimes where you can look at the defendant, his actions, the evidence, and consider his intoxication level.

Now, this doesn't mean, Hey, I'm drunk, so I'm not guilty. It's -- it doesn't matter if you're drunk. You have to consider -- you can consider it when forming your opinion. So, if you find that he was so drunk that he can't form the intent to commit those crimes, that is when you find him not guilty. It's not just merely being drunk.

But the State's position is that the defendant was not intoxicated. And let's look at the evidence that we have to support that. Number 1, Security Officer Dennis Duran, he's the first security officer you heard from and he's been at -- working security at the Circus Circus for over 30 years. And he was one of the individuals that was assisting Manager Daniel Goodwin outside of the room. And you heard from both of them.

And both of them I asked, Any problems walking? Nope, no problems walking. Any problems talking? Nope. Was he able to follow commands? Yes, he was able to follow commands. Was he having any problems communicating? Nope. No problems communicating. Was he having any problems sitting up? Nope. Was he having any problems sitting down? No. Those are what those security officers told you. Then you heard from Security Officer Haros.

And he told you about he knocked on the door. And when he knocks on the door, he can hear the people inside. And he can hear them rummaging around and speaking, but they're not coming to the door to answer. And he's identified in security. He has his Bike uniform on. Yellow shirt that says security. And he's knocking and he told you what he did. He showed you how loud he pounding.

He was pounding, Security, open up. Security, open up. And he could hear that rummaging, but no one's coming. So he has to use his own personal key to enter into that door. And when he does, he makes contact with the defendant, Mazen Alotaibi. And he tells -- and he told you that the defendant was repeatedly fidgeting in his pockets.

And he says to the defendant, Get your hands out of your pockets.

He still does it. Get your hands out of your pockets. So Officer Haros approaches the defendant. He pats him down. He told you he did not smell any alcohol on the defendant when he was patting him down. He did not appear to be drunk. He was able to follow the directions. Besides the first one of, you know, put your hands up, besides that, he was able to follow directions.

He -- Officer Haros was the individual who walked the defendant to the elevator. He was able to stand upright, he had no problems walking, he had no problems talking to Officer

Haros.

Officer Haros was also the individual who took the defendant in the elevator with some of the other males. And he told you that he told all of the individuals to get into the elevator and put their faces against the wall. He told the defendant that, and immediately the defendant began speaking quickly, as if he was issuing commands. And Security Officer Haros, he doesn't speak Arabic. And he did his own little rendition of if he did speak Arabic, what it would sound like.

But he said that the tone and how quickly he was speaking, he felt like the defendant was issuing commands to the others, and the others kind of just kept their heads down and nodded. And he told the defendant, Knock it off, there's no talking. Defendant shook his head like he understood. And immediately, right afterwards, again starts issuing -- starts issuing the commands, starts speaking loudly and quickly to the others. He tells him again, Hey, knock it off. So, he obviously has the intent to -- that he needs to get what he needs to say out to those guys, and he continues to do it.

And Security Officer Haros also talked to you that he felt that the defendant was the alpha male of the group. He felt like he was telling the others what to do.

And I asked Security Haros, Well, do you think that the defendant was drunk? And he said no.

Did it seem like he had been up all night and out all night?

Yes. Did it seem like he had been drinking? That he had drank a little? Yes. But at the end of the day, he was completely fine.

He was not drunk, he was able to walk, able to talk, able to communicate.

You also heard that when the defendant got to the holding area of the security room, he was able to do several things. He was able to give them his name, he was able to provide them his date of birth, where he's from, he was able to sit upright, and he was able to communicate not only with the security officers, but he was also able to communicate with Detective Williams when Detective Williams got to the holding area. There was no problems.

The defendant was also taken down to headquarters. And you heard from Kristen Tucker, who's the crime scene analyst. And she had a lot of contact with the defendant, because she had to go in his mouth and get the buccal swab that we heard her talk about. She also took photos of the defendant, both with clothes on and without clothes on. She had absolutely no problems communicating with him. And she had no problems with him following her commands while she was taking the photos.

When you're thinking about whether or not the

defendant was intoxicated, the State would ask that you also look at the defendant's statement and look at all of the particulars with which he can remember. He can remember how many drinks he had. When he talks about the strip club, not only can he tell you how much money he paid to get into the strip club, he can tell you how long he was there for. He paid $30, and he was there for an hour and 20 minutes. And he even remembers losing his key and the fact that it was actually that he left the key in the car. These are all things that he remembers.

He also remembers meeting the Asian boy outside of the elevators. And he remembers the amount of money which he negotiated with AJ, which AJ told you was $150. And the defendant tells you $150. So, he remembers all of this. And he also remembers that the boy was adamant that he wanted the weed first. Before they went any further, the victim wanted the weed.

He also remembers details of the assault, it happened in the bathroom. He states, No, I just touched him, I didn't put my dick in. And then he says yeah, he did put it in, in his mouth, and the boy wanted it, it's crazy. And then he stated that he sucked his penis first and he trusted him. And after he trusted him, that's when they moved into the anal. And he states that AJ was standing up when it happened, it went in for a second, it slipped in. And then he said, Well,

maybe he wanted it, he was just chilling, he backed his ass up.

These are all things that the defendant, this person who was so drunk, remembers all of these little details, from the amount he pays at a strip club, for how long he was there. He can tell you how much he negotiated with AJ. He can tell you what happened when he went in the room.

People get drunk all the time. No matter how drunk you are, if you didn't sodomize a little boy, would you say it? People are drunk all the time. They don't do things like this. They don't say things like this. He said these things because he remembers them, because he did them.

Instead of focusing on the defendant's words, actions speak louder than words in some situations. I'd like you to consider some of the things he was sober enough to do during this time period. He was sober enough to wait until they were inside the elevator to kiss AJ. And you'll have the video. And what I think the video says and what Mr. Chairez thinks the video says, it doesn't matter. The video is its own best evidence. You'll have that in evidence to go back and look at. And we invite you to do so. Because how you interpret the video is most important.

But right before you see the defendant lean in and kiss AJ in that elevator, right before he does that, you see him look up. What's he looking for? Is he looking for a

camera? Because it's clear as day, he goes in, looks up over his shoulder, and then goes in for that kiss. He's sober enough to wait until he does all that stuff, until he gets into an elevator where nobody's going to see.

He's also sober enough to take AJ outside to smoke the marijuana. He knows his friends aren't going to tolerate it in the room. They've already kicked the 13-year-old out. So, he's smart enough to walk all the way downstairs, all the way through the casino to find an exit, and to go in the alley where he and AJ can be alone.

Once they get back in, he's sober enough to rush AJ into the bathroom so that his friends can't stop it. He's also sober enough to bargain with the money. Because, like AJ tells you, AJ told him -- AJ's plan was to go in, get the weed, which is why he wanted the weed first -- he was adamant he wanted the weed first -- and then get the heck out of there.

And when AJ -- when the defendant comes in and AJ sees he's over his head, he's clear, like, I don't want any more of this, man. I'm out of here. And the defendant bargains with him. I mean, he's of clear enough mind to up the money, to bargain with him, to double it up. AJ said he doubled the money.

He's sober enough to remember lubrication. Not only did he lubricate his own penis -- he found something within

the bathroom to lubricate his own penis -- he also lubricated AJ's butt. So, he's of enough clarity that he's thinking how to make this process easier.

And he's sober enough to get an erection. And Ms. Dermanelian, the SANE nurse, talked to you about the effects that alcohol and things like marijuana can have on the ability of a man to get an erection. And he was able to get an erection, he was sober enough to do that.

You also heard from Rasheed or Rashed Alshehri. And the defendant drove good. He drove from where they were at the strip club, or where they had parked their car, all the way back to the Circus Circus. And he believed that drive was somewhere to amount of 30 minutes. And he didn't have any issues with that.

He also talked to you about how the door was locked, the defendant was sober enough that he knew to lock the door. And he wouldn't let them in, even though they were loudly banging. And then, after the boy left and his friends were, like, what was all that about? The defendant walked out and just calmly said to them, Oh, he wanted some weed and money. He didn't come out -- Rashed didn't say he came out stumbling and like he didn't know what happened. He came out and said, Oh, it was nothing, the boy just wanted some weed and money.

Mr. Chairez talked to you about Jennifer and what she remembered. And when you're thinking about what Jennifer

remembered, first of all, she thinks that the defendant got there at 6:00 or 8:00 p.m. the night before. We know that's not true, because the defendant, in his statement, says that they got to Circus Circus in the early morning hours. And Rashed tells you that they got to Circus Circus in the early morning hours.

And Mary -- Ms. Holthus said, Well, would it surprise you if they actually got to town early -- earlier that morning? And she's like, No, like I told you, man, I was drunk. Like, I was drunk.

So, in one way she wants to not be able to answer the questions by hiding behind, Oh, I was drunk. But in other areas she wants to tell you, you know, how drunk the defendant was. She can't tell you how many drinks she had, or how many places she drank, because she was drinking all day, and as she was working herself down the Strip she was continuously drinking in multiple locations. But she can tell you how many drinks she had. I mean, this is a girl who doesn't even know how she got home that night. She just remembers someone pouring her in her bed and then waking up at 11:00 in the morning.

She's his friend. It's understandable. But when you look at it, her testimony does not add up, when she can't remember how much she drank, but she can tell you how much the defendant drank.

Mr. Chairez talked a little bit about the defendant might not be able to understand some of the concepts or some of the words that were used during his interview. But you heard form Laura MacKenzie, and she -- she was the director at the Department of Defense Language Institute. And she stated that when he came over, he came over with some limited language -- English language skills. But he took a year-long program. And during that year-long program, only English was allowed to be spoken in that classroom. And he was in that classroom five to six hours every day for one year.

They additionally had two hours of homework each night. And she said that the defendant was a very good student and that his scores showed his aptitude, show that he was developing the language skills that he needed. And he actually graduated. And after graduating this year-long class, he then took nine additional weeks of specialized training.

And she talked about the things that he would be able to do. He could function in an English-only academic or highly technical environment. He could read authentic military and semi-technical reading materials. He could accurately transcribe from dictation. And with this type of English training, he could go if he wanted to, to go into an undergraduate pilot training, and he could also go to professional military educations -- education courses, such as

those at a university.

The defendant understood English. I mean, even Rashed, who English is not his first language, and he has been going to the -- to school here for about a year, you saw how much that he understood, and he didn't need any help or any -- there was a few things, like blackout, couple of things that he had questions over. But he was able to carry on a conversation just fine.

And look at the questions that were asked in the interview. They're not complex questions. They're as simple as:

"You didn't put your dick in him?"

Answer, "No. Just -- I just touched him."

"Well, did you put your penis in his mouth?"

"Yeah, he put it in his mouth. He wanted it. It's crazy."

"Well, how long was your penis in his mouth?"

"Two seconds."

"Well, how long did you put your penis in his butt?"

"Just for a second." He has answers for those questions. And his answers are appropriate. When it's how long, he demonstrates he understands by telling them how long it happened. There was nothing wrong -- when the defendant was telling the detective that he did these things, he understood and he was answering.

Another thing that can be considered is the voluntariness of what he said. And the voluntariness is a question of fact to be determined from the totality of the circumstances on the will of the accused. An involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will. A voluntary statement must be the product of rational intellect and a free will.

If you look at the tone of the interview, the detective was not threatening at all, he was never yelling, he never raised his voice at the defendant, he even tried to minimize the defendant's involvement by trying to put more blame on AJ, like, That kid was trying to take your money, huh? I know he was trying to steal from you.

He spoke -- he's -- the defendant told -- or, excuse me, the detective told you he wanted to speak to the defendant man to man, and he recognized that the defendant was uncomfortable with the female detective being in the room. And so he asked the female detective to leave so defendant could be more comfortable. So the State would submit to you this was a very voluntary type of environment and he voluntarily gave that confession that he gave.

DNA. You heard from Ms. Marschner, the forensic scientist, and she talked to you about touch DNA and -- and the other types of DNA that come from bodily fluids and how

the bodily fluid DNA is much stronger. Blood, semen, saliva; that leaves a much stronger trace of DNA than simple touch DNA, otherwise referred to as skin DNA.

And in the defendant's interview, the detective, as a tactic, asked him, Well, in regards to DNA, if they find that on that boy, that means you did it, right? So, if they find your DNA on that boy, that means you did it, right?

And the defendant says, Yeah. Yeah, right. But I don't. Meaning, but I didn't.

And they found it. And they found it in multiple places. And I'm not going to go through all of these, because Ms. Holthus did. But they found it on AJ's testicle swabs, they found it on AJ's penis swabs, they found it on the stain on the inside crotch of AJ's boxers. They found it on AJ's left ear, they found it on AJ's left chest, they found it on AJ's right hand.

And yesterday Dr. Miller came in and testified, and if you remember, this is the individual that's paid by the defense, and his current bill is up to $12,000. And Mr. Miller said that the -- the Metro -- the Las Vegas Metropolitan Police Department, they did a fine job. He doesn't disagree with any of the findings that Ms. Marschner listed in her report.

And I asked him, Well, is it important to you to know whether or not AJ was prepubescent? And his response was,

Well, yeah, it's -- it's pretty important.

And my question was, Well, because if AJ is prepubescent, and he can't produce semen or sperm, then it can be assumed that any of the semen or sperm found would be the defendant's, right?

And he kind of waffled, and he said, Well, no, no. You can't assume it would be the defendant's.

And I said, Well, really? Because I have an e-mail here from you dated last week at 6:17 in the morning, and in underline and bold, it states, "I cannot overemphasize the importance of whether or not AJ Dang is prepubescent. Because if he does not yet produce semen or sperm, then all of the semen and sperm found is assumed to originate from Mazen Alotaibi."

And you heard from Ms. Dermanelian, and she told you that she believes through her assessment that AJ was prepubescent. She said he was small, he was young, he had not filled out, he didn't have any chest muscles, no arm muscles, his Adam's apple was not yet protruding. His voice was still that of a child. And she said that he had very little or no pubic hair.

So, if you follow the defense expert's line of reasoning, if AJ Dang is prepubescent and he doesn't produce semen and sperm, then everywhere they found semen -- and you'll have the DNA report -- per the DNA -- the defense's DNA

expert, that belongs to the defendant.

Another thing that Dr. Miller couldn't quite wiggle out of was the question Mr. Chairez actually asked him on direct examination:

Well, AJ's DNA was not found anywhere on the defendant's penis? AJ Dang's DNA was not found on the defendant's penis?

And again, he kind of waffled. Well, and he said -- stopped for a second, he thought about it, and he said, I actually can't say that. And he told you that actually he received the raw data and in that raw data it shows you that there is DNA consistent with AJ on several places of the defendant's penis. It's just at low levels, so it's not -- they can't scientifically state it with certainty. But it is not true that AJ's DNA was not found on the defendant's penis. It was on several places. It just doesn't rise to the level where they can scientifically state it.

Ms. Marschner also talked to you about the findings on the anus. And if there was no ejaculation, if the defendant did not ejaculate into AJ's anus or rectum, then there would be no DNA through what's called the sperm fraction, because there was no sperm. Additionally, if there was a use of a lubricant, it greatly decreases the likelihood of recovering DNA, because, like we said, if you have two hands and you rub them together, there's no lubricant, there's

a -- more of a likelihood of a cell-to-cell transfer. But if I have a bunch of lotion or shampoo and I put it in my hands, there's less friction, so there's less skin-to-skin contact, which reduces the amount of skin transfer that could happen.

She also told you that the blood of the victim, if the victim was bleeding, that's such a good amount of that victim's DNA that it would likely override any of the other DNA that was found.

In regards to the mouth, she told you, and Dr. Miller told you, too, it's very hard to find DNA of another individual inside another person's mouth, because the saliva is such a strong trace -- it leaves such a strong trace of the own individual's DNA that it's very hard to find.

You heard the credibility instruction by the Court, and then I think both the previous attorneys talked to you about it, so I'm not going to go into the instruction. But just when you're looking at that, take into consideration someone's motives, their manner on the stand and, you know, your opportunity to observe them when you're thinking about it. And when you're thinking about credibility, I'd like you to think of the similarities between AJ's -- what he told you happened, and then several pieces of evidence.

And the first piece of evidence is AJ and the DNA. AJ told you that the defendant licked and kissed on his ear. And the DNA results show you that the defendant's saliva was

on AJ's ear. And how do we know that it was the defendant's saliva? Because it was one in 700 billion. There was such a strong trace of DNA found in that area, Ms. Marschner told you it's more likely that it was saliva.

Same thing with the -- AJ told you that the defendant licked his chest. Again, the DNA showed that the defendant's saliva was on AJ's chest. It was one in 700 billion, as well.

AJ also stated, and he told you that, The defendant touched me all over my body. And the DNA shows the defendant's touch DNA was on the inside of the stain of AJ's boxers, as well as he -- the defendant cannot be excluded from AJ's testicles, penis, and his right hand.

Again, the defendant not ejaculating would lead to no sperm being found, but as I previously stated, we have the DNA in the other areas in regards to the saliva.

Think of what AJ told the sexual assault nurse examiner and how that matches up to her findings. He told the sexual assault nurse examiner that the defendant forced him to have oral sex, and it hurt. And when she looked in his throat, she could see that there was a bruise on the back right side of AJ's throat.

He also told her that he -- the defendant forcefully anally raped him. When she looked and she pulled back and did his exam, she could see not only was there swelling and redness, but there was tearing and even a blood clot.

He also told the nurse that the defendant punched him a couple of times in the butt. When she looked at AJ's butt, she could see there was a pattern bruise on his left butt cheek.

And AJ also told her that during the assault the defendant used a lubricant. And she showed you the picture where she could tell that there was some type of glistening substance in AJ's butt crack that she found to be consistent with a lubricant.

And then think of what AJ stated that happened in the bathroom and the evidence that can be found there in regards to what the crime scene analyst found -- found. AJ told -- talked about that he believed that a lotion or a shampoo was used. So when the crime scene analyst went in there, she looked on the counter, she saw that there was a shampoo that was recently opened. But when AJ was going through and -- and telling the State what happened to him, he said it was a shampoo.

And, Well, what did it look like? It was green. Oh, it wasn't a little white one? No, it was a green one. Go back through the pictures and you see that there is a green shampoo bottle in the trash in the bathroom.

AJ and the video. He told you that he woke up at 7:30 and he went to go and see Mary. The video shows at 7:43 he exits and goes to Mary on the sixth floor. Mary wasn't

awake. And so he tells you that he then decided to walk around the casino. And the video shows you that for about 10 minutes that's what he did.

He then goes back to the sixth floor and sits on that couch. There shows a -- there's a picture in evidence of the couches right outside the sixth floor where he tries to pass some time. And that's when the video shows the defendant getting on the elevator about seven to eight minutes later and he exits the sixth floor.

AJ talks about it was on the way to the elevator that the defendant starts making sexual advancements on him. And the video shows the defendant coming onto AJ and licking his ear once he's in the elevator. And when you have the video out there, as a point of reference, it's at 8:15 in the morning, and 38 seconds. And that's during that time period when that conduct is shown.

AJ also told you that they went to the back alley to smoke marijuana and the video clearly shows them going towards the exit that would lead that way. He then says that he went back upstairs where the assault took place. And the video shows them take the elevator back up to the sixth floor, and they're in that room for a period of 33 minutes.

AJ then states he runs to the elevator and goes to security and the video, if you watch it, will show AJ -- the doors are open, you'll see AJ run in. He hits the door. He

goes down a couple floors. The doors open. He slams the door shut, door shut. And then he goes to security. And then you see him telling security what happened.

There's also a lot of similarities between what AJ says and what the defendant says, especially AJ approached him about marijuana, and the defendant agrees with that, AJ approached him about marijuana.

They both tell you that touching took place first. They both tell you that there was oral sex after the touching in the bathroom. And they both tell you that the defendant then placed his penis in the butt of the -- in -- while they were in the bathroom.

And then lastly, and the State would submit to you, most importantly, is AJ told you that his whole plan -- his whole plan was to go and get that weed. He made an agreement and he said, Yeah, I'll do this with you if you give me some weed first. And his whole plan was to go up into that room, get that weed, and run out.

And he told you that that was his plan. And the defendant even confirms that in his statement by saying he wanted to smoke first. The kid was adamant he wanted to smoke first. And that's important. Because AJ did not consent to any of this. He went there with a plan. When that plan wasn't working, he tried to back out. And he was adamant, I want that weed first, I want that weed first. Because when he

wanted that weed, he wanted to get the weed and get out.

And the defendant confirms that by telling you in his statement, and you'll have it in the video, that the kid wanted that weed first. He kept saying he wanted the weed first.

When you're looking at the video and considering whether or not the defendant committed the crime of burglary, you have -- the State has to show you that the defendant, when he walked in the room, he had the intent to commit a felony therein. Consider his conduct before that. He was kissing and licking in the elevator. Down in the alley he was kissing and touching AJ. He told AJ, Hey, man, I want to have sex with you. I'll pay you this, or I'll give you some weed. So, obviously he has the intent to touch, kiss, lick, have sex with this child when he enters that room. That's burglary.

If you find that when Mazen Alotaibi walked into Room 631, if he was thinking in his head, I'm going to kiss this kid, I'm going to lick this kid, and I'm going to do it to gratify myself, that's burglary. He committed that crime. Because it's clear what his intent was. And the fact that he had an erection, and was able to have an erection so strong that it bruised the back of that child's throat, shows you what his intent was. He had lust, he had passions, he wanted to gratify those.

Also, the kidnapping, you know, everybody has this

idea of a kidnapping being your child -- it's your worst nightmare, your child's walking down the street and he's going to the bus stop, and someone grabs him, puts him in the car, and drives off. And that can be a form of kidnapping.

But there are other forms of kidnapping. And that's what we have here. The first part of the statute, any -- every person who wilfully confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any person by any means whatsoever with the intent to hold or detain or who holds or detains the person for the purposes of committing sexual assault is guilty of kidnapping. So if you find that the defendant confined him, kept him in the bathroom, and he did so with the intent to hold or detain him there for the purpose of committing a sexual assault, he is guilty of kidnapping.

And that's not the only way you can get there. There's a second part of the statute that states if he leads, takes, entices, or carries away or detains the minor with the intent to keep him or imprison him or confine him from his parents, who have lawful custody of him, or with the intent to hold the minor to an unlawful service or perpetrate upon the person any unlawful act, is guilty of kidnapping in the first degree.

So, if you find that he led AJ or he took AJ and he didn't ask permission from AJ's parents, or he did so with the

intent to commit an unlawful act on AJ, he is guilty of kidnapping.

Lastly, I just want to talk to you about this idea that AJ consented to these acts, that he consented to the defendant doing these things to him. And if you think about one thing, one thing, the State would ask, What is his motive to lie about it? It would be one thing if AJ was caught with marijuana on the way out. So, he has sex with the defendant, he's walking out, he gets caught with marijuana, security approaches him, he said, Oh, man, so I was raped, the defendant gave me his marijuana, I was raped. That didn't happen.

AJ wasn't caught in anything. This happened to him. He went downstairs, got scared, and he said what happened to him. There's no motive for him to make up this lie. He -- if he willingly had sex with the defendant, he could have walked out that room and gone about his day and no one would have ever known. No one would have ever known what he did. That shows you it wasn't consensual. There's no motive for him to go through all of this. If he had consensual sex with Mazen Alotaibi, then why tell anybody? It's probably embarrassing for a 13-year-old boy.

And think of why would he go through everything he's gone through? Number one, he had to risk his mother and grandmother knowing he smoked weed or was trying to find weed.

He has to tell multiple people that the defendant forced him to perform oral sex on him. And he has to tell multiple people that the defendant forced him -- forced his penis in his anus. How embarrassing must that be for a 13-year-old child? Think about when you -- before you were going through puberty or while you were going through puberty, and how embarrassing these types of subject are: Sex and being naked and pubic hair. And he has to talk about all of that in front of all of these people that he doesn't even know. Why go through those things if this didn't happen to you?

Think of the SANE exam and how mortifying that must have been. And Ms. Dermanelian told you that when he sat down she has to go through all of these things with him. And she has to tell him, These are all the things I have to do. I have to take your blood to make sure you don't have any STDs, I have to give you a shot, I have to take pictures, not only of your penis, but of your butt hole. I have to look at your penis and examine it. I have to look at your butt, not only of the outside, but the inside. We have to talk about personal things, like how often and how much you poop. And I have to report it to the police.

And he sat down with her and he's still wanting to go through this, all of this, because this happened to him. And he wants people to know about it. Because it's not right.

And she talked about his demeanor. He was shy. He

was quiet. He was very timid. She said that he got embarrassed multiple times and his face became flushed, because this was embarrassing for him to talk about. And he even became teary-eyed when she was -- when he was talking about some of the pain that was going on during the assault. And she told you.

Oh, and lastly, he -- he has to come in front of a jury, people -- 14 people he doesn't know. He has to come in front of the defendant. And he has to come in front of the media. If you remember, when AJ Dang testified, that entire side of the courtroom was filled with cameras and reporters. You don't think that's intimidating, talking about someone shoving their penis in your mouth and in your butt? How embarrassing and intimidating that must have been for a 13-year-old child. But he did it. He did it because it happened to him and he has to do something about it.

At the end of the day, you know, Mr. Chairez wants to talk about AJ's a liar and he -- he lied and he told all these different stories. One thing. He lied about one thing. He told -- he originally said that the defendant drug him into that room, to detectives. And the truth is, is he went willingly into that room to get marijuana. 13-year-olds make bad decisions. 13-year-olds make bad decisions. Teenagers make bad decisions.

And he told you why he did that. He didn't want to

get in trouble, he didn't think anybody would believe him. He was ashamed, he was scared, and he was embarrassed. So he made up that lie.

But most importantly, he -- when he very first told security, when he went down and told Mr. Laskin with security, and he told Jefferson and Goodwin, he told them the truth. It was when his grandma was involved with the investigation and the detectives were telling him that he makes up this lie. But when he first comes down and he goes down those stairs and he's talking on his mom, and you -- with his mom on the phone, and you see him pacing back and forth, and then you see a little 5'3" 108-pound kid waiting at security, waiting until everybody is gone, to tell his story, he tells them. Hey, we were talking about weed and I went in there willingly.

Children do not like pain. People in general do not like pain. Ms. Dermanelian told you that only 1 percent of all of the people she's ever seen like pain. But children, they have an aversion to pain. This was painful. To have a bruise on the back of your throat from a penis, an erect penis going in and slamming the back of your throat, that's painful. When she looked in there and saw that bruise, she told you that would have hurt. It's consistent with blunt-force trauma. He didn't consent to that.

And even if you buy, Oh, he consented to it, and he went through all that pain, do you really think he would

consent to that? A child doesn't consent to getting blood clots.

And all of these findings: 11:00, blood clot; 12:00; 12:30; 1:00; 2:00, lacerations; 4:00, contusion; 5:00 and 5:30, laceration; 6:00, laceration and swelling; 7:00, two lacerations. For 33 minutes.

Mr. Chairez tells you that you can't find him guilty of both lewdness and sexual assault, and the law says that you can. And when you go through those instructions, you can see, for instance, when he was putting his penis and it touched the outside of the anus, that is lewdness if you find that he did it with lust, with intent. And when it goes into that anus, like AJ told you, when it shoved into that anus, that is sexual assault. You can find the defendant guilty of both of those crimes.

What today comes down to is the concept of accountability. In the early morning hours of December 31st, 2012, Mazen Alotaibi made decisions. He made a decision to sexually assault a 13-year-old child, not because he was drunk, not because that child consented, but because he wanted sex and he wasn't going to take no for an answer. And for those decisions, he has to pay. And he needs to pay today.

And the only 14 people, the only 14 people who can tell him what he did was wrong are you. As a community. Tell him that what he did to that child is not going to be

tolerated. And the only way you do that is if you go into that room, you consider the evidence, and you come back in here and you find him guilty of those crimes. And that's what the State is asking you to do now. Thank you.

THE COURT: All right. Jason. And who's taking the alternate? Will you swear them in.

(Officers sworn.)

(Jury recessed for deliberation at 3:35 p.m.)

THE COURT: All right. Counsel, please leave us numbers where you can be reached. The jury will not deliberate beyond 5:00 tonight. So if you don't hear from us before 5:00, assume that they are not finished. Okay.

MS. BLUTH: Thank you, Judge. Judge, I'm going to clean off my computer and -- and leave it. So --

THE COURT: That's fine.

MS. BLUTH: -- unless they need to look at the evidence. Are you okay with that, Mr. Chairez?

MR. CHAIREZ: What is it? What are you doing?

MS. BLUTH: In case they need to watch the video, they have to be provided with a computer.

MR. CHAIREZ: Oh, okay.

MS. BLUTH: So I was going to clean mine.

MR. CHAIREZ: Okay.

MS. BLUTH: You know, erase everything on there.

(Court recessed for the evening at 3:36 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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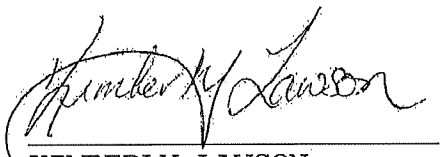

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA, Plaintiff, vs. MAZEN ALOTAIBI, Defendant.	CASE NO. C287173-1 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 9

WEDNESDAY, OCTOBER 23, 2013

APPEARANCES:

FOR THE STATE:	MARY KAY HOLTHUS, ESQ. Chief Deputy District Attorney JACQUELINE M. BLUTH, ESQ. Deputy District Attorney
FOR THE DEFENDANT:	DON P. CHAIREZ, ESQ.
Also Present:	Mohammad A. Taha, Interpreter

RECORDED BY MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 23, 2013, 12:26 P.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: Okay. The reason everyone has been called back -- the State's present, Mr. Chairez and his client, Mr. Alotaibi are present, the interpreter is here, as well.

The reason you've been called back is we have a jury question. This is the jury question: What is the difference between coercion sexually motivated and coercion a misdemeanor? That's the question for the jury.

MS. BLUTH: Did you bring the jury instructions, Mr. Chairez? I've seen them right there, those?

MR. CHAIREZ: Yeah. Here.

MS. BLUTH: May I see it?

MR. CHAIREZ: Yeah.

THE COURT: Did -- I don't think we gave them an instruction on coercion, a misdemeanor coercion.

MS. HOLTHUS: We gave a lesser --

THE COURT: Did we? I don't remember.

MS. HOLTHUS: We did. Because coercion without physical force is only a misdemeanor. So we did put that in there. We added it to the verdict form, as well, and gave them the option.

What I don't know that was included -- because I --

as I understand it, the way I was reading the statute is the sexually motivated portion is really something to be determined by the Court. Which doesn't really make sense.

MR. CHAIREZ: That's correct.

MS. HOLTHUS: But -- but it's kind of been my way of hearing it and it arguably didn't need to be in there at all.

MS. BLUTH: So, the -- on line 9, Your Honor, of Instruction 20, it says, "Where physical force or the immediate threat of physical force is used, the person has committed the offense of coercion, a felony." And then lines 11 and 12 discuss, "Where no physical force or immediate threat of physical force is used, the person has committed the offense with coercion, a misdemeanor." So I don't --

THE COURT: Just tell them to look at Instruction No. 20?

MS. BLUTH: Instruction No. 20, lines 9 through 12 is the specific answer to that question.

THE COURT: Okay. Well, let's just bring the jury in real quick to tell them that.

This will be made a court's exhibit.

(Pause in proceedings.)

THE MARSHAL: Jury is present.

(Jury reconvened at 12:29 p.m.)

THE COURT: Everyone knows to go to their exact seats. All right.

All right. Ladies and gentlemen, the reason we're here is I have a jury question. The jury question is as follows.

What is the difference between coercion sexually motivated and coercion a misdemeanor?

All right. The answer to that, ladies and gentlemen, is on Jury Instruction No. 20. You need to go back and look at Jury Instruction No. 20. Okay. It will discuss both types of coercion.

So, we're going to -- with that being said, we're going to send you back into the jury room. Are there any other questions you have before I send you back in there that you guys have written down? No?

All right. Well, then I'll send you back. I think the trip in here was longer than the answer. So we'll send you back to deliberate. Okay. Thank you very much.

(Jury recessed at 12:30 p.m.)

THE COURT: Okay. Everyone, Mr. Alotaibi is going to go down and get a bite to eat. I think we're going to have a verdict within the next hour.

MS. HOLTHUS: Okay.

THE COURT: So please stay downtown.

MS. HOLTHUS: Okay.

THE COURT: Thanks.

MS. HOLTHUS: That was signed by the foreperson,

correct?

THE COURT: Yes.

MS. HOLTHUS: Who is that, if we can ask.

THE COURT: Number 9, Nicole Catello.

MS. HOLTHUS: Thanks.

THE COURT: Jason thinks that we'll be -- hold on. Jason thinks it'll be soon.

MR. CHAIREZ: Jason needs to leave?

THE COURT: I don't know. Jason thinks the verdict is actually going to be --

MR. CHAIREZ: Oh. Okay.

THE COURT: -- very soon. Like in the next few minutes. You know, Jason, we've got a lot of calls.

(Court recessed at 12:32 p.m., until 1:30 p.m.)

(Outside the presence of the jury.)

THE COURT: All right. The record is going to reflect the presence of the district attorneys on this case, as well as Mr. Chairez and his client, Mr. Alotaibi.

Counsel, if there's nothing to add right now, we have a verdict. Are you ready for the jury?

MS. BLUTH: Yes, Your Honor.

THE COURT: All right.

MR. CHAIREZ: We are, Your Honor.

THE COURT: Please stand for the jury. Also, the Court's going to note that the translator is present.

THE MARSHAL: Jury is present.

(Jury reconvened at 1:32 p.m.)

THE COURT: All right. Everyone can sit down. Ladies and gentlemen of the jury, the record is going to reflect the presence of all the jurors. Ladies and gentlemen, did you select a foreperson? Who's my foreperson?

JUROR NO. 9: I am.

THE COURT: All right. Madam Foreperson, did you reach a verdict?

JUROR NO. 9: Yes, we did.

THE COURT: Would you please give it to Jason. All right. The clerk is now going to read the verdict and inquire if it is, in fact, the verdict of the jury.

THE CLERK: District Court, Clark County, Nevada, the State of Nevada, Plaintiff, vs. Mazen Alotaibi, Defendant, Case No. C-13-287173-1, Department No. 23, verdict.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 1, burglary; guilty of burglary.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 2, First Degree Kidnapping; guilty of first degree kidnapping.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 3, Sexual Assault with a Minor Under 14 years of Age; guilty of sexual assault with a minor under 14 years of age.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 4, Lewdness with a Child Under the Age of 14; not guilty.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 5, Sexual Assault with a Minor Under 14 Years of Age; guilty of sexual assault with a minor under 14 years of age.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 6, Lewdness with a Child Under the Age of 14; not guilty.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 7, Lewdness with a Child Under the Age of 14; guilty of lewdness with a child under the age of 14.

We, the jury in the above entitled case, find the Defendant, Mazen Alotaibi, as follows:

Count 8, Lewdness with a Child Under the Age of 14; guilty of lewdness with a Child under the Age of 14.

We, the jury in the above entitled case, find the

Defendant, Mazen Alotaibi, as follows:

Count 9, Coercion Sexually Motivated; guilty of coercion misdemeanor.

Dated this 23rd day of October 2013, signed Nicole Catello, Jury Foreperson.

Ladies and gentlemen of the jury, is this your verdict as read, so say you one, so say you all?

THE JURY: Yes.

THE COURT: Does either side wish to have the jury polled before the verdict's recorded?

MS. BLUTH: The State does not, Your Honor.

MR. CHAIREZ: The defense does, Your Honor.

THE CLERK: Ms. Kawi, is this your verdict as read?

JUROR NO. 1: Yes.

THE CLERK: Ms. Young, is this your verdict as read?

JUROR NO. 2: Yes.

THE CLERK: Mr. Flores, is this your verdict as read?

JUROR NO. 3: Yes.

THE CLERK: Mr. Morgan, is this your verdict as read?

JUROR NO. 4: Yes.

THE CLERK: Ms. Styilanou, is this your verdict as read?

JUROR NO. 5: Yes.

THE CLERK: Ms. Mosquera, is this your verdict as read?

JUROR NO. 6: Yes.

THE CLERK: Ms. Romero, is this your verdict as read?

JUROR NO. 7: Yes.

THE CLERK: Ms. Metzner, is this your verdict as read?

JUROR NO. 8: Yes.

THE CLERK: Ms. Catello, is this your verdict as read?

JUROR NO. 9: Yes.

THE CLERK: Ms. Faehling, is this your verdict as read?

JUROR NO. 10: Yes.

THE CLERK: Mr. Collins, is this your verdict as read?

JUROR NO. 11: Yes.

THE CLERK: Ms. Dyer, is this your verdict as read?

JUROR NO. 12: Yes.

THE COURT: All right. The verdict is now going to be recorded.

Ladies and gentlemen of the jury, I want to thank you very much for your time and your service. You are now going to be discharged as jurors. I've watched you guys over the last several weeks and that you've been very diligent in this case.

Now that you've been discharged as jurors, you're

free to talk about this case with whomever you would like to talk with. You are not under any obligation to talk with anyone if you don't want to. I know that at the conclusion of most cases, both the attorney for the State and the attorney for the defendant, they do like -- like to have the chance to talk to the jury. It's very insightful as lawyers to kind of see things from the jury's perspective, because ultimately that's what's important, is how everyone sitting in that box perceives the evidence and perceives everything that went on during the course of the trial.

So, if you would be so amenable, I'm sure they would love to talk to you. If you don't want to talk and you just want to go, make sure you go downstairs to jury services and check out before you leave the building. As you've seen, there is media involved in this case. Again, you are -- you've been released as jurors, so you can talk about the case.

Thank you very much. If any of you need notes for your work, let Jason know, we'll get those for you before you leave the courthouse. Thank you.

(Jury adjourned at 1:37 p.m.)

THE COURT: Counsel, if you want to stay around, my inclination is probably that you'll have at least a few jurors who would like to speak with you, if you guys want to speak with them, as well. Right now we need to give the defendant a

date for sentencing. He has no -- he has bail set at this point, but given the fact of he was convicted on almost all the charges, the nature of the charges, and the potential sentence address charges, he will be remanded to the detention center pending sentencing without bail.

Let's give him a date, please.

THE CLERK: December 16th, 9:30.

MS. HOLTHUS: Judge, I'll -- I'll come back. I have a -- a victim waiting at a prelim downstairs. I'm going to put her on. If I can get back, I'll get back. But...

THE COURT: Okay. Is Ms. Bluth going to go in?

MS. BLUTH: Yes, Your Honor.

THE COURT: Mr. Chairez, do you wish to speak to the jurors if they want to talk?

MR. CHAIREZ: Yes, Your Honor.

THE COURT: Okay. So, thank you very much.

MS. HOLTHUS: Thank you.

MS. BLUTH: Thank you, Your Honor.

THE COURT: Let's go back and thank the jurors. All right. We'll come and get you when they're ready.

MS. BLUTH: Okay. Thanks, Judge.

(Court adjourned at 1:38 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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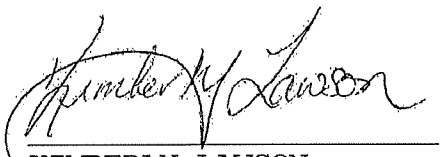

KIMBERLY LAWSON

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TRAN

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MAZEN ALOTAIBI,

Defendant.

CASE NO. C287173-1

DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 28, 2015

TRANSCRIPT OF PROCEEDINGS

SENTENCING

APPEARANCES:

For the State: JACQUELINE M. BLUTH, ESQ.
Chief District Attorney
MARY KAY HOLTHUS, ESQ.
Chief District Attorney

For the Defendant: DOMINIC P. GENTILE, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

GAL FRIDAY REPORTING & TRANSCRIPTION
10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249

Wednesday, January 28, 2015 at 9:44 a.m.

THE MARSHAL: 287173, Alotaibi.

THE COURT: Good morning everybody. So --

MR. GENTILE: Good morning, Your Honor.

MS. HOLTHUS: Good morning.

THE COURT: -- this is the time set for sentencing for Mr. Alotaibi.

Counsel, is there any legal cause or reason why we should not go forward today?

MR. GENTILE: No, Your Honor.

MS. BLUTH: No.

THE COURT: Okay, I just want --

MR. GENTILE: There is one issue and that is --

THE COURT: Yes, sir.

MR. GENTILE: -- the sealing -- we filed the motion to seal Dr. Paglini's psychosexual report. The grounds are stated in the motion itself and we would ask that you rule on that and seal the report.

THE COURT: Okay.

MR. GENTILE: Obviously at some point in the future the penal system and the parole office -- excuse me, the parole board will have access to that and we understand that --

THE COURT: Okay.

MR. GENTILE: -- but it's not a public document.

THE COURT: My understanding is that the State did receive a copy of the report, correct?

MS. BLUTH: That's correct, Your Honor.

THE COURT: And I obviously have a copy that I prepared for today's hearing. And I believe that I did sign that yesterday -- I mean ordinarily we left side file it so it's just not available for the public view. As far as filing it under seal, there would be a basis to file it under seal since in fact it does deal with his -- you know, his mental health, wellbeing, et cetera so there is a basis so that's the reason I did sign it.

MR. GENTILE: Oh, I didn't --

THE COURT: And --

MR. GENTILE: -- know that you did. Thank you.

THE COURT: I did, yeah. Obviously I had to state the basis on the record in order for it to be upheld in front of the Supreme Court. So it's obviously part of the record if this case were to go on appeal.

With all that being said, I did receive a sentencing memorandum and other items, an errata, and is there anything else before we begin?

MS. BLUTH: No, Your Honor, not on behalf of the State.

THE COURT: And I understand that there was speakers noticed. Are the speakers here today?

MS. BLUTH: That's correct, Your Honor.

THE COURT: Okay. So and the speakers are going last pursuant to statute; is that correct?

MS. BLUTH: Yes, Your Honor.

THE COURT: All right. By the State?

MS. BLUTH: And there will be one speaker for the record.

THE COURT: Just one? Which one?

MS. BLUTH: Thanh Nguyen, the victim's mother.

THE COURT: All right, that's fine. Okay, so let me get my copy --

MS. BLUTH: Your Honor, just for the record before we go any further in the proceedings, you know, sometimes in trial the defendant would use an interpreter and sometimes --

THE COURT: You know what?

MS. BLUTH: -- he wouldn't so I just want to make sure --

THE COURT: I'm glad that you brought that to my attention because --

THE MARSHAL: Said no.

THE COURT: I'm sorry?

THE MARSHAL: Mr. Gentile said no.

MR. GENTILE: He doesn't need an interpreter. He speaks --

THE COURT: Okay. Let me just --

MR. GENTILE: His English has improved tremendously in the last two years.

THE COURT: And I know sometimes you use interpreter and sometimes you don't. Do you want an interpreter today, Mr. Alotaibi?

THE DEFENDANT: No.

THE COURT: Okay. So again, like we've done in other hearings, if -- I know your English is pretty good. If there's -- ever comes a point when you don't understand something, please let you -- let me know.

THE DEFENDANT: I'll bring it to attention.

THE COURT: Okay.

THE DEFENDANT: Okay.

THE COURT: Perfect. All right.

MR. GENTILE: May I stand next to him? Would that be appropriate?

THE COURT: That's fine.

MR. GENTILE: It seems to me that that's where I want to be.

THE COURT: Sure, that's fine.

Okay. So by the State? Are you ready?

MS. BLUTH: Yes, Your Honor. I am. Thank you.

Judge, obviously we sat through a lengthy two-week trial so I don't see the point in giving you a complete recitation of the facts. However there are a few things I would like to point out from he trial that still stand out to me. I mean we all know that AJ went into that room willingly, you know, like a 13-year-old boy and we all know that his point -- and in his 13-year-old mind he was going to go in there, grab the marijuana and he -- in his mind he was going to be able to leave. We know that he wasn't able to do that, that he was blocked from doing so and that he was bitten, beaten about the butt and anally and orally assaulted.

I've done a lot of sexual assault cases, in fact I've done several in front of Your Honor, and I've never had a case where I had anal lacerations to the 11:00, 12:00, 12:30, 1:00, 2:00, 4:00, 5:00, 6:00 and 7:00 with noted blood clots. I've also done several sexual assaults that revolved around the charges of oral sexual assault and I have never seen bruises and contusions to the back of a victim's throat. I bring these out because this was a violent rape on a child. Not only was it violent but it was painful. And AJ Dane (phonetic) -- not only was it painful that day, but it's been painful every day since then and I'd ask Your Honor to take that into consideration.

I recognize also some important facts that were in the defendant's psychosexual evaluation. You know, one of the things that was bothersome to the State is the defendant discussed liking America because of their open views

towards sex in comparison to the country that he came from. Some of his activities in the past are very concerning to the State. In fact I think that the word reckless is completely appropriate. They're very sexually driven. You know, once outside of Saudi Arabia, he admits to multiple, multiple on end encounters with prostitutes. He discusses heavily drinking --

MR. GENTILE: Your Honor, that document is sealed.

MS. BLUTH: Well, that doesn't mean that --

MR. GENTILE: And --

MS. BLUTH: -- we can't respond to it in sentencing arguments, Your Honor.

MR. GENTILE: I'd have to object to that. If there was a response, it should have been done in writing.

MS. BLUTH: Well --

MR. GENTILE: And we asked for a postponement of this and it was denied because the State basically said that we should, you know, get it in and we got it in.

THE COURT: Okay. I've read the report. So -- and I'm very familiar with the contents of that --

MS. BLUTH: Okay.

THE COURT: -- report, okay?

MS. BLUTH: And so you understand the State's concerns with some of those actions was my point.

THE COURT: I read the report, yes.

MS. BLUTH: Another thing that the State would like to discuss is, you know, during trial there were certain times where I don't want to use the term blame shifting but that AJ's questions were acting and I'd like to remind the Court that this is a 13-year-old child who was away from home who was a long tame away from --

a long ways away from the family who he normally lives with and laws are written to protect children because 13-year-old boys and 13-year old girls, they're going to make bad decisions. Okay, that's why adults are hold -- are held criminally accountable and not children. So when AJ Dane made bad decisions, like any 13-year-old child does, it's up to us, it's up to Mazen Alotaibi to steer him in the right direction and not to capitalize on those bad decisions like Mazen Alotaibi did.

The State is asking for consecutive time between the sexual assaults for the anal as well as the oral, and the reason why we find this is appropriate, Judge, is two reasons. This whole idea that the United States as well as, you know, other countries have about what happens in Las Vegas stays in Las Vegas is offensive. It's offensive to those of us who have chosen to live here, to vacation here, to raise families here.

This idea that you can come in here and act how you want and do the things you want and then you get to leave and what happens in Vegas stays in Vegas is wrong. It should really be what happens here could make you stay here a long time, and I hope that anyone reading this or seeing it on the news tonight recognizes that that's all about show and that's all about TV and commercials because it's not real life and Mazen Alotaibi should know that and should be the poster boy for it. If you come here and you commit crimes and you rape our kids, you're going to pay for it. And I think consecutive time would show those individuals that that is what the message we're really sending from this court.

Secondly, I think consecutive time is warranted because the child was raped in different ways. Otherwise what is to keep individuals from raping a child multiple times or in multiple different ways? If a child -- if an individual who rapes a child multiple times or in multiple different ways is given concurrent, the State

believes that sends a message you'll be punished but you won't be punished for your different crimes, just your first one. So when you choose to anally rape a child and orally rape a child, you'll serve for both of those assaults.

Lastly Judge, in the sentencing memo, the line that was most offensive to the State was because the minimum sentence for his convictions are so substantial, consecutive sentences would effectively ruin his life. Ruin his life? What about AJ's life? What about that 13-year-old boy who was forced onto the ground and anally raped to the point he had blood clots and lacerations to his anus at almost every portion of it?

It is hard to be a 13-year-old boy. It is hard to go through puberty. Then to be raped on top of that the way he was raped in the most demeaning ways possible, you want to talk about a life sentence? AJ Dane saves that -- he serves that every single day. Maybe one day Mazen Alotaibi will get out of jail. You know what? AJ Dane doesn't. He serves it every single day of his life. So why Mazen may think his life is ruined, try walking a day in the feet of AJ Dane, and that's why consecutive is warranted in this case and we'd ask Your Honor to run the counts of the oral sex and the anal sex consecutively and we'd submit it on the rest of the charges.

THE COURT: All right, Thank you. Counsel?

MR. GENTILE: Your Honor, the legislature has created the statutory framework that really gives you very little discretion, and candidly after reading the presentence report I think that the Court should follow it. If Mr. Alotaibi is going to -- I was not the trial lawyer as you know. I'm not going to argue the facts of the case. I read a cold record, but if Mr. Alotaibi is going to get any consideration in the future, it can't be from this Court. Your hands are essentially tied, so I'd suggest

that you follow the presentence report.

THE COURT: I'm not sure how to interpret that statement, counsel.

MR. GENTILE: Well --

THE COURT: My hands are tied because of?

MR. GENTILE: Because of mandatory minimum --

THE COURT: Got it.

MR. GENTILE: -- sentences, Judge.

THE COURT: Okay.

MR. GENTILE: You have no choice but to sentence him to life on at least four counts in this case and the -- obviously the statute indicates when he become eligible for parole on those.

THE COURT: All right, I misunderstood what you said.

MR. GENTILE: The focus of our appeal obviously is going to be to change that, but at this moment it isn't changed and so I don't see -- I don't really see you having any discretion. I apologize to the Court. I wish you did. If you did, I'd be arguing, you know, fervently in terms of exercising it, but I just don't see it.

And as far as consecutive sentencings, I think that the probation department and the presentence report made a good analytical covering of the facts in this case. They see lots and lots and lots of cases as do you and their recommendation is for concurrent and I'd ask that you follow that.

THE COURT: All right, thank you.

Mr. Alotaibi, anything you'd like to say, sir?

THE DEFENDANT: No, ma'am.

THE COURT: All right. The speaker please.

MS. BLUTH: Thank you. Ms. Nguyen?

THE MARSHAL: Remain standing, raise your right hand, be sworn in by the clerk.

THANH NGUYEN

[having been called as a speaker and first duly sworn, testified as follows:]

THE CLERK: Would you please state and spell your first and last name for the record?

THE SPEAKER: Thanh is my first name, T-h-a-n-h, and last name is Nguyen, N-g-u-y-e-n.

THE COURT: Yes, ma'am.

THE SPEAKER: This whole ordeal has been a nightmare for my family and I and especially AJ. Since this happened to him he hasn't been the same and I'm still battling with him every day. It's like he's given up on life. He doesn't care what happens to him. And it's very, very hard, but I'm glad this is finally being over. Just want him to be locked up for the rest of his life that only because if he's out, who knows what he's done to other kids or even his own country where there's no justice or they can't get help.

And for him to come here and think it's okay to do it in our country is like a slap in our face and I really hope he realize what he did to my son can't -- that can't be taken back and AJ's -- AJ speaks about dying almost like every day. He wants to die. He wants to kill himself because he doesn't think anybody cares or love him anymore because of the situation. And it's been very very very hard to deal with AJ and I hope he realize what he's done to my son has scarred him forever. Every day I'm scared to wake up to find AJ either commit suicide or done something to himself to hurt himself. It's very very scary not for only me, my mom, my husband, my other three children. Just hope that he really really gets what he

deserve is to stay in prison and rot in hell.

THE COURT: Thank you. Is there anything else?

THE SPEAKER: (No audible response.)

THE COURT: And this is the only speaker, correct?

MS. BLUTH: That's correct, Your Honor.

THE COURT: Mr. Alotaibi, sir, the Court finds you guilty in count 1, burglary, a felony. The Court finds you guilty in count 2, first degree kidnapping, a felony. The Court finds you guilty on counts 3 and 5, sexual assault with a minor under 14 years of age, felonies. The Court finds you guilty on counts 7 and 8, lewdness with a child under the age of 14, felonies.

In accordance with the law State of Nevada the Court assesses a $25 administrative assessment fee. There's a $150 DNA analysis and testing fee.

Count 1, burglary, a felony: The Court sentences you to a minimum term of 12 months, a maximum sentence of 48 months.

Count 2, first degree kidnapping: The Court sentences you for a definite term of 15 years with eligibility for parole beginning when a minimum of five years have been served. Count 2 will run concurrent with count 1.

Count 3, sexual assault with a minor under 14 years of age, a felony: The Court sentences you to life with the eligibility for parole beginning when a minimum of 35 years have been served. Count 3 will run concurrent with count 2.

Count 5, sexual assault with a minor under 14 years of age, a felony: The Court sentences you to life with the eligibility for parole beginning when a minimum of 35 years have been served. Count 5 will run concurrent with count 3.

Count 7, lewdness with a child under the age of 14, a felony: The Court sentences you to life with the eligibility for parole beginning when a minimum

of 10 years have been served. Count 7 will run concurrent with count 5.

Count 8, lewdness with a child under the age of 14, a felony: The Court sentences you to life with the eligibility for parole beginning when a minimum of 10 years have been served. Count 8 will run concurrent with count 7.

Additionally, you are subject to a special sentence of lifetime supervision which will commence upon release from any term of probation, parole or imprisonment.

Additionally pursuant to NRS 179D.460, you shall register as a sex offender within 48 hours of sentencing or release from custody.

What is Mr. Alotaibi's credit?

MR. GENTILE: I really don't know. It's over two years.

MS. BLUTH: On the PSI, Your Honor -- I apologize, I didn't bring the PSI. What was the amount given on that?

THE COURT: I'm sorry. What is on the PSI?

MS. BLUTH: Yes, on the last page of it.

THE COURT: It says 350, but that was a long time ago.

MS. BLUTH: I'll submit an order, Your Honor, and make sure it's okay with Mr. Gentile.

MR. GENTILE: Your Honor, he -- yeah, that's fine with me. He was taken into custody on the 31st of December of the year 2013.

THE COURT: Do you want to just --

MR. GENTILE: No, 2012.

MS. BLUTH: No, '12.

THE COURT: Do you want to just calculate it out real quick and then we'll recall the case?

MR. GENTILE: It's 365 times 2 plus however many days it is here.

THE COURT: I know you're really good at math --

MS. HOLTHUS: Twenty-eight days in January.

THE COURT: -- so you get to do that, sir.

MR. GENTILE: Okay, it's 730 plus what's the date today?

MS. HOLTHUS: Twenty-eight days in January.

MR. GENTILE: Twenty-eight more days; 758 days.

MS. BLUTH: State's fine.

THE COURT: See I knew you could do it. Thank you so much. Seven fifty-eight credit for time served. Thank you.

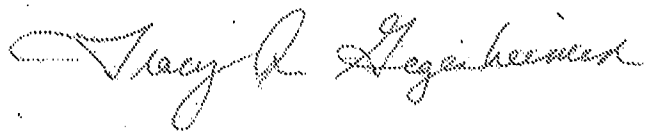
MS. BLUTH: Thank you, Your Honor.

MR. GENTILE: Thank you.

THE COURT: Thank you.

[Proceedings concluded at 10:01 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

MAZEN ALOTAIBI, Petitioner, vs. RENEE BAKER, WARDEN, LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTION, Respondents.	A-18-785145-W CASE NO. DEPT. NO. XXIII **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **Date of Hearing:** **Time of Hearing:**

Pursuant to Nevada Revised Statutes ("NRS") §§ 34.360 *et seq.* and §§ 34.720 *et seq.*; the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and Article 1, Section 8 of the Constitution of the State of Nevada, MAZEN ALOTAIBI, Petitioner in the above-entitled matter ("Petitioner"), by and through his attorneys, Dominic P. Gentile, Esq. and Vincent Savarese III, Esq. of the law firm of Gentile Cristalli Miller Armeni Savarese, PLLC, hereby respectfully petitions this Honorable Court for post-conviction habeas corpus relief from his conviction and sentence following jury trial with respect to the offenses of Sexual Assault of a Minor Under 14 Years of Age in violation of NRS § 200.366 as charged in Counts 3 and 5 of the Second Amended Information filed in the matter entitled *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant,* Case No. C-13-287173-1; and in support thereof, respectfully assigns the

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following:

1. That Petitioner is presently imprisoned at Lovelock Correctional Center, Pershing County, Nevada.

2. That the Judgment of Conviction herein challenged was entered by the Eighth Judicial District Court in and for Clark County, Nevada, Department XXIII.

3. That the Judgment of Conviction herein challenged was entered orally on January 28, 2015, and the written Judgment of Conviction was entered on February 5, 2015.

4. That the Judgment of Conviction herein challenged was entered in the matter entitled *State of Nevada v. Mazen Alotaibi, Case No.* C-13-287173-1.

5. That, in accordance with the minimum mandatory sentencing provisions imposed by NRS § 200.366(3)(c), the length of sentence imposed upon Petitioner with respect to Petitioner's conviction of the offense of Sexual Assault of a Minor Under 14 Years of Age as charged in Counts 3 and 5 of the Second Amended Information filed in the above-entitled matter to which this Petition is addressed was a term of life imprisonment with parole eligibility only after a mandatory, minimum term of thirty-five (35) years of imprisonment have been served as to each such count (to be served concurrently).

6. That Petitioner's conviction of the offense of Sexual Assault of a Minor Under 14 Years of Age as charged in Counts 3 and 5 of the Second Amended Information filed in the above-entitled matter and the sentence of imprisonment imposed upon him with respect thereto were obtained and imposed respectively in violation of the Constitution of the United States and the Constitution and laws of the State of Nevada as set forth hereinafter and as set forth with particularity and supported by legal argument in the Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) separately submitted together herewith.

7. That Petitioner is also presently serving sentences of imprisonment with respect to convictions of other offenses also charged in the Second Amended Information filed in the above-entitled matter, as follows: Count 1 (Burglary): a maximum term of 48 months of imprisonment with parole eligibility after 12 months of imprisonment have been served; Count 2

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(Kidnapping): a maximum term of 15 years of imprisonment with parole eligibility after 5 years of imprisonment have been served; Count 7 (Lewdness with a Child Under 14 Years): a term of life imprisonment with parole eligibility after 10 years of imprisonment have been served; Count 8 (Lewdness with a Child Under 14 Years): a term of life imprisonment with parole eligibility after 10 years of imprisonment have been served, all such sentences to be served concurrently with one another and with the sentences as to Counts 3 and 5 herein challenged.

8. That Petitioner is not presently serving sentences of imprisonment with respect to any other conviction of any other offense involving this or any other matter.

9. That the nature of the offenses involved in the conviction being challenged herein is Sexual Assault of a Minor Under 14 Years of Age.

10. That Petitioner's plea with respect thereto was that of Not Guilty.

11. That Petitioner likewise entered pleas of Not Guilty with respect to each and every count of the Second Amended Information in the above-entitled matter.

12. That after entering pleas of Not Guilty with respect thereto, Petitioner was found guilty of the offenses at issue herein following trial by jury.

13. That Petitioner did not testify at the trial.

14. That Petitioner appealed from the judgment of conviction.

15. That Petitioner's direct appeal was to the Supreme Court of the State of Nevada.

16. That the Nevada Supreme Court Case Number was 67380.

17. That Petitioner's appeal to the Nevada Supreme Court resulted in an Order of Affirmance dated February 28, 2017 (appended hereto and marked "A"). It is reported at 390 P.3d 654 (2017) (Unpublished Disposition). The panel filed its Order Denying Rehearing on April 26, 2017. It is unreported. The Nevada Supreme Court filed its Order Granting En Banc Reconsideration on November 3, 2017. It is unreported. And the Nevada Supreme Court filed its Opinion *en banc* and its Judgment on November 9, 2017, affirming Petitioner's conviction (appended hereto and marked "B" and "C," respectively). It is reported at 133 Nev. Adv. Op. 81, 404 P.3d 761 (2017).

18. That the Nevada Supreme Court issued its Remittitur on December 4, 2017

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(appended hereto and marked "D").

19. That Petitioner thereafter filed a Petition in the Supreme Court of the United States seeking a Writ of Certiorari to the Supreme Court of Nevada on February 7, 2018.

20. That the grounds raised therein were as follows:

A. That the Nevada Supreme Court's determination on direct appeal that Petitioner was not entitled to a lesser-included offense instruction with respect to the crime of Statutory Sexual Seduction in regard to Counts 3 and 5 of the Second Amended Information filed in the above-entitled matter (in each of which counts he was charged with the greater offense of Sexual Assault of a Minor Under 14 Years of Age), conflicted with relevant decisions of the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Alleyne v. United States,* 570 U.S. 99 (2013), a United States court of appeals, and other state courts of last resort in failing to treat a statutory sentencing factor, to wit: that the alleged victim be 16 years of age or younger (a textual element of the lesser offense of Statutory Sexual Seduction), triggering an enhanced mandatory minimum sentence of thirty-five (35) imprisonment as an "element" of the greater offense of Sexual Assault of a Minor Under 14 Years of Age for purposes of application of the "same elements test" of *Blockburger v. United States,* 284 U.S. 299 (1932), in violation of Petitioner's right to due process of law; and

B. That the Nevada Supreme Court's determination that Petitioner was not entitled to a lesser-included offense instruction with respect to the crime of Statutory Sexual Seduction in regard to Counts 3 and 5 of the Second Amended Information filed in the above-entitled matter (in each of which counts he was charged with the greater offense of Sexual Assault of a Minor Under 14 Years of Age), arbitrarily failed to follow its own previous jurisprudence in violation of the doctrine of *stare decisis* for purposes of application of the "same elements test" of *Blockburger v. United States,* 284 U.S. 299 (1932), in violation of Petitioner's right to due process of law.

21. That no evidentiary hearing was conducted with respect to that Petition.

22. That the United States Supreme Court issued its Order Denying Certiorari on April 16, 2018 (appended hereto and marked "E").

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23. That other than his direct appeal to the Nevada Supreme Court and his subsequent Petition for Writ of Certiorari filed in the United States Supreme Court, Petitioner has not filed any other petition, application or motion with respect to the Judgment of Conviction challenged herein.

24. That no ground being raised in this Petition has been previously presented to or ruled upon by this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding.

25. That Petitioner is not filing this Petition more than one year after the Nevada Supreme Court issued its remittitur on December 4, 2017.

26. That Petitioner does not have any petition or appeal now pending in any court, either state or federal, concerning the Judgment of Conviction herein challenged.

27. That Petitioner was represented at trial by Don P. Chairez, Esq., Nevada Bar Number 3497.

28. That Petitioner was represented on direct appeal in the Nevada Supreme Court and with respect to his Petition for Writ of Certiorari filed in the Supreme Court of the United States by Dominic P. Gentile, Esq., Nevada Bar Number 1923 and Vincent Savarese III, Esq., Nevada Bar Number 2467.

29. That Petitioner does not have any future sentences to serve after completing the sentence imposed by the Judgment of Conviction herein challenged.

30. That in support of Petitioner's contention that he is he currently being imprisoned unlawfully with respect to his conviction of the offense of Sexual Assault of a Minor Under 14 Years of Age as charged in Counts 3 and 5 of the Second Amended Information filed in the above-entitled matter to which this Petition is addressed, Petitioner respectfully assigns the following grounds, which are set forth with particularity and supported by legal argument in the Memorandum of Points and Authorities separately submitted together herewith in accordance with NRS § 34.735(2):

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NOTICE OF PETITION FOR WRIT OF HABEAS CORPUS

TO: All Interested Parties;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTE that the undersigned will bring the above and foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) on for hearing before the Court in the courtroom of the above-entitled Court on the 14 day of January 2019, 2018, at 11: 00 am .m. of said day, in Department XXIII of said Court.

Dated this 29th day of November, 2018.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

DOMINIC P. GENTILE, ESQ.
Nevada Bar No. 1923
VINCENT SAVARESE III, ESQ.
Nevada Bar No. 2467
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709
Attorneys for Petitioner Mazen Alotaibi

GROUND ONE

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL[1]

As set forth with particularity in the separate Memorandum of Points and Authorities submitted together herewith in accordance with NRS § 34.735(2), under the facts and circumstances of this case, trial counsel's rejection of the trial court's offer to provide an alternative lesser-related offense instruction regarding Statutory Sexual Seduction with respect to Counts 3 and 5 of the Second Amended Information wherein Petitioner was charged with the substantially graver offense of Sexual Assault Of A Minor Under 14 Years Of Age constituted objectively unreasonable deficient performance by which Petitioner was prejudiced and thereby deprived of the effective assistance of counsel guaranteed by the federal and state constitutions,

[1] A complete recitation of all of the specific facts supporting Petitioner's contention that he was denied the effective assistance of trial counsel are set forth with particularity in the separate Memorandum of Points and Authorities submitted together herewith. *See* NRS § 34.735(2).

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in the following respects:

First, trial counsel failed to meaningfully consult with his client and obtain Petitioner's informed consent before rejecting the trial court's offer to provide a lesser-related offense instruction regarding Statutory Sexual Seduction.

Secondly, in view of the enormous sentencing disparity at stake trial counsel's rejection of the trial court's offer to provide a lesser-related offense instruction regarding Statutory Sexual Seduction constituted an objectively unreasonable decision.

And finally, Petitioner was prejudiced by trial counsel's deficient performance because he was sentenced to serve the minimum, mandatory 35-year term of imprisonment applicable to the greater offense with which he was charged in Counts 3 and 5.

WHEREFORE, for all the foregoing reasons, Petitioner MAZEN ALOTAIBI respectfully prays that this Honorable Court enter an order vacating his conviction and sentence on Counts 3 and 5 of the Second Amended Information filed in the matter entitled *State of Nevada v. Mazen Alotaibi,* Case No. C-13287173-1, on which counts he was convicted at jury trial of Sexual Assault of a Minor Under 14 Years of Age, together with such other and further relief as the Court deems fair and just in the premises.

Dated this 26 day of November, 2018.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Dominic P. Gentile, having first been duly sworn, deposes and states under penalty of perjury as follows:

1. That I am an attorney duly licensed to practice law by the Supreme Court of the State of Nevada;
2. That I represent Mazen Alotaibi, the Petitioner named in the foregoing Petition for Writ of Habeas Corpus (Post-Conviction);
3. That I have read the foregoing Petition for Writ of Habeas Corpus (Post-Conviction) and know the contents thereof;
4. That the same is true of my own knowledge except for those matters therein stated on information and belief and as to those matters I believe them to be true; and
5. That Petitioner Mazen Alotaibi has personally authorized me to bring the foregoing Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 27th day of November, 2018.

DOMINIC P. GENTILE

SUBSCRIBED AND SWORN to before me
this 27 day of November, 2018.

S. CONCEPCION
Notary Public State of Nevada
No. 99-54067-1
My Appt. Exp. March 24, 2019

NOTARY PUBLIC in and for said
County and State

Gentile Cristalli
Miller Armeni Savarese
Attorneys At Law
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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 27 day of November, 2018 I served a copy of the **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER 1200 Prison Road Lovelock, Nevada 89149	JAMES DZURENDA DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTION 3955 West Russell Road Las Vegas, Nevada 89118
ADAM LAZALT NEVADA ATTORNEY GENERAL 100 North Carson Street Carson City, Nevada 89701	STEVE WOLFSON CLARK COUNTY DA CLARK COUNTY DISTRICT ATTORNEY'S OFFICE 200 Lewis Avenue Las Vegas, Nevada 89101

An employee of GENTILE CRISTALLI MILLER ARMENI SAVARESE

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EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67380

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, first-degree kidnapping, two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a minor under 14 years of age, and coercion. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

First, appellant Mazen Alotaibi argues that the district court erred in failing to instruct the jury that statutory sexual seduction is a lesser-included offense of sexual assault with a minor under 14 years of age. We apply the elements test to determine whether an offense is a lesser-included offense of the charged offense so as to warrant a jury instruction. *See Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). An offense is "necessarily included" in the offense charged if "the offense charged cannot be committed without committing

the lesser offense." *Id.* at 690, 30 P.3d at 1106 (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). A comparison of the relevant statutes in effect at the time Alotaibi committed the offenses shows that it was possible to commit sexual assault without necessarily committing statutory sexual seduction.[1] *Compare* 2009 Nev. Stat., ch. 300, § 1.1, at 1296 (NRS 200.364(5)), *with* 2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1)).[2] Thus, statutory sexual seduction was not a lesser-included offense of sexual assault with a minor, and Alotaibi was not entitled to an instruction on it.

Next, Alotaibi argues that the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence. We review a district court's decision whether to grant a new trial for an abuse of discretion. *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). Alotaibi's motion was based on an affidavit from a State witness recanting part of his trial testimony about Alotaibi driving a car shortly before he committed the offenses. Alotaibi argues that this recantation warrants a new trial because the false testimony about him driving directly undermined his defense of being too intoxicated to form the requisite mental state for the offenses. We conclude that the district

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[1]We reach the same conclusion even if we accept Alotaibi's position and consider only the elements of the offense as charged in the charging document.

[2]NRS 200.366(1) was amended in 2015 to provide that sexual penetration of a child under the age of 14 years is sexual assault regardless of consent.

court did not abuse its discretion in denying the motion for a new trial. *See Callier v. Warden, Nev. Women's Corr. Ctr.*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (explaining the four required components for granting a motion for a new trial based upon a recantation). The district court was not satisfied that the trial testimony was false and determined that the witness's conflicting accounts demonstrated at most that his recollection of the event could not be trusted. The record supports this determination, given that the witness admitted that he initially believed that Alotaibi was the driver but later decided that Alotaibi had been too drunk to drive. Moreover, the record supports the district court's determination that it was not probable that the outcome of the trial would have been different without the allegedly false testimony. The witness testified that Alotaibi was extremely intoxicated, other witnesses also testified to Alotaibi's level of intoxication, and the jury had the opportunity to observe Alotaibi in a hotel surveillance video and in a recorded interview conducted within hours of the offenses. Thus, we conclude that Alotaibi has not demonstrated that the district court abused its discretion in denying his motion for a new trial.

Finally, Alotaibi argues that his trial counsel provided ineffective assistance by failing to insist on a jury instruction and interview a witness. Claims of ineffective assistance of counsel should be raised in postconviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal unless there has been an evidentiary hearing or an evidentiary hearing would be unnecessary. *Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001); *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727,

729 (1995). Alotaibi has not established that either exception applies, and thus we decline to address his ineffective-assistance arguments. For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Stefany Miley, District Judge
Gentile, Cristalli, Miller, Armeni & Savarese, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

EXHIBIT B

EXHIBIT B

133 Nev., Advance Opinion 81

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67380

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, first-degree kidnapping, two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a child under 14 years of age, and coercion. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

Gentile Cristalli Miller Armeni Savarese and Dominic P. Gentile and Vincent Savarese, III, Las Vegas,
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Ryan J. MacDonald, Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to determine whether, under the statutory definitions existing in 2012, the offense of statutory sexual

seduction is a lesser-included offense of sexual assault when that offense is committed against a minor under 14 years of age.[1] Under the elements test, for an uncharged offense to be a lesser-included offense of the charged offense so that the defendant is entitled to a jury instruction on the lesser offense, all of the elements of the lesser offense must be included in the greater, charged offense. In applying the elements test in this case, we must resolve two issues related to the elements that make up the charged and uncharged offenses. First, we consider whether a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is an element of the offense for purposes of the lesser-included-offense analysis. We hold that it is not. Second, we consider how to apply the elements test when a lesser offense may be committed by alternative means. We hold that the elements of only one of the alternative means need be included in the greater, charged offense to warrant an instruction on the lesser offense.

Applying these principles to the statutes at issue, we conclude that statutory sexual seduction, as defined in NRS 200.364(5)(a) (2009), is not a lesser-included offense of sexual assault even where the victim is a minor, NRS 200.366(1) (2007), because statutory sexual seduction

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[1]The statutes defining statutory sexual seduction and sexual assault were amended in 2015. Under the 2015 amendments, any sexual penetration of a minor under the age of 14 is sexual assault, and it is no longer possible for statutory sexual seduction to be committed against a minor under the age of 14. Therefore, the analysis of the statutory elements in this opinion pertains only to the version of the statutes in place at the time the offenses were committed in 2012. *See* 2007 Nev. Stat., ch. 528, § 7, at 3255 (sexual assault, NRS 200.366(1)); 2009 Nev. Stat., ch. 300, § 1.1, at 1296 (statutory sexual seduction, NRS 200.364(5)).

contains an element not included in the greater offense. Thus, the district court did not err in refusing to give a lesser-included-offense instruction on statutory sexual seduction.[2]

FACTS

On the morning of December 31, 2012, appellant Mazen Alotaibi arrived at the Circus Circus hotel where his friends had a room. In the hallway outside the hotel room, Alotaibi encountered A.D., a 13-year-old boy who was staying at the hotel with his grandmother. A.D. asked Alotaibi for marijuana, and they went outside the hotel to smoke it. Alotaibi made sexual advances toward A.D. in the elevator and outside the hotel, despite A.D.'s resistance. Alotaibi then offered A.D. money and marijuana in exchange for sex. A.D. testified that he agreed but intended to trick Alotaibi into giving him marijuana without engaging in any sexual acts.

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[2]The two other arguments raised on appeal do not merit relief. First, as to the argument that trial counsel was ineffective, claims of ineffective assistance of counsel generally should be raised in postconviction proceedings in the district court, and we therefore decline to consider the argument in the first instance. *See Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001). Second, as to the claim regarding the district court's denial of a motion for a new trial based on newly discovered evidence, we have considered the arguments on appeal and conclude that the district court did not abuse its discretion in denying the motion. *See State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993) (reviewing a district court's decision to grant a motion for a new trial for an abuse of discretion); *Callier v. Warden, Nev. Women's Corr. Ctr.*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (explaining the four required components for granting a motion for a new trial based upon a recantation).

They went back to the hotel room where Alotaibi's friends were staying, and Alotaibi took A.D. into the bathroom and closed the door. Alotaibi told A.D. that he wanted to have sex and began kissing and touching him. A.D. testified that he told Alotaibi "no" and wanted to leave the bathroom but Alotaibi was standing between him and the door. A.D. testified that Alotaibi forced him to engage in oral and anal intercourse. After leaving the hotel room, A.D. reported to hotel security that he had been raped.

During his interview with the police, Alotaibi admitted meeting A.D. in the hallway of the hotel and stated that A.D. had asked him for money and weed. Alotaibi initially denied touching A.D. or bringing him into the bathroom, but then admitted engaging in the sexual acts in the bathroom of the hotel room. According to Alotaibi, it was A.D.'s idea to have sex in exchange for money and weed, A.D. went willingly with him into the bathroom and initiated the sexual acts, and Alotaibi did not force him.

Based upon this incident, Alotaibi was charged with numerous offenses, including two counts of sexual assault. In settling jury instructions, Alotaibi requested an instruction on statutory sexual seduction as a lesser-included offense of sexual assault, arguing that evidence indicated the victim consented to the sexual activity. The district court determined that statutory sexual seduction was not a lesser-included offense because it contained an additional element (the consenting person being under the age of 16) not required by sexual assault. Noting that there was evidence of consent to support the lesser offense, the district court instead offered to instruct the jury on statutory sexual seduction as a

lesser-related offense of sexual assault, but Alotaibi declined such an instruction.[3]

The jury found Alotaibi guilty of two counts of sexual assault with a minor under 14 and other offenses. Alotaibi now appeals from the judgment of conviction.

DISCUSSION

Alotaibi contends that the district court erred in refusing to instruct the jury on statutory sexual seduction as a lesser-included offense of the charged offense of sexual assault with a minor because he presented evidence that the sexual conduct was consensual. We review the district court's settling of jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

NRS 175.501 provides that a "defendant may be found guilty . . . of an offense necessarily included in the offense charged." We have held that this rule entitles a defendant to an instruction on a "necessarily included" offense, i.e., a lesser-included offense, as long as there is some evidence to support a conviction on that offense. *Rosas v. State*, 122 Nev. 1258, 1267-69, 147 P.3d 1101, 1108-09 (2006).

In determining whether an uncharged offense is a lesser-included offense of a charged offense so as to warrant an instruction pursuant to NRS 175.501, we apply the "elements test" from *Blockburger v. United States*, 284 U.S. 299 (1932). *Barton v. State*, 117 Nev. 686, 694,

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[3]The district court was not required to give an instruction on a lesser-related offense, as the defendant is not entitled to such an instruction. *See Peck v. State*, 116 Nev. 840, 844-45, 7 P.3d 470, 472-73 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas*, 122 Nev. 1258, 147 P.3d 1101. Under the elements test, an offense is "necessarily included" in the charged offense if "all of the elements of the lesser offense are included in the elements of the greater offense," *id.* at 690, 30 P.3d at 1106, such that "the offense charged cannot be committed without committing the lesser offense," *id.* (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). Thus, if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted.

Alotaibi suggests that this court has already resolved the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault with a minor in *Robinson v. State*, 110 Nev. 1137, 1138, 881 P.2d 667, 668 (1994). We disagree. Though *Robinson* contains statements to the effect that statutory sexual seduction is a lesser-included offense of sexual assault, the focus in that case was on whether a juvenile who had been certified to be tried as an adult also was an adult for purposes of statutory sexual seduction, which includes the defendant's age (18 years of age or older) as an element. *Robinson*, which was decided before this court clarified the test for determining whether an offense is a lesser-included offense in *Barton*, provides no analysis as to whether statutory sexual seduction is a lesser-included offense of sexual assault, and thus any statement on this issue is dictum.[4] Accordingly, *Robinson* is not

[4]Before *Barton*, there was a lack of clarity and consistency in Nevada caselaw as to how courts determine what constitutes a lesser-included offense. As explained in *Barton*, this court initially adopted the elements test in 1966 but then occasionally applied other tests that considered the particular facts of the case as well as the elements of the crimes. 117 Nev. at 689-92, 30 P.3d at 1105-07. *Barton* specifically

continued on next page . . .

controlling on the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault so as to entitle a defendant to an instruction on the lesser, uncharged offense. The issue thus has not been clearly resolved by this court.[5]

The statutes at issue raise several questions about how to apply the elements test. Specifically, the parties disagree about which elements are included in the lesser and greater offenses. Thus, before comparing the statutory elements of the two offenses, we must ascertain what elements actually comprise those offenses.

Elements of the greater offense

In 2012, NRS 200.366(1) proscribed sexual assault as follows:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

2007 Nev. Stat., ch. 528, § 7, at 3255. A separate subsection of that statute, NRS 200.366(3)(c), provided for a sentence of life with parole eligibility after 35 years if the offense was committed "against a child

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. . . continued

disavowed the use of this "same conduct" approach and explicitly reaffirmed the *Blockburger* elements test. *Id.* at 694-95, 30 P.3d at 1108-09.

[5]We disavow any language in *Robinson* and our previous decisions suggesting that statutory sexual seduction is a lesser-included offense of sexual assault.

under the age of 14 years" and did not result in substantial bodily harm. *Id.* at 3255-56.

The State contends that the age of the victim is not an element of sexual assault for purposes of the lesser-included-offense analysis because the victim's age only goes to the sentence for the offense. Thus, the State argues, because statutory sexual seduction requires proof of the victim's age as an element while the offense of sexual assault does not, statutory sexual seduction is not a lesser-included offense.[6] Alotaibi argues that the State's decision to charge him with the offense of "Sexual Assault with a Minor Under 14 Years of Age" necessarily inserted the age of the alleged victim as an element of that offense and triggered the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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[6]The State contends that this court has already concluded as much in *Slobodian v. State*, 98 Nev. 52, 639 P.2d 561 (1982), *rejected by Barton*, 117 Nev. at 689 & n.9, 30 P.3d at 1105 & n.9. We disagree. In *Slobodian*, which concerned an earlier version of the sexual assault statute, this court held that statutory sexual seduction was not a lesser-included offense of sexual assault because "the crime of statutory sexual seduction requires a victim under the age of sixteen, while the age of the victim is irrelevant to the crime of sexual assault." 98 Nev. at 53, 639 P.2d at 562 (internal footnote omitted). The earlier version of the sexual assault statute in *Slobodian* defined sexual assault in the same way as the statute in Alotaibi's case, but differed in that it provided for a specific sentence only where the victim was under the age of 14 but contained no specific sentencing provision for a victim under the age of 16. *See id.*; 1977 Nev. Stat., ch. 598, § 3, at 1626-27. Under this earlier statute, if the victim was between the ages of 14 and 16, the victim's age was not relevant to either guilt or punishment. The *Slobodian* decision did not indicate whether the victim was under the age of 14. Thus, the *Slobodian* decision did not indicate whether the age of the victim is an element of sexual assault when the offense is *committed against a minor*.

We agree with the State that the age of the victim in the sexual assault statute is not an element of the offense for purposes of the lesser-included-offense analysis. We acknowledge that our prior decisions have been somewhat inconsistent in distinguishing elements required for a conviction from those that only affect sentencing in applying the elements test. For example, in *Rosas*, we included as elements of the lesser offense several factors that served only to elevate the offense from a misdemeanor to a gross misdemeanor. 122 Nev. at 1263, 147 P.3d at 1105. We take this opportunity to clarify that when an element goes *only* to punishment and is not essential to a finding of guilt, it is not an element of the offense for purposes of determining whether a lesser-included-offense instruction is warranted. *Cf. LaChance v. State*, 130 Nev. 263, 273-74, 321 P.3d 919, 927 (2014) (holding that an element that does not affect guilt but rather only determines the sentence is not an element of the offense for the purposes of *Blockburger*). To the extent that *Rosas* included elements only relevant to sentencing in its analysis under the elements test, we disavow any such application of the elements test.

Alotaibi's arguments regarding *Apprendi* do not alter our conclusion. In *Apprendi*, the United States Supreme Court considered whether the Sixth Amendment's guarantee of a jury trial requires that a jury, rather than a judge, determine any factor other than a prior conviction that increases the statutorily authorized sentence for an offense. 530 U.S. at 476. The Supreme Court held that, regardless of how a fact is designated by a legislature, any fact (other than a prior conviction) that authorizes the imposition of a more severe sentence than permitted by statute for the offense alone must be found by a jury beyond a reasonable doubt. *Id. Apprendi* did not address whether a sentencing

factor is an element of an offense when determining whether the offense is included within a greater offense, and Alotaibi cites no controlling authority applying *Apprendi* to double jeopardy or lesser-included-offense analysis.[7]

Here, the elements necessary to convict a defendant of sexual assault are contained solely in subsection 1 of NRS 200.366, whereas the age of the victim set forth in subsection 3 is a factor for determining the appropriate sentence for the offense. As clearly indicated by the statute's structure and language, the age of the victim is not essential to a conviction for sexual assault; it serves only to increase the minimum sentence that may be imposed. Thus, it is a sentencing factor and not an element of the offense for purposes of the elements test. As such, for purposes of the elements test, the offense of sexual assault, regardless of whether it was committed against a minor, has two statutory elements:

> (1) "subject[ing] another person to sexual penetration, or . . . forc[ing] another person to make a sexual penetration on himself or another, or on a beast,"
>
> (2) "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or

[7]Notably, other courts have rejected the application of *Apprendi* to double jeopardy or lesser-included-offense analysis. *See, e.g.*, *Smith v. Hedgpeth*, 706 F.3d 1099, 1106 (9th Cir. 2013) (holding that *Apprendi* did not clearly establish that a state court must "consider sentencing enhancements as an element of an offense for purposes of the Double Jeopardy Clause"); *People v. Alarcon*, 148 Cal. Rptr. 3d 345, 348 (Ct. App. 2012) (rejecting contention that *Apprendi* requires enhancements to be considered in determining whether an uncharged offense is necessarily included in a charged offense).

> physically incapable of resisting or understanding the nature of his conduct."

2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1)).

Elements of the lesser offense

Having identified the elements of the greater offense, we turn to the elements of the lesser offense. In 2012, statutory sexual seduction was defined in NRS 200.364(5) as:

> (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or
>
> (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

2009 Nev. Stat., ch. 300, § 1.1, at 1296. The statute therefore sets forth two alternative means of committing statutory sexual seduction: (a) engaging in sexual intercourse, anal intercourse, cunnilingus, or fellatio; or (b) engaging in *other sexual penetration* with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either person. The parties disagree on how to apply the elements test where, as here, the statute provides different ways for a person to commit the offense. The State asserts that all of the elements of both alternative means of committing the lesser offense must be included in the greater offense, while Alotaibi focuses only on the elements of one of the alternatives, NRS 200.364(5)(a), that is most consistent with the sexual acts alleged in this case.

We conclude that where a statute provides alternative ways of committing an uncharged offense, the elements of only one of those

alternatives need to be included in the charged offense for the uncharged offense to be lesser included. *See* 6 Wayne R. LaFave, et al., *Criminal Procedure* § 24.8(e) (3d ed. 2007) ("When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives."). This approach comports with that taken by other jurisdictions that have considered this issue. *See, e.g., United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003) (holding that "alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense"); *United States v. Alfisi*, 308 F.3d 144, 152 n.6 (2d Cir. 2002) (finding an offense to be a lesser-included offense "notwithstanding the existence of possible or alternative, and non-mandatory, elements in the lesser offense not contained in the greater offense"); *State v. Waller*, 450 N.W.2d 864, 865 (Iowa 1990) ("When the statute defines [a lesser] offense alternatively, . . . the relevant definition is the one for the offense involved in the particular prosecution."). In particular, we agree with the Second Circuit's reasoning in *Alfisi*, whereby the court rejected an "unnecessary and formalistic requirement on how [the legislature] drafts criminal statutes," opting instead to view no differently a statute drafted as a "singular but disjunctive whole" from a statute dividing the alternative elements "into several discreet and independent sections." 308 F.3d at 152 n.6. Likewise, here, the fact that the Legislature included the alternative means of committing statutory sexual seduction in disjunctive subsections of the statute does not preclude each alternative means from being a lesser-included offense.

Here, neither of the alternatives in NRS 200.364(5) is necessarily included in the offense of sexual assault. Both alternatives

include the age of the victim (under 16 years of age) as an element of the offense that is required for conviction. 2009 Nev. Stat., ch. 300, § 1.1, at 1296. As explained above, the age of the victim is not an element required for a conviction of the greater offense (sexual assault). The alternative set forth in NRS 200.364(5)(b) also includes an intent element that is not included in the greater offense—that the sexual act was committed "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [the defendant or the victim]." *Id.* Therefore, under the elements test, statutory sexual seduction is not a lesser-included offense of sexual assault, and Alotaibi was not entitled to an instruction on statutory sexual seduction. As such, the district court properly refused to instruct the jury on statutory sexual seduction. We therefore affirm the judgment of conviction.

_____, J.
Hardesty

We concur:

_____, C.J.
Cherry

_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Pickering

_____, J.
Parraguirre

_____, J.
Stiglich

EXHIBIT C

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 67380
District Court Case No. C287173

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Affirmed."

Judgment, as quoted above, entered this 9th day of November, 2017.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this December 04, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

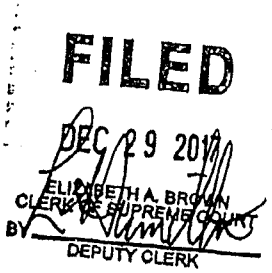
EXHIBIT D

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 67380
District Court Case No. C287173



REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: December 04, 2017

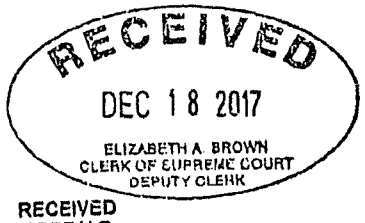
Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

cc (without enclosures):
Hon. Stefany Miley, District Judge
Gentile, Cristalli, Miller, Armeni & Savarese, PLLC
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on DEC 14 2017.



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APPEALS

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CLERK OF THE COURT

Deputy District Court Clerk

17-41550

EXHIBIT E

EXHIBIT E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 16, 2018

Mr. Dominic Pasquale Gentile
Gentile Cristalli Miller Armeni Savarese
410 South Rampart Boulevard, Suite 420
Las Vegas, NV 89145

Re: Mazen Alotaibi
v. Nevada
No. 17-1128

Dear Mr. Gentile:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk