

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

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**COLE DUANE ENGELSON**

Appellant,

vs.

**THE STATE OF NEVADA**

Respondent.

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**Docket No. 82691**

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Appeal From A Judgment of Conviction (Jury Trial)  
Fifth Judicial District Court  
The Honorable Robert Lane, District Judge  
Court No. CR9226

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**APPELLANT'S APPENDIX VOLUME 3 OF 22**

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<b><u>VOLUME</u></b>	<b><u>PLEADING</u></b>	<b><u>PGS</u></b>
1	Amended Information (2/7/2019).....	5-8
5	Amended Order Setting Jury Trial (9/14/2020).....	742-743
1	Brief in Support of Admitting Bad Act Evidence (11/25/2019).....	9-24
3	Court Order (7/8/2020).....	518-523
3	Court Order on Motion to Suppress (7/8/2020).....	524-528
1	Defendant Cole D. Engelson's Opposition to Bad Act Evidence (4/29/2020).....	43-51
1	Defendant's Formal Request for Pro Se Self-Representation (3/5/2020).....	30-39
1	Information (11/21/2018).....	1-4
22	Judgment of Conviction (3/12/2021).....	2175-2177
5	Motion to Disqualify the Nye County District Attorney's Office (10/27/2020).....	744-750
1	Motion to Suppress Defendant's Statements (6/4/2020).....	137-147
22	Notice of Appeal (3/26/2021).....	2178-2183
1	Notice of Motion and Motion for Deposition (2/10/22).....	25-29
2	Opposition to Defendant's Motion to Suppress Defendant's Statements, Pages 1-249 (6/12/2020).....	148-397
3	Opposition to Defendant's Motion to Suppress Defendant's Statements, Pages 250-307 (6/12/2020).....	398-454

6	Opposition to the Defendant’s Motion to Disqualify the Nye County District Attorney’s Office (10/29/2020).....	751-771
1	Order Appointing Counsel (3/30/2020).....	40-42
1	Reply to Opposition to Brief in Support of Admitting Bad Act Evidence (5/27/2020).....	52-60
1	Transcript of Proceedings Deposition of Christopher Pullen (5/21/2020).....	61-135
3	Transcript of Proceedings Defendant’s Motion to Suppress/Motion Admitting Bad Act Evidence/Calendar Call (7/6/2020).....	455-517
6	Transcript of Proceedings, Jury Trial Day 1 (11/4/2020).....	794-825
7	Transcript of Proceedings, Jury Trial Day 2 Pages 1-100 (11/5/2020).....	826-925
8	Transcript of Proceedings, Jury Trial Day 2 Pages 101-157 (11/5/2020).....	926-982
9	Transcript of Proceedings, Jury Trial Day 3 Pages 1-118 (11/6/2020).....	983-1100
10	Transcript of Proceedings, Jury Trial Day 3 Pages 119-194 (11/6/2020).....	1101-1176
11	Transcript of Proceedings, Jury Trial Day 3 Pages 195-275 (11/6/2020).....	1177-1257
12	Transcript of Proceedings, Jury Trial Day 4 Pages 1-100 (11/9/2020).....	1258-1357
13	Transcript of Proceedings, Jury Trial Day 4	

	Pages 101-176 (11/9/2020).....	1358-1433
14	Transcript of Proceedings, Jury Trial Day 5 Pages 1-100 (11/10/2020).....	1434-1533
15	Transcript of Proceedings, Jury Trial Day 5 Pages 101-190 (11/10/2020).....	1534-1623
16	Transcript of Proceedings, Jury Trial Day 6 Pages 1-110 (11/12/2020).....	1624-1733
17	Transcript of Proceedings, Jury Trial Day 6 Pages 111-212 (11/12/2020).....	1734-1835
18	Transcript of Proceedings, Jury Trial Day 7 Pages 1-70 (11/13/2020).....	1836-1905
19	Transcript of Proceedings, Jury Trial Day 7 Pages 71-127 (11/13/2020).....	1906-1962
20	Transcript of Proceedings, Jury Trial Day 8 Pages 1-80 (11/16/2020).....	1963-2042
21	Transcript of Proceedings, Jury Trial Day 8 Pages 81-153 (11/16/2020).....	2043-2115
6	Transcript of Proceedings, Motion to Disqualify the Nye County District Attorney's Office (10/29/2020).....	772-793
4	Transcript of Proceedings Petrocelli Hearing Day 1 (8/10/2020).....	529-639
5	Transcript of Proceedings Petrocelli Hearing Day 2 (8/11/2020).....	640-741

21	Transcript of Proceedings, Sentencing Hearing Day 1 (2/1/2021).....	2118-2132
22	Transcript of Proceedings, Sentencing Hearing Day 2 (3/8/2021).....	2133-2174
21	Verdict (11/16/2020).....	2116-2117

1           A. I do not. Like I didn't even know he was there until after  
2 they took her, sitting in the ambulance.

3           Q. Uh-huh.

4           A. And like they were all yelling at me, "What'd you do?  
5 What'd you do?" And I -- I said, "I don't know. I don't know."

6           Q. So when you get blacked out like this normally, what -- what  
7 is the normal trigger for that?

8           A. Why do I drink so heavy to get to that state?

9           Q. No. Like what is that level for you? Like at what point do  
10 you get to that level usually? You know, are we talking about half a  
11 bottle of vodka, a full bottle? What are we talking about?

12          A. Maybe a couple pints, probably. Well, I used to be a big  
13 drinker, then like last couple of years I've been on those pills. So I still  
14 think I can drink that way, and I can't.

15          Q. And that pill makes you sick when you drink, right?

16          A. Yeah. If -- you have to come off of it for like a couple weeks  
17 or you -- violently ill is what they told me.

18          Q. Yeah.

19          A. It could be a placebo, but I ain't --

20          Q. No. I've --

21          A. I'm scared to --

22          Q. I've seen people fucked up bad. Yeah. It's pretty bad. So  
23 what's your relationship with like -- with Victoria's kids?

24          A. Me and Yessenia, I -- we were real close, you know. She --  
25 Victoria would always called her my minion 'cause she'd always have

1 my mannerisms and everything. We -- we did lots of stuff. We always  
2 went to the park and we always -- we had a real good strong bond.

3 Dwight, not so much 'cause he's rubbed me the wrong way from  
4 first impressions. He hit my kid with a rock, and cut his eye like the day  
5 before pictures in school. And I kind of had, you know, animosity ever  
6 since then where I just try to find what he does wrong and point it out. I  
7 don't know. He (incomprehensible) -- he's not that bad of a kid. He's  
8 just a terrible sportsman and he's a know-it-all that doesn't know shit is  
9 the way I explain him. I try to tell him how to do his homework, you  
10 know, this is wrong. How is that wrong, my teacher said this is right,  
11 blah, blah, blah. And just, well, (incomprehensible) you calm down, and  
12 it is wrong 'cause it's wrong. You know --

13 Q. Yeah.

14 A. -- fix it. So I -- I stayed away from him. You know, I don't  
15 do any discipline with him or anything like that.

16 The -- the oldest daughter, things were getting better. She -- she  
17 got real weird when I first started coming around. And she didn't  
18 understand why her last dad and her didn't -- Victoria didn't work out.  
19 And it was, you know, grown people talking.

20 Q. Yeah.

21 A. She didn't even know it. And she was real weird towards  
22 me at first, and then things got a little bit better as time went on.

23 Q. And you said you didn't discipline Dwight ever then?

24 A. Uh-uh.

25 Q. How did that go in the house to not discipline a kid in the

1 house?

2 A. If she wants it, she would do the discipline on him. And she  
3 done them a couple times, running his mouth, but --

4 Q. Well, did --

5 A. I mostly --

6 Q. What was your feel on why you wouldn't discipline him?  
7 Like what was the thought process going on?

8 A. I -- I told her, I said I don't want to hit the kid 'cause I think I  
9 won't stop, you know. And I think I was just trying to put the fear in him  
10 a little bit.

11 Q. Yeah.

12 A. You know, let him -- 'cause I told him personally that's the  
13 reason I haven't done it.

14 Q. Hmm.

15 A. I don't know. I think he hits -- hurts him most taking video  
16 games away from him --

17 Q. Uh-huh.

18 A. -- and --

19 Q. Yeah. Most kids nowadays.

20 A. Yeah. And like his phone. Take that away from him, make  
21 him go upstairs, and be in the room, you know. And that was more of  
22 my thing with him. And I'd make him do all the chores. I mean  
23 (incomprehensible) supposed to split the chores with the boys, I'd make  
24 him do all of it, especially the dog shit. So that was my way of --

25 Q. Gotcha.



- 1 A. Yeah.
- 2 Q. What about the daughter? Your -- your youngest. What  
3 was her name? Yessenia, right?
- 4 A. Yessenia.
- 5 Q. What was like discipline for her? Three year olds  
6 sometimes are a little sassy so --
- 7 A. They do. The (incomprehensible) and the last time I  
8 spanked her was her mom told her, you know, if you do this, then Big  
9 Cole's going to come home and spank you. And -- and she did that  
10 thing --
- 11 Q. What'd she call you?
- 12 A. Big Cole.
- 13 Q. Oh.
- 14 A. Big Cole, Little Cole.
- 15 Q. Oh. Yeah. I'm real quick. Okay.
- 16 A. Or Big Cole's going to come over and, you know, spank you  
17 if you do it, and she did it. So I got home, and I gave her a good bad --  
18 I'm heavy-handed, you know. And I said, "I don't want to hit this kid  
19 anymore. You know?" I said -- so I started coming up with alternatives  
20 where I'd make her sit on the wall, you know, and -- one of the  
21 detectives calls it an invisible chair. I mean, you know --
- 22 Q. Yeah.
- 23 A. -- the lactic --
- 24 Q. Squat.
- 25 A. -- acid starts building up, and it -- it hurts like a son-of-a-

1     bitch after a while. And I -- I picked that up from a seventh grade math  
2     teacher. He used to catch all the kids running. One day he caught me  
3     running, made me sit on the wall, and I just -- I could still remember it.

4             Q.   Uh-huh.

5             A.   You know, it had to be 25 years ago.

6             Q.   Uh-huh.

7             A.   So I'd make her do stuff like that and make her sit in a plank  
8     position until -- then I'd make her put up one leg, hold that out, and put  
9     that one down, put the other one up. And I started doing more things  
10    like that with her. You know, one time she hit my son with a golf ball on  
11    his foot, like slammed the golf ball on him. I said, "What foot was it?"  
12    So she told me which one it was. So I made her stick out that foot as  
13    long as she could, you know, sitting on the stairs straight out. You  
14    know, you -- a couple minutes in and it gets a nice burn.

15            Q.   (Incomprehensible.)

16            A.   Yeah. She -- and she hated it.

17            Q.   Was she usually responsive to their discipline?

18            A.   Yeah. Yeah. I think she was all right. She'd cry like a --  
19    you know, some of them --

20            Q.   Right.

21            A.   -- you know, even really before she'd even have to do it.  
22    You know, she tried to cry her way out of it, and I'll let her cry. You  
23    know, you cry all you want and --

24            Q.   When you were talking about the shower, what -- what is  
25    the story with why she doesn't want water on her face? Do you know?

1 A. She's always hated water in her face.

2 Q. So does she normally take baths instead of showers or --

3 A. Sometimes. I -- I won't give her a bath 'cause I don't really  
4 that time.

5 Q. Right.

6 A. Like sometimes she's -- she's okay. I think she has to be  
7 warned that it's coming. But if it just gets her in the face then they just -  
8 - a nightmare.

9 Q. Well, in this instance to the best of your recollection, you  
10 were giving her a shower and she got water in her face.

11 A. Yeah. I guess.

12 Q. You said, right?

13 A. She -- I think she had dirt in her hair so I -- I just went right  
14 at it, and didn't give her a warning or anything, and then she was trying  
15 to bail out of there.

16 Q. So what does she actually do? I mean I -- I haven't seen  
17 that shower. What does -- like is it a stall, is it a --

18 A. It's this --

19 Q. -- a bathtub or --

20 A. -- tiny stall. Yeah. It's -- it -- I can barely fit in it.

21 Q. Well, what does she actually do when -- like when that  
22 happened, what -- what happened that night? What is -- what is her  
23 reaction when the water gets in her face?

24 A. It's screaming and, I think, maybe she tried and run out to  
25 get a towel, maybe. But she's trying to get out of there, and -- and that

1 shower is real slippery on the (incomprehensible) so she -- she went  
2 down a few times. She also can't stand cold water. You know, she  
3 was crying it was too hot, and I went down too far. Then she did it  
4 again when -- trying to get out of there 'cause it was just too cold for  
5 her. So those are the two things that she's -- she loses it.

6 Q. So when you put her in it, it was too hot. She says it's too  
7 hot so you made it cold. That made it worse because she doesn't like  
8 cold water either, and it went all the way cold?

9 A. Yeah. She hates coldest the most.

10 Q. And so she's trying to get out, meaning she's like -- I mean  
11 you're in the doorway, right?

12 A. Yeah.

13 Q. (Incomprehensible.) So how was she actually going to like  
14 try to get out?

15 A. 'Cause she's like -- just like running and play like a cartoon.  
16 You know, like --

17 Q. And you were just holding her? Just --

18 A. I wasn't even touching her at first. So she's slipping, like her  
19 feet went out from underneath her. Like she racked her ribs on maybe  
20 like, you know, how the door comes up and keep the water from coming  
21 out. Hit that area. And then the second time she just kind of like  
22 slipped and like hit from back to back on the -- on --against the wall  
23 that's on the other side of the door.

24 Q. And then you said at some point you demonstrated like  
25 putting your foot up to --

1 A. Yeah. Yeah.

2 Q. Then what -- what was that in response to?

3 A. Just her trying to get out as well, you know. The thing when  
4 she got up from all that, she's still trying to go. I'm like -- I was, you  
5 know, get back in there, and I'll turn it up, and stuff like that.

6 Q. Okay. And then where'd it go from there? What -- what do  
7 you remember next?

8 A. I don't.

9 Q. That's the last thing you remember?

10 A. Yeah. I don't -- like I said, I don't -- I don't even remember  
11 if I washed her hair in there. I know I wetted it. I don't remember drying  
12 her off 'cause usually when I dry her off, I put her up on the counter and  
13 get her going, get her lotion 'cause she needs lotion every day, and  
14 slather her up (incomprehensible). I told that to the female detective  
15 that came on the scene. She went, and took pictures, and looked it,  
16 and she said there's no footprint (verbatim) out there or anything like  
17 that so I don't -- I don't know what was done.

18 Q. Do you have a guesstimate on time frame from when mom  
19 left to when you put her in the shower?

20 A. It seemed like it was relatively quick. Like I said, we just  
21 went outside and I smoked a cigarette. It wasn't that long. So maybe  
22 ten minutes there, then right inside. So it was -- whenever she left, it  
23 had to be within a half-hour.

24 Q. So -- so I'm listening to your story. Obviously, I don't know  
25 anything about it. But -- so over the years what I find in these

1 circumstances is if someone has a lapse of memory or, like what like  
2 you're saying where you don't remember what happened after that, that  
3 traditionally happens after what I call the critical moment. So the  
4 moment where you say, oh fuck, that's traditionally where people -- it's  
5 a -- it's a safety mechanism. If you think about real life when you have  
6 a bad situation, what do we want to do? We want to try to forget it,  
7 right? We build up a wall. And so traditionally what -- what we see  
8 happen is you have a critical moment or where Cole says, fuck, this is  
9 not good; and then memory after that sometimes is, you know, minimal  
10 if --if existent. And then listening to your story about the -- before that  
11 part, I would say that it sounds like that encounter in the shower was  
12 probably substantially more dramatized than it sounds sitting here  
13 talking to you and I. I mean would -- would you agree? I mean that's  
14 the part you remember. So --

15 A. Yeah.

16 Q. -- would you agree that it's a -- it was just a violent mayhem  
17 going on in there?

18 A. It -- it wasn't that bad, like the parts I remember. I don't  
19 know if it got amped up maybe after the fact. Like I said, I don't even  
20 remember pulling her out of the shower so I don't know anything --

21 Q. So -- so I mean -- and by no means am I a fortune teller so  
22 don't -- don't take what I'm going to say as a fortune teller. But in terms  
23 of experience of this, this story you're telling me sounds consistent with  
24 her injuries. So it would be venture to -- my guess that she didn't come  
25 out of that shower conscious just based on her injuries and based on

1 the story you're telling me. That that is probably where she went  
2 unconscious based on the injuries to her head, the bruising that you  
3 saw. That would all be consistent with -- with something like that where  
4 you just finally got, you know, pissed or -- for lack of a better term,  
5 pissed, and that that was just the -- the mechanism in that shower. You  
6 know what I mean?

7 A. Yeah. Yeah. I --

8 Q. And if you found her unconscious, obviously --

9 A. Uh-huh.

10 Q. -- in the shower, that would be what I would call that critical  
11 -- you know, if she just went down, that would be that critical point in  
12 where your memory -- it would make sense that you didn't remember  
13 that afterwards. You know what I'm saying?

14 A. I don't know if -- I don't know if she came unconscious then I  
15 found her again later on if I went to sleep --

16 Q. Right.

17 A. -- and got up. Then --

18 Q. (Incomprehensible.)

19 A. Because there is a big gap between that shower --

20 Q. Yeah. You're forgetting a whole -- whole bulge of it.

21 A. Yeah.

22 Q. Now, mom says you called 911. She was already home  
23 when you called the paramedics, correct?

24 A. I don't believe so.

25 Q. Oh. I thought that -- I might have written down bad info.

1           A. I think I -- I think I was on the phone with her first, and then  
2 she said to call the paramedics. I think I got right off the phone and  
3 called the paramedics right after that. She might have been there. I -- I  
4 don't remember who arrived first.

5           Q. Okay. And obviously you saw the pictures. What -- what  
6 do you think when you see those pictures? What does --

7           A. It's sickening and -- and -- like I was expecting some -- so  
8 much different from just listening to the -- the female detective, you  
9 know. And -- and I thought maybe I had like choked her when we were  
10 laying down or something, the way she made it seem. And that's why I  
11 thought she lost -- then to see that, it -- it blew my mind 'cause I couldn't  
12 -- I don't remember a single strike.

13          Q. So -- and the strike part you're getting 'cause you're looking  
14 at those bruises and you're thinking that must be somebody striking  
15 her?

16          A. Well, it's 'cause --

17          Q. Is that kind of what you're --

18          A. The way it was presented towards me is that my girl was  
19 abused, and it looks -- it looks bad.

20          Q. Well, yeah. And you saw. You have to --

21          A. Yeah.

22          Q. -- agree it does look bad.

23          A. It does.

24          Q. But -- so for instance -- I mean you're a big boy, she's a little  
25 girl. If she's fighting to get out of cold water, and you're fighting to keep



1 her in the shower, and she's hitting her head and falling on whatever  
2 else -- I don't know what's in your shower, but there's traditionally things  
3 in the shower, and a shelf, and a door frame, and things like that --  
4 certainly injuries can occur in that situation without a strike.

5 A. Yeah.

6 Q. You know. If -- if you -- what do you weigh, 300 pounds?

7 A. I'm about 350.

8 Q. So I mean if you're weighing 350 pounds, take a three-year-  
9 old and push her back into the shower, whether you punched her or you  
10 threw her back into the shower, the blunt force doesn't necessarily  
11 change.

12 A. Yeah.

13 Q. Do you know what I'm saying? And I'm not saying the  
14 detectives are wrong for insinuating that it looks like punches. But for  
15 sure if you're punching someone or if you're picking her up and  
16 throwing her into the shower, you know, then that -- that isn't  
17 necessarily going to change the -- the (incomprehensible) of injury --

18 A. Yeah.

19 Q. -- that much.

20 A. Yeah. And like -- I mean I wasn't -- I got drilled by, you  
21 know, Cox and them the other day, and I was like, you know, like it's  
22 not going to change. I wish I could tell you more. I -- I would love, you  
23 know, to clear it up for everybody. I wish I could say, hey, you know I  
24 did take this when she did this, and I did that to her and -- but I can't. I  
25 can't sit here honestly and tell you what happened 'cause I don't

1 remember hitting her.

2 Q. Uh-huh.

3 A. I don't.

4 Q. And the whole pushing part in the shower, I mean do you --  
5 do you have a memory of the force that you used for that?

6 A. I -- I couldn't tell you. I couldn't really tell you. I don't know  
7 if she bounced off or anything, or if she slipped. I -- I don't really  
8 remember.

9 Q. And do you remember her crying and screaming during it?

10 A. (Incomprehensible) she was pretty much crying and  
11 screaming the whole time 'cause she gets really worked up with the  
12 water in her face and the cold water. So there was a lot of crying.

13 Q. Do you ever put cold water on her as a form of punishment?

14 A. I have.

15 Q. And what does she normally do in reaction to that?

16 A. She usually just more cowers into a ball and complains  
17 about it.

18 Q. So in this instance was it different in terms of her reaction?

19 A. I guess --

20 Q. It doesn't sound like she cowered at all.

21 A. No. She was more -- she wanted to get out of it.

22 Q. Do you know like why? Why different this time versus the  
23 last time?

24 A. Maybe 'cause she didn't know it was coming maybe with the  
25 -- the punishment part.

- 1 Q. So the punishment part --
- 2 A. I'll let her --
- 3 Q. -- you tell her ahead of time?
- 4 A. Yeah.
- 5 Q. That you're going to --
- 6 A. Yeah.
- 7 Q. What is it that's (incomprehensible)?
- 8 A. You're going to act this way, you're going to get this. You --
- 9 Q. Is it like a set amount of time or what is the --
- 10 A. I make her count to five.
- 11 Q. While you're pouring the water on her?
- 12 A. Uh-huh.
- 13 Q. Is it normally like in the shower or --
- 14 A. It is.
- 15 Q. Okay. So you like say go in the shower, you're going to do
- 16 five seconds of cold water, and you turn it on for five seconds, and --
- 17 and then the punishment (incomprehensible).
- 18 A. It's usually something happens in the shower where I was
- 19 like --
- 20 Q. Oh.
- 21 A. -- if you're going to act that way, you're going to get this, you
- 22 know, and then I just -- I hit her with it (incomprehensible).
- 23 Q. And she normally just lays down and counts to --
- 24 A. Yeah.
- 25 Q. -- five?

- 1 A. Just trying to get out of the -- the spray of it.
- 2 Q. So was the cold water this time, was that a punishment?
- 3 A. I don't believe so. I think it was just too hot at one point.
- 4 Q. Just went past (incomprehensible).
- 5 A. Just went too far. Right. Like I said -- and there was a lot of
- 6 vodka involved, and then it's -- hundred proof vodka is not normal.
- 7 Q. So when Victoria comes in here -- you can imagine what
- 8 Victoria's life is like right now.
- 9 A. Oh, I know. I know and --
- 10 Q. She -- she's going to demand some answers from you, and
- 11 I'm going to make sure I'm in here because I anticipate when you tell
- 12 her you have no answers that -- I don't anticipate that's going to go over
- 13 well with her. Just my guess. I mean I don't know for a fact, but that's
- 14 my guess.
- 15 A. Well, she put a -- a nice combination on me the other day,
- 16 you know, when -- it was when -- I felt the pain, you know, and like I
- 17 understand --
- 18 Q. You mean the day that this happened?
- 19 A. Yeah.
- 20 Q. She punch you?
- 21 A. Yeah. You know, she kept on asking what -- what I did and
- 22 I couldn't tell her. I couldn't give her an answer 'cause I don't know.
- 23 Q. And you can imagine if this were Cole.
- 24 A. I know.
- 25 Q. You can imagine --

1 A. No. I been --

2 Q. -- your grief that -- that --

3 A. Yeah.

4 Q. -- you would be feeling and your demand for answers  
5 (incomprehensible).

6 A. I've been in a suicide cell for, you know, a day-and-a-half  
7 and -- or maybe a day. And that's all I have is time with my thoughts.  
8 And especially with a TV behind the -- the chairs.

9 Q. Desk. Yeah.

10 A. *PAW Patrol* keeps on -- every commercial, you know, and  
11 that was her favorite show. So, you know, it's just a constant reminder,  
12 and I have nothing but time to think about --

13 Q. Yeah.

14 A. (Incomprehensible.)

15 Q. What do you -- what do you base your discipline on in your  
16 mind? Like, you know, we normally have parents that have taught us,  
17 and we've learned our (incomprehensible). What do you base that on?  
18 Like where -- where would you have gotten the -- the planking? I mean  
19 you told me the sitting on the wall was the seventh grader. But the cold  
20 water and stuff, where -- is that just something that you've decided was  
21 effective or --

22 A. Yeah. Like with the cold water -- and, like I said, I knew it  
23 upsets her so I know -- using that method probably once or twice. I  
24 think her mom might have gave her a cold shower once, and I think I  
25 picked up on it from there. Then I saw how -- how true it was.

1 Q. How responsive it was.

2 A. Yeah. And so -- when the planking stuff, I just -- like I said, I  
3 didn't want to spank her no more 'cause the last time I did it she kind of  
4 like rolled over when I came in the room so I gave her -- I tagged her  
5 pretty good. And where her mom was supposed to spank her with a  
6 belt too, but that was part of the deal, and her mom just pulled up the  
7 pants and that was enough, you know. That was pretty much the -- I  
8 wasn't going to spank her no more after that.

9 Q. Just because it was so dramatic?

10 A. And just you could tell, you know, and you can -- the slap,  
11 you can hear it, you know, and it was just -- it was too much.

12 Q. So you normally did a bare butt instead of through the pants  
13 then?

14 A. Yeah.

15 Q. Was that just because it was more effective that way than  
16 through the padding or --

17 A. I just think how I was raised. Uh-huh. More of a bare ass is  
18 more effective way. Yeah. I think that Victoria would leave the pants  
19 on. She's more that type.

20 Q. Looking back, what do you think you could have done  
21 different in this whole relationship situation? What can -- what could we  
22 have done to not be here?

23 A. I could have stayed on that fucking pill, you know.

24 Q. So you think this is solely alcohol-related?

25 A. It is. Like I -- when I saw those pictures, there's no way

1 being sober I can be that upset. And, you know, if those are all strikes  
2 from me or whatever. Just looking at that, that night, there's no way.  
3 Sober, I can't get that upset.

4 Q. So Victoria told the detectives that when you get drunk,  
5 normally you're a happy drunk. You're one to -- one to laugh, you're  
6 kind of like a class clown. What would be --

7 A. In a social -- social situation.

8 Q. What would be different when you're home alone with --  
9 with the baby?

10 A. I couldn't -- you know, all I want to do is get a little buzz just  
11 to lay down and go to bed. That's all I really wanted. I don't know -- but  
12 when I'm -- when I'm out and try to get everybody to laugh, you know,  
13 that's -- that's different than being one-on-one with a kid too so --

14 Q. Uh-huh.

15 A. Well, you know, I'm not going to try to --

16 Q. Is she normally like the type of kid that's not going to let you  
17 sleep? I mean I've worked graves. That sucks when your kids are --

18 A. Yeah.

19 Q. -- climbing on you, and turning the lights on, and all --

20 A. Nah. She --

21 Q. -- that shit. Is that normally what she's like?

22 A. She got a lot better. Like me and my mom both worked on  
23 her. She -- she wouldn't take any naps like previous to me coming  
24 around, and I couldn't believe it, you know, but -- you know, this kid will  
25 be a lot better if you gave her some naps. So every time I had to watch

1 her I made sure I put her down. And the first, you know, ten times was  
2 kind of a nightmare. Her screaming nonsense. But after that you pretty  
3 much just tell her, all right, it's nap time.

4 Q. Uh-huh.

5 A. And she knows to go.

6 Q. And she was okay with that?

7 A. Yeah.

8 Q. If I were to get you a -- a semi-similar-sized doll, would you  
9 be able to demonstrate the force that -- in the shower the best to your  
10 memory?

11 A. I don't think so.

12 Q. You don't think you'll remember that at all?

13 A. Uh-huh. I don't remember. 'Cause I kind of like do this with  
14 my toe. I don't know -- I don't know if it was -- he might have been a  
15 midget kick for, you know -- but I don't believe so. But I just remember -  
16 - there's a couple things.

17 Q. You remember using your foot to -- to contain --

18 A. Yeah.

19 Q. -- her in the shower?

20 A. Yeah.

21 Q. Why did you not just let her out? Just 'cause you were  
22 trying to be in charge or because --

23 A. I think --

24 Q. -- you had a purpose?

25 A. -- she wasn't done, I -- I believe. I don't -- like I said, I can't



1 remember if I even washed her hair or not. And when she went head  
2 over heels, you know, that she was -- she was dirty.

3 Q. So head over heels -- so you said it's a small -- it's like a  
4 stall shower? Like a box? Like the -- the tall ones.

5 A. Oh. Well, I was -- I was talking on the chair --

6 Q. Oh.

7 A. -- to in the dirt.

8 Q. Okay.

9 A. Yeah.

10 Q. So when you were talking about her slipping in the shower  
11 though, that's -- the floor is wet, basically.

12 A. Yes.

13 Q. And she's trying to get out, you were trying to keep her in;  
14 and she just would fall to the ground, or was she falling and hitting the  
15 wall, or what is she doing?

16 A. Like she would hit the wall in the back end one --

17 Q. Uh-huh.

18 A. -- time. Then she fell and hit the -- the little raised area.

19 Q. And that's where you said that was her ribs you thought.

20 A. Yeah.

21 Q. Did that.

22 A. It looked like it was more on the side (incomprehensible).

23 Q. And when she fell and hit the wall, what part of her hit that  
24 wall? Do you remember?

25 A. Probably her back. I think she went back to back with it.

1 Q. Okay. And was that -- those were the only two instances  
2 where she hit a wall or was it kind of like the whole time back and forth  
3 fighting to keep her in or --

4 A. I think it was only two I can really recall. I don't know. I  
5 don't know how hard it hit any of it. I don't -- I don't recall. I just  
6 (incomprehensible) --

7 Q. Do you remember your feelings about it?

8 A. No. I just don't think -- I'm just used to it, you know. I don't  
9 think I was upset about it.

10 Q. Didn't make you angry?

11 A. I don't believe so. But maybe with the -- the booze in me  
12 and -- and maybe it did. And --

13 Q. And you -- you told Detective Fernandes initially, you know,  
14 something to the effect of it's my fault; I don't remember what  
15 happened, but I can't believe I did this; or I destroyed lives or --

16 A. Yeah.

17 Q. -- some quote like that. When you -- when you make a  
18 statement like that, is that -- what is that based on? Is that based on  
19 your memory, based on the fact that you knew you were the only one  
20 home? What are you basing that on?

21 A. I was the only one home.

22 Q. So you knew what -- you were her sole caregiver.

23 A. Yeah.

24 Q. Obviously, so regardless (incomprehensible).

25 A. Regardless, it was on my watch and something happened,

1 you know, and -- but like -- like I said, nobody's going to break in, and  
2 just --

3 Q. No.

4 A. -- do that, and not take nothing, and that would be on the  
5 way so -- and I don't think Dwight would do anything like that. I think  
6 he's a little too young for it so --

7 Q. When -- when you're talking about her crying basically the  
8 whole time in the shower, was there a point that you remember that she  
9 stopped crying?

10 A. No. I don't. I don't remember.

11 Q. Okay. Okay. Anything else you do remember that I haven't  
12 asked you about?

13 A. No. No. And now, like I said, there's -- there's that big gap  
14 from the shower to --

15 Q. To Victoria coming in.

16 A. Yeah. Like -- I don't -- like I said, I don't know if I was  
17 asleep and got up or if that's just when I snapped out of that -- the panic  
18 scare, you know, get you sober, you know. I don't know what  
19 happened. I thought that I got up to go to the bathroom, but I don't -- I  
20 don't -- I can't hold if that's true or not 'cause -- like I said, I was  
21 dreaming a lot about this stuff too so I don't know which is reality  
22 anymore.

23 Q. Hmm.

24 A. I thought I -- I thought we went to go lay down after the  
25 shower, but maybe that was just what the plan was supposed to be.

1 Maybe I did and left her there. I don't -- I couldn't tell you.

2 Q. Okay. Are you going to be able to deal with Victoria?

3 A. Yeah. I'll be all right.

4 Q. Don't anticipate that it will be pleasant.

5 A. I'm -- I won't. But I've been wanting to talk to her anyways,  
6 and I -- I wasn't going to call her or anything like that. So kind of glad  
7 this is going to happen. I just lost the love of my life. You know, like --  
8 like I said, I've ruined a lot of people's lives and (incomprehensible).

9 Q. Hopefully at the end of this you don't drink anymore.

10 A. No. No. Not on -- I'll stay on that pill religiously.

11 (Incomprehensible.)

12 Q. All right. We'll deal. Let me go grab her. Would you --  
13 would you feel more comfortable or less comfortable with me in here?

14 A. It doesn't matter. I don't -- I don't --

15 Q. You don't think it'll change anything?

16 A. No. I wouldn't -- I don't think -- and if -- if she gets violent,  
17 then I'll let her be all violent. Like I --

18 Q. I'm not going to let her get violent like that. All right. Let me  
19 go grab her, and I'll be right back. All right?

20 A. Getting old.

21 (Lieutenant Boruchowitz leaves the interview room.)

22 LIEUTENANT BORUCHOWITZ: Going off the record at  
23 2000 hours.

24

25

1 I certify that the foregoing is a true and accurate transcript of the  
2 electronic audio recording with a length of 00:57:50 from the interview  
3 in the above-entitled matter.  
4  
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6 Amber Tubbs, Transcriptionist

July 24, 2017

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NYE COUNTY DISTRICT ATTORNEY  
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EXHIBIT 7

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EXHIBIT 7

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19 (Lieutenant Boruchowitz exits the jail.)

22 VICTORIA SCHLICK: No.

1

1 VICTORIA SCHLICK: I --

2 LIEUTENANT BORUCHOWITZ: Don't -- don't put  
3 yourself in jail 'cause --

4 VICTORIA SCHLICK: Uh-huh.

5 LIEUTENANT BORUCHOWITZ: -- it's a mandatory  
6 arrest, okay?

7 VICTORIA SCHLICK: I understand.

8 LIEUTENANT BORUCHOWITZ: Second of all, you're on  
9 camera in there. He knows he's on camera. I'm going to go in with  
10 you. I'm going to give him a warning that -- to remember that anything  
11 he says to you has the same -- 'cause -- because technically you could  
12 --

13 VICTORIA SCHLICK: He's -- yeah.

14 LIEUTENANT BORUCHOWITZ: -- be construed as our  
15 agent. So I'm going to make sure he understands that and that'll it be  
16 used against him. I can tell you that I don't think he's an honest person.  
17 I don't know enough about him and his blackouts to know what  
18 allegedly -- what he actually could -- you know, could black out and --

19 VICTORIA SCHLICK: I just --

20 LIEUTENANT BORUCHOWITZ: -- could not black out,  
21 but --

22 VICTORIA SCHLICK: I just keep thinking like after this  
23 like everything's in the past and what I could have noticed like from her  
24 -- like the fall when he called me and I had to come home from work  
25 because of her busted chin.



1                   LIEUTENANT BORUCHOWITZ: Uh-huh.

2                   VICTORIA SCHLICK: He was giving her a shower that  
3   day too. But I asked him to give her a shower 'cause she had wet the  
4   bed.

5                   LIEUTENANT BORUCHOWITZ: So he says he punishes  
6   her by putting her in cold water in the shower. Are you aware of that?

7                   VICTORIA SCHLICK: He told me he did that once, and I  
8   said that wasn't necessary. I've done it once and then I felt bad about  
9   it. But she was to the point, how I told you -- I don't know if I told you or  
10   that other officer, like she cried so hard one day she gave herself  
11   petechia on her -- on her ears and underneath her eyes that -- 'cause  
12   she was crying until she couldn't breathe. She was just tired and -- so  
13   like I kind -- I just -- to calm her down, I was like I just stuck her in the  
14   shower and -- just to get her calmed down. I calmed her down, but I  
15   told him like I don't agree with that. And every time he's punished her,  
16   he's always called me and told me what's happened.

17                  LIEUTENANT BORUCHOWITZ: I'm going to guess that -  
18   - and I'm just telling you a speculation. We'll never know until we get to  
19   -- to our maker. But I'm going to speculate everything that happened to  
20   her happened in the shower from the story he's telling me.

21                  VICTORIA SCHLICK: I wanted to tell you --

22                  LIEUTENANT BORUCHOWITZ: I know.

23                  VICTORIA SCHLICK: -- you guys had found -- I looked in  
24   the shower and that soap on a rope that's on the floor, that was hanging  
25   with the rope still attached because I took a shower. That was still -- it

1 was -- and you know how hard it is to pull that rope of that bar, and the  
2 rope and the bar are not connected anymore. So I don't know if you  
3 want to go to the house and grab that.

4 LIEUTENANT BORUCHOWITZ: I may have Detective  
5 Parra follow you back there and grab that.

6 VICTORIA SCHLICK: Yeah. Okay.

7 LIEUTENANT BORUCHOWITZ: But I don't think there's  
8 any question from his story that that's what happens. Sounded like he  
9 put her in some hot water in the shower first, and then she was  
10 desperately trying to get out, and he put her in cold water. And then he  
11 basically tells a story about how she fell all over the shower trying to get  
12 out, and he kept her in the shower and wouldn't let her out. It's his  
13 casual rendition of what happened. But I think, you know, based on her  
14 injuries that that's probably the whole -- the whole crime scene. Like I  
15 don't think -- I don't anticipate that, you know, he took her out of the  
16 shower and went and did something to her. I think he had this whole  
17 (incomprehensible) --

18 VICTORIA SCHLICK: You think that -- I mean I don't --  
19 so did she like -- from her injuries, did she just go to sleep and then  
20 pass away? I don't --

21 LIEUTENANT BORUCHOWITZ: No one will ever know  
22 for sure so --

23 VICTORIA SCHLICK: Did they -- I mean --

24 LIEUTENANT BORUCHOWITZ: You know it's really  
25 speculative. She has a serious brain injury from the -- the blunt force

1 trauma to the head. The hope --

2 VICTORIA SCHLICK: (Incomprehensible.)

3 LIEUTENANT BORUCHOWITZ: -- is that that -- that that  
4 makes you unconscious and obviously that you wouldn't feel  
5 subsequent pain. There's no way to know, and -- and I don't lie to  
6 people and try to make you feel better by saying she felt nothing. The  
7 truth of the matter is what matters is she doesn't feel anything now. But  
8 it was probably not pleasant no matter -- no matter how you look at it or  
9 what --

10 VICTORIA SCHLICK: He knows.

11 LIEUTENANT BORUCHOWITZ: -- what he did.

12 VICTORIA SCHLICK: Can I see her when they're done  
13 with the autopsy?

14 LIEUTENANT BORUCHOWITZ: Yep. She'll be going  
15 back to the mortuary. She probably already is back there and I -- yeah.  
16 You can go down there and -- and see her. Yeah.

17 VICTORIA SCHLICK: Okay.

18 LIEUTENANT BORUCHOWITZ: So -- and then we'll  
19 know a lot more. They send -- so what they do is they cut portions of  
20 the tissue behind a bruise out, and it basically tells them what's the  
21 force, how long, you know, was that bruise there. So they'll know --

22 VICTORIA SCHLICK: (Incomprehensible.)

23 LIEUTENANT BORUCHOWITZ: -- more. That takes a  
24 couple weeks, but --

25 VICTORIA SCHLICK: Did he say he bit her?

1                   LIEUTENANT BORUCHOWITZ: Nah. He just --

2                   VICTORIA SCHLICK: (Incomprehensible.)

3                   LIEUTENANT BORUCHOWITZ: -- claims he doesn't  
4 remember anything. He says it might have been a glass that he was  
5 drinking out of. He -- he's very --

6                   VICTORIA SCHLICK: Did you see it?

7                   LIEUTENANT BORUCHOWITZ: Yeah.

8                   VICTORIA SCHLICK: It's a bite. It's a bite mark, right?

9                   LIEUTENANT BORUCHOWITZ: Not necessarily. And  
10 there's dispute. The coroner says it could be; the pediatric doctor says  
11 it doesn't look like it. There's no definitive teeth marks. You know, in  
12 terms of normally you see the molars and things like that; that is not  
13 visible. But that doesn't mean that it's not. And, you know, there's no  
14 evidence of sexual assault or anything like that in the autopsy, so I don't  
15 think it's a sexual thing. And really, you know, if he's in that fit of rage,  
16 and he's using the soap, and throwing her around the shower, and  
17 whatever else; if he's holding a glass, certainly it could have been a  
18 glass. It could have been. You know, and -- and proving what exactly  
19 was the implement, it doesn't really matter. You know at the end of the  
20 day he killed her and -- and at least to me it doesn't matter what, you  
21 know, exactly it was. His story is very clearly minimizing and trying to  
22 not (inaudible).

23                   VICTORIA SCHLICK: I don't understand --

24                   LIEUTENANT BORUCHOWITZ: Okay. All right.

25                   VICTORIA SCHLICK: -- why he's doing that.

1                   LIEUTENANT BORUCHOWITZ: So whatever you do,  
2     please do not touch him, okay? All right. Let's get this done. I locked  
3     myself out so we're going to have to call. We got to call it in 'cause I left  
4     my keys in there. Oh, I don't like to take my stuff in with people like that  
5     in case --

6                   VICTORIA SCHLICK: Absolutely.

7                   LIEUTENANT BORUCHOWITZ: -- we're in a fight. I want  
8     to at least have it be a fist fight instead of keys, and pens, and guns,  
9     and all that.

10                  VICTORIA SCHLICK: I can understand  
11     (incomprehensible).

12                  UNKNOWN OFFICER: Yes.

13                  LIEUTENANT BORUCHOWITZ: Hey, will you come let  
14     me in the front door? I locked myself out.

15                  UNKNOWN OFFICER: Okay.

16                  LIEUTENANT BORUCHOWITZ: Thank you.

17                  VICTORIA SCHLICK: Does he know I'm here?

18                  LIEUTENANT BORUCHOWITZ: Yeah. I told him that  
19     you want to talk to him. He said, "Good. I want to talk to her" so --  
20     yeah. (Incomprehensible.)

21                  Thank you, sir.

22     (Lieutenant Boruchowitz and Victoria Schlick enter the interview room.)

23                  LIEUTENANT BORUCHOWITZ: Let me -- let me talk to  
24     him with you in the room for one second before you start and then you  
25     can talk to him, okay?

1 VICTORIA SCHLICK: Okay.

2 LIEUTENANT BORUCHOWITZ: You can have a seat  
3 right there. Two things before you guys talk. Number one: since I'm  
4 bringing her into the room, I'm making sure you understand that not that  
5 she is my agent, but that the Miranda rights about having a lawyer  
6 present, all that, still are applicable when you talk to her. Anything that  
7 you say in front of me at any time can be used against you. So I just  
8 have to make sure you're aware of that. And, obviously, so you're  
9 aware that we're recording this as well. So, all right, go ahead.

10 VICTORIA SCHLICK: Don't cry. Don't you fucking cry.

11 COLE ENGELSON: I don't know what to tell you.

12 VICTORIA SCHLICK: All I want is why.

13 COLE ENGELSON: I don't know what happened. I don't  
14 know what --

15 VICTORIA SCHLICK: So --

16 COLE ENGELSON: -- went down.

17 VICTORIA SCHLICK: -- don't -- that's a fucking lie. What  
18 -- she was laying down for a -- she was laying down for her nap. What  
19 did she do?

20 COLE ENGELSON: I know we went outside 'cause she  
21 was crying when you left. Went outside, I had to smoke a cigarette.

22 VICTORIA SCHLICK: Uh-huh.

23 COLE ENGELSON: She jumped up in that green chair  
24 and she fell backwards. She was dirtier than hell, so I threw her in the  
25 shower, and that's pretty much all I really remember the rest of the

1 night. I don't know what happened after that. I don't remember a single  
2 thing. I got in that big jug of vodka and (incomprehensible).

3 VICTORIA SCHLICK: But I -- I saw that.

4 COLE ENGELSON: Do -- (incomprehensible) think it's -- I  
5 don't want to say that 'cause I know apology ain't shit. I just -- I lost out  
6 on the love of my life, and I know I cost you your beautiful daughter,  
7 and I'm sorry for everything, and I don't know what to do. And I don't  
8 know what happened, and that's the worst part of all of it.

9 VICTORIA SCHLICK: Was -- I --

10 COLE ENGELSON: I ruined a lot of -- a lot of -- shit. I  
11 ruined everything. I mean -- and I don't know like -- I don't know how I  
12 can make anything better.

13 VICTORIA SCHLICK: You can't. Can you bring her  
14 back?

15 COLE ENGELSON: No.

16 VICTORIA SCHLICK: Can you bring her back to me?

17 COLE ENGELSON: I wish I could.

18 VICTORIA SCHLICK: So --

19 COLE ENGELSON: I wish I can give you more of an  
20 explanation.

21 VICTORIA SCHLICK: How do you -- I don't -- I don't  
22 believe you. That's -- it's -- you didn't -- you didn't black out. That's --  
23 that what you drank is not enough. I've been around you and I know  
24 how much you can take.

25 COLE ENGELSON: And how much did I drink

1 (incomprehensible)?

2 VICTORIA SCHLICK: That bottle? Like there's only that  
3 much left. I -- I mean when did you start drinking it? It was three hours  
4 before Dwight (phonetic) got home. Three hours. He would -- did you  
5 chug the bottle? I don't understand.

6 COLE ENGELSON: No. I was making vodka waters, and  
7 I was making them stiff, half and half. You know, slamming them.

8 VICTORIA SCHLICK: Why?

9 COLE ENGELSON: Victoria, I thought I needed a  
10 nightcap to go to sleep. Yeah.

11 VICTORIA SCHLICK: So you slammed a whole half a  
12 fucking gallon of vodka? That's the nightcap for you?

13 COLE ENGELSON: No.

14 VICTORIA SCHLICK: Wouldn't it -- I -- I don't understand.  
15 I'll probably never understand. I don't understand you. I can't even --  
16 she's gone because of you. Because of you. I hate you so much.

17 COLE ENGELSON: I know. And now you said --

18 VICTORIA SCHLICK: My kids, Nicole (phonetic) and  
19 Dwight, saw her. They had to experience that. So not only I lost her,  
20 they're in Vegas with their dad because of you.

21 COLE ENGELSON: You know it's all I been thinking  
22 about the whole time in my days.

23 VICTORIA SCHLICK: What did you -- and --

24 COLE ENGELSON: You their mom and, you know,  
25 everybody, and I'm --



1 VICTORIA SCHLICK: You -- they show you pictures of  
2 her body?

3 COLE ENGELSON: Yeah. They did. And I --

4 VICTORIA SCHLICK: You whooped her ass. You put  
5 hands on her.

6 COLE ENGELSON: No. I wasn't --

7 VICTORIA SCHLICK: So bad so that -- well, I mean so  
8 she fell in the dirt and that was the cause of that?

9 COLE ENGELSON: No.

10 VICTORIA SCHLICK: Because --

11 COLE ENGELSON: 'Cause I -- like I don't --

12 VICTORIA SCHLICK: So you put her in the -- you put her  
13 in the shower and, what, she was fighting you?

14 COLE ENGELSON: Yeah. We were, you know, going at  
15 it where she don't like her face wait (phonetic) and, you know, that type  
16 of shit. But I don't -- I don't know what happened where I -- I would hit  
17 her like that. I don't know what happened at all. There's not one  
18 recollection of me even putting my hands up to her. I don't know what  
19 happened.

20 VICTORIA SCHLICK: What -- I mean -- and then after  
21 the shower, then what?

22 COLE ENGELSON: I don't remember anything. I don't  
23 remember getting her out of the shower. I don't remember drying her  
24 off. Like I told the other detective, I said usually when I dry her off I put  
25 her up on the counter and that's when I get her going, then I just --

1 VICTORIA SCHLICK: My makeup box is there so --

2 COLE ENGELSON: I know. She went and looked. And  
3 she was like, well, there's no footprints. So I don't know if I even dried  
4 her off. I don't know anything. I don't know what happened. I'm sorry I  
5 messed this up, and I'm sorry you lost your daughter. It's --

6 VICTORIA SCHLICK: (Incomprehensible.)

7 COLE ENGELSON: -- going to haunt me forever.

8 VICTORIA SCHLICK: Good. I really hope it does.

9 COLE ENGELSON: It will. Like I said, I wish I can tell  
10 you more. You know, information's not there. I don't know what  
11 happened.

12 VICTORIA SCHLICK: I don't -- I don't believe any of that.  
13 I've given her showers to where she was fighting, and never once did  
14 she fall, or flail, or anything else like that. Not once. And if she did slip,  
15 I caught her.

16 COLE ENGELSON: In our little shower?

17 VICTORIA SCHLICK: Yeah.

18 COLE ENGELSON: But she was trying to run out of there  
19 like --

20 VICTORIA SCHLICK: What -- I mean there was so much  
21 of a struggle. What happened with the soap that was hanging there?

22 COLE ENGELSON: I don't know.

23 VICTORIA SCHLICK: It's pulled apart is what it is. I don't  
24 understand. I mean how did that -- I had to go back in there. I had to  
25 fucking go and see everything again and relive it again.

1 COLE ENGELSON: I don't know what the rope on --  
2 soap on a rope?

3 VICTORIA SCHLICK: Yeah. That purple one that was  
4 hanging.

5 COLE ENGELSON: I have no clue. No idea about it.  
6 (Incomprehensible.) I don't.

7 VICTORIA SCHLICK: So nothing is (incomprehensible).  
8 Nothing. I don't --

9 COLE ENGELSON: I know.

10 VICTORIA SCHLICK: I need you to give me something.  
11 You're giving me nothing. I know. You're giving them what you gave  
12 them.

13 COLE ENGELSON: Yeah. It's all I have. I don't know if I  
14 went to sleep afterwards or I stayed up the whole time. I don't  
15 remember Dwight being there at all. I don't know anything. I don't  
16 know anything.

17 VICTORIA SCHLICK: When did you -- when did you  
18 come to? When did you start remembering again?

19 COLE ENGELSON: I --

20 VICTORIA SCHLICK: Obviously, when you told them I  
21 was hitting you.

22 COLE ENGELSON: Before that. I didn't say you were  
23 hitting me to like --

24 LIEUTENANT BORUCHOWITZ: No. It --

25 COLE ENGELSON: -- get you in trouble or anything.

1 VICTORIA SCHLICK: I know.

2 LIEUTENANT BORUCHOWITZ: I know. I just --

3 VICTORIA SCHLICK: He told me.

4 LIEUTENANT BORUCHOWITZ: -- cautioned her not to  
5 do the same thing again.

6 COLE ENGELSON: Oh.

7 VICTORIA SCHLICK: (Incomprehensible) anywhere right  
8 now. I really don't want to go to jail so --

9 COLE ENGELSON: It's warranted, and I said it's  
10 (incomprehensible). I deserved every one of them. My -- I -- I don't  
11 know the information. I don't know what happened. The only thing I  
12 know is when I came to, and saw her limp, and when I called you.  
13 That's when my memory starts again. So I don't know if I woke up --  
14 VICTORIA SCHLICK: Why didn't you start CPR? Why  
15 didn't you call 911?

16 COLE ENGELSON: I don't know. I was so fucking drunk  
17 so --

18 VICTORIA SCHLICK: You came to and you called me.

19 COLE ENGELSON: Yeah.

20 VICTORIA SCHLICK: You were sober enough to call me.  
21 Why didn't you call 911?

22 COLE ENGELSON: I didn't think of it first. I thought of  
23 you first.

24 VICTORIA SCHLICK: Did you even check her pulse?  
25 Did you --

1 COLE ENGELSON: No.

2 VICTORIA SCHLICK: Anything?

3 COLE ENGELSON: I --

4 VICTORIA SCHLICK: Anything? Nothing?

5 COLE ENGELSON: Nothing parent-wise. No. I didn't do  
6 anything correct. I was just trying to get her to snap out of it, you know,  
7 so I hit her on the cheek a few times. Then I was, oh, no. Then that's  
8 when I called you.

9 VICTORIA SCHLICK: And after you called me, didn't  
10 think of maybe like checking her pulse or, I mean, anything? Any -- her  
11 -- of all the kids, her.

12 COLE ENGELSON: I know. I just --

13 VICTORIA SCHLICK: It's just what I don't understand.  
14 She was the one you loved the most.

15 COLE ENGELSON: I know. I know. I -- I keep telling all  
16 these detectives the same thing and they all (incomprehensible). I love  
17 her, you know, and she was my -- my minion, like you always called  
18 her, and --

19 VICTORIA SCHLICK: I keep telling myself I should have  
20 taken her. She was crying for me to take her. This wouldn't have  
21 happened. I hate you and you did this, but I blame myself 'cause I  
22 didn't take her.

23 COLE ENGELSON: No. I talked you out of it. And I think  
24 you (incomprehensible).

25 VICTORIA SCHLICK: I'm so numb right now. I just -- I

1 can't --

2 COLE ENGELSON: I wish I can, you know, say more to  
3 you, and I wish there was more I could do for you. It just gone. And  
4 you're always going to hate me, and that hurts. But always know I -- I  
5 love you and I wish this never came about.

6 VICTORIA SCHLICK: (Incomprehensible.)

7 COLE ENGELSON: I know. I know you don't and you  
8 shouldn't.

9 VICTORIA SCHLICK: How am I going to live without her  
10 now?

11 COLE ENGELSON: I know.

12 VICTORIA SCHLICK: And your son.

13 COLE ENGELSON: I know. He's probably going to go  
14 live with his mom.

15 VICTORIA SCHLICK: She's on her way here. She's here  
16 already.

17 COLE ENGELSON: All ready? I wish I would have  
18 stayed on those pills. I always knew that fucking booze would ruin me.  
19 I didn't know it was going to ruin everything around me too.

20 VICTORIA SCHLICK: All I can think right now is that  
21 you're weak. You're so weak. Because you went two-and-a-half  
22 months without those pills and your weak mind just ruining your life. I'm  
23 out. I can't do this anymore. I don't want to.

24 LIEUTENANT BORUCHOWITZ: I'll be right back  
25 (incomprehensible).

1 (Lieutenant Boruchowitz and Victoria Schlick leave the interview room.)

2 VICTORIA SCHLICK: Nothing. I don't believe him.

3 LIEUTENANT BORUCHOWITZ: You know him better  
4 than I do. You feel like he's lying to you?

5 VICTORIA SCHLICK: I don't believe him.

6 LIEUTENANT BORUCHOWITZ: He's lying, right? Yeah.

7 VICTORIA SCHLICK: And he couldn't remember -- if he  
8 was drinking that much and he could remember her falling over in the  
9 chair and putting her in the shower, he's lying. Right. I know it.

10 LIEUTENANT BORUCHOWITZ: Is the soap on the rope  
11 still there?

12 VICTORIA SCHLICK: Yeah. I --

13 LIEUTENANT BORUCHOWITZ: 'Cause then Parra's  
14 going to need to go back with her and (incomprehensible).

15 VICTORIA SCHLICK: Yeah. Okay. I saw that and --

16 LIEUTENANT BORUCHOWITZ: Is it --

17 VICTORIA SCHLICK: -- it -- it --

18 LIEUTENANT BORUCHOWITZ: -- square or round?

19 VICTORIA SCHLICK: It's a -- it's a round one, like a oval  
20 one. And it was -- you know how soap on a ropes are. You can't -- you  
21 can't --

22 LIEUTENANT BORUCHOWITZ: Yeah.

23 VICTORIA SCHLICK: And it's broken, and the rope is --

24 DETECTIVE PARRA: (Incomprehensible.)

25 LIEUTENANT BORUCHOWITZ: Yeah. We need --

1 VICTORIA SCHLICK: That's the only thing that made me  
2 like --

3 LIEUTENANT BORUCHOWITZ: -- to go accompany her  
4 back home and grab it.

5 DETECTIVE PARRA: Yeah. I'm just going to go get my  
6 keys and I'll just --

7 VICTORIA SCHLICK: I'm parked right out here.

8 DETECTIVE PARRA: Yeah. I'll follow you.

9 LIEUTENANT BORUCHOWITZ: She's at 5320 East  
10 Manse.

11 DETECTIVE PARRA: Okay. I'll follow you then.

12 VICTORIA SCHLICK: Okay. What -- can I go see her?

13 LIEUTENANT BORUCHOWITZ: Well, let's see. Which  
14 mortuary was that?

15 VICTORIA SCHLICK: Are they going to let me?

16 LIEUTENANT BORUCHOWITZ: They'll let -- yeah. She's  
17 done --

18 VICTORIA SCHLICK: Okay.

19 LIEUTENANT BORUCHOWITZ: -- working with her. So  
20 you may want to wait and see if -- I don't know if she's been cleaned up,  
21 how that works with the mortuary. You may want to wait 'til they do that  
22 so you don't -- it is what it is. I don't know that it looks any better made  
23 up if it's (incomprehensible).

24 VICTORIA SCHLICK: Okay.

25 LIEUTENANT BORUCHOWITZ: Okay.



1 VICTORIA SCHLICK: (Incomprehensible.)

2 LIEUTENANT BORUCHOWITZ: So -- and we'll let you  
3 know as soon as we have more info. I just think based on his story  
4 today there's no question the shower is -- is the incident, and he's being  
5 not forthcoming of what exactly happened in there.

6 VICTORIA SCHLICK: I don't know. Yeah. I don't believe  
7 it. If he could remember putting her in the shower, he didn't black out  
8 after that.

9 LIEUTENANT BORUCHOWITZ: No. Obviously not.

10 VICTORIA SCHLICK: And I knew he was drinking more  
11 than what he -- what he told you about this.

12 LIEUTENANT BORUCHOWITZ: Right. Obviously.

13 DETECTIVE PARRA: What are you driving?

14 VICTORIA SCHLICK: It's a Nissan Maxima out here.

15 DETECTIVE PARRA: Okay. What color?

16 VICTORIA SCHLICK: White.

17 DETECTIVE PARRA: Give me a second.

18 VICTORIA SCHLICK: Okay.

19 LIEUTENANT BORUCHOWITZ: Thanks, Jose.

20 VICTORIA SCHLICK: All right. I guess --

21 LIEUTENANT BORUCHOWITZ: All right.

22 VICTORIA SCHLICK: -- keep in touch with me.

23 LIEUTENANT BORUCHOWITZ: We'll keep you in touch.

24 Yeah. And the mortuary, you know, you can talk to them tomorrow  
25 morning.

1 VICTORIA SCHLICK: Right. Is it the one mortuary here?  
2 LIEUTENANT BORUCHOWITZ: I think it was Pahrump  
3 Family Mortuary. I'll have him find out and we'll send you a text for  
4 sure.  
5 VICTORIA SCHLICK: Okay.  
6 LIEUTENANT BORUCHOWITZ: I can't remember which  
7 one showed up. But if not, the other one -- they would tell you the  
8 (incomprehensible) the other one, but --  
9 VICTORIA SCHLICK: So there's only two in town?  
10 LIEUTENANT BORUCHOWITZ: Only two. Yeah.  
11 VICTORIA SCHLICK: Okay. So --  
12 LIEUTENANT BORUCHOWITZ: All right?  
13 VICTORIA SCHLICK: Thank you. I really appreciate it.  
14 LIEUTENANT BORUCHOWITZ: No problem. Try and  
15 hang in there.  
16 VICTORIA SCHLICK: Thank you.  
17 LIEUTENANT BORUCHOWITZ: All right. Your ride.  
18 This is who's driving you?  
19 VICTORIA SCHLICK: Yeah. He should be out -- out --  
20 LIEUTENANT BORUCHOWITZ: Somewhere?  
21 VICTORIA SCHLICK: -- in the (incomprehensible).  
22 LIEUTENANT BORUCHOWITZ: Bathroom, maybe? All  
23 righty.  
24 (Victoria Schlick leaves the area.)  
25 LIEUTENANT BORUCHOWITZ: I'm going to take a stab

1 at him, and then I'll be right in.

2 MALE: He's not (incomprehensible).

3 LIEUTENANT BORUCHOWITZ: Stand by to stand by.

4 (Lieutenant Boruchowitz enters the interview room.)

5 LIEUTENANT BORUCHOWITZ: How was that? You all  
6 right?

7 COLE ENGELSON: Yeah. I'm okay.

8 LIEUTENANT BORUCHOWITZ: You don't need to be in  
9 suicide watch still?

10 COLE ENGELSON: No. I didn't need to be on in the first  
11 place.

12 LIEUTENANT BORUCHOWITZ: Okay. Nothing you  
13 could remember. That rope on the soap -- or soap on the rope thing,  
14 that jog your memory at all?

15 COLE ENGELSON: Not at all. And -- and when -- when  
16 she said she had to go relive it, I wish I could see it again too. I've -- I  
17 don't know if it would help or not, but I don't know if the string was just  
18 ripped off or I don't -- I don't remember anything like that either.

19 LIEUTENANT BORUCHOWITZ: You don't remember  
20 hitting her with it or --

21 COLE ENGELSON: (Incomprehensible.) I was trying to  
22 think of those bruises on her legs. Maybe that came 'cause of -- some  
23 circle bruise that they were really concerned about.

24 LIEUTENANT BORUCHOWITZ: Uh-huh. Is that soap on  
25 a rope, is that circular?

1 COLE ENGELSON: I (inaudible). I don't know. Don't  
2 know if it's an oval one 'cause I never use it.

3 LIEUTENANT BORUCHOWITZ: Uh-huh.

4 COLE ENGELSON: I don't know. I wish I could have  
5 gave her more, you know.

6 LIEUTENANT BORUCHOWITZ: Yeah. Well, as the time  
7 goes on I'm going to send my card back down there with you. Certainly  
8 let me know if something comes up. I'm not going to tell you if you're a  
9 liar or not. I'm going to know that (inaudible) liar, that's not my style at  
10 all. Obviously, there's people that are going to believe you're lying and  
11 there's people that are going to believe you're telling the truth. At the  
12 end of the day, I don't really care if you're lying, and at some point you  
13 have a decision that you want to tell the truth, you can call me. And,  
14 likewise, if you're not lying, and somehow it comes back to you, feel  
15 free to -- to make sure that they know you want to talk to me as well.

16 COLE ENGELSON: All right.

17 LIEUTENANT BORUCHOWITZ: All right? And my goal  
18 is for you to come out of this as successful as possible.

19 COLE ENGELSON: Thank you.

20 LIEUTENANT BORUCHOWITZ: Lousy situation. It sucks  
21 no matter what. But at the end of the day, you have a son that you  
22 have to live for and, you know, you're going get a -- so at some point  
23 you're going to get a letter, and you're going to have to make some  
24 decisions. One of the biggest decisions you're going to have to make is  
25 are you going to make her take the stand, and testify, and relive this.

1 And a lot of people sit in this seat and say, no, I'm not going to do that  
2 to her. But once you get a lawyer, and they tell you, look, we can fight it  
3 and this is a hole in the police report, you know, a lot of people look at  
4 their freedom and say I'm going to (incomprehensible) advice, and I'm  
5 going to make her take the stand, and I'm going to make Dwight take  
6 the stand, and I'm going to make Nicole take the stand. That's your  
7 call. All I tell you is when you're laying --

8 COLE ENGELSON: (Incomprehensible.)

9 LIEUTENANT BORUCHOWITZ: -- in your cell, make --  
10 make things right. You've got a God that you can --

11 COLE ENGELSON: Yeah. I haven't (incomprehensible).  
12 Yeah.

13 LIEUTENANT BORUCHOWITZ: And -- and let's put, you  
14 know, one day at a time here, really. But you have a God that -- to  
15 make good with and you have a -- a son to make good with, and you  
16 need to worry about that. All right? And if there comes a point in time  
17 where you do feel like you have a thought of hurting yourself or  
18 anything substantial like that, be sure to let us know and we'll -- we'll  
19 take care of you.

20 COLE ENGELSON: (Incomprehensible.)

21 LIEUTENANT BORUCHOWITZ: All right?

22 COLE ENGELSON: I have to go to court soon, though.  
23 Right?

24 LIEUTENANT BORUCHOWITZ: Tomorrow morning you  
25 should go to court (incomprehensible).

1 COLE ENGELSON: And --

2 LIEUTENANT BORUCHOWITZ: That'll be your first  
3 appearance, and the judge will make a decision on your bail, etc., and  
4 then the DA has seven days to file formal charges against you. And  
5 then once those are filed, that starts the actual court proceedings.

6 COLE ENGELSON: And do I need to speak on my behalf  
7 in front of the judge tomorrow or is it just --

8 LIEUTENANT BORUCHOWITZ: Traditionally, with these  
9 charges they'll probably have a court-appointed attorney they'll appoint  
10 to you right then.

11 COLE ENGELSON: Okay.

12 LIEUTENANT BORUCHOWITZ: But that's up to the  
13 judge. And really this hearing tomorrow is simply to determine bail. In  
14 this case you have no bail because of the charge.

15 COLE ENGELSON: Yeah.

16 LIEUTENANT BORUCHOWITZ: Customarily, the judges  
17 aren't inclined to change that with the first appearance. So I would  
18 imagine your court will be two minutes of: you understand what you've  
19 been charged with, yes; I'm recommending no bail, go back to jail.  
20 Traditionally how it happens.

21 COLE ENGELSON: All right.

22 LIEUTENANT BORUCHOWITZ: All right? This is my  
23 card. Let me grab the jail guy. I'll turn this off. I'm happy to not take  
24 you back down there, and we'll get you changed back to regular clothes  
25 and house. You're going to be held -- housed in segregation because

1 of the nature of your charges.

2 COLE ENGELSON: Yeah.

3 LIEUTENANT BORUCHOWITZ: I don't have a place to  
4 put you in a pod with people that won't, you know, have a problem with  
5 your charges so -- so you'll be in the (incomprehensible), and it's called  
6 J Pod. There's a TV and stuff in there. But you'll be in there, and you'll  
7 get out. They'll let you out for an hour out to have access to the kiosk  
8 to visit with people and make phone calls (incomprehensible).

9 COLE ENGELSON: Okay. Nah. I'll figure out the rest as  
10 we go.

11 LIEUTENANT BORUCHOWITZ: Yeah. Another thing is  
12 my jail staff will you help you along the way.

13 COLE ENGELSON: All right.

14 LIEUTENANT BORUCHOWITZ: All right? Good luck to  
15 you.

16 COLE ENGELSON: Thank you, David.

17 LIEUTENANT BORUCHOWITZ: I wish you -- I wish I saw  
18 you under different circumstances.

19 COLE ENGELSON: Oh. (Incomprehensible) stay here.

20 LIEUTENANT BORUCHOWITZ: No. I think he -- I heard  
21 keys, and he's probably right here. Yep. He sure is.

22 All right. He's all yours, and you can change him out and  
23 house him in J Pod. Okay. Should be good to go.

24 All right. Good luck to you, Cole.

25 OFFICER GREG: (Incomprehensible.)

25



NYE COUNTY DISTRICT ATTORNEY  
P.O. BOX 39  
PAHRUMP, NEVADA 89041  
(775) 751-7080

**EXHIBIT 8**

**EXHIBIT 8**

<b>Las Vegas Metropolitan Police Department</b> <b>Forensic Laboratory</b>  <b>Report of Examination</b>  <b>Blood Alcohol Testing</b>		<b>Distribution Date:</b> August 7, 2017 <b>Agency:</b> Nye County SO <b>Location:</b> NCSO - Pahrump <b>Primary Case #:</b> 17NY1964 <b>Incident:</b> Homicide <b>Requester:</b> C Sehnert <b>Lab Case #:</b> 17-06839 3
<b>Subject(s):</b>	Cole Engelson (Suspect)	

I, Marissa Collins, do hereby declare:

That I am a Forensic Scientist employed by the Las Vegas Metropolitan Police Department,

That I am a "chemist", as defined in Nevada Revised Statute 50.320, and my duties include the analysis of the blood of a person to determine the presence or quantification of alcohol;

That on February 23, 2016, I first qualified in the Justice Court of Clark County, Nevada, as an expert witness, to testify regarding the presence and amount of alcohol in a biological fluid.

That I received sealed evidence in the above case from a secure refrigerator in the LVMPD Forensic Laboratory, containing a sample of whole blood;

That I completed an analysis on the sample from Blood/Alcohol Kit Engelson, Cole and determined that the blood contained a concentration of ethanol of 0.101 g/100ml +/- 0.004 g/100ml of blood.

*NOTE: Limit of detection is 0.010 g ethanol/100 ml of blood.*

*NOTE: A coverage probability of 99.73% was utilized in the calculation of uncertainty (+/-) for the measurement(s) reported above.*

That I sealed the evidence and placed it in a secure refrigerator in the LVMPD Forensic Laboratory,

That the evidence was in my custody from the time I first obtained it until I resealed the sample, at which time it was in substantially the same condition as when I first obtained it.

I declare under penalty of perjury that the foregoing is true and correct.

*Marissa Collins 14973*

Marissa Collins, #14973  
Forensic Scientist

—This report does not constitute the entire case file. The case file may be comprised of worksheets, images, analytical data and other documents.—

- END OF REPORT -

NYE COUNTY DISTRICT ATTORNEY  
P.O. BOX 39  
PAHRUMP, NEVADA 89041  
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**EXHIBIT 9**

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**EXHIBIT 9**

<b>Las Vegas Metropolitan Police Department</b> <b>Forensic Laboratory</b>  <b>Report of Examination</b>  <b>Drug Screening/Confirmation</b>		<b>Distribution Date:</b> August 22, 2017 <b>Agency:</b> Nye County SO <b>Location:</b> NCSO - Pahrump <b>Primary Case #:</b> 17NY1964 <b>Incident:</b> Homicide <b>Requester:</b> C Sehnert <b>Lab Case #:</b> 17-06839 2
<b>Subject(s):</b>	Cole Engelson (Suspect)	

I, Nicole Van Aken, do hereby declare

That I am a Forensic Scientist II employed by the Las Vegas Metropolitan Police Department;

That I am a "chemist", as defined in Nevada Revised Statute 50 320, and my duties include the analysis of the blood of a person to determine the presence or quantification of a controlled substance, chemical or prohibited substance,

That on February 24, 2011, I first qualified in the Eighth Judicial District Court of Clark County, Nevada, as an expert witness, to testify regarding the presence and amount of alcohol in a biological fluid and that on February 24, 2011, I first qualified in the Eighth Judicial District Court of Clark County, Nevada as an expert witness, to testify regarding the presence and amount of controlled substances in a biological fluid,

That I received a sealed blood sample in the above case from a secure refrigerator in the LVMPD Forensic Laboratory.

That an Immunoassay Screen was completed on the sample Blood/Alcohol Kit Engelson, Cole and the following was determined:

Immunoassay Screen

<u>Drug Class</u>	<u>Result</u>
Amphetamines	none detected
Benzodiazepines	none detected
Cannabinoids	further analysis performed, see Confirmation Analysis below
Cocaine	none detected
Opiates	none detected
Phencyclidine (PCP)	none detected

That I completed a Confirmation Analysis on the sample Blood/Alcohol Kit Engelson, Cole and the following was determined

Confirmation Analysis

<u>Drug Class</u>	<u>Drug</u>	<u>Result</u>
Cannabinoids	Delta-9-tetrahydrocannabinol	none detected
Cannabinoids	THC-Carboxylic Acid (Marijuana metabolite)	20.8 ng/mL +/- 3.6 ng/mL

*NOTE: A coverage probability of approximately 95% was utilized in the calculation of uncertainty (+/-) for the measurement(s) reported above.*

That I sealed the evidence and placed it in a secure refrigerator in the LVMPD Forensic Laboratory,

That the evidence was in my custody from the time I obtained it until I resealed the sample, at which time it was in substantially the same condition as when I first obtained it.

I declare under penalty of perjury that the foregoing is true and correct.



Nicole Van Aken, #14272  
Forensic Scientist II

---This report does not constitute the entire case file. The case file may be comprised of worksheets, images, analytical data and other documents ---

---"None detected" indicates the drug/metabolite is not present above the reporting threshold.---

---Reporting thresholds as applicable

Immunoassay Screen.

<u>Drug Class</u>	<u>Reporting Threshold</u>
Amphetamines	80 ng/mL
Benzodiazepines	100 ng/mL
Cannabinoids	10 ng/mL
Cocaine	100 ng/mL
Opiates	100 ng/mL
Phencyclidine (PCP)	10 ng/mL

Confirmation Analysis.

<u>Drug Class</u>	<u>Reporting Threshold</u>
Amphetamines	
Amphetamine	100 ng/mL
Methamphetamine	100 ng/mL
Methylenedioxymphetamine (MDA)	100 ng/mL
Methylenedioxymphetamine (MDMA)	100 ng/mL
Benzodiazepines	
Alprazolam	25 ng/mL
Clonazepam	25 ng/mL
Diazepam	25 ng/mL
Lorazepam	25 ng/mL
Oxazepam	25 ng/mL
Nordiazepam	25 ng/mL
Temazepam	25 ng/mL
Triazolam	25 ng/mL
Cannabinoids	
Delta-9-tetrahydrocannabinol (THC)	2 ng/mL
THC-Carboxylic Acid (Marijuana metabolite)	5 ng/mL
Cocaine	
Cocaine	50 ng/mL
Benzoylcegonine	50 ng/mL
Opiates	
Codeine	50 ng/mL
Morphine	50 ng/mL
Hydrocodone	25 ng/mL
Phencyclidine (PCP)	10 ng/mL
Soma	
Carisoprodol	1000 ng/mL
Meprobamate	1000 ng/mL

- END OF REPORT -

**CERTIFICATE OF SERVICE BY MAIL**

I, Renne McKeen, Executive Legal Secretary, Office of the Nye County District Attorney, Post Office Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

**OPPOSITION TO DEFENDANT'S MOTION  
TO SUPPRESS DEFENDANT'S STATEMENTS in  
5<sup>TH</sup> JUDICIAL DISTRICT COURT Case No. CR9226  
STATE v. COLE D. ENGELSON**

upon said Defendant herein by placing a true and correct copy thereof, in their folder at the Pahrump District Attorney's Office, on 06/12/2020 to the following:

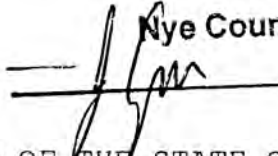
**DANIEL MARTINEZ; AND  
RONNI BOSKOVICH  
Defense Counsel for Cole Engelson**

  
Renne McKeen

NYE COUNTY DISTRICT ATTORNEY  
P.O. BOX 39  
PAHRUMP, NEVADA 89041  
(775) 751-7080

**FILED**  
**FIFTH JUDICIAL DISTRICT**

JUL 09 2020

 Nye County Clerk  
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF NYE

THE HONORABLE ROBERT W. LANE, DISTRICT JUDGE

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**ORIGINAL**

THE STATE OF NEVADA,	)	TRANSCRIPT OF PROCEEDINGS
	)	DEFENDANT'S MOTION TO SUPPRESS/
Plaintiff,	)	MOTION ADMITTING BAD ACT
	)	EVIDENCE/CALENDAR CALL
vs.	)	(JT 8/11-8/28)
	)	
COLE DUANE ENGELSON,	)	JULY 6, 2020
	)	10:35 A.M.
Defendant.	)	PAHRUMP, NEVADA
	)	

APPEARANCES:

For the State: KIRK D. VITTO, ESQ.  
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Pahrump, Nevada 89060

For the Defendant: DANIEL MARTINEZ, ESQ.  
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DEPUTY PUBLIC DEFENDERS  
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The Defendant: COLE DUANE ENGELSON  
(Present via videoconference)

Reported by: CECILIA D. THOMAS, RPR, CCR No. 712

1 PAHRUMP, NYE COUNTY, NEVADA, MONDAY, JULY 6, 2020

2 10:35 A.M.

3 -oOo-

4 P R O C E E D I N G S

5  
6 THE COURT: Cole Engelson, 9226, pages 5  
7 through 6. It shows a Calendar Call, Motion to  
8 Suppress, Motion for Bad Act Evidence, and Motions for  
9 Extraordinary Fees. I've seen Mr. Martinez and  
10 Ms. Boskovich in action. I can't picture anything  
11 extraordinary. I'm just joking with you guys.

12 So let's start with the basics first.  
13 Which one do you want to do first, Mr. Vitto?

14 MR. VITTO: It makes no difference to me,  
15 Judge.

16 THE COURT: All right. Does it make any  
17 difference to you guys? Which one would you like to  
18 do first?

19 MR. MARTINEZ: Court's pleasure, Judge.

20 THE COURT: All right. Let's go ahead and  
21 do the Motion to Suppress first.

22 MR. MARTINEZ: And, Judge, I am not going  
23 to rehash all of the arguments in my Motion. I know  
24 the Court has read that. The Court has prepared. The  
25 Court has briefed everything. But in short here,



1 Your Honor, first what I do want to address, I know  
2 that the State in their Opposition mentioned the  
3 Massachusetts Rule. That does not apply in this case.  
4 The Massachusetts Rule applies in we are saying  
5 statements that were given were not voluntary. My  
6 Motion to Suppress is based on the lack of Miranda in  
7 one case, the (inaudible) of Miranda in a couple -- in  
8 a few of the different interviews, and the staleness  
9 of Miranda. The Massachusetts --

10 MR. VITTO: And the what?

11 MR. MARTINEZ: The staleness.

12 MR. VITTO: Got it.

13 MR. MARTINEZ: And the staleness of Miranda  
14 in the third interview. So the Massachusetts Rule  
15 does not apply where we are forced to put the  
16 defendant on the stand and he has to say all the  
17 reasons why his statements were not voluntary. We're  
18 not talking about the statements themselves. We don't  
19 get that far in my Motion; so that Massachusetts Rule  
20 does not apply.

21 First, Your Honor, I will take the  
22 interviews, the interrogations by the officers kind of  
23 one by one. The first one was with  
24 Detective Fernandes. She doesn't initially read the  
25 Miranda rights. When she showed up on the scene,

1 Mr. Engelson was immediately a suspect. She had  
2 already been told he's the one who did it. He's the  
3 one who killed her. It was an atmosphere dominated by  
4 police, by fire departments, by all the first  
5 responders. He was not free to move around the scene.  
6 He was certainly not free to leave at that point.

7 Legally speaking, he was detained. He was  
8 in custody. It was a custodial interrogation from the  
9 minute Detective Fernandes started asking him  
10 questions. She was required to read him his Miranda  
11 at that point, and she didn't. Because she did not,  
12 that's why those first statements that he made need to  
13 be suppressed. He was in custody, Miranda was  
14 required, and she did not read it.

15 THE COURT: You don't mind if we do one at  
16 a time, do you?

17 MR. MARTINEZ: Sure, Judge, that's fine.

18 THE COURT: All right. Anything else you  
19 want to add on that before I --

20 MR. MARTINEZ: On that one? No. I will  
21 kick it over to Kirk.

22 THE COURT: All right. Mr. Vitto. We're  
23 just talking about Fernandes, I believe.

24 MR. VITTO: Yes. Couldn't be more clear.  
25 The Defense is obviously wrong. The case law is

1 adequately set forth in our motion. Fernandes did  
2 everything by the book exactly the way it should be  
3 done. Case law backs her up all the way. She  
4 Mirandized him after he said, "I did it." That's when  
5 she stopped him, cuffed him, told him he was detained,  
6 went and ascertained the condition of Yessenia, found  
7 out that Yessenia was deceased, talked to Chief Lewis  
8 about the condition of the child prior to the child  
9 being transported, retrieved the Miranda card from  
10 Fowles, read the Miranda warning, and he said what he  
11 said. There's absolutely 100 percent nothing wrong  
12 with what Fernandes did.

13 THE COURT: Any reply?

14 MR. MARTINEZ: Judge, two things. First of  
15 all, Mr. Engelson never said, "I did it." What he  
16 said to Detective Fernandes was that he takes  
17 responsibility because he was the only one home.

18 THE COURT: All right. Anything else on  
19 Fernandes?

20 MR. MARTINEZ: Well, yes, Your Honor.  
21 There's a second part to that where I'm going to argue  
22 about how his waiver of Miranda when it was read was  
23 not valid, but for that first half, no, nothing else.

24 THE COURT: Okay. Motion to suppress on  
25 the first half is denied. Then go to the second one.

1 MR. MARTINEZ: The second half, Your Honor,  
2 when he waived his Miranda rights, the waiver of  
3 Miranda must be voluntary, knowing, and intelligent.  
4 If it's not voluntary, knowing, and intelligent, the  
5 waiver of Miranda is not valid. And that was the case  
6 here.

7 Specifically, that first night when  
8 Detective Fernandes read him his Miranda rights, it  
9 had already been noted by other officers that  
10 Mr. Engelson was so intoxicated that he was struggling  
11 to stand up. Multiple times, they had to catch him to  
12 keep him from falling down. He had told those  
13 officers already that he had been so intoxicated that  
14 he blacked out. Because of that intoxication, there  
15 is no way that his waiver at that point in time was  
16 knowing, voluntary, or intelligent.

17 So that second half of his statement after  
18 Miranda was read, that needs to be suppressed because  
19 his waiver of Miranda was not knowing, voluntary, and  
20 intelligent.

21 MR. VITTO: And that's with who?

22 THE COURT: Mr. Vitto.

23 MR. MARTINEZ: Detective Fernandes.

24 MR. VITTO: Judge, and that's a problem for  
25 the Defense, because that's going to require the

1 defendant to testify, and that's going to invoke the  
2 Massachusetts Rule. If he wants to say his  
3 statements -- Defense Counsel started off -- we're  
4 talking about the lack of Miranda, we're talking about  
5 the waiver of Miranda, and we're talking about the  
6 staleness of Miranda. But if the argument is going to  
7 be that the statements were intoxicating statements or  
8 he was too drunk or he was this or he was that, I  
9 believe that that's moving, if not completely within  
10 the realm of the Massachusetts Rule, it moves to the  
11 point where their testimony is going to be required.

12 But clearly -- and I've attached all of the  
13 transcripts of all of the interviews, and all anybody  
14 has to do is read the transcripts of those interviews  
15 or listen to them, and you can clearly tell that he  
16 was obviously able to listen to the question, he was  
17 able to relate, he was able to give answers that were  
18 appropriate and in context with the questions that  
19 were being asked. There's absolutely no basis to  
20 think for one second that he was too intoxicated to  
21 reasonably be able to waive the Miranda warning.

22 THE COURT: Go ahead.

23 MR. MARTINEZ: I did begin with that,  
24 Your Honor, about the Massachusetts Rule because I'm  
25 not saying statements. We're talking about the waiver

1 of Miranda, which is a different standard than the  
2 statements themselves. The Massachusetts Rule comes  
3 in to play more when officers arrive on the scene and  
4 they're talking to people to just find out what  
5 happened before somebody was detained.

6 THE COURT: I read your pleadings, both of  
7 your pleadings over the weekend. And I'm reading  
8 through them again real quick right now, and it's  
9 basically I'm looking for one issue, which is  
10 according to case law in the past, is it a legitimate  
11 defense to say, "I didn't know what I was doing when I  
12 waived my Miranda because I was drunk or high"? Is  
13 there a case on point on that says if you're drunk or  
14 high, you don't -- you're not knowingly waiving? Is  
15 there such a case?

16 MR. MARTINEZ: There are cases, Your Honor,  
17 but none that I've actually found where it says that  
18 the defendant -- that the statements should have been  
19 suppressed. Because in all of those cases, it goes  
20 to the defendants will say, "I was too high, or I was  
21 too intoxicated so I didn't know what I was doing when  
22 I waived my Miranda." And the courts have held that  
23 you were not so over the top intoxicated or high that  
24 you didn't know what you were doing. You admitted to  
25 using, but you certainly didn't seem like you were



1 high, or you didn't seem like you were intoxicated at  
2 the time, and you're just trying to get the statements  
3 suppressed now.

4 THE COURT: Okay. So it goes down to me  
5 hearing testimony from the cop and/or Engelson saying  
6 how drunk or high he was. And if the cop says, "Oh,  
7 man, he was so plastered that there's no way he could  
8 have understood what I was saying," I would say,  
9 "Yeah, you're right. We're suppressing it."

10 MR. MARTINEZ: Yeah. And to the State's  
11 point, I'm sure they're going to argue the  
12 Massachusetts Rule again here, Your Honor. My point  
13 is that's not coming to play; so we are not going to  
14 be required to put Mr. Engelson on the stand. We can  
15 put Detective Fernandes and the other officers that  
16 night on the stand and have them talk about how  
17 intoxicated he was and what they observed, and I can  
18 make my arguments off that.

19 THE COURT: Summarize the Massachusetts  
20 Rule for me again.

21 MR. VITTO: Judge, the Massachusetts Rule  
22 is, in a nutshell, if you're claiming that your  
23 statements are involuntary, you're the one that has to  
24 do it. You've got to get on the stand in front of the  
25 jury and say my statements were involuntary. Because

1 ultimately, it's the finder of fact, not this Court,  
2 that has to determine voluntariness. And they'll be  
3 given a jury instruction.

4 It's preponderance -- preponderance or  
5 clear and convincing? It's a different standard for  
6 them to determine voluntariness.

7 THE COURT: Okay. So if the cop says, "He  
8 didn't look that drunk to me and he waived it," when  
9 she testifies; and then Engelson takes the stand and  
10 says, "No. I didn't know what I was doing. I was  
11 plastered," then we give it to the jury with an  
12 instruction. And by preponderance, they decide  
13 whether or not they believe it.

14 MR. MARTINEZ: Judge, my understanding of  
15 the Massachusetts Rule is that there's two parts of  
16 it. First we have to have a hearing outside the  
17 presence of the jury where the defendant would take  
18 the stand. The Court gets to make the decision  
19 whether or not by a preponderance of the evidence  
20 whether or not those statements get to come in at  
21 trial.

22 If you believe that they were voluntary,  
23 and the Court decides that by the preponderance of the  
24 evidence and they come in at trial, then we get a jury  
25 instruction that says that the jury also -- if the



1 jury wanted to use those statements against him, the  
2 jury has to find beyond a reasonable doubt that they  
3 were voluntary.

4 THE COURT: Makes more sense.

5 MR. MARTINEZ: But that's the Massachusetts  
6 Rule. Again, my position is we don't need to get into  
7 the Massachusetts Rule. We can use the testimony, we  
8 can use the observations of the detective and officers  
9 that were on the scene, and I can make arguments based  
10 on that.

11 THE COURT: Now, they're not experts; so  
12 they're going to give you a layman's opinion of "he  
13 didn't look that drunk to me" or something.

14 MR. MARTINEZ: Well, they're going to give  
15 an officer's opinion, and they're trained to do field  
16 sobriety tests and recognize intoxication.

17 THE COURT: Okay. We'll hear what they  
18 have to say.

19 MR. VITTO: Judge, the case law I attached  
20 to page 9 and 10 of my Opposition. And I agree with  
21 the Defense that we don't have to get into that aspect  
22 because I believe it's rebuked by -- their position is  
23 rebuked by the great weight of the record which I've  
24 attached as exhibits.

25 If you look on page 9, it starts off with

1 "Voluntary intoxication -- even when heavily  
2 intoxicated, injured, medicated, even with numerous  
3 drugs in his system, voluntary intoxication will not  
4 necessarily render statements inadmissible for being  
5 involuntarily uttered." And then I've cited some  
6 examples State v. Hall from 1932, Pickworth v. State  
7 from 1979, and Tucker v. State from 1976. It makes  
8 manifest within the decisions that I've quoted there  
9 in box quotes, even under egregious circumstances, the  
10 statements are admissible. And we have not under any  
11 circumstances reached some of the requirement that the  
12 Nevada Supreme Court has reviewed in the past.

13           You look through these exhibits that I've  
14 attached and the interviews that the defendant has  
15 with half a dozen different people that are recorded,  
16 he clearly, unequivocally has no problem being able to  
17 relate rationally, listen to questions, give  
18 contextual responses. This motion is misplaced  
19 insofar as his being too drunk to voluntarily waive  
20 his Miranda warning.

21           THE COURT: Are you arguing that based on  
22 the case law you're citing and the transcripts you  
23 want me to read that we don't even need to put the  
24 officer on the stand to testify to her opinion of how  
25 intoxicated he was?

1 MR. VITTO: Give me one second, Judge,  
2 because I've highlighted exactly what this Court's  
3 obligation should be today.

4 If the Defense position is that the  
5 statements were not voluntarily tendered, which if I  
6 understand correctly, a distinct -- it's sought to be  
7 distinguished today the difference between the  
8 statement voluntarily tendered and a waiver being  
9 voluntarily waived.

10 MR. MARTINEZ: Yes. But because there's  
11 more of a standard to the waiver. The waiver must be  
12 voluntary, knowing, and intelligent. So we could make  
13 the argument that even if the Court found it was  
14 voluntary, it wasn't knowing and it wasn't intelligent  
15 and that's because of his intoxication.

16 MR. VITTO: That being the case -- this is  
17 the first page of my Opposition -- according to  
18 Wilkins v. State, referencing a similar case  
19 Jackson v. Denno, it is the Defense burden to  
20 establish the basis for the hearing. An evidentiary  
21 hearing will be required when the allegations of the  
22 defendant, if true, would warrant suppression. If  
23 this Court determines that a hearing is necessary, the  
24 statements and the circumstances under which the  
25 statements were received should be received as sworn

1 testimony. If Miranda was applicable -- which clearly  
2 at one point it was -- if it was not violated -- which  
3 it never has been -- and the statement were voluntary,  
4 the statements are admissible.

5 I have one other thing I want to look at,  
6 Judge.

7 MR. MARTINEZ: And real quick, before we  
8 get off that topic, because he mentioned Miranda,  
9 Your Honor, that is my motion. The waiver of Miranda  
10 is a part of Miranda. My motion to suppress is based  
11 entirely on Miranda being violated, either because it  
12 was not read, the waiver was not valid, or in the last  
13 interview because it was stale.

14 THE COURT: Right. Right now we're just  
15 talking about part 2 of Fernandes, which is your  
16 argument that he was too intoxicated to knowingly,  
17 intelligently understand and voluntarily waive the  
18 Miranda. And --

19 MR. VITTO: And my basic position --

20 THE COURT: -- it sounds to me from what  
21 Kirk just read that we do need to have a hearing and  
22 put the cop on the stand to testify her opinion on  
23 whether or not he was that plastered.

24 MR. MARTINEZ: That's my position as well,  
25 Your Honor. But the State -- where we differ, the

1 State believes we need to put the defendant on the  
2 stand at that hearing, and I do not believe that.

3 MR. VITTO: No. That's not what I'm saying  
4 at all.

5 MR. MARTINEZ: Okay. Then I misunderstood.

6 MR. VITTO: My position is simply --  
7 because it's your decision, Judge, whether a hearing  
8 is necessary, and I'm saying that the Defense position  
9 is completely and wholly belied by the transcripts of  
10 the interviews themselves. I have no problem with the  
11 hearing. We welcome a hearing.

12 THE COURT: Did she record it --

13 MR. VITTO: Absolutely --

14 THE COURT: -- her interview with him?

15 THE DEFENDANT: -- a hundred percent. The  
16 whole thing, start to finish.

17 THE COURT: Okay. So you're submitting  
18 that I could listen to her interview with him and hear  
19 it and say, "No. That guy wasn't so plastered that he  
20 didn't know what he was doing." So should I look  
21 first and look at the transcript, listen to that  
22 interview, and then decide whether or not I need  
23 additional testimony?

24 MR. MARTINEZ: The Court can do that, yes.

25 THE COURT: All right. That's what we'll

1 do.

2 MR. VITTO: And understand that --

3 THE COURT: After I read the transcript  
4 and/or listen to it, if I think that we need a  
5 hearing, Louise will get in touch with you and set the  
6 date and bring the officer in.

7 MR. VITTO: I have no problem with that.

8 Now, Counsel, Your Honor, you have the  
9 transcripts?

10 THE COURT: Yes, sir.

11 MR. VITTO: You don't have the recorded  
12 audio interviews?

13 THE COURT: I understand that, but I will  
14 request it if I need to listen to it.

15 MR. VITTO: Okay. Perfect.

16 THE COURT: Okay. So we covered what's her  
17 name, the officer, step 1 and step 2. What's next?

18 MR. MARTINEZ: Your Honor, next I'm going  
19 to go through the second interview that was done with  
20 Mr. Engelson by Detective Cox, Gibbs, and Fancher.

21 THE COURT: Okay.

22 MR. MARTINEZ: These are my same arguments  
23 as to the last (inaudible) that I just made that his  
24 waiver of Miranda was not voluntary, knowing, and  
25 intelligent. But in this situation, it's not



1 necessarily because he was intoxicated. He was most  
2 certainly hung over when this was given, given that it  
3 took place at 5:00 a.m. due to sleep deprivation. He  
4 went and did that interview from a suicide smock.  
5 Everyone in this courtroom knows that if you get  
6 placed in a suicide smock, we're having issues in the  
7 jail. Whether it's your suicidal thoughts, you're  
8 acting erratically, you're clearly not in the right  
9 mind-set. All of those things coupled together.

10 THE COURT: Okay. I have sleep deprivation  
11 and the suicide pod, or whatever you called it.

12 MR. MARTINEZ: The smock. I'm sorry,  
13 Your Honor.

14 THE COURT: Smock?

15 MR. MARTINEZ: Yeah.

16 THE COURT: Oh, just the smock.

17 MR. MARTINEZ: Yeah. The green smock that  
18 they wear.

19 THE COURT: Okay. You're not arguing  
20 intoxication anymore; you're just arguing sleep  
21 deprivation and suicide?

22 MR. MARTINEZ: I'm arguing a hangover as  
23 well, Your Honor. So not intoxication at the time,  
24 but --

25 THE COURT: Okay. And then Mr. Vitto is

1 going to say read the transcript, listen to the tape;  
2 you'll see everything is fine.

3 MR. MARTINEZ: I'm sure he's going to,  
4 Your Honor.

5 THE COURT: And if I disagree with  
6 Mr. Vitto or I'm not sure, then if we bring the cops  
7 in, they can testify.

8 MR. MARTINEZ: Sounds great.

9 THE COURT: Same issue. Okay.

10 MR. VITTO: With two additional points.  
11 The first point is that the defendant maintained in  
12 his interview with Fernandes that he had two drinks;  
13 showed her the glass; showed her how much, pointing to  
14 the glass, "I filled the glass up this much with vodka  
15 and this much with water." So he said he had two  
16 drinks.

17 We got his blood alcohol level back later  
18 after we had to -- because he wouldn't voluntarily  
19 give, we had to get a warrant. An hour after the  
20 warrant, we did get the blood. We have a reading, all  
21 of which will be dealt with.

22 But I want to point the Court to page 9 at  
23 the top, lines 1 through 5, quoting Taylor v. State, a  
24 1980 decision, "Where the accused has been fully and  
25 fairly apprised of his Miranda rights, there is no



1 requirement that the warnings be repeated each time  
2 the questioning is commenced. All that is required is  
3 that the accused be initially advised of his rights  
4 and that he understands them at the time of his  
5 interrogation."

6 THE COURT: Okay. We haven't got to the  
7 Boruchowitz argument yet.

8 MR. VITTO: Well, this is for Cox and Gibbs  
9 and Fancher as well. If you find that Fernandes was  
10 okay, then under Taylor, Cox, Gibbs, and Fancher are  
11 okay as well. And then it would also go to  
12 Boruchowitz, but we can get to that.

13 THE COURT: Okay. But he's arguing sleep  
14 deprivation and suicide smock also. And those two  
15 things he's saying puts him over -- Judge, if you find  
16 the alcohol is okay, don't forget sleep deprivation  
17 and suicide smock. That takes him over the hump.

18 MR. MARTINEZ: Judge, the standard the  
19 State just said is for the staleness of Miranda, which  
20 is, as you said, I'll get to when we argue about the  
21 Boruchowitz interview. I'm not making that argument  
22 with the interview with Cox, with Fancher, and with  
23 Gibbs, because he was read his Miranda at the  
24 beginning of that.

25 THE COURT: Right.

1 MR. MARTINEZ: My argument is that it  
2 wasn't a voluntary, knowing, and intelligent waiver.

3 THE COURT: Okay. I think I got a handle  
4 on it. Anything else?

5 MR. VITTO: Nope. We've addressed it.

6 THE COURT: Okay. Let's go to Boruchowitz.

7 MR. MARTINEZ: In Boruchowitz, Your Honor,  
8 again, I made the same arguments about voluntary,  
9 knowing, and intelligent on the waiver of Miranda  
10 there for the same reasons, the suicide smock, his  
11 sleep deprivation, his mind-set of being in jail. I  
12 know that when they are in a suicide smock, they are  
13 held by themselves; they are not held in the general  
14 population. So I would gloss over that.

15 Again, I kind of encourage the Court to  
16 read those transcripts, listen to those audio  
17 interviews, and I'm sure the Court's going to --

18 THE COURT: I will take all of that into  
19 consideration.

20 MR. MARTINEZ: Yes. But I am making the  
21 argument that his Miranda was stale at that point, and  
22 Boruchowitz was required to read Miranda.

23 THE COURT: How many hours later was it  
24 after Cox and Gibbs?

25 MR. MARTINEZ: About 14 hours later.

1 THE COURT: Fourteen hours; okay.

2 MR. MARTINEZ: It was about 14 hours later.  
3 This is also distinguishable from other cases that  
4 I've read in the case law. Oftentimes it happens  
5 where if it was applicable to this case, Detective Cox  
6 would have read the Miranda, then 14 or 24 hours  
7 later, Detective Cox comes back and re-interviews the  
8 defendant and says, "Hey, we talked about this  
9 before." And that detective was present for the  
10 Miranda warnings.

11 That's not the case here. Boruchowitz was  
12 not present for those Miranda warnings. He doesn't  
13 know the wording that was used. He doesn't know the  
14 state of mind that Engelson was in when he allegedly  
15 waived it, and I'm asking the Court to find that he  
16 didn't knowingly, voluntarily, and intelligently waive  
17 it, and just kind of glossed over it as he began his  
18 interview.

19 THE COURT: Three questions real quick.  
20 Sorry to interrupt. Case law basically says if 14 or  
21 24 hours later, the same cop comes back, the case law  
22 says that's fine, it's not stale.

23 MR. MARTINEZ: It depends on the situation,  
24 Your Honor. It's a case by case basis.

25 THE COURT: All right. And you're

1 submitting that case law says that if it's a different  
2 cop who didn't give the first warning, then it's set  
3 in stone, the case law says it's no good, the new cop  
4 has to give the warning again. He can't be told by  
5 the other cops, "I read the card to him. Everything  
6 was fine on the card, and we did it proper," and then  
7 proceed with an interview. He has to read it again,  
8 case law says.

9 MR. MARTINEZ: No, Your Honor. It's the  
10 totality of the circumstances in each case. Whether  
11 or not the officer in the later interview is reading  
12 Miranda or needs to read Miranda or was present for  
13 the Miranda the first time -- all things to consider  
14 in the totality of the circumstances.

15 And my argument is given the totality of  
16 the circumstance here, the length of time between when  
17 Miranda was read, his mental situation while he was  
18 in -- while he's been in custody,  
19 Detective Boruchowitz was not present the first time  
20 or the second time Miranda was read to him, that he is  
21 required that they became stale, and Boruchowitz was  
22 required to read Miranda again.

23 THE COURT: Just out of curiosity, was  
24 there any record of the fact that the other officers  
25 said to Boruchowitz, "We already read the Miranda

1 pursuant to our policy," and so forth?

2 MR. MARTINEZ: None that I have,  
3 Your Honor.

4 THE COURT: So we might need to ask  
5 Boruchowitz.

6 MR. VITTO: Judge, you'll see in the  
7 transcript with Boruchowitz's transcribed interviews  
8 with the defendant, that he was completely, fully  
9 aware that the defendant had already been Mirandized.  
10 He reminded the defendant of his being Mirandized,  
11 asked him if he understood them, if he was still  
12 willing to talk, and he said yes. It's all there.

13 In regard to the suicide smock, I mean  
14 here's where we are. The defendant says to  
15 Alexandra Fernandes -- it's recorded -- he said he  
16 knew something was wrong with the back of her head.  
17 He tried to wake her up, smacking her face a little  
18 bit saying, "Hey, hey, hey. Get up, get up, get up,"  
19 and there was nothing. "And that's why I called her  
20 mom. I don't know if I called the paramedics first,  
21 but there was something wrong and I did it." And  
22 that's when Fernandes asked him to turn around, cuffed  
23 him, detained him, checked the status, as I relayed  
24 earlier, and Mirandized the defendant.

25 Importantly, as it pertains to the smock,

1 he clearly was exhibiting stress and duress from the  
2 situation, looked like he was starting to cry, started  
3 breathing heavily, started crying harder after he was  
4 Mirandized. He was put in a suicide smock because he  
5 clearly was manifesting emotion, and they did it for  
6 his own protection.

7 THE COURT: Is there any way that a burden  
8 shifts to the Defense if they're going to say he  
9 unknowingly waived the Miranda and we can prove it  
10 because he's wearing a suicide smock? Do they have  
11 any kind of burden to bring in an expert to say  
12 because he had a suicide smock and showing emotion and  
13 exhibiting breathing, the crying, and so forth,  
14 there's no way he could have voluntarily waived?

15 MR. VITTO: Judge, they have all the  
16 burden. This is their motion. They have the burden  
17 of establishing that to you, and they're running very  
18 close in Massachusetts.

19 THE COURT: I don't know if they have the  
20 burden, but I would imagine it would at least help.

21 MR. MARTINEZ: Judge, at the time of any  
22 hearing, if the Judge needs -- if Your Honor deems  
23 that a hearing is necessary, we are allowed to call  
24 witnesses at that hearing as well; whether it's the  
25 defendant himself, which I am strongly inclined not to



1 do, or to bring in outside experts to say with all of  
2 these factors in place, there's no way it was  
3 voluntary and he was in his right mind.

4 THE COURT: Would you give proper notice to  
5 the State if you planned on doing such a thing so they  
6 could get their own expert?

7 MR. MARTINEZ: I think I would be required  
8 to, Judge.

9 THE COURT: Anything else you want to talk  
10 about regarding the Cox/Gibbs' interview?

11 MR. MARTINEZ: No, Judge.

12 THE COURT: Okay. We'll go to -- we did  
13 Boruchowitz too. Is there anything else on the  
14 Motions to Suppress?

15 MR. MARTINEZ: No, Your Honor.

16 THE COURT: Okay. I will go back and look  
17 at them, decide whether we need to have a hearing.

18 MR. MARTINEZ: Judge, as far as the  
19 recordings of all those interviews, I don't believe  
20 that the Court has them in your possession.

21 THE COURT: Correct.

22 MR. MARTINEZ: I know you have the  
23 transcripts. If that's something -- I don't know if  
24 the State would like me to provide that to the Court.

25 THE COURT: Right. I'm going to take a

1 look at the transcripts and decide if I need to hear  
2 it or not.

3 MR. MARTINEZ: Okay.

4 THE COURT: Thank you, sir.

5 That takes care of the Motions to Suppress.  
6 We'll proceed now to the Bad Act Evidence. Mr. Vitto  
7 can start with us and tell me what it is you want to  
8 bring in and why, and then we'll hear from the  
9 Defense.

10 MR. VITTO: Thanks, Judge.

11 So one of the things that I will be seeking  
12 to admit are the --

13 MR. MARTINEZ: Briefly --

14 THE COURT: Go ahead.

15 MR. MARTINEZ: Sorry.

16 THE COURT: No, no. Take your time.

17 MR. MARTINEZ: Judge, for purposes of  
18 today's argument, we're kind of taking the position  
19 here that the State can meet their factual burden by  
20 clear and convincing evidence within all reason, and  
21 we're going to argue the legality of it. If  
22 Your Honor rules against the Defense here and says,  
23 "No. We think that the State did not file legally to  
24 bring this in," then prior to the trial, we would have  
25 a hearing outside the presence of the jury where they



1 would still be required to prove the facts of it by  
2 clear and convincing evidence. But my position is  
3 even if they can prove it by clear and convincing  
4 evidence, legally none of this should come in. So  
5 that's why we're not arguing the facts of it; we're  
6 not going to have any witness testimony about this.

7 THE COURT: Thank you, sir.

8 MR. VITTO: So, Your Honor, I'm providing  
9 Counsel and Your Honor some photographs, and these  
10 photographs I'll be seeking to admit at trial. Judge,  
11 these photographs were recovered from the defendant's  
12 phone. They were taken over the course of less than a  
13 year. The relationship between Victoria and the  
14 defendant, Victoria being Yessenia's mother, had been  
15 rekindled in September of 2017.

16 Do I have that right? No.

17 VOICE IN THE AUDIENCE: 2016.

18 MR. VITTO: 2016. September of 2016, the  
19 relationship had been rekindled over the course of  
20 about a year. So between September of 2016, and the  
21 date of death, July 15 of 2017, these photographs were  
22 taken, and they were recovered from his phone. He is  
23 accused of brutally beating Yessenia to death.

24 If I present these as evidence to the Court  
25 for a ruling at trial, the Defense will object for

1 being irrelevant. So, Judge, our position is that  
2 these photographs are relevant. And at trial,  
3 irrespective of how the Court rules in regard to them  
4 being used as bad act evidence, the State will be  
5 seeking to admit them as res gestae as he portrays the  
6 pictures, the defendant himself. They are simply the  
7 complete story of the crime that occurred resulting in  
8 the death of Yessenia.

9           Looking at these photographs, our position,  
10 Who saves pictures like this on a phone? Who does  
11 that? Who keeps these kinds of pictures and why?"  
12 When you have photographs that depict a crying,  
13 bruised, injured, scarred, sad, depressed, even  
14 terrorized little girl. I'm presenting them today and  
15 seeking their admission as bad act testimony, seeking  
16 from the Court a ruling that they're relevant from a  
17 factual standpoint for the argument today. They are  
18 factually conceded as being what they are. We're not  
19 trying to say -- we're not attacking foundation or  
20 authenticity. They are what they are -- the UMC  
21 reports, the Kidfixers reports, the evidence in this  
22 case.

23           Does this evidence legally fit a  
24 permissible bad act purpose? Because if it doesn't,  
25 it isn't admissible pursuant to 48.045(2). If it

1 does, would admission be unfairly prejudicial? So  
2 even if the Court were to determine that there's an  
3 admissible purpose; obviously the Court would then  
4 have to do the balancing test, which is always where  
5 we find ourselves. We always find ourselves at the  
6 balancing test. Will it unfairly prejudice the  
7 defendant? Does the prejudicial impact substantially  
8 outweigh the probative value?

9 We considered what happened. We look at  
10 these photographs. Is this something that can be  
11 understood? Is there something about the bad act  
12 evidence that will help a finder of fact at least  
13 apprehend the incomprehensible? Because that's  
14 exactly why in Ledbetter, as I've set forth in my  
15 Motion, the Court determined that it should come in  
16 because it was helpful to the jury to understand  
17 something that would otherwise be incomprehensible.

18 If you look at the photographs that I've  
19 given you, Judge, I would want to compare that  
20 photograph at trial to a photograph taken of the  
21 decedent at Desert View Hospital. This was taken by  
22 Officer Teter where you can see that with Yessenia's  
23 death, there's an obvious bruise on her chin. Why is  
24 that important?

25 Because factually, the incidents, what you

1 see on his phone that is consistent with the UMC  
2 records that I'm seeking admission of, and the  
3 testimony from Victoria that we're conceding at this  
4 point, it's virtually identical incidents. The  
5 pictures that you see on her phone, the defendant was  
6 alone with Yessenia. The defendant was drinking while  
7 he was home alone with Yessenia. The defendant was  
8 giving Yessenia a shower while he was home alone and  
9 drinking with Yessenia, and that happened to her chin.

10 In the photograph that we have with  
11 Yessenia deceased, what are the facts that we know?  
12 These facts aren't disputed. The defendant was home  
13 alone with Yessenia. He was home alone with Yessenia,  
14 and he was drinking. He was home alone and drinking  
15 with Yessenia, and he was giving her a shower.  
16 Obviously, last July 2017, Yessenia died with this  
17 mark on her chin. Prior to that, Yessenia didn't die,  
18 but she had her chin split open.

19 Now, the other interesting fact that isn't  
20 contested, sets of facts, is that in the incident that  
21 did not result in death, the defendant had put  
22 Yessenia on the counter where he was drying her off,  
23 and she fell and hurt her chin. When she died, the  
24 first thing that the defendant told Fernandes was that  
25 she came out of the shower -- she went into the shower

1 fine. She came out of the shower. And I was drying  
2 her off on the counter, and she just went limp and she  
3 died.

4 I'm arguing that because it's the Defense  
5 position that this is some kind of drunken mistake,  
6 some kind of accident, "I don't know what happened.  
7 She went into the shower fine, and I was taking her  
8 out of the shower and she just died." There's a lot  
9 more to the story than that, based on the things that  
10 he told law enforcement which the Defense would like  
11 to suppress for very good reason, because it's very  
12 damning.

13 But for that reason, we believe it  
14 appropriate that these photographs manifest a  
15 demonstration that this was neither a mistake nor an  
16 accident, consistent with what would be the testimony  
17 of Kishanna Marquez, the incident she observed with  
18 the defendant dragging little Yessenia across the  
19 rocks screaming, and then the Kidfixers' medical  
20 records that the State is also seeking admission of  
21 that manifest the bruises to the legs and the doctor's  
22 opinions -- opinion in regard to what was taking  
23 place.

24 Because the evidence reflects that when  
25 Victoria left the home on the afternoon when Yessenia



1 was killed, Yessenia ran screaming from the house  
2 after Victoria. You want to know why? Look at this  
3 picture of this terrified, little girl that the  
4 defendant took and kept on his phone that we  
5 recovered. Look at the pictures of what she suffered  
6 and how she suffered up until the time of her death,  
7 that the defendant kept on his phone. A little  
8 three-year-old girl and a grown, adult male.

9           This was no drunken mistake. This was not  
10 some unfortunate accident, both claims that the  
11 Defense will make in the context of, as we know from  
12 his interviews, "'Well, yeah, I had to throw her in  
13 the shower. And she fought like a cat thrown in a  
14 bathtub.' And he told Victoria, 'We were going at it,  
15 and I had to pull her head back and had to kick her  
16 back in. That must be how I hurt my toe. But I don't  
17 know what happened,'" admitting that the child was  
18 screaming the whole time, as opposed to curling up in  
19 a ball in the corner like she had done in the past.  
20 And these are all things -- these are quotes. These  
21 are all things that the defendant himself has said  
22 over the course of his interviews.

23           But the defense will be that it was some  
24 kind of mistake or accident or the result of alcohol,  
25 which is no defense to this case. They won't even be

1 allowed to give a voluntary intoxication instruction,  
2 because it's a general intent crime. For that purpose  
3 and for those reasons, it is relevant, it's clear and  
4 convincing; and with the provision of appropriate jury  
5 instructions, the probative value is not substantially  
6 outweighed by the danger of unfair prejudice, the  
7 unfair prejudice concern being that the jury would  
8 convict him for Murder, that the jury would convict  
9 him for Murder of the things that the State is trying  
10 to admit. And a lot of times that's the difference  
11 with bad act rulings that don't pass muster upon  
12 review.

13 We're not asking to admit a prior Murder.  
14 There should be no concern that the jury would convict  
15 him of Murder because of what the State is trying to  
16 admit. The jury is going to have to convict him of  
17 Murder because the facts at trial and in evidence will  
18 prove it beyond a reasonable doubt, or not. But what  
19 we're seeking to admit are UMC medical records  
20 relating to the chin, Kidfixers' Pediatric records  
21 relating to the testimony of Kishanna Marquez, and  
22 then the photographs that were recovered from his  
23 phone as attested to by Chris DeFonseka, or would be.  
24 It's been admitted by stipulation at this point.

25 The State isn't bringing before the Court

1 or seeking to bring before the Court or the jury some  
2 evidence of some past savage beating. But it is  
3 evidence that what occurred three years ago was not a  
4 mistake. It wasn't an accident. It shows opportunity  
5 out of his own mouth. The facts are beyond dispute.  
6 He was alone with Yessenia. It speaks to his intent  
7 when he was alone with Yessenia. And this evidence  
8 should be admissible for those purposes, the other  
9 purposes of Ledbetter as it gives the jury insight  
10 into motivation.

11 Thank you, Your Honor.

12 THE COURT: Mr. Martinez.

13 MR. MARTINEZ: Judge, I will start where  
14 the State just left off with the Ledbetter, with the  
15 Ledbetter case. That case the court specifically held  
16 their ruling in that case was limited to cases of  
17 sexual abuse. Essentially, what they held was that  
18 evidence of his prior sexual abuse was admissible to  
19 show that the defendant was a pervert. They cautioned  
20 their holding should not be used in other cases. It  
21 was very narrow in scope to cases of sexual abuse.

22 The case we have before us is much more  
23 similar to the Tavares case. In that case bad acts  
24 were admitted against the defendant of prior child  
25 abuse -- bad acts plural, of prior child abuse. That



1 case went up to the Supreme Court, and the  
2 Supreme Court held no, those should not have come in  
3 especially without a limited jury instruction. All  
4 that did was say that, hey, if you believe the  
5 defendant was a -- is a bad person because of these  
6 prior incidents, you must convict him of murder. That  
7 was a circumstantial evidence case. That's why -- and  
8 that's why the court overturned it.

9 That is exactly what the State is  
10 attempting to do here is to introduce these prior bad  
11 acts to assassinate his character. That's shown by  
12 their own statements today when the State argued,  
13 Your Honor, "What kind of person takes these pictures?  
14 What kind of person saves these pictures on their  
15 phone?"

16 As the pictures are concerned, as far as  
17 those go, Your Honor, my understanding of those  
18 pictures is they were all taken after the one incident  
19 when she fell, fell off the counter and she cut open  
20 her chin. He took those pictures from that once  
21 incident. Not over the course of a year; they were  
22 all from the same incident. What kind of person saves  
23 them to their phone? Anybody with a smartphone.  
24 That's how they operate. You take a picture. It  
25 automatically saves it to your phone. Unless you

1 actively go in and delete it, it stays on there.

2           Your Honor, the State -- let me back up for  
3 a second. There are four incidents, four bad acts  
4 that the State wants to introduce. There's the  
5 incident where Mr. Engelson was allegedly dragging  
6 Yessenia through the rocks. There was a doctor's  
7 visit where she had bruises on her legs. There's this  
8 incident from the pictures with the cut on her chin.  
9 I believe they're telling another child that he would  
10 never put his hands on that child, because if he ever  
11 did, he wouldn't stop. In each of every single one of  
12 these, the State can't just leave it open and say,  
13 "We're admitting it for other purposes that's not  
14 character evidence." They must be specific with the  
15 purpose that they are admitting it for. So when I  
16 throw it back to the State here, I am going to ask  
17 them to be specific with the purpose so I can argue  
18 against that.

19           The State has mentioned mistake of fact --  
20 or mistake of accident or mistake. Bad acts are  
21 admissible to prove the absence of mistake or  
22 accident, because the proof that a child has  
23 experienced many purported accidents is evidence that  
24 the most recent injury may not have resulted from yet  
25 another accident. That's Bludsworth versus State. In

1 this case we had a single bad act that was an  
2 accident, not many, a single, when she fell off the  
3 counter and she cut her chin. None of these other  
4 incidents are alleged to be accidents, and there are  
5 certainly not many, seeing as we have four.

6           The incident where the bruises on her leg,  
7 there's not going to be any testimony. We know she  
8 went to the doctor, that the doctor saw her for  
9 bruises. We don't know when those happened. We don't  
10 know who was watching her. There's no evidence at all  
11 that's going to be presented that Cole caused those  
12 injuries on Yessenia. So that specific purpose will  
13 not apply here, Your Honor.

14           Again, when we're getting into motive and  
15 intent, the State continues to cite the Ledbetter.  
16 That case was specific as it relates to cases of  
17 sexual abuse. This is not a case of sexual abuse. So  
18 the holding in Ledbetter does not apply to this case.  
19 Everything the State is seeking to admit, Your Honor,  
20 is nothing but character reference, which is entirely  
21 against the law, is extremely disfavored by courts,  
22 because they should be convicted -- if they are  
23 convicted, defendant should be convicted based on the  
24 facts at hand, not because of their character, not  
25 because the jury believes them to be a bad person.

1 That's what the State is attempting to do here. Get  
2 the jury to believe that Mr. Engelson is a bad person  
3 so he must have done this, and convict him of an  
4 otherwise relatively weak case.

5 So, Your Honor, I am going to throw it back  
6 to the State; and again, with regard --

7 THE COURT: Okay. A couple of questions  
8 for you real quick. I'm getting a lot better grasp of  
9 it now than I did just reading the briefs. But  
10 basically, if I understood you correctly, you said  
11 there were four prior bad act incidences they want to  
12 admit. One was dragging her through the rocks, you  
13 said?

14 MR. MARTINEZ: Yes.

15 THE COURT: All right. The second was a  
16 bruise on her leg with the doctor?

17 MR. MARTINEZ: Yes.

18 THE COURT: The third was these pictures  
19 from when she fell off the counter and cut her chin?

20 MR. MARTINEZ: Yes, Your Honor.

21 THE COURT: And the fourth was?

22 MR. MARTINEZ: Yessenia's brother who lived  
23 in the house with them, there have been testimony and  
24 interviews that Mr. Engelson told that minor child, "I  
25 would never put my hands on you to discipline you,"

1 because he didn't like him, and "because I'm afraid if  
2 I ever did put my hands on you to discipline you I  
3 wouldn't stop."

4 THE COURT: Where does -- the defendant's  
5 brother is a kid?

6 MR. MARTINEZ: No, I'm sorry. Yessenia's  
7 brother, not the defendant's brother. The decedent in  
8 this case.

9 THE COURT: The decedent's brother?

10 MR. MARTINEZ: Yes.

11 THE COURT: He said to Yessenia's brother,  
12 "If I ever put my hands on you, I wouldn't stop"?

13 MR. MARTINEZ: "I'm afraid I wouldn't  
14 stop."

15 THE COURT: And somebody heard that.

16 MR. MARTINEZ: Yes. And in fact, I think  
17 if I recall right, Your Honor, that may be something  
18 that Mr. Engelson told police as far as his interview  
19 as well, that he did admit that he said that. That  
20 one specifically has absolutely no relevance to the  
21 case at hand here. It's a different child and is not  
22 relevant in any way, shape, or form.

23 And again, when I throw it back to the  
24 State here, Your Honor, I'm going to ask them for each  
25 one of these four bad acts that they want to admit

1 what the specific purpose for each one is. And there  
2 is no specific purpose other than attacking his  
3 character and trying to show the jury he is a bad  
4 person and they should convict him because of that.

5 THE COURT: Thank you, sir.

6 Mr. Vitto?

7 MR. VITTO: Yes, Judge. Clearly, this is  
8 not character evidence. How are two medical reports,  
9 pictures from the defendant's phone character  
10 evidence? We're not characterizing them as character  
11 evidence.

12 I don't know where the defendant is coming  
13 from in regard to "Did he say that he was afraid that  
14 if he started beating Dwight, that he wouldn't be able  
15 to stop himself?" Yes, he said that. He told that to  
16 police. He told that to Victoria. He told Victoria,  
17 "This might frighten you, but I'm afraid that if I  
18 ever started beating Dwight, I might not stop." He  
19 told that to Victoria, and he told that to law  
20 enforcement. Without baseball bats, without sleep  
21 deprivation, without any kind of coercion, he's  
22 volunteering his statements to law enforcement.

23 But if you notice at page 15 of my Bad Act  
24 Motion that was filed December 3rd -- no, that was the  
25 errata. I don't know when the original was filed.



1 The original was filed November 25th of 2019 -- I  
2 didn't say anything about that. But in context, the  
3 reason I believe that would be relevant is because he  
4 also talked about the one time he whacked Yessenia way  
5 too hard. It really smacked. It popped. He knew it.  
6 There's context to what he said in regard to Dwight as  
7 it pertains to Yessenia.

8 So what the State is seeking relative to  
9 the photographs from his phone, Victoria's explanation  
10 about them as it is consistent with what happened with  
11 the death of Yessenia, the photo taken by Josh Teter  
12 that shows the chin injury with his explanation, the  
13 testimony from Kishanna Marquez when she saw the  
14 defendant dragging a screaming Yessenia through the  
15 rocks, and then the medical records from Kidfixers  
16 Pediatrics and UMC Quick Care.

17 Now, the Defense would like the law to be  
18 that according to -- and it starts with B -- according  
19 to Bludsworth, that the State has to have many  
20 incidents, but that's not the law. Those were the  
21 facts in Bludsworth, as pointed out by Bludsworth.  
22 But the reality of the situation here is that in less  
23 than a year, we have multiple incidents. How do we  
24 have multiple incidents? Well, we have the chin.  
25 These pictures, Judge, that I've given you that were

1 taken from his phone, look at the outfits that  
2 Yessenia was wearing. There are at least three  
3 outfits represented here. This is not all one day,  
4 one incident. We have Kidfixers Pediatrics is one  
5 incident that is consistent with the testimony of  
6 Kishanna Marquez. We have the UMC incident, which is  
7 consistent with the chin. But if you look at what  
8 she's wearing, she's clearly -- these are -- this is  
9 not one incident, Judge.

10 So the State, for Defense edification,  
11 which is entirely appropriate, the State would be  
12 seeking to admit this evidence to show opportunity.  
13 The defendant has given virtually identical fact  
14 patterns for the injury, the laceration to the chin,  
15 and the bruise to the chin in the photograph of  
16 Yessenia deceased. Identical fact patterns. The  
17 State would be seeking to use this to show motive,  
18 slash, intent, and the motive language comes from  
19 Ledbetter. Yes, Ledbetter was a sex case. But the  
20 language used in Ledbetter as it pertains to motive is  
21 certainly applicable.

22 And lastly, Judge, mistake or accident. So  
23 prior to anybody testifying as it pertains to any bad  
24 act evidence, the jury would be informed how they can  
25 use this evidence and how they can't use this



1 evidence. This evidence would only appropriately be  
2 used not as substantive evidence of guilt but as to  
3 whether this was a mistake or an accident, whether the  
4 defendant had opportunity, and how it would relate to  
5 his motive. That's the instruction they would be  
6 given before each witness would testify, and it's also  
7 an instruction that they would receive in the packet  
8 of instructions at the close of trial.

9 THE COURT: Daniel?

10 MR. MARTINEZ: Many purported accidents,  
11 Your Honor. That's the law. That's what it says in  
12 the case law. I know it's not what the State wants it  
13 to be, but that's what it says. And the reason why is  
14 because when you look back on these histories in these  
15 sorts of cases, what the courts held in that case is  
16 when it was constant. Wow, she suffered these bruises  
17 and you said she just fell down the stairs. Or this  
18 child suffered a broken arm, and you said it was an  
19 accident; you didn't see the child at that point. And  
20 we have all of these, and it continued to line up all  
21 of these times when a defendant said it was an  
22 accident. Well, now it's a little suspicious because  
23 that child has died or there's been a more severe  
24 injury and we can look back and say, "Well, maybe that  
25 wasn't an accident after all." That's why it has to

1 be many purported accidents. We don't have that here.

2 This is nothing but an attempt to introduce  
3 character evidence. Otherwise, if we don't know a  
4 contact behind the pictures and when they were taken,  
5 all we're doing is trying to, attempting to get into  
6 the mind-set of a deceased three-years-old to say that  
7 she was terrified of Cole and that's why he was taking  
8 those pictures.

9 We don't know why they were taken. We  
10 don't know why she was upset in those pictures, but  
11 we're going to make the jury assume that it was  
12 because she was terrified of Cole. The only reason he  
13 wants to -- the State wants to introduce any of this  
14 evidence is to prove that -- attempt to prove that  
15 he's a bad person, and that's why the jury should  
16 convict him is because he's a bad person. That is it,  
17 Your Honor.

18 And again, I go back to Ledbetter. They're  
19 holding -- I encourage the Court to go read that  
20 case -- they're holding this very specific that that  
21 applies to sexual abuse cases, not all cases. And  
22 they caution that it should not be applied to all the  
23 other cases and should be specifically only applied to  
24 those sexual abuse cases.

25 With that, Your Honor, I would submit it on

1 everything. But again, I would encourage the Court to  
2 go back and read that case law and apply it here,  
3 because none of the State's other purposes apply here.  
4 And these would certainly be more prejudicial than  
5 have any sort of probative value whatsoever. Even if  
6 the State's purpose for motive or intent opportunity  
7 did apply here, there's not dispute he was the one  
8 home with Yessenia, Your Honor. So when we're talking  
9 about opportunity to commit some sort of crime, he's  
10 the only one home, what probative value does that have  
11 if that's why we're introducing it?

12 They don't fit into any exception, any  
13 purpose; they're merely character evidence,  
14 Your Honor. And even if they did have some minor  
15 exception, they are far more prejudicial than they are  
16 probative, overwhelmingly prejudicial than they are  
17 probative. They prove nothing about this case,  
18 nothing about the facts of this case. And because of  
19 that, the Court should not allow them in.

20 THE COURT: A few questions.

21 Did you want to reply?

22 MR. VITTO: I do. I would like to respond  
23 briefly.

24 You know what would be prejudicial?  
25 Prejudicial would be if the State was trying to bring

1 in evidence of another murder. That's what this case  
2 law is talking about. This is not that.

3 I do want to address Bludsworth, and I did  
4 address it in my Reply Motion because the Defense  
5 brought it up in their Opposition, from the  
6 proposition that without more than one incident, it's  
7 inadmissible. So at page -- this one isn't numbered.  
8 In my Reply brief, Judge, about half a dozen pages in,  
9 citing Bludsworth v. State as legal precedent for the  
10 position that, quote, Under existing law, a single  
11 incident is not probative of absence of mistake or  
12 accident. It takes many purported accidents to reach  
13 that burden, and the State has not done so.

14 Read Bludsworth, that's not what Bludsworth  
15 says. That is not a quote from Bludsworth; that is a  
16 quote from the Defense Opposition.

17 The State goes on, "It is not a very well  
18 reasoned interpretation of Bludsworth, giving the  
19 Defense the benefit of the doubt. The fact pattern in  
20 Bludsworth is similar and helpful to the case before  
21 this Court."

22 Quote, At trial, the Defense claimed that  
23 the stepfather accidentally injured Eric, the  
24 two-year-old stepson that died, murdered, as the  
25 result of head jury, by dropping him as Eric and he

1 climbed the stairs of the family home. On appeal,  
2 appellants argue that all evidence presented at trial  
3 was consistent with the theory that Eric's injury was  
4 accidental, end quote. And some of that language was  
5 bracketed, Judge. I rely on the Court to look at my  
6 brief. The appellate court disagreed.

7 In the instant matter, although admittedly  
8 striking Yessenia, the defendant claims her death must  
9 have been accidental or did otherwise result from his  
10 voluntary intoxication, which isn't a legal defense to  
11 the offense before this Court.

12 Like in the instant matter, in Bludsworth,  
13 the defendant, quote, was alone with, bracketed, the  
14 victim, at the time of the fatal injury, and he  
15 admitted involvement in the purported accident, which  
16 is exactly what happened in our case, Judge. In  
17 Bludsworth, quote, during the trial, considerable  
18 evidence was presented that Eric had sustained  
19 numerous bruises, including a bite mark on his scrotum  
20 prior to the day of his fatal injury. In Bludsworth,  
21 the Court determined that both the bite mark and other  
22 bruise evidence, unquote/quote, prior to the day of  
23 his fatal injury, unquote, was, quote, independent,  
24 relevant, circumstantial evidence tending to show that  
25 the child was intentionally rather than accidentally



1 injured on the day in question.

2 Which is exactly why the State -- one of  
3 the reasons why the State wants the evidence available  
4 to be presented to a jury, the finder of fact, for  
5 ultimate determination. "Proof that a child has  
6 experienced injuries in many purported accidents is  
7 evidence that the most recent injury may not have  
8 resulted from yet another accident." But that doesn't  
9 mean that it has to be many purported incidents. And  
10 you will find nowhere in that decision where it says  
11 that.

12 Look, would it be better? Sure. Give me  
13 six. Give me 12. Great. But I can't make stuff up.  
14 I gotta go with what I have, and this is what I got.  
15 It should be admitted. It should be admitted for the  
16 purposes that the State is requesting its admittance  
17 for.

18 Your Honor had questions.

19 THE COURT: I do, but let's see if Daniel  
20 wants to respond to your Bludsworth argument.

21 MR. MARTINEZ: Judge, I disagree with the  
22 State. I believe that that is the holding of that  
23 case. That's why I put it in my Opposition to their  
24 Bad Acts Motion. Again, the State is arguing the  
25 similarities in one case are similar here, which means

1 that he definitely did it then, and he definitely did  
2 it now. That's it; it's character evidence. He's  
3 admitting in the character evidence. He did it once,  
4 that's why he definitely did this one. That's what  
5 all of this is, plain and simple, Judge.

6 THE COURT: Thank you. If I understood  
7 Mr. Martinez correctly, there were four incidences.  
8 No. 3 is these pictures that you admitted or  
9 submitted. No. 1 was dragging through the rocks. You  
10 stated, I believe, that Kisha (sic) Marquez talked  
11 about an incident where she observed dragging through  
12 the rocks. Do I need to have a Petrocelli hearing and  
13 get Kisha in here to see if there's clear and  
14 convincing evidence of that incident?

15 MR. VITTO: Here where we are, Judge, and  
16 Daniel addressed this right up front.

17 THE COURT: Okay. I didn't hear that.  
18 What?

19 MR. MARTINEZ: Go ahead. Kirk is going  
20 with where I went. That's what I was talking about --

21 THE COURT: Okay. And I didn't hear it  
22 what he said.

23 MR. VITTO: Up front, Judge, we're not --  
24 and correct me if I'm wrong -- we're not contesting  
25 the facts today. We want to submit it to the Court.

1 Counsel is convinced that he has a winning legal  
2 argument, that even if the facts were as I say, you  
3 shouldn't legally admit them. So we're not contesting  
4 the facts. We're not --

5 THE COURT: The reason I was asking you  
6 about the first incident regarding dragging through  
7 the rocks is because I don't know anything about it.

8 MR. VITTO: It's right here, Judge, in my  
9 brief if you look at --

10 THE COURT: How old is Dwight --

11 MR. VITTO: Dwight was eight at the time;  
12 so he's 11 now?

13 VOICE IN THE AUDIENCE: Twelve.

14 MR. VITTO: He's 12 now. He might have  
15 been nine at the time.

16 And I'm sorry, Judge, I'm trying to find  
17 the part in my brief where I detail -- oh, here it is.  
18 It's on page 2. And for the purposes of this hearing,  
19 the Defense isn't contesting that if called to the  
20 stand to testify, Kishanna Marquez would testify that  
21 she observed the defendant dragging Yessenia through  
22 rocks while he was quote-unquote babysitting and  
23 Victoria was at work. Again, alone with Yessenia.  
24 Kishanna heard Yessenia screaming. She looked out the  
25 window and saw the defendant dragging Yessenia by the



1 arm through the rocks. She confronted the defendant  
2 who explained his conduct by saying that Yessenia, the  
3 two-year-old child at the time, had thrown a rock at  
4 him. Yessenia then cried for Kishanna to pick her up,  
5 took her into the house and cleaned her up. Kishanna  
6 told Victoria that the defendant should not be left  
7 alone with Yessenia because he can't handle her. And  
8 the incident occurred before the December 29th, 2016,  
9 visit to Kidfixers.

10 I also found the part where I mentioned  
11 earlier, Judge. This is on page 4 of my initial brief  
12 in record to the incident that Defense brought up with  
13 Dwight where the defendant said, referencing Yessenia,  
14 that he, quote-unquote, tagged her pretty good, and  
15 he, quote, wasn't going to spank her anymore after  
16 that. You could tell the slap. You could hear it.  
17 You know it was too much, describing himself as a  
18 heavy-handed disciplinarian. Heavy-handed being his  
19 words.

20 MR. MARTINEZ: And again, here,  
21 Your Honor --

22 THE COURT: So that's five incidents then.

23 MR. VITTO: Nope. The only thing the State  
24 is seeking to admit for purposes of bad act evidence  
25 are -- and this is on page 15 in my brief -- the

1 photos from his phone, which I will be seeking to  
2 admit anyway as res gestae; but for the purposes of  
3 context with the motion, the photos recovered from his  
4 phone with Victoria's explanation of when and where  
5 they were taken and what the defendant himself told  
6 her about them. Two is the photo that you have taken  
7 by Josh Teter, along with his explanation, at DVH.  
8 Three is Kishanna Marquez for what she saw and heard,  
9 which I just told the Court. And then the medical  
10 reports -- Dr. John Lapore from Kidfixers Pediatrics  
11 and the UMC Quick Care medical records.

12 THE COURT: Four is the medical pictures  
13 that were taken post -- at the end; right?

14 MR. MARTINEZ: That's No. 2, Your Honor.

15 MR. VITTO: That's No. 2.

16 THE COURT: That's No. 2. That's this one?

17 MR. VITTO: Correct.

18 THE COURT: Okay. That's not -- you're not  
19 submitting this as a prior bad act?

20 MR. VITTO: That's to give context.

21 THE COURT: Right. But it's not a prior  
22 bad act. It's a picture of the --

23 MR. VITTO: Correct.

24 THE COURT: Okay. So the prior bad act is  
25 the pictures No. 1, and then No. -- I apologize that

1 I'm being obtuse here, gentlemen. Page --

2 MR. VITTO: Page 15 is Kishanna, and then  
3 the medical reports.

4 THE COURT: Okay. And then the 3 is  
5 dragging through the rocks; you want that in as a  
6 prior bad act?

7 MR. VITTO: Yes.

8 THE COURT: And the fourth one was what  
9 again?

10 MR. VITTO: Four and 5 are the medical  
11 reports. The Kidfixers Pediatric's medical report  
12 document the dragging through the rocks, and the UMC  
13 medical report document the lacerated chin.

14 THE COURT: Okay. So all of the talk about  
15 some prior incident where the child had bruises on the  
16 leg isn't in front of me today?

17 MR. VITTO: That's Kidfixers.

18 MR. MARTINEZ: And I disagree that those  
19 medical records talk about the dragging through the  
20 rocks at all, Your Honor.

21 MR. VITTO: They don't say anything about  
22 the dragging through the rocks. We have the dragging  
23 through the rocks incident being described. When the  
24 child gets to the doctor, the doctor says -- the  
25 doctor notes -- let me just see. I've got this in my

1 hand. I guess the mistake is I haven't given these to  
2 you, Judge.

3 Let me give you a copy (handing a copy to  
4 Mr. Martinez). This is going to make it easy for you,  
5 Judge (copy passed to the bailiff for the Judge).

6 With the UMC records, if you look on  
7 page -- the second page -- nope -- well, the second  
8 page it says "chin contusion laceration." That's the  
9 UMC records and the photographs.

10 The Kidfixers Pediatrics that I'm giving  
11 you a copy of now, the Kidfixers Pediatrics  
12 references -- and I'm going to try to find the exact  
13 language.

14 THE COURT: While he's reading that,  
15 Mr. Martinez, how soon do you want the Petrocelli  
16 hearing? Because when's the trial set, a month from  
17 now?

18 MR. MARTINEZ: August 11th, Your Honor.

19 THE COURT: So we would have to have the  
20 Petrocelli hearing a couple of weeks from now, if we  
21 didn't do it right before the trial?

22 MR. MARTINEZ: Well, I think we're going to  
23 have to do it right before the trial, Your Honor.  
24 Well, depending on if you rule that some of it  
25 definitely isn't coming in and we just need a

1 Petrocelli hearing on some of it, I know some of the  
2 base witnesses on these matters are coming from out of  
3 state. So just hoping the plan is to do it right  
4 before trial.

5 THE COURT: Okay. Pretrial Petrocelli's.

6 Kirk, I sped read through those medical  
7 records. I couldn't see what you were looking for.

8 MR. VITTO: You know what, Judge. I don't  
9 either. I don't know if I have two sets. I know that  
10 I have spoken with Victoria. I know that I have  
11 spoken with the doctor. And the contusions and  
12 abrasions to the legs were noted with the admonition  
13 that should the child be seen with this kind of  
14 bruising again, it was going to have to be reported.

15 THE COURT: Can you go back and look  
16 through your files? If you find those, submit them to  
17 me and give a copy to Mr. Martinez and Ms. Boskovich?

18 MR. VITTO: Yes, Your Honor. Yes.

19 MR. MARTINEZ: For what it's worth, Judge,  
20 I know they exist as well. I have seen those. I know  
21 what the State is referencing.

22 THE COURT: Very good. Nonetheless, if you  
23 go back through your file and you find the set that  
24 you wanted me to have here today, just make sure  
25 Mr. Martinez sees them so he knows what you're

1 submitting to me.

2 MR. VITTO: Thank you, Your Honor.

3 THE COURT: All right. Is the res gestae  
4 argument before me, or is that going to be argued in  
5 the course of the complete story during the course of  
6 the trial?

7 MR. VITTO: The second one.

8 THE COURT: Okay. Anything else that you  
9 all would like to talk about regarding the prior bad  
10 acts?

11 MR. MARTINEZ: Yes, Your Honor. The State  
12 is connecting this incident where she was dragged  
13 through the rocks with the Kidfixers' medical  
14 documentation. And when you get that and read through  
15 that, you will see there's no connection there.  
16 There's no factual bridge to put the two together. So  
17 my question is what's his specific purpose of  
18 introducing the bad act of --

19 THE COURT: Let me make sure I understand  
20 your argument. Kirk's saying that somebody, a  
21 neighbor or someone, saw him dragging --

22 MR. VITTO: Roommate.

23 THE COURT: Say it again?

24 MR. VITTO: Roommate.

25 THE COURT: -- roommate saw him dragging



1 the kids through the rocks. Then he says he has a  
2 medical report that talks about that incident. You're  
3 saying there's no connection between the two?

4 MR. MARTINEZ: It doesn't talk about the  
5 incident. The medical report says she has bruises.  
6 It doesn't say what they are from.

7 THE COURT: Okay. But doesn't he have a  
8 witness who can say after he dragged her through the  
9 rocks, I took her to the doctors and this is the  
10 report that came from it?

11 MR. MARTINEZ: It wasn't that quick,  
12 Your Honor. In the State's own argument, he said they  
13 had the dragging through the rocks, and that occurred  
14 sometime before she went to Kidfixers and she went to  
15 the doctor.

16 THE COURT: All right. Good point.

17 MR. VITTO: That's correct, Judge. The  
18 witness will testify this is what I saw. She's going  
19 to testify that it was around Christmastime, and then  
20 on December -- I believe in my brief, I referenced the  
21 Kidfixers incident that I'm talking about was  
22 December 29th. She's taken to the doctor, and these  
23 bruises and contusions to her legs are observed. So,  
24 yeah, is it a perfect bridge? No. But is it logical  
25 and reasonable and for this Court to consider? Yes.

1 THE COURT: Did you say you have pictures  
2 of the bruises on the leg?

3 MR. VITTO: Negative.

4 THE COURT: Okay. Anything else?

5 MR. MARTINEZ: Your Honor, my question is  
6 what's the specific purpose of the dragging through  
7 the rocks? And if the Court finds that the State is  
8 trying to introduce those four because I know that  
9 we've spoken a lot about the pictures with the cut on  
10 her chin and the reason for that. But we haven't  
11 about the dragging through the rocks and what the  
12 specific purpose of that is, because there is none.  
13 Again, it's just more character evidence.

14 THE COURT: Oh, I understood that.

15 MR. MARTINEZ: And if that bridge isn't  
16 connected, what's the purpose of the medical documents  
17 showing the bruises on the leg?

18 THE COURT: Okay. I will talk take that  
19 all under consideration. Anything else in the prior  
20 bad acts?

21 MR. VITTO: No, Judge.

22 THE COURT: All right. That takes us to  
23 the Motion For Extraordinary Fees.

24 MR. MARTINEZ: I thought I took that off  
25 calendar, Your Honor.



1 THE COURT: Okay.

2 MR. MARTINEZ: I don't need that. We can  
3 disregard that.

4 THE COURT: That's fine. And then calendar  
5 call. Both sides are declaring ready?

6 MR. VITTO: Yes, sir.

7 MR. MARTINEZ: Yes, sir.

8 THE COURT: Okay. Anything else we need to  
9 do today?

10 MR. VITTO: No, Your Honor.

11 THE COURT: Okay.

12 COURT STAFF: Your Honor, I just wanted to  
13 put on record that I have to reserve the  
14 Commissioners' Chambers for our jury voir dire. So if  
15 it's not available on the first day, I'm hoping it's  
16 available on the second day.

17 MR. VITTO: Okay.

18 COURT STAFF: I have to do that when we  
19 leave court, and I will let you know what day we're  
20 doing right away.

21 MR. MARTINEZ: And I know we went over this  
22 last week. We have a DCFS calendar in the courtroom  
23 on the morning of August 11th when we're supposed to  
24 start. So if we can reserve it, we probably only need  
25 it for the afternoon to get started on the 11th.

1 COURT STAFF: Yeah. We'll probably start  
2 at 11:00 --

3 MR. MARTINEZ: Okay.

4 COURT STAFF: -- in the chambers, unless  
5 Judge decides, which we haven't talked about, we still  
6 may cancel DCFS. It's just we have to decide first;  
7 correct?

8 THE COURT: Currently, do you have DCFS --  
9 or the Commissioners' Chambers reserved at all for  
10 this trial?

11 COURT STAFF: No, no.

12 THE COURT: So you're going to go talk to  
13 them, see if they're available?

14 COURT STAFF: Yes.

15 THE COURT: We bring in 50 -- we summons 50  
16 jurors at a time. They won't all show up. The staff  
17 has gone through the Commissioners' Chambers -- all  
18 six feet apart with masks and so forth. We're looking  
19 at that afternoon and the next morning for another 50?

20 COURT STAFF: Yep.

21 THE COURT: All right. I don't see why we  
22 need to start at 11:00 if we're only doing 50 that  
23 first day. We can start at 1:15, do the first 50.

24 COURT STAFF: Okay.

25 THE COURT: The next morning, do the next

1 50. So how many were summonsed, a hundred?

2 COURT STAFF: A hundred. I am concerned on  
3 that Tuesday that that might be a Commissioner's day;  
4 so that's why I have to double-check and see if we're  
5 starting on Tuesday or what or Wednesday?

6 THE COURT: And if it is, we're starting on  
7 Wednesday?

8 COURT STAFF: Correct.

9 THE COURT: Unless we find another place to  
10 do it?

11 COURT STAFF: Unless we find someplace to  
12 do it.

13 THE COURT: We'll be in touch with you  
14 about the plans.

15 MR. VITTO: Thanks, Judge.

16 MR. MARTINEZ: Sounds good, Judge.

17 MR. VITTO: And as -- I'm glad Louise is  
18 here. As I'm looking at how I've got the case mapped  
19 out, I think we might have been told that the 10th was  
20 potentially available to us for a bad act evidentiary  
21 hearing if necessary?

22 COURT STAFF: I do have Engelson Petrocelli  
23 at 1:15 on the 10th.

24 MR. VITTO: Perfect.

25 THE COURT: Monday the 10th at 1:15,

1 Petrocelli hearing. And your witnesses will be here  
2 for that?

3 MR. VITTO: If necessary, they will be  
4 here, yes. Yes, Your Honor.

5 THE COURT: Just out of curiosity, do you  
6 know who they'll be? Can I write a list down to go  
7 along with my review of all your evidence?

8 MR. VITTO: Yes. If you look at probably  
9 the first page of my brief, Victoria, the mother;  
10 Joshua Teter -- it's all there on the first page of my  
11 brief.

12 THE COURT: Okay. That's fine. I'll look  
13 at it.

14 MR. VITTO: Thanks, Judge.

15 THE COURT: Anything else from anybody?

16 MR. MARTINEZ: Not today, Your Honor.

17 THE COURT: Okay. If I do need more  
18 information, I'll get in touch with you and maybe set  
19 another hearing.

20 MR. MARTINEZ: Okay.

21 THE COURT: Okay. Court's adjourned.  
22 Thank you.

23 THE BAILIFF: All rise.

24 -oOo-

25 / / /

1 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE  
2 PROCEEDINGS.  
3  
4

*Cecilia D. Thomas*

Cecilia D. Thomas  
RPR, CCR No. 712

FILED  
FIFTH JUDICIAL DISTRICT

JUL 08 2020

Nye County Clerk  
**Judy Ayotte** Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant.

**COURT ORDER**

Plaintiff filed a Motion for Prior Bad Acts on November 25, 2019 and an Errata on December 3, 2019. Defendant filed an Opposition on April 29, 2020.

A hearing on the Motion was held on July 6, 2020. This Order follows.

**I. LAW**

The State requests Prior Bad Acts be admitted pursuant to NRS 48.045(2):

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

The State cites *Bolin v. State*, 114 Nev. 503 (1998), interpreting NRS 48.045(2), where the Nevada Supreme Court set forth that to be admissible the evidence must be relevant, clear and convincing, and "the probative value of the evidence [must not be] substantially outweighed by the danger of unfair prejudice." *Id.* 517. "The trial court's



determination will not be overturned absent manifest error.” *Petrocelli v. State*, 101 Nev. 46, 52 (1985).

Pursuant to *Ledbetter v. State*, 122 Nev. 252 (2006) the court should give the appropriate limiting instruction prior to the testimony of each witness, “both at the time of admission and again when the case is submitted to the jury” if the evidence is ruled admissible. The State cites *Tavares v. State*, 117 Nev. 725 at 733 (2001):

We are also convinced that a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury. As one leading commentator has stated:

[An instruction given at the time of admission] can be directed specifically at the evidence in question and can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose. Instructions given at the end of the case will be more abstract, may apply to a number of items of evidence, and are buried in a mass of other instructions.

Therefore, to maximize the effectiveness of the instructions, we hold that the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes.

## II. ARGUMENT

The State argues that this court should allow the jury to see and hear the following items with the appropriate limiting jury instruction. The State submits the items should be seen in the totality of the case, possibly *res gestae*, including statements made by the defendant and other witnesses.

### A. PHOTOS FROM DEFENDANT'S PHONE



1  
2  
3 The State recovered photos from the defendant's phone of the child, Yessenia,  
4 hurt and in distress. The State submits that the photos combined with Victoria's  
5 explanation of when and where they were taken, and what the defendant himself told her  
6 about them, are admissible. The State submits that on April 3, 2017 an incident occurred  
7 when the defendant was watching Yessenia, by himself, babysitting for Victoria in Las  
8 Vegas. In the State's Brief, page 3, the State argues "Victoria, Yessenia's mother will  
9 explain that the defendant was home alone with Yessenia, like in the case before the  
10 court, that he had been drinking, like in the case before the court, that he had given her  
11 a shower, like in the case before the court, and that while brushing her hair while she  
12 was standing on the counter after getting out of the shower, like in the case before the  
13 court, she "fell" and injured her chin." The State continues and states that "[y]ou will  
14 hear Detective Alexandra Fernandez testify that in this case, according to the defendant,  
15 Yessenia was fine when he put her in the shower, fine when she got out of the shower,  
16 he put her on the counter, began to towel her off, and she just went limp, he doesn't  
17 know what happened. The court will see the pictures, as exhibits, of an injured, hurt,  
18 crying, distressed little girl, Yessenia, recovered by Chris DeFonseka from the  
19 defendant's phone after Yessenia died. Victoria will describe what she knows regarding  
20 each of those photographs." Further, the State provided that the court will have as an  
21 exhibit, supporting medical documentation.  
22  
23  
24

25 The defense argues the prejudice substantially outweighs the probative value; that  
26 it is being used to inflame the jury; they are not close in time; do not demonstrate a  
27  
28



1  
2 pattern; that they were not reported at the time; that the medical staff did not report it;  
3 that the mother spans the kids; that injuries are not similar; that the child fell.

4 After reviewing the pleadings and arguments made at the hearing, the Court finds  
5 it appropriate to order a Petrocelli hearing be scheduled prior to trial for the State's  
6 witnesses to submit clear and convincing evidence to meet the standards of *Bolin v. State*  
7 cited above.  
8

9  
10 **B. DRAGGING OVER THE ROCKS**

11 The State submits on page 2 of their brief that Kishanna Marquez will testify to  
12 what she saw and heard. The State states that Kishanna "observed the defendant  
13 dragging Yessenia through rocks while he was "babysitting" and Victoria was at work at  
14 Albertsons. Kishanna heard Yessenia screaming, she looked out the window and saw the  
15 defendant dragging Yessenia by the arm through the rocks. She confronted the defendant  
16 who explained his conduct by saying that Yessenia, the two-year-old child (at the time)  
17 had thrown a rock at him. Yessenia then cried for Kishanna who picked her up, took her  
18 into the house, and cleaned her up. Kishanna told Victoria that the defendant should not  
19 be left alone with Yessenia, that he can't handle her. The incident occurred before the  
20 December 29, 2016 visit to Kidfixers, she remembered a Christmas tree being in the  
21 residence they shared and thinks it happened just before Thanksgiving."  
22

23  
24 The State adds on page 3 of their brief that they will use the medical records and  
25 observations of Dr. John Lapore, DO, from Kidfixers, a pediatric office in Las Vegas  
26 where Yessenia had been taken by her mother Victoria on December 29, 2016,  
27  
28



1  
2 documenting what appeared to be abuse, "contusions" on her legs. Victoria will tell you  
3 that she was told the injuries were from a "hard hitting beating." Dr. Lapore told her to  
4 keep an eye on Yessenia, and if Victoria saw any more bruises to bring Yessenia back  
5 and he would call the authorities.

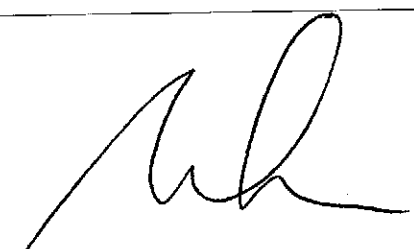
6 The defense argues the prejudice substantially outweighs the probative value; that  
7 it is being used to inflame the jury; they are not close in time; do not demonstrate a  
8 pattern; that they were not reported at the time; that the medical staff did not report it;  
9 that the mother spansks the kids; that injuries are not similar.

10 After reviewing the pleadings and arguments made at the hearing, the Court finds  
11 it appropriate to order a Petrocelli hearing be scheduled prior to trial for the State's  
12 witnesses to submit clear and convincing evidence to meet the standards of *Bolin v. State*  
13 cited above.

14 Pursuant to the above explanations, good cause appearing,

15 **IT IS HEREBY ORDERED** that a Petrocelli hearing be scheduled for the State  
16 to present their witnesses on these matters.

17 DATED this 8<sup>th</sup> day of July, 2020.

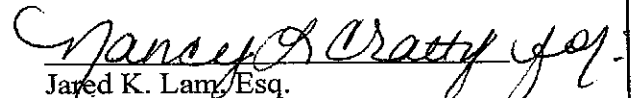
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District Court Judge

**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the 8<sup>th</sup> day of July, 2020, he mailed copies of the foregoing Court Order to the following:

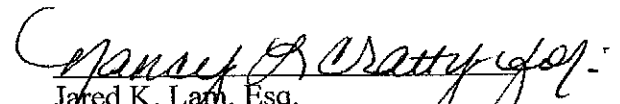
NYE COUNTY DISTRICT ATTORNEY  
1520 E. BASIN AVE.  
PAHRUMP, NV 89060  
(HAND DELIVERED)

DANIEL MARTINEZ, ESQ.; AND  
RONNI BOSKOVICH, ESQ.  
3340 South Hwy. 160, Suite 202  
Pahrump, NV 89048

  
Jared K. Lam, Esq.  
Law Clerk to Judge Robert W. Lane

**AFFIRMATION**

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

  
Jared K. Lam, Esq.  
Law Clerk to Judge Robert W. Lane



FILED  
FIFTH JUDICIAL DISTRICT

JUL 09 2020

Nye County Clerk  
Judy Ayotte Deputy

Case No. CR9226  
Dept. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant.

COURT ORDER

Defendant filed a Motion to Suppress on June 4, 2020. The State filed an  
Opposition on June 12, 2020. A hearing was held on July 6, 2020. This Order follows.

**I. Detective Fernandez**

Defendant argues that Miranda was required at the Start of Questioning by  
Detective Fernandez upon first contact because it was a custodial interrogation. (Defense  
Brief p. 8) The State argues Fernandez asked non-custodial questions upon arrival at the  
scene to learn what was going on. (State's Brief p. 10) The Court heard argument at the  
hearing and ruled the statements would not be suppressed.

Defendant also argues the statements made after Fernandez read the Miranda  
warning should be suppressed because the waiver was not voluntary, knowing and  
intelligent, due to intoxication. (Defense Brief p.9) The State argued that the Court





1  
2 should review the transcript and/or recording, and would determine that his Miranda  
3 waiver was voluntary, knowing and intelligent, and that the intoxication was not  
4 sufficient to suppress pursuant to *Archanian v. State*, 122 Nev. 1019, 1038 (2006);  
5 *Chambers v. State*, 113 Nev. 974, 981 (1997); *State v. Taylor*, 114 Nev. 1071, 1082  
6 (1998), referencing *United States v. Jones*, 21 F.3d 165, 170 (1994); *Taylor v. State*, 96  
7 Nev. 385, 386 (1980); *State v. Hall*, 54 Nev. 213, 234, 235 (1932); *Pickworth v. State*, 95  
8 Nev. 547, 549 (1979); and *Tucker v. State*, 92 Nev. 486, 488 (1976). (State's Brief p. 8-  
9 11.)  
10

11 Having reviewed the transcript of the post Miranda interview by Fernandez, the  
12 Court concurs with the State that the waiver was voluntary, knowing and intelligent, and  
13 denies the Motion to Suppress these statements.  
14

## 15 **II. Detectives Cox, Fancher and Gibbs**

16 Defendant argues his waiver was not voluntary, knowing and intelligent due to  
17 intoxication; a blood draw; fatigue from sleep deprivation; mental state disarray and a  
18 suicide smock; a four hour interview; accusing, calling him a liar, and pressuring him.  
19 (Defense brief p. 9-10) The State argues Defendant spoke with the detectives in a  
20 logical, rational, reliable manner, and that the Court should review the transcript and/or  
21 recording to determine if the waiver was voluntary, knowing and intelligent. (State's  
22 Brief p. 11.)  
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1  
2 Having reviewed the transcript of the post Miranda interview by Cox, Fancher  
3 and Gibbs, the Court concurs with the State that the waiver was voluntary, knowing and  
4 intelligent, and denies the Motion to Suppress these statements.  
5

6  
7 **III. Captain Boruchowitz**

8 Defense argues the Prior Miranda warning was stale, even more so when  
9 combined with the factors set forth above, citing *Koger v. State*, 117 Nev. 138, 141 17  
10 P.3d 428, 430 (2001), and *Taylor v. State*, 96 Nev. 385, at 386, 609 P.2d 1218, 1239  
11 (1980). (Defense Brief p. 7, 10) The State argues that Boruchowitz did not need to re-  
12 Mirandize, citing *Taylor v. State*, 96 Nev. 385, at 386 (1980), and notes that "although  
13 Boruchowitz did not need to re-Mirandize the defendant, he reminded the defendant of  
14 his rights, two more times, once during his private conversation with the defendant, and  
15 again when Victoria met with the defendant while he was present." (State's Brief p. 9,  
16 11-12)  
17

18 Having reviewed the transcript, the Court concurs with the State that the prior  
19 warning was not stale, and denies the Motion to Suppress these statements.

20 Further, Defendant claims that his waiver of Miranda for use by Boruchowitz was  
21 not Voluntary, Knowingly and Intelligently entered. This issue was addressed in item II  
22 above and is denied.  
23

24 ...

25 ...

26 ...

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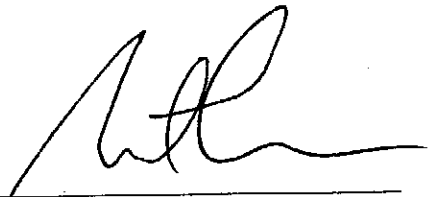


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Therefore, based upon the above analysis,

**IT IS HEREBY ORDERED** that Defendant's Motion to Suppress is denied.

DATED this 8<sup>th</sup> day of July, 2020.

  
\_\_\_\_\_  
District Court Judge



1  
2 **CERTIFICATION OF SERVICE**

3 The undersigned hereby certifies that on the 8<sup>th</sup> day of July, 2020, he mailed copies  
4 of the foregoing Court Order to the following:

5 NYE COUNTY DISTRICT ATTORNEY  
6 1520 E. BASIN AVE.  
7 PAHRUMP, NV 89060  
(HAND DELIVERED)

8 DANIEL MARTINEZ, ESQ.; AND  
9 RONNI BOSKOVICH, ESQ.  
10 3340 South Hwy. 160, Suite 202  
Pahrump, NV 89048

11  
12  
13  
14 *Nancy K. Cratty for:*  
15 Jared K. Lam, Esq.  
16 Law Clerk to Judge Robert W. Lane  
17

18 **AFFIRMATION**

19  
20 The undersigned hereby affirms that this Court Order does not contain the social  
21 security number of any person.  
22

23  
24 *Nancy K. Cratty for:*  
25 Jared K. Lam, Esq.  
26 Law Clerk to Judge Robert W. Lane  
27  
28