IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN WILLIAMS, No. 83418

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a Judgment of Conviction in Case Number CR20-0630B
The Second Judicial District Court of the State of Nevada
The Honorable Kathleen M. Drakulich, District Judge

JOINT APPENDIX VOLUME NINE

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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE

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STATE OF NEVADA,

Plaintiff,

vs.

ADRIANNA MARIE NORMAN,
RYAN WILLIAMS,

Defendants.

Case No. CR20-0630A
CR20-0630B
Dept. No. 1

TRANSCRIPT OF PROCEEDINGS

TRIAL

DAY 11

MONDAY, APRIL 26, 2021

Reported By: PEGGY B. HOOGS, CCR 160, RDR, CRR

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RENO, NEVADA; MONDAY, APRIL 26, 2021; 8:08 A.M.

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(The following proceedings were held outside the presence of the jury.)

THE COURT: Counsel, I just wanted to take a few minutes to discuss logistics before we start this morning.

Is the interpreter ready, Ms. Rosenthal?

MS. ROSENTHAL: Yes, Your Honor.

THE COURT: Ms. Rosenthal, the name of the witness for Ms. Norman's case?

MS. ROSENTHAL: Yes, Your Honor. That's Faustino Saguro.

THE COURT: We'll bring the interpreter up, and we'll just work out the logistics of it, make sure the headsets are working and everything.

After that, we discussed we're going to take another break, and the reason for that break is counsel is going to take as much time as they want with their client and let me know when you're ready because I will be seeking at some point in time whether or not you're going to have additional witnesses or counsel is going to

rest in both cases, and then I'll turn to Mr. Prengaman later in the morning regarding any rebuttal he might have. Okay? Those are the logistics for this morning.

Before we bring the jury out, Counsel, any questions?

Okay. It's going to be a little broken up this morning, but that's all right. It's logistically what we need to do.

(The following proceedings were held in the presence of the jury.)

THE COURT: Good morning, ladies and gentlemen. Welcome back. I hope you had a nice weekend.

Ms. Grosenick.

MS. GROSENICK: Thank you, Your Honor.

Mr. Williams calls Trooper Aimee Chesebrough.

AIMEE CHESEBROUGH,

having been first duly sworn,

was examined and testified as follows:

THE COURT: Take a seat. You can testify without your mask behind the Plexiglas if you're comfortable doing so.

THE WITNESS: Yes, I am. Thank you.

THE COURT: We also have a face shield we can provide you if you want a face shield in addition to the Plexiglas.

THE WITNESS: No. It would probably be easier to understand me.

DIRECT EXAMINATION

BY MS. GROSENICK:

Q Trooper Chesebrough, can you please state and spell your name for the record.

A My name is Aimee Chesebrough. Aimee is A-i-m-e-e. Chesebrough is C-h-e-s-e-b-r-o-u-g-h.

Q Thank you.

Can we please start with your current position.

A My current position is I'm an investigator on the MIRT Team, which is the Multi-Disciplinary Incident and Reconstruction Team.

Q Is that through the Nevada Highway Patrol?

A Yes, that is.

Q Okay. And is that the position that you held on February 22nd of 2020?

A Correct.

Q And how long have you been in that position?

A I have been in this position since November 1st

of 2018.

Q And how long have you been in law enforcement?

A Since June 1st of 2015.

Q And do you have any training or experience related to accident scene investigation or collision investigation?

A I do. I have 120 hours of basic crash investigation that was -- that I received in the basic academy for law enforcement. After that, I continued my interest, and I took Crash 2 as well as vehicle design assessment. That's another 80 hours.

And then I have received 80 hours of ART, which is accident reconstruction training, and I have CDR, which is airbag control/little black box training as well as analysis of that, which I believe is either 40 or 60 hours. I forget the exact amount of time.

Q Okay. First, I want to talk to you a little bit about your involvement in this case.

Do you recall being tasked to investigate a collision on February 22nd of 2020?

A I do. I remember Sergeant Killian, who was over the MIRT Team at that time, called me that morning and said it was a case where all hands were going to be on deck.

I got to the scene roughly two hours -- a little under two hours from when it occurred.

Q And when you say you got to the scene, did you go to where the collision occurred?

A I did.

Q And was that in between the McCarran -- was that close to the East McCarran Boulevard exit?

A It was.

Q Okay. And just to be clear, was that in the westbound lane?

A It was in the westbound lane.

Q What was your goal in investigating this collision?

A Anytime that our team is called out, it is either for substantial bodily harm, felony prosecution, or, as in this case, a fatality collision.

Our purpose when we arrive on scene is to gather as much evidence as we can in order to later reconstruct the scene if necessary. It was -- I can't remember exactly when we discovered that we actually had the dash camera from the commercial motor vehicle.

This scene was weak in the fact that there was law enforcement eyewitnesses to it as well as civilian witnesses and this dash camera, so in terms of a

reconstructionist, the job was -- I don't want to say given to me, but a lot of the work that normally has to happen was provided with eyewitness accounts, law enforcement, dash cameras, and civilians.

Q Okay. So is one part of your role in this to sort of figure out what happened?

A Correct.

Q And you talked about information that you had in doing this investigation.

A Correct. When I arrived on scene, my sergeant, due to his proximity to the crash when it occurred, was on scene already, and my partner at the time, Trooper Max Davis, had just barely beat me to the scene, but we were briefed by Sergeant Killian who had spoken to troopers who arrived on scene as well as Sparks Police Department.

Q Okay. And throughout your investigation, did you have access to speak with other law enforcement?

A Briefly on scene, and then Detective Dach from Sparks PD, when we downloaded the Jeep's airbag control module at the police station, kind of gave an up-to-date of what was going on.

We were -- Nevada Highway Patrol was just asked to be very limited in their scope and just the crash.

Q Okay. And did you also have access to video

recordings of the collision?

A We did, which was provided by a commercial motor vehicle.

Q And did you mention witness statements? Did you have access to those?

A We did. We had copies of the witness statements.

Q Did you have access to police reports written by other law enforcement?

A I do believe I got a copy of -- and I'm going to forget their names -- the original officers' -- for our part of the report, we talk about how they're identified. I want to say Officer Dillon.

Q And at the conclusion of your investigation, did you write a report memorializing your findings?

A I did.

Q Was that report reviewed by a supervisor?

A Sergeant Killian, yes.

Q And was it approved?

A It was.

Q Now, you mentioned that you did go to the scene on Interstate 80 on the actual day of the collision.

Did you also go to the Sparks Police Department evidence lot that day?

A I did that evening. As we were attempting to clear the scene, we got word that they got a search warrant for the airbag control module.

Q And so at the Sparks Police Department, did you take possession or control of the airbag control module data from either/or both vehicles?

A The Sparks Fire Department had to be called in to assist with retrieving the Jeep's due to damage sustained. They physically removed that module. Sparks Police took possession of it and downloaded it.

We were able to work alongside Washoe County Forensic and go to the Chevrolets's OBD port, which is the onboard diagnostic. It's the link towards the airbag control module for downloading. We were able to do the Chevrolet's airbag on scene at the evidence yard.

Q Okay. So you did obtain the data from both vehicles; right?

A Correct. We imaged it.

Q And did you analyze that data later?

A I did.

Q Okay. And I think you mentioned you do have training in downloading and analyzing data from an airbag control module; is that right?

A That is correct.

Q First, let's orient with the two vehicles involved in this case.

One of them was a white Chevrolet Silverado truck; correct?

A (Witness nods head.)

Q Was that the one that you referred to in your report as Vehicle Number 1?

A Correct.

Q Okay. So was Vehicle Number 2 a gray Jeep Patriot?

A Correct.

Q And did you also need to identify VIN numbers for either vehicle regarding the airbag control module data?

A That is part of the process. A lot of times -- a lot of times, depending on the newer models, it reads directly when you connect, but we always look for the VIN plate and verify it against what the software can download.

Q Okay. And so since the white truck was Vehicle 1, was the driver of the white truck identified as Driver Number 1?

A D1 in the report, correct.

Q Okay. And since the gray Jeep was identified

as Vehicle 2, was the driver of the gray Jeep identified occasionally as Driver 2?

A Correct. D2.

Q Now, I want to talk to you about the information that you downloaded from the gray Jeep.

Do you recall whether the gray Jeep applied its brakes prior to the collision?

A I didn't do the download on the gray Jeep, Trooper Max Davis did, but I did read it. Do you want me to continue?

Q Yes, if you recall.

Well, let me ask you this: Did you adopt his findings in your report?

A Yes.

Q Did you have any reason to doubt them?

A No. He actually wrote the section on the Jeep in my report. He wrote it.

Q All right.

A It's very common in our reports.

Q Did you reach a conclusion as to whether the gray Jeep applied the brakes prior to the collision?

A Yeah. We actually sat down and together watched the video and referenced it towards what the CDR stated, and the video dash camera and the CDR matched, so

there was no evidence to say that it would not have been accurate in the CR report.

Q So what was that conclusion about the brakes?

A That D2 applied braking and input steering to the left in what one could assume was to avoid the collision.

Q Okay. And D2 also took his foot off the gas; correct?

A Correct.

Q Okay. I want to move on to the white truck.

You utilized the software from Bosch to analyze the crash data from the white truck's airbag control module; right?

A That is correct.

Q And you personally downloaded and analyzed that data?

A Correct.

Q And in looking at that data, were you able to conclude that the throttle was decreased in the white truck prior to the collision?

A Correct. If I recall, the speed range for the Chevrolet was 52 to 66. Five seconds prior, the -- I can't remember -- I remember the throttle being -- right before impact, there was another increase in the throttle

but not significant. It could have been just trying to find -- I mean, the throttle was on and off in the five seconds prior to the collision.

Q Did the data from the white truck also show you that the brakes of the white truck were applied prior to the collision?

A That is correct.

Q And I want to talk to you about a couple of photographs.

This is what's previously been admitted as Exhibit 26.

Do you recognize that photograph?

A I do.

Q And you recognize what's here in these circles?

A I do.

Q Can you talk to me about what that is?

A We determined what that was was the braking -- the heavy braking from the Chevrolet, V1, prior to impact.

Q Okay. And what would create those marks on the road?

A Those are tire friction -- what we call skid marks, scuff marks, tire friction marks, and it is from the front tires and then the -- they don't overlap, so

it's front tires and the back tires. It's heavy braking.

Q I'm showing you what's been admitted as Exhibit 215.

Do we see the same marks in this exhibit as well?

A Faintly, yes.

Q Are there red arrows pointing to them?

A I put red arrows pointing to them just because they were hard to see.

Q Can you circle where they are?

A (The witness complied.)

Q And now I'm showing you what's been admitted as Exhibit 214.

Is this a diagram that you incorporated into your report?

A It is.

Q And here we see the blue lines; correct?

A That is correct.

Q And do those represent the heavy braking from the Chevrolet truck?

A That's correct.

Q And are they straight or curved?

A They're curved.

Q Did you come to any conclusions about why

they're curved?

A That the driver input steering to the right.

Q And was it, in fact, one of your conclusions that both drivers input steering to avoid a collision?

A That was my finding. That was my assumption.

Q And that assumption was actually your conclusion in the report?

A That is correct. Based on roadway markings and the CDR report, it all coincided with the conclusion that both drivers applied braking and steering in an attempt to avoid.

Q Okay. And was it also based on the damage to the vehicles?

A That's correct. The angular collision where the cars met.

MS. GROSENICK: Pass the witness, Your Honor.

THE COURT: Thank you so much.

Ms. Rosenthal.

MS. ROSENTHAL: Thank you, Your Honor. We have no questions for this witness.

THE COURT: Thank you so much.

Mr. Prengaman.

MR. PRENGAMAN: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. PRENGAMAN:

Q Good morning.

A Good morning.

Q You came to the conclusion, after your investigation, that the D1 driver, Driver Williams, was at fault as he decided to enter the wrong side of Interstate 80 causing the collision?

A That is correct.

MR. PRENGAMAN: Thank you. No further questions.

THE COURT: Ms. Grosenick.

MS. GROSENICK: No further, Your Honor.

THE COURT: Thank you so much.

Trooper, thank you very much for your testimony.

Ladies and gentlemen of the jury, we're going to take a short recess. During this recess you are not to discuss or communicate with anyone, including other jurors, in any way regarding this case or its merits either by phone, voice, email, text, Internet, or other means of communication or social media. You are not to read, watch, or listen to any news or media accounts or commentary about the case, do any research such as

consulting dictionaries, using the Internet, or using reference materials, make any investigation, test the theory of the case, re-create any aspect of the case, or in any other way investigate or learn about the case on your own, and you are not to form or express any opinion about the case until it's finally submitted to you.

Thank you.

(A recess was taken.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Counsel, I'd like you to bring in Mr. Sagrero.

Mr. Picker, Ms. Rosenthal, I'd just like him to sit in the seat before we swear him in or anything. Mr. Picker, ask him a few questions, and, Ms. Escobar, just to test the microphone and headset and make sure everything is going smoothly.

THE INTERPRETER: Thank you, Your Honor.

Can I instruct him how to put that on?

THE COURT: Yes, please.

THE INTERPRETER: Your Honor, the mask?

THE COURT: He doesn't need to wear the mask. He needs to be seated.

THE INTERPRETER: Your Honor, we can hear each

other just fine. Thank you very much.

THE COURT: Go ahead and take your seat.

Mr. Picker.

MR. PICKER: Good morning. Could you please state your name and spell it.

THE WITNESS: My name is Faustino Sagrero, F-a-u-s-t-i-n-o S-a-g-r-e-r-o.

THE COURT: Now, Ms. Escobar, when Mr. Picker asked that question, you translated it through the headset?

THE INTERPRETER: Yes.

THE COURT: Mr. Picker, you good?

MR. PICKER: Good.

THE COURT: Any objection to leaving the witness right where he is, bring the jury out, swear the interpreter, and we'll go from there?

MR. PICKER: No. That's more efficient. Thank you.

(The following proceedings were held in the presence of the jury.)

THE COURT: Mr. Picker.

MR. PICKER: Thank you, Your Honor. We'd call Faustino Sagrero.

THE COURT: I'm going to ask Ms. Clerk first to

swear in Mr. Sagrero.

Ms. Clerk.

(The witness, Faustino Sagrero, was sworn through the interpreter.)

THE COURT: Thank you. Please be seated.

Mr. Sagrero is being assisted by an English-to-Spanish interpreter, Jessica Escobar.

Ms. Escobar, the clerk will now swear you in.

FAUSTINO SAGRERO,

having been first duly sworn through the previously sworn English-Spanish court interpreter, Jessica Escobar, was examined and testified as follows:

THE COURT: Thank you so much.

Mr. Picker.

MR. PICKER: Thank you.

DIRECT EXAMINATION

BY MR. PICKER:

Q Good morning, Mr. Sagrero.

A Good morning.

Q Could you please state your name and spell it.

A Yes. Faustino Sagrero, F-a-u-s-t-i-n-o

S-a-g-r-e-r-o.

Q Mr. Sagrero, I don't want to embarrass you in any way, but do you speak English?

A (In English) Yes.

Q Do you understand English?

A (In English) Yes. I think, like, 75 percent I understand.

Q And you have an interpreter here today so you understand everything that's going on; is that right?

A (In English) Yes. Because I think more comfortable to understand everything.

Q Thank you.

I'd like to take you back to February 22nd of last year.

Do you recall that day?

A (In English) Yes.

Q Prior to that day, had you ever been to the Bob & Lucy's Bar on Oddie Boulevard?

A (In English) Yes.

Q And did you go on that day, February 22nd of 2020?

A (In English) Yeah. I remember exactly.

Q I'm going to show you Exhibit 1, Camera 4, the file that ends in 1025.

Do you see the screen in front of you?

A (No audible response.)

Q You have to answer out loud. Do you see it?

A (In English) Yes.

Q Do you recognize it?

A (In English) Yes.

Q Is that Bob & Lucy's?

A (In English) Yes, sir.

Q And those are the front doors?

A (In English) Yes.

THE COURT: Mr. Picker, if we can wait until the interpreter responds.

THE INTERPRETER: Your Honor, this is the interpreter speaking. I wonder, would it be possible, if Mr. Sagrero wants to answer in English, to place the microphone in front of him. I'm not sure if the court reporter will be comfortable with that.

THE COURT: Mr. Picker.

MR. PICKER: That would be fine, Your Honor.

THE INTERPRETER: Mr. Sagrero is saying it's better to hear in Spanish.

BY MR. PICKER:

Q Mr. Sagrero, if there's anything that I ask that you don't understand, please ask the interpreter to

translate for you. Otherwise --

THE INTERPRETER: Just to clarify, I will continue to interpret everything for him, but since his answers are in English, it might be easier for you to hear him directly.

MR. PICKER: Thank you. I'm trying to eliminate confusion.

BY MR. PICKER:

Q Do you see on the screen that is Bob & Lucy's, and that is the front door; is that correct?

A Of course, yes.

Q Now, you see up here this part that I've circled?

A (In English) Yes.

Q That's the time of day on the screen. Do you recognize that? Do you see it?

A (In English) Yes, sir.

Q Now, I'm going to play it forward, and I'm going to stop it right here at 6:18:10.

(Video recording played.)

BY MR. PICKER

Q Do you recognize who came in the front door?

A (In English) John.

Q Was John already there when you arrived that

morning?

A He was not there when I showed up.

Q He was not there when you showed up. So you would have shown up before this.

Let me rewind.

(Video recording played.)

BY MR. PICKER:

Q Do you know about what time you arrived at Bob & Lucy's?

A (In English) Between 6:00, 6:30 in the morning.

Q Okay. Then let me go forward starting at 6:20:18.

(Video recording played.)

BY MR. PICKER:

Q Is that still John that's sitting at the bar?

A (In English) Yes.

Q Do you know this person who just walked in?

A (In English) No, no.

THE INTERPRETER: The interpreter would like to add that he said in Spanish, "I can't make him out."

BY MR. PICKER:

Q Starting at 6:24:10, do you recognize either of these persons?

A (No audible response.)

Q What was that?

A Joshua and me. That's me and Joshua.

THE INTERPRETER: For the clarity of the record, the interpreter heard the witness say, "Joshua and me."

BY MR. PICKER:

Q So that was you and Joshua arriving together?

A Yes.

Q So this is 6:24:12 when the two of you come in? Does that look right?

A (In English) Yes.

Q And just so the jury is clear -- and you can use your finger and circle on the screen -- can you circle which one is you?

A (The witness complied.)

Q How long were you at Bob & Lucy's that morning?

A (In English) After that moment, I think around 45 minutes.

Q Do you know someone by the name of Steve Sims?

A (In English) Yes.

Q And you know him by sight?

A (In English) Yeah. I know -- I talk sometimes with him. Yes, I know. I know him.

Q Did you see him that morning at Bob & Lucy's?

A (In English) Yes.

Q When you arrived at 6:24, did you see him in the casino area of the bar?

A (In English) Yes.

Q Was he with anybody?

A (In English) That one chick.

Q Okay.

THE INTERPRETER: The witness said, "That one chick."

BY MR. PICKER:

Q Were they involved in a conversation, or what were they doing?

A (In English) I saw them walk to the bar -- from the gamble area to the bar, and that's it.

(Through interpreter) I saw them walk from the gamble area to the bar, and that's it. Just walking.

Q Could you hear them when they were walking through?

A Only one thing. I hear the woman -- the woman --

MR. PRENGAMAN: Objection. Hearsay.

THE COURT: Mr. Picker, objection, hearsay.

MR. PICKER: That's fine. I just asked him if he could hear them.

BY MR. PRENGAMAN:

Q So you only heard the woman one time?

A (In English) Yes.

Q Was that while they were sitting down or when they were somewhere else?

A No. They were by the bar.

Q Over by the bar.

You could see Steve Sims and this woman together, is that correct, when they were in the casino area?

A (In English) Just one time by the bar.

Q You didn't see them together in the casino area?

A (In English) No.

MR. PICKER: Okay. Thank you. That's all the questions I have.

THE COURT: Thank you, Mr. Picker.

Ms. Grosenick. Ms. Hickman.

MS. HICKMAN: Thank you.

CROSS-EXAMINATION

BY MS. HICKMAN:

Q Good morning.

A (In English) Good morning.

Q Mr. Sagrero, do you go to Bob & Lucy's often?

A (In English) Every day.

Q Every day.

So between February 22nd of 2020, which is what we're looking at on the video, and today, you've been at Bob & Lucy's; right?

A (In English) Yes.

Q And are you usually at Bob & Lucy's around the same time as we see in this video?

A (In English) No. I'd say different time.

Q Okay. But it's fair to say you're there almost every day?

A (In English) Yes.

Q Okay. How many times did the Sparks Police Department come talk to you about this case?

A (In English) The only -- only in the day, and that's it.

Q Okay. So they've only talked to you one time?

A Yes.

MS. HICKMAN: Thank you. I have no further questions.

THE COURT: Thank you, Ms. Hickman.

Mr. Prengaman.

MR. PRENGAMAN: No questions. Thank you, Your

Honor.

THE COURT: Mr. Sagrero, thank you very much, sir. You are excused.

THE WITNESS: (In English) Appreciate it.

THE INTERPRETER: I appreciate it. Thank you.

THE COURT: Ladies and gentlemen, we're going to take another recess, during which you must not discuss or communicate with anyone, including fellow jurors, in any way regarding the case or its merits, either by voice, phone, email, text, Internet, or other means of communication or social media, read, watch, or listen to any news or media accounts or commentary about the case, do any research, such as consulting dictionaries, using the Internet or using reference materials, make any investigation, test a theory of the case, re-create any aspect of the case from any other way, investigate or learn about the case on your own, and you must not form or express any opinion about the case until it is finally submitted to you.

Thank you. We'll see you after the recess.

(A recess was taken.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Mr. Picker, Ms. Rosenthal, do you

have additional evidence to present in this case?

MR. PICKER: We do not, Your Honor.

THE COURT: Thank you, Mr. Picker.

Ms. Hickman, Ms. Grosenick, any additional evidence to present in Mr. Williams' case.

MS. HICKMAN: No, Your Honor. Thank you.

THE COURT: I will begin with Ms. Norman.

Good morning.

DEFENDANT NORMAN: Good morning.

THE COURT: Would you please stand.

How are you this morning?

DEFENDANT NORMAN: I'm good. How are you?

THE COURT: I'm very well. Thanks.

Ms. Norman, I'm going to have the clerk swear you in.

DEFENDANT NORMAN: Okay.

(Defendant Norman was sworn.)

THE COURT: Ms. Norman, have you taken -- I want you to understand this is the standard canvass that the Court conducts with regard to someone's right to testify such as yourself.

Do you understand that?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Have you taken any medication in

the last 24 hours?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: A little louder.

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Can you tell me what that is?

DEFENDANT NORMAN: Tylenol, Lexapro, and Trileptal.

THE COURT: What's the last one?

DEFENDANT NORMAN: Trileptal.

THE COURT: Trileptal.

I know what the Tylenol would be for. What are the other two medications?

DEFENDANT NORMAN: Trileptal is an antipsychotic for bipolar, and Lexapro is for anxiety and depression.

THE COURT: How long have you been taking those medications?

DEFENDANT NORMAN: I would say about a year, since I've been in here.

THE COURT: Do they help you?

DEFENDANT NORMAN: Yes, they do.

THE COURT: Anything about taking those medications that at all impairs your ability to understand what's been going on in this trial or what's

going on today?

DEFENDANT NORMAN: No, ma'am.

THE COURT: If that changes during the course of my conversation with you this morning, would you be sure and let me know?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Are you under the care of a physician or a psychiatrist?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Is that as a result of the fact you need the prescriptions to take medication?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Any other reason for being under the care of a physician or a psychiatrist besides the medications?

DEFENDANT NORMAN: No, ma'am.

THE COURT: Okay. You've been here every day?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Have you been able to hear every witness testify in this case?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Now, modifications have been made to the physical courtroom setup, including the installation of various Plexiglas barriers in certain

ways, the use of microphones, to address COVID-19 concerns, and the witnesses have all been allowed to lower their masks when they've testified; right?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Were you able to hear each witness as they testified?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Were you able to hear the questions that were asked by counsel of the witnesses?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: I saw you throughout trial at times conferring with counsel.

Have you been able to confer with counsel, both in the courtroom and outside of the courtroom, about witness testimony, about the answers that were provided and the questions that have been asked?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Did you receive copies of the discovery materials produced in this case?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Were you able to review all of the discovery materials?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: After reviewing the discovery

materials, were you able to confer with your counsel?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: And are you satisfied with the services that they have provided you?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Have they answered all of the questions you had with regard to this case satisfactorily?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Thank you.

Mr. Picker, Ms. Rosenthal, is there any question in your mind about your client's competency?

MR. PICKER: No, Your Honor.

THE COURT: Ms. Rosenthal.

MS. ROSENTHAL: No, Your Honor.

THE COURT: Thank you so much.

Ms. Norman, you understand under the Fifth Amendment to the Constitution, you have a constitutional right not to testify. Conversely, you have a right to testify.

Do you understand that you should never waive a constitutional right without having had an opportunity to speak with your counsel?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Have you had an opportunity to speak to Mr. Picker and Ms. Rosenthal about exercising your right to testify or, conversely, exercising your right not to testify?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Have you had enough time to talk to counsel about this?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Do you realize that if you do not testify, I will instruct the jury they are to infer nothing by the exercise of that right, that they are not even to consider it or discuss it during their deliberations?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Conversely, do you understand that if you do testify, you would be subject to cross-examination by the State's attorney?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: I'm not familiar with your background so I don't know if there are qualifying events, but if there were and you testified, the State would be allowed to ask you about them.

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: This is the risk of testifying.

Do you understand that?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Having balanced these risks and having sought and received the advice of counsel, have you made an independent decision about whether or not you wish to testify in this case?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: And based upon all of this that you and I have discussed today, what is your decision?

DEFENDANT NORMAN: I'm not going to testify.

THE COURT: You are not going to testify?

DEFENDANT NORMAN: No.

THE COURT: Was your decision made without any sort of coercion, threats, or promises?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Ms. Norman, do you have any questions for me about that decision?

DEFENDANT NORMAN: No, ma'am.

DEFENDANT NORMAN: Okay. Thank you very much. Can you pass the microphone to the next table.

DEFENDANT WILLIAMS: I have my counsel's.

THE COURT: Thank you.

Good morning, Mr. Williams.

DEFENDANT WILLIAMS: Good morning, ma'am.

THE COURT: How are this morning?

DEFENDANT WILLIAMS: I'm fine.

THE COURT: Excellent. I'm going to have our court clerk swear you in.

DEFENDANT WILLIAMS: Yes, ma'am.

(Defendant Williams was sworn.)

THE COURT: Mr. Williams, have you taken any medication in the last 24 hours?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Can you tell me what that is?

DEFENDANT WILLIAMS: Ibuprofen, Remeron, and a natural herb medicine.

THE COURT: A natural herb medicine?

DEFENDANT WILLIAMS: Melatonin.

THE COURT: Melatonin?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Tell me what you're taking the ibuprofen for.

DEFENDANT WILLIAMS: For my injuries for my legs.

THE COURT: So discomfort? Pain?

DEFENDANT WILLIAMS: Yes.

THE COURT: What are you taking the melatonin for.

DEFENDANT WILLIAMS: To help me sleep at night.

THE COURT: And then the other drug is Remfry?

DEFENDANT WILLIAMS: Remeron.

THE COURT: What are you taking that for?

DEFENDANT WILLIAMS: For -- to help me sleep at night with my anxiety.

THE COURT: How long have you been taking these medications?

DEFENDANT WILLIAMS: I believe about seven to eight months.

THE COURT: Anything about taking those medications that at all impairs your ability to understand what's been happening in this trial or what's going on here today?

DEFENDANT WILLIAMS: No, ma'am.

THE COURT: If that changes during the course of my conversation with you this morning, would you be sure and let me know?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Aside for the purpose of taking medication, are you otherwise under the care of a physician or a psychiatrist?

DEFENDANT WILLIAMS: No, ma'am.

THE COURT: Have you heard each witness testify

in this case?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: You have been present here every day; correct?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Modifications have been made to the courtroom setup, including the installation of Plexiglas, the use of masks, microphones, to address COVID-19, and each witness who has testified has been allowed to lower their mask; is that correct?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Were you able to hear each witness as they testified?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Were you able to hear all of the questions asked by counsel?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Now, during the course of trial, whether it's here in the courtroom or outside of the presence of the Court while you were with counsel, have you been able to talk to your counsel about witnesses' testimony and question asked and answered both before and after the testimony?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: And did you receive copies of all the discovery materials produced in this case?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: And were you able to review all of that written discovery?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: After reviewing discovery, were you able to confer with your counsel?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Did your counsel provide you satisfactory answers to all of your questions about this case, including discovery, witnesses, etcetera?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Ms. Grosenick, Ms. Hickman, is there any question in your mind about Mr. Williams' competence?

MS. HICKMAN: No, Your Honor.

MS. GROSENICK: No, Your Honor.

THE COURT: Mr. Williams, do you realize that under the Fifth Amendment to the Constitution you have a constitutional right not to testify. Conversely, you have a right to testify.

Do you understand that you should never waive or invoke a constitutional right without having a chance

to speak with your counsel?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Have you had an opportunity to speak with Ms. Grosenick and Ms. Hickman about exercising your right not to testify or, conversely, your right to testify in this case?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Have you had enough time to talk to your counsel about this?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Do you realize that if you do not testify, I am going to instruct the jury they are to infer nothing from the exercise of this right, that they are not to even consider it or discuss it during their deliberations?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Conversely, do you understand that if you do testify, you would be subject to cross-examination by the State's attorney?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Now, I'm familiar with your history and any qualifying offenses because they were the subject of a pretrial motion in this case.

Do you understand that if you testify in this

case, the State would be able to ask you about those qualifying offenses?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Do you understand that that is the risk of testifying in this case?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Having balanced these risks and having sought the advice of counsel, have you made an independent decision about whether or not you are going to testify in this case?

DEFENDANT WILLIAMS: I'm not going to testify in this case, ma'am.

THE COURT: Okay. Was your decision made without any sort of coercion, threats, or promises?

DEFENDANT WILLIAMS: Yes, ma'am.

THE COURT: Mr. Williams, do you have any questions for the Court about this decision?

DEFENDANT WILLIAMS: No, ma'am.

THE COURT: Okay. Thank you so much. You may be seated.

Mr. Prengaman, both Ms. Norman and Mr. Williams have rested.

Does the State have any rebuttal witnesses they intend to present?

MR. PRENGAMAN: The State will not call any rebuttal witnesses.

THE COURT: Counsel, it is now my intention to bring the jury back in, to first go to Mr. Picker and Ms. Rosenthal, ask if they have additional witnesses to present and have them respond, same with Mr. Williams' counsel, and then ask Mr. Prengaman if he has any rebuttal witnesses.

Then it's my intention to excuse the jury for the day, inform them that we will be working on jury instructions, and instruct them to return tomorrow morning at 8:00 a.m.

Does everyone understand that? Does anyone have any questions about that?

THE COURT: Okay. Deputy Finn.

(The following proceedings were held in the presence of the jury.)

THE COURT: Mr. Picker and Ms. Rosenthal, any additional evidence to present in your case?

MR. PICKER: Thank you, Your Honor. No, not for Ms. Norman.

THE COURT: Thank you so much.

Ms. Grosenick, Ms. Hickman, anything additional to present as to Mr. Williams?

MS. HICKMAN: Thank you, Your Honor.

On behalf of Mr. Williams, we also rest.

THE COURT: Mr. Prengaman, does the State intend to call rebuttal witnesses?

MR. PRENGAMAN: No rebuttal, Your Honor.

THE COURT: Thank you so much.

Ladies and gentlemen of the jury, we've come to the point in the case where the presentation of evidence has ended. Counsel and I are now going to spend some time working on jury instructions, and as a result of that, I'm going to release you for the rest of the day. I do need you back here tomorrow morning at 8 o'clock for the reading of the instructions and for closing arguments.

As a suggestion, I know, as you know, with COVID-19, we will not be able to provide food and snacks. Your day may be long tomorrow. I anticipate deliberations will begin, so I want you to think about maybe bringing some extra food and snacks and drinks for yourself. All right.

Either way, thank you very much for your service today. You are released until tomorrow at 8:00 a.m.

During this recess you must not discuss or

communicate with anyone, including fellow jurors, in any way regarding the case or its merits, either by voice, phone, email, text, Internet, or other means of communication or social media. You must not read, watch, or listen to any news or media accounts or commentary about the case, do any research such as consulting dictionaries, using the Internet, or using reference materials, make any investigation, test the theory of the case, re-create any aspect of the case or in any other way investigate or learn about the case on your own, and you must not form or express any opinion regarding the case until it is submitted to you.

Thank you very much, ladies and gentlemen. We'll see you tomorrow morning at 8:00 a.m.

(The jury was excused.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Go ahead and be seated, Counsel.

Can you make sure that door is closed, Deputy Coss.

Thank you.

Counsel, I'm going to go get my binder, and we'll commence the discussion with respect to jury instructions. As I informed you originally, your clients

are free to stay, or if they want to be excused, I need you to tell me that they have been informed of what's going to happen and they've requested to be excused and you have no objection to that.

Ms. Hickman, Ms. Grosenick, will Mr. Williams be staying during jury instructions?

MS. HICKMAN: Your Honor, he has asked to say.

THE COURT: Thank you.

Mr. Picker and Ms. Rosenthal?

MR. PICKER: Your Honor, Ms. Norman would prefer not to be here.

THE COURT: Okay. And, Mr. Picker, you fully advised her of what goes on during the discussion of jury instructions?

MR. PICKER: I have.

THE COURT: Ms. Norman, is that what you'd like to do at this point, be excused?

DEFENDANT NORMAN: Yes, ma'am.

THE COURT: Deputy Finn, Deputy Coss, I'm going to take a few minutes off the record and grab my belongings.

Counsel, whatever it is you need to get ready so we can commence jury instructions, I'll be back in about five minutes.

MR. PICKER: Your Honor, can we actually have 15 minutes?

THE COURT: You can. That's absolutely okay.

It's 9:40. Let's come back at 10 o'clock.

MR. PICKER: Thank you.

(A recess was taken.)

THE COURT: What I was first going to do was make a record of those that have been stipulated to thus far just by reading those instructions and the first phrase or sentence in that instruction.

This is in no particular order. So the ones that the Court has received that have been stipulated to are as follows:

"Ladies and gentlemen of the jury, it is my duty as judge"; "If in these instructions any rule, direction, or idea"; If, during this trial, I have said or done anything.

The next is the Information. "The defendants in this matter, Ryan Williams and Adrianna Norman, are being tried upon an Information. An Information is a formal method accusing a defendant of a crime."

"To the jury alone belongs the duty"; "Although you are to consider only the evidence in the case in reaching a verdict"; "Intent may be proved by

circumstantial evidence"; "Neither side is required to call as witnesses all persons"; "The evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and stipulations"; "You should not decide any issues merely by counting the number of witnesses"; "A defendant in a criminal trial has a constitutional right not to be compelled to testify"; "A witness who has special knowledge, skill, experience, training, or education"; "In every crime, there must be a union or joint operation of act and intent"; "A reasonable doubt is one based on reason"; "The elements of the crime of murder are"; "Express malice is that deliberate intention to unlawfully take away"; "Murder is divided into two groups"; "Count 4 of the Information alleges three alternative theories of murder"; Murder of the first degree includes murder which is perpetrated"; "Murder committed to avoid or prevent the lawful arrest of any person"; "Murder of the second degree does not require specific intent"; "Malice aforethought as used in the definition of murder means"; "Manslaughter is the unlawful killing of a human being without malice"; "In cases of voluntary manslaughter must be serious and highly provoking injury"; "Involuntary manslaughter is the killing of a human being"; "An attempt is an act done

with the intent to commit a crime"; "The crime of burglary consists of the following elements"; "The driver of any vehicle has a duty to"; "Vehicle means every device in, upon, or by which a person or property"; "If you find that either/or both defendants committed the offenses"; "When a defendant aids and abets or participates as a conspirator"; "Count 4 of the Information in this case charges open murder"; "On arriving at the verdict in this case, you shall not discuss or consider"; "Each charge and any evidence pertaining to it should be considered separately"; "Where a person has committed an unlawful act"; "During the trial, the Court has instructed you that certain statements attributed to a particular defendant"; "It is your duty as jurors to consult with one another and to deliberate"; "Upon retiring to the jury room, you will select one of your member to act as foreperson."

Now, those are the ones I received prior to trial. During the course of trial, there have also been limiting instructions, and you've been provided copies of those limiting instructions.

The first is "You heard evidence of the alleged prior possession of a handgun by defendant Ryan Williams." Next, "You heard testimony related to text

messages Defendant Adrianna Norman"; "You heard recordings of telephone calls made by Defendant Ryan Williams."

Those are the three limiting instructions, and we'll talk about those at some point, as to whether or not the parties -- where in the order the parties want those to go.

Counsel, with that, I want to start with the guide that was prepared and provided to you last Friday in terms of headings, the first being "Direct and Circumstantial Evidence."

I have three probable instructions for direct and circumstantial evidence. Each party has provided me with one, and the way I'm going to do this, Counsel, is, first, if you have -- I doubt it -- presentation at trial has been rather continuous, so I don't know if counsel have had an opportunity to talk through these instructions again to see if there's any agreement.

Mr. Prengaman, I'm going to start with you. Your instruction begins, "There are two kinds of evidence, direct and circumstantial."

MR. PRENGAMAN: I'm sorry, Your Honor. Yes.

THE COURT: You're offering direct and circumstantial evidence?

MR. PRENGAMAN: Yes. I'm sorry, Your Honor. We have not -- there has been no discussion.

THE COURT: Okay. With regard to the State's instruction versus that one proposed by Mr. Williams and that proposed by Ms. Norman, your argument, Mr. Prengaman.

MR. PRENGAMAN: Your Honor, I would rely on the authorities cited in support of the instruction.

I think this has been a case where there's both direct and circumstantial evidence. I believe the State's instruction is more comprehensive. If the Court is referring to Ms. Norman's instruction, I believe -- is the Court referencing the instruction that begins "Before you may rely on circumstantial evidence"?

THE COURT: Yes. So Ms. Norman's begins, "Before you can rely on circumstantial evidence," and Mr. Williams' begins, "Evidence may be direct or circumstantial."

MR. PRENGAMAN: So while I think that with regard to Ms. Norman's instruction, I submit that for the reasons stated in the State's Trial Statement, that is an incorrect statement. The Nevada Supreme Court, in unpublished disposition in the case cited by the State, has specifically pointed out that that instruction is

incorrect.

THE COURT: The one proposed by Defendant Norman?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: And what about the one proposed by Mr. Williams?

MR. PRENGAMAN: And I think between the State's and defense's, I submit the State's is more comprehensive. However, I don't believe that Mr. Williams' instruction is legally incorrect. It's just the State's is more comprehensive and provides a better, more accessible explanation of circumstantial evidence.

THE COURT: Ms. Hickman.

MS. GROSENICK: Thank you, Your Honor.

THE COURT: Ms. Grosenick.

MS. GROSENICK: As to the State's, the portions we object to in the State's instruction, the first that we object to are the second --

(The reporter asked for clarification.)

THE COURT: You can put the Plexiglas in front of your counsel tables.

MS. GROSENICK: Or I can move to the podium.

THE COURT: It's your choice, but we can also

move the Plexiglas. We have three panels here that we are not going to be using anymore, Deputy Wood, these two and that one.

MS. GROSENICK: Thank you, Judge.

THE COURT: Then if we can appropriate one from somewhere else for Ms. Rosenthal and Mr. Picker, so we can do two on each table.

That one is extraordinary large, so that can maybe go in front of Ms. Hickman and Ms. Grosenick. We can put the other two in front of Mr. Picker and Ms. Rosenthal.

(A discussion was held off the record.)

MS. GROSENICK: Thank you, Your Honor.

So the sentence in the State's instruction that begins, "Direct evidence is direct proof of a fact such as testimony of an eyewitness," that's confusing because eyewitness testimony can also be testimony that is actually circumstantial in nature.

Then the fourth sentence says, "Such evidence, referring to circumstantial evidence, may consist of any acts, declarations, or circumstances of the crime." That really doesn't say anything. I mean, that doesn't really clarify what "circumstantial" is, whereas in Mr. Williams' instruction, it's, I think, very clearly

laid out from the Ninth Circuit instructions, "Direct evidence is direct proof of a fact, which could come from testimony by a witness about what that person saw or heard or did, as opposed to circumstantial evidence, which is proof of one or more facts that lead to potentially a finding of another fact."

And then, also the paragraph on line 7 through 9, "If you are satisfied of the defendant's guilt beyond a reasonable doubt, it matters not," that sentence puts an undue emphasis on finding guilt and is not neutral. And so Mr. Williams' instruction is shorter, but I also think it's clearer and less confusing for the jury.

THE COURT: Ms. Grosenick, what do you think about those last two sentences in the State's proposed: "It is for you to decide whether" and "You should not be concerned with"?

MS. GROSENICK: I think that's an accurate statement of law.

THE COURT: Okay. Thank you. Thank you very much.

Ms. Rosenthal and Mr. Picker.

MS. ROSENTHAL: Thank you, Your Honor.

We would join in Mr. Williams' objections to the State's proposed instruction, and our instruction is

meant to be in addition to one of the other instructions, and we would submit that it is an accurate statement of law. It's not meant to replace one of them but to be a supplement to.

THE COURT: Mr. Prengaman, if you could again, for me, make a record with regard to Ms. Norman's proposed instruction.

MR. PRENGAMAN: And, Your Honor, yes. In the State's Trial Statement, beginning on page 8, the State addresses the two reasonable -- both the defendants request a variation of the jury's reasonable interpretation instruction, and Defendant Norman submits two, of which this is one.

So on page 14 of the State's Trial Statement, I cite to Russell vs. State, which is an unpublished decision from 2021. However, the supreme court addressed that same instruction and pointed out -- so the court held in that case that the trial court did not err -- as numerous cases in Nevada have held -- did not err in refusing to give a reasonable interpretation instruction because the jury was appropriately instructed on the burden of proof.

In addition to that, as I quote, beginning at the top of page 14, the court -- so now I'm quoting from

Russell vs. State, 478 P.3d 873 -- "Moreover, appellant was not entitled to an instruction that included the following incorrect statement of law: 'Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty...'"

THE COURT: Slow down for the court reporter.

MR. PRENGAMAN: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the State has proved each fact essential to that conclusion beyond a reasonable doubt."

And then the court cites to Carter vs. State and Crawford vs. State.

And that is the first sentence of Norman's proposed instruction. Again, our supreme court has just indicated that's an incorrect statement of the law.

THE COURT: What about the statement in the Norman instruction that begins at line 6: "If you can draw two or more reasonable conclusions from the circumstantial evidence and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence"?

MR. PRENGAMAN: Your Honor, again, I would point to the argument that the State offers beginning at

page 8 of the Trial Statement. Our supreme court -- now, the defense goes back to Crane vs. State, which is quite old, and I would submit while the court did hold there was not error in that case giving it, our court has numerous times, leading up to, again, as recently as that Russell 2021 unpublished disposition, approved not giving it.

As I've quoted, there are a number of Nevada cases that have called out that it can be confusing, particularly when a jury is correctly instructed on the burden of proof.

So I would submit it for the reasons stated by the Nevada Supreme Court about it being confusing and potentially incorrect; the quotations I've indicated from Holland indicating it is confusing and incorrect, and it's not necessary.

And, in fact, I cite some California cases that talk about maybe in a purely circumstantial evidence case, but not in a case where you have mixed direct and circumstantial, which is this type of case.

So I would submit there's really no scenario I would submit under case law where it would be appropriate or necessary in this case. In other words, what does that serve in this case other than to just confuse the

issues and sort of draw the jury to a path that it doesn't need to go down, and the Court is just going to tell them there's no difference, and now you're telling them, well, there is a difference.

THE COURT: Mr. Prengaman --

Go ahead.

MR. PRENGAMAN: For all those reasons -- if the Court wants, I will go into detail, but I don't want to repeat what I've said unless the Court wants me to go through it in my Trial Statement.

THE COURT: Your Trial Statement has been filed in this case. I appreciate you making a record here where we're talking about the instructions, and I called on you to do that so it's all in place one place on the record.

Mr. Picker, Ms. Rosenthal, anything in response to Mr. Prengaman?

MS. ROSENTHAL: Yes, Your Honor.

In regards to the Court's inquiry as to the sentence that begins at line 6 of our instruction, I believe the State is not making an accurate comparison because you're giving them two options in regards to circumstantial and direct.

This is giving them, about circumstantial, the

options of guilt or innocence. Not saying that direct or circumstantial are different, but that the evidence, even if it is circumstantial, if it leads one way or the other, it should be considered a certain way. And I think that's important, and that's something that is not included in the other instructions, so we would ask that that part be stricken.

THE COURT: Thank you so much.

Ms. Grosenick.

MS. GROSENICK: Thank you.

I think that the second paragraph in Norman's instruction is also the language from the Crane instruction, so I think it would be duplicative to give both, but I am requesting the Crane instruction. So to the extent that the State's argument touches on the Crane instruction, I would like to address that, but I can wait if you want to do that one separately.

THE COURT: I'm handling these three right now under this heading. We'll get to the others.

This is what I'm inclined to do: I'm inclined to give the instruction as proposed by Defendant Williams. The first paragraph, "Evidence may be direct or circumstantial." Second paragraph, "You are to consider both direct and circumstantial evidence," adding

the last two paragraphs proposed by the State.

The first paragraph at line 10 of the State's instruction is "For you to decide whether a fact has been proved by circumstantial evidence" -- it's not the whole paragraph, just the lead-in sentence -- I'll finish that paragraph -- "in making that decision, you must consider all the evidence in light of reason, common sense, and experience. You should not be concerned with the type of evidence but, rather, the relative convincing force of the evidence."

So that's the way this instruction will read.

The issue that I have with the instruction that has been proposed by Defendant Norman is some of it is duplicative, obviously, of what's going to be included now in circumstantial evidence.

The problem I have, though, starts with line 6, "If you can draw two or more reasonable conclusions from the circumstantial evidence and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence."

I mean, to the extent that this is a supported statement in Nevada law, it doesn't -- and if it is, it wouldn't justify as circumstantial evidence, and I think it leads the jury to be confused about what do I do with

direct evidence, to that extent.

So we'll talk about that again. As Ms. Grosenick pointed out, what she's referring to is the Crane instruction, but for circumstantial evidence, that's how I will give it: Defendant Williams' with the last two paragraphs of the State's.

Next, statements made during police interviews. I have an instruction from the State that begins, "Statements of a defendant made during a police interview have been admitted into evidence," and that's followed by one authored by Defendant Williams which begins, "A statement made by defendant, other than at his or her trial, may be either an admission or a confession or neither."

Mr. Prengaman, are you still advancing this instruction in light of the testimony in the record?

MR. PRENGAMAN: Your Honor, only -- the State believes it's up to the defense. If the defense wants the instruction, I think Nevada law entitles them to such an instruction, but if they're not -- if neither is requesting it, I think this is the accurate statement of the law in terms of voluntariness if either of them is requesting one. I guess the first statements from each defendant, not necessarily police contacts as to

Williams.

THE COURT: I want to make sure that that you distinguish between what's being proposed here.

The State is proposing an instruction that talks about "made during a police interview," "statements made during a police interview." The body of the instruction is really about a police interview because it talks about coercion or physical intimidation, the importance of that, but the instruction that's being offered by Defendant Williams is simply "A statement made by a defendant, other than at his or her trial, may be either an admission or confession or either."

So they're different concepts, which is why they're in the same group, because they talk about statements the defendant made, but the context is different. And I don't know, with the exception of an officer testifying, if you get consent to look at the telephone from Defendant Norman. I don't remember -- I'm racking my brain right now thinking about other statements that defendants may have made in this case in the context of a police interview.

Mr. Picker.

MR. PICKER: Your Honor, I think the only interview -- or I guess you would call it interview

comments -- came in response, at Bob & Lucy's in the parking lot, when Sergeant McNeely did ask and did intervene in discussions between Ms. Norman and Mr. Sims.

THE COURT: Okay. The interview or encounter?

MR. PICKER: Well, Your Honor, that's a good question. I think that's up to the jury to decide whether it's an interview or an encounter.

THE COURT: All right. So I view these as being somewhat different.

Mr. Prengaman.

MR. PRENGAMAN: Your Honor, so I think the defendant is only entitled to it on voluntariness, so I think -- I would submit that's the threshold determination. If a police interview or statements made to the police are admitted, the defendant is entitled to an instruction on voluntariness.

The one submitted by Williams, which they say they're not offering, but -- I think they're not independently offering, but they're saying if the Court is going to give one, they're offering this, is the way I take that -- it doesn't really address voluntariness, and that's the only reason that they're entitled to get a separate instruction regarding a defendant's statement. Again, other than the limiting instruction separate and

apart that we've talked about limiting consideration, but this instruction does not talk about voluntariness, does not address that, and the Court shouldn't single out the defendant's statements and tell them that it by itself is not sufficient for an inference of guilt or that type of language.

I submit the only issue is voluntariness, and I don't believe Ms. Norman's police encounter qualifies because --

THE COURT: As?

MR. PRENGAMAN: -- as a police interview because she was making -- again, I just want the Court to be clear. If the defense is claiming -- in particular Norman, if they're claiming that they're entitled to a voluntariness instruction, that's why I'm offering this. I would submit that that is not a police interview because those were spontaneous statements made by Ms. Williams.

Now, the thought that she was in the course of being detained, as we can see on the body camera footage, however, there is no questioning by the officer. In fact, he was trying to get her to stop talking, and she was making spontaneous statements and engaging with Mr. Sims.

So I would submit those do not qualify because it's not a police interrogation, and the Court should not give the instruction, but if Ms. Norman is going to argue the Court should give one, voluntariness is what should be addressed in such an instruction, and this is the correct one, Your Honor.

THE COURT: Okay. So there's that issue about whether or not there's a police interview. I agree it wasn't a police interview. It was an encounter.

A police interview, to me, and the reason voluntariness is an issue is there are certain circumstances regarding the classic interview where voluntariness is an issue, but this was an encounter in a parking lot.

So, Ms. Grosenick, I am interested in Defendant Williams' position about, in light of the Court's statements, whether or not the State's instruction needs to be offered and included -- excuse me -- needs to be included because it's specific to a police interview.

MS. GROSENICK: Your Honor, the State's instruction should not be included. Voluntariness of a statement to law enforcement is not an issue that was raised in this case, and I think that it would just be confusing to the jury. It would not be narrowly tailored

to the facts in this case. It's not something that's even at issue.

Mr. Williams had intended to not offer his instruction at all but merely offer it as an alternative to the State's. However, at this point we are offering it as an instruction.

To the State's argument that it's not appropriate to single out any evidence and explain to the jury things about it, I disagree with that. That's what we do with jury instructions all the time, is help the jury understand what to do with evidence. They should not be expected to be legal experts or make legal inferences, and that's from Brooks vs. State, 124 Nev. 203, 211, from 2008.

And the jury should be advised of relevant legal principles. The jury can consider whether statements made by either defendant during this trial were confessions or admissions or neither, and they should be told that it is up to them what to do with those statements.

I'd also point out that Mr. Williams' instruction was taken verbatim from another case in this district given just a year or two ago in State vs. Frederick Borden, CR18-0034, the instruction which I

believe was included with our memorandum.

THE COURT: It was.

So, Ms. Grosenick, let me clarify something.

If there are no police interviews in this case -- and I take it from your statements that's the position of Mr. Williams -- and the Court is not going to give Mr. Prengaman's or the State's proposed instruction regarding police interviews, is it Mr. Williams' intent to continue to offer the instruction regarding admissions and confessions?

MS. GROSENICK: Yes.

MR. PRENGAMAN: May I address that at the appropriate time, Your Honor?

THE COURT: Yes, you may, of course.

MR. PRENGAMAN: So if that's the case, Your Honor, I do object to this instruction because if there's no interview being considered, it doesn't matter. Why would we tell the jury it's an admission or confession? There's no legal weight or attachment to that.

Again, apart from taking the voluntariness statement out of the equation -- we're not going to talk to the jury about it -- there's no legal weight to be attached to whether it's an admission or confession. Again, that only matters for voluntariness, so why would

you single that out and inject this issue of suggesting to the jury you need to determine whether what you've heard is a confession?

Because that's basically what this says is that, ladies and gentlemen, there's a difference between an admission and a confession, but we're not going to tell you why it matters or how you should determine its weight. So this is misleading because it suggests they have to determine something they don't have to. They can just hear the statements.

Again, apart from voluntariness, what does the jury do? They hear evidence that the defendant's statements came in as any other evidence. They just need to decide, based on the circumstances, how much weight to attach. They don't need to decide whether it was an admission or confession. So this is really confusing in that it tells them to do something when there's no legal basis for this.

The Brooks case cited is merely for a separate general proposition about jurors not being legal experts. It doesn't support this instruction. And I'm not familiar with the Borden case. I don't know what the issues were in that case. I don't know if voluntariness was an issue in that case, so I object to that as being

any basis for -- there's no authority there, and just saying that it was given in a different case with different facts is not, I would submit, even persuasive.

So this is confusing, there's no legal justification for making the distinction for the jury outside of, again, the context of voluntariness, about admission or confession.

THE COURT: Thank you, Mr. Prengaman.

Ms. Grosenick, before I get to you, Ms. Rosenthal, your team, anything with regard to this instruction?

MS. ROSENTHAL: Your Honor, we will submit to the Court. We don't believe that the State's is necessary.

THE COURT: I'm sorry. You don't believe that --

MS. ROSENTHAL: -- that the State's is necessary. I believe it's confusing, as I believe we're all in agreement that no type of police interview or confession was presented to the jury.

And then we'll defer to the Court as to related -- I believe the other one relates to Mr. Williams and not necessarily to Ms. Norman.

THE COURT: Ms. Rosenthal, thank you.

Ms. Grosenick, anything else?

MS. GROSENICK: I just wanted to address the point that the State is arguing that this instruction is not relevant to anything in the case, but the State did introduce out-of-court statements by both Ms. Norman and Mr. Williams, and so it is relevant to evidence introduced in the case.

I would also note it appears to be a fairly neutral instruction. In fact, the language regarding what an admission is and what a confession is I think actually helps the State, so I'll just add that to my argument.

THE COURT: Thank you.

I agree with Ms. Rosenthal. I don't think that there have been police interviews or confessions in this case, and as a result of that, they're just statements right now in the record with regards to -- that either Ms. Norman or Mr. Williams may have said in this case.

I don't think either one of these instructions needs to be given. There are no police interviews. That's the State's instruction. There are no confessions. That's half of or at least a significant portion of the instruction proposed by Mr. Williams. Otherwise they are just statements, and if someone wants

to offer an instruction just based on statements or something you view as an admission, I'll take a look at that, but I'm not inclined to give either one of these because I don't think they reflect what happened in this case.

Okay. Next category is "Inconsistency or Discrepancy." The State is offering an instruction that begins, "Inconsistencies or discrepancies in the testimony of a witness," and Defendant Norman has offered an instruction that is "You alone must judge the credibility or believability of a witness."

Mr. Prengaman, with regard to the State's instruction that was proposed by Ms. Norman?

MR. PRENGAMAN: Just so I'm clear, Your Honor, would you -- if you would, could you read the sentence of the Norman instruction?

THE COURT: It's a two-page instruction, and it has numerous bullet points that start on the first page and go onto the second page, and it starts, "You alone must judge the credibility or believability of the witness."

MR. PRENGAMAN: Your Honor, so the State's instruction is intended to be a supplement to the general instruction on credibility. I think it's supported by

the case law, and it's neutral and merely indicating that the discrepancies in a witness's testimony in and of themselves have to be considered with the rest of the evidence and recognizing, as the cases do, that that is not a common occurrence.

As I look at the Norman instruction, I would submit this is duplicative of what I believe is the agreed-upon instruction about judging credibility. I would submit that this goes beyond what the case law supports. In other words, it's too detailed; it's too specific.

I think it's certainly, under case law, appropriate to give general guidance, but, really, this is, again, too specific and too directed towards -- I think if you read this, it's directed towards evidence in the case, so I would submit that this is, again, cumulative given the other instruction.

THE COURT: Okay. Mr. Prengaman, thank you so much.

Ms. Rosenthal, with regard to the instruction being offered by the State versus that being offered by Ms. Norman.

MS. ROSENTHAL: Your Honor, I believe we all have stipulated to a proposed jury instruction that falls

under this. Ours is more meant to be in addition to to help explain a little more than the one -- in addition to the one that was stipulated to, not to take it away.

THE COURT: Okay. Thank you so much.

Ms. Grosenick, Ms. Hickman, anything?

MS. GROSENICK: Yes, Your Honor. We object to the State's proposed inconsistencies instruction. Frankly, the State just argued that we should not be expanding on what the jury is to do with the evidence or testimony by witnesses, and this instruction contravenes that position, but, more importantly, it's duplicative of the stipulated instruction on the duty to determine the credibility of witnesses that is already being stipulated to by the parties.

My other issue --

THE COURT: Take me to that instruction. That's number 6. Let's take a look at that.

That's the one that begins, "To the jury alone belongs the duty of weighing the evidence"?

MS. GROSENICK: Correct. And it's Instruction Number 6 from the packet of the State's instructions that are being stipulated to.

THE COURT: Okay. Thank you.

Anything else?

Go ahead.

MS. GROSENICK: Yeah. My other objection to the State's version is that it does put -- it attempts to minimize inconsistencies by focusing on innocent misrecollection, and in that sense it is not neutral.

THE COURT: Okay. This is the way I see it: I am going to give the State's instruction simply because it's supported by Nevada law. It's an instruction that I know has been given time and again in the Second Judicial District.

I'm not going to give the one proposed by Defendant Norman. There are a number of things about this instruction that I think are problematic.

Did the witness -- for example, to ask did the witness understand the question and answer them directly? To me, that's asking to get inside the witness's head. They may have answered a question directly, but whether or not they understood it is only something the witness would know. There are a couple of other issues in this instruction that raise the same issue about what the jurors could reasonably know. So I'm not going to give the one proposed by Mr. Norman, but I am going to give the one proposed by the State.

Next category is "Every person charged with

commission of a crime is presumed innocent."

Mr. Prengaman, I only have one question for you: The three instructions are identical, except for the defense has added -- Defendant Norman and Defendant Williams offer the same instruction. The only thing they've added to the State's instruction is "If the prosecution fails to do so, the defendant is entitled to be acquitted."

MR. PRENGAMAN: Your Honor, I don't oppose that. I would just ask that the last sentence be put on -- include the statute. I thought I had said the statute earlier in the presumption of innocence instruction, but it's NRS 175.191. I would just ask that the last sentence be -- I don't think it says, "If the prosecution fails to do so." I think it says something more neutral about the evidence. I would just ask that it reference 175.191, and then I have no objection to the defense version of that.

THE COURT: What 175.191 reads is this: "A defendant in a criminal action is presumed to be innocent until the contrary is proved" -- we have an instruction on that -- "and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted."

Okay. Ms. Grosenick.

MS. GROSENICK: Your Honor, I think that that last sentence verbatim from the statute is somewhat confusing, so the defense provided a different version of that. It's not identical to Blake vs. State, but in that case the entire instruction included, "If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty." So that was simplified.

And then I believe we cited the Frederick Borden case -- Borden, B-o-r-d-e-n -- in this district and to the language from there so that it's less confusing than what the statute actually says.

But I think that the holding in Blake, which is 121 Nev. 779, 799, that indicated that that final sentence that was left out of the State's instruction was necessary to make the instruction complete and accurate.

THE COURT: The instruction you provided actually cites to Crawford. Is the language in Blake the same as the last sentence proposed by Mr. Williams?

MS. GROSENICK: It's not identical, Your Honor.

THE COURT: What is the sentence in Blake?

MS. GROSENICK: "If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a

verdict of not guilty."

THE COURT: "If you have a reasonable doubt as to the" --

MS. GROSENICK: -- "guilt of the defendant" --

THE COURT: -- "he or she is entitled to" --

MS. GROSENICK: -- "a verdict of not guilty."

THE COURT: Thank you, Ms. Grosenick.

You did not use that language?

MS. GROSENICK: No. Let me make sure that's right because they also address the presumption of innocence in that case as well, so let me make sure that's the right -- yes, that's correct. That's is what they held in Blake.

THE COURT: Again, they held in Blake that the last sentence --

MS. GROSENICK: -- that the last sentence needed to be given to make the instruction complete.

THE COURT: Okay. The last sentence being -- not what's on line 4 of your instruction, but the sentence, "If you have reasonable doubt as to the guilt of the defendant, he or she is entitled to a verdict of not guilty"?

MS. GROSENICK: Correct.

THE COURT: Ms. Rosenthal.

MS. ROSENTHAL: Your Honor, we believe that the last sentence should be included in some regard if the State has --

(The reporter asked for clarification.)

MS. ROSENTHAL: -- that we could submit to the Court an appropriate change, but we think that something along those lines needs to be included for the proper ruling or shall be included if asked for by the defense.

THE COURT: Say that again, Ms. Rosenthal.

MS. ROSENTHAL: Your Honor, my understanding in Crawford is that if the defense asks for such an addition, that it shall be included.

THE COURT: Thank you.

Mr. Prengaman, anything else?

MR. PRENGAMAN: Nothing further, Your Honor.

THE COURT: Okay. I'm going to give it the way it's proposed by Defendants Norman and Williams.

Next, a number of instructions. This is the murder -- there's a few things in this category: Murder in the first degree; felony murder perpetration.

I have a number of instructions that I threw together, so I will give those to you, but let's start with -- let me have you pull all these so you know which ones I think are in this category. They were provided to

you by Ms. Davies.

The first is the State's proposed instruction which begins, "Whenever death occurs during the perpetration or attempted perpetration of certain felonies." That's the one that's State's 5.

And then there are two perpetration instructions, one offered by the State, which we call State's 6, and it begins, "As applied to felony murder, the term 'perpetration,'" and the fact is that Defendant Williams has offered one that begins the same way. We're referring to Defendant Williams. We call that number 6 in the outline.

Then the State has offered what we call State 21, and this is "The State has alleged alternative theories of robbery, attempted robbery, and burglary in Counts I, II, and III," and I grouped that with what we labeled Defendant Williams' Number 7, "In order to prove either defendant guilty of felony murder based on perpetration or attempted perpetration," and then we had Defendant Williams' what I'm calling specific intent or number 8, "In order to find the defendant guilty of felony murder on the theory that a killing occurred in perpetration alleging specific intent."

And then I have two others, one which we

labeled State's Number 20, "Where the jury finds beyond a reasonable doubt that a killing occurred in the perpetration or attempted perpetration of robbery, burglary, and/or kidnapping."

And then the last one is Defendant Williams' that we labeled as 22, and this is what I would call the Mendoza instruction. "In order for you to find the defendant guilty of both felony murder," is how that one starts.

Okay. So what I'd like to begin with is the State's instruction, which is "Whenever death occurs during the perpetration or attempted perpetration."

I want to begin with Ms. Grosenick and Ms. Hickman with regard to the objection that you have to State's Number 5. This is the one that begins, "Whenever death occurs during the perpetration or attempted perpetration of separate felonies."

Importantly, the second paragraph begins at line 6, "In regard to the felony murder alternative, the State is not required to prove that the killing was committed with malice, premeditation or deliberation."

MS. GROSENICK: Your Honor, I would request that you start with Mr. Picker and Ms. Rosenthal. We initially did not object to this instruction, but they

did.

THE COURT: Thank you so much.

Mr. Picker, Ms. Rosenthal.

MS. ROSENTHAL: Court's indulgence.

Thank you, Your Honor, for that.

On Instruction State's 5, we object on line 4 and again on line 9, using the word "is" before "first-degree murder." We believe it should say, "may be first-degree murder."

THE COURT: Okay. So right there at line 4, "is" should be "may be," and then at line 9, same thing, "may be."

Okay. Thank you.

Mr. Prengaman, any objection to that change?

MR. PRENGAMAN: Yes, Your Honor. It's inaccurate. It is first-degree murder. The jury doesn't -- the jury doesn't have discretion to say if a killing occurs in the perpetration or attempted perpetration of one of the listed felonies.

We may find it is or we may elect not to. We don't have that discretion. It is. So the finding they have to make is, did it occur in the perpetration or attempted perpetration of one of those felonies, and if so, it is first-degree murder. Again, there's no

discretionary component. It's not a "may be," it's an "is."

So, again, that would be inaccurate, and I think it would suggest that -- again, that implies to the jury that there's some aspect of discretion that simply does not exist and is not supported by Nevada law.

THE COURT: Mr. Prengaman, thank you.

Ms. Rosenthal, anything in response?

MR. PICKER: Your Honor, I'll add one thing.

The reason we asked for the change is because the way this instruction is written, it appears that the Court is instructing the jury to find first-degree murder by the language. That's why we asked for "may." If nothing else, it's an inartfully written instruction in that it directs the jury to make a finding.

MS. ROSENTHAL: Your Honor, if I may propose an alternative. If the Court were to simply take out the sentence that begins at line 2, "The offenses," and all the way down to "therefore," it would still have the same effect of letting them know what the elements are. I believe the elements are written out in such a way as to express the same instruction without having the word "is."

THE COURT: I'm going to give it the way it's

been written. This is how I read 200.030: "Murder of the first degree is murder which is," going to be now paraphrased for purposes of this case, "committed in the perpetration or attempted perpetration of kidnapping, robbery, burglary."

That's what the law says, and that's what the instruction says. So I'll give it the way it's been written.

Okay. Let's go now to the one that reads -- let's go to the one that we've labeled State's 20, which is "Where the jury finds beyond a reasonable doubt that the killing occurred in the perpetration or attempted perpetration of a robbery, burglary, and/or kidnapping, each defendant was liable for the perpetrated or attempted robbery, burglary and/or kidnapping because he or she" -- it lists three -- "directly committed, aided and abetted, participated" -- "is also liable for murder of the first degree."

Ms. Grosenick, Ms. Hickman, was there an objection to this?

MS. GROSENICK: Yes, Your Honor.

Court's indulgence, please.

This is number 20 in the State's objected-to instructions; right?

THE COURT: Yes. For everyone's edification, we go to 21 next.

MS. GROSENICK: Your Honor, State's Number 20 is another one where Mr. Williams did not object to that instruction.

THE COURT: Thank you so much.

Ms. Rosenthal.

MS. ROSENTHAL: Thank you, Your Honor.

On this instruction, Ms. Norman would ask that on line 9, instead of "is also liable," "may also be liable."

THE COURT: Okay. Thank you.

Mr. Prengaman.

MR. PRENGAMAN: I'm sorry. I was having a little trouble getting there. Could you read me the first line?

THE COURT: Of course. "Where the jury finds beyond a reasonable doubt that the killing occurred in the perpetration or attempted perpetration."

MR. PRENGAMAN: Thank you.

THE COURT: And then it lists the three criteria, and what Defendant Norman is asking is at line 9 the word "is" be "may also be liable."

MR. PRENGAMAN: Your Honor, I would submit

that's the same argument that we just had, and it is liable. That's what the law says or the statute says that's what the law says.

If the jury finds -- again, it's not a "may" situation. It's not discretionary. If they participate, if they directly committed, aided or abetted or acted as a conspirator, they are liable, and, again, the jury doesn't have any discretion to say they may be liable. I assume it is not just incorrect, but it is confusing.

THE COURT: I agree with the State. The way the instruction is drafted is a correct statement of the law. That will be given.

Let's go to State Number 21. It starts, "The State has alleged alternative theories of robbery, attempted robbery, and burglary in Counts I, II, and III, respectively, as allowed by law."

I think the -- anyway, the language goes on after listing the criteria at line 9, "While the guilty verdict must be unanimous, it is not necessary that you unanimously agree upon the means or specific theory by which the offense was committed," and it goes on to say, "In order to reach a verdict as to robbery, attempted robbery, burglary, or first-degree murder for each defendant, you must unanimously agree that the defendant

is guilty of a particular offense based upon one or more of the alternative theories suggested by the State, but you do not have to unanimously agree upon a single means or theory by which a particular offense was committed."

Ms. Grosenick.

MS. GROSENICK: Your Honor, I think that is -- well, I think what the parties are trying to do here is to break this down for the jury because there are multiple theories of liability for each offense and two defendants, and so it is very confusing.

And so our objection to this primarily is that we offered a different way to break it down for the jury.

THE COURT: Is this 7 and 8? Tell me which ones those are, Defendant Williams.

MS. GROSENICK: It will be 18 --

THE COURT: 18?

MS. GROSENICK: -- 19, and 20.

So I think that lumping robbery, attempted robbery, and burglary all together with those three theories of liability, that being principal, aiding and abetting, and conspiracy, this instruction, I don't think, goes far enough to tell the jury, you know, what elements are necessary. I think we need to tell the jury, here are the elements of each offense so that they

understand that, and then here's what must be proven for each one under the three theories of liability.

So that's why ours is -- I don't necessarily object that the State's is an incorrect statement of law, but we broke ours down differently.

THE COURT: So I have your 18, and that's a conspiracy instruction. "The existence of a conspiracy need not be demonstrated by direct proof."

So take a look at that and tell me if that's what you meant.

MS. GROSENICK: I believe that's not the same one that I have. I have in 18, "In this case the defendants are accused of committing the crime of robbery under three different theories."

THE COURT: Okay. I have it. All right.

So I have "In this case the defendants are accused of committing the crime of robbery under three different theories." That's 18?

MS. GROSENICK: Correct.

THE COURT: But 19 reads the same.

MS. GROSENICK: 19 is the same but specific to attempted robbery.

THE COURT: Right. The lead-in is the same.

MS. GROSENICK: Correct.

THE COURT: So let me pull those because I had those grouped under the elements of robbery.

And your 20 is the third one you want me to look at; right?

MS. GROSENICK: Yes.

THE COURT: Okay. All right. I have them.

So 18, 19, and 20, as proposed by Mr. Williams, are intended to take the place of State's 21?

MS. GROSENICK: Yes.

THE COURT: In that order?

MS. GROSENICK: Yes.

THE COURT: So we're going to have -- this is a broader discussion. I'm going to need the other parties' instructions with regard to burglary and robbery as well.

MR. PRENGAMAN: Your Honor, for the State, the way the State has it broken down is you have the separate elements of those offenses and then instructions. In other words, instead of -- this may help.

So the way the State has it, the defense is basically proposing that for every single crime, you tell them or go over what's aiding and abetting, and then for every single offense, you give them an elements instruction, and then on top of that, you give this instruction. So you're basically telling them about

conspiracy or aiding and abetting, respectively, giving them an elements instruction that simply lists the elements of each offense, and then on top of that using a separate instruction for each that looks like this.

Now, the State has proposed that you simply instruct on the elements in each offense and then give them an instruction that defines aiding and abetting or conspiracy, as the case may be, and in that instruction it talks about the elements of conspiracy, which can generally be applied to each defendant.

So instead of giving a separate instruction that goes down the laundry list for each offense, the State has put those in two instead of three, but in order to get all those together, the Court would need the State's and the defense's elements instructions with respect to the conspiracy, aiding and abetting instruction, and then these additional ones for Defendant Williams.

THE COURT: Let's put all of these on the table, then, at the same time.

MR. PRENGAMAN: Although doing that -- as a prelude, none of these instructions that the defense is talking about address the reason for this instruction, State's 21, which is telling the jury the essential and

necessary, that they don't have to be unanimous. So the defense instructions don't include that and don't tell them that, and that is the fundamental purpose of this instruction, telling them, ladies and gentlemen, you have to be unanimous as to guilt for each offense, but you do not need to be unanimous about the theory of the case. And, again, none of the defense's instructions convey that essential concept.

THE COURT: Go ahead, Ms. Grosenick.

MS. GROSENICK: Your Honor, we won't object to that language. That is an accurate statement of Nevada law.

THE COURT: So let's resolve this.

I'm looking now at State's 21, Ms. Grosenick. Let me make sure I understand what you just said.

I'm looking at State's 21. Line 9 begins, "While a guilty verdict must be unanimous." At line 14, the next paragraph is, "The elements of the offenses and the reasonable alternative are elsewhere in these instructions," paraphrasing.

Lines 9 through 16, Defendant Williams does not object to?

MS. GROSENICK: Correct, Your Honor.

THE COURT: Ms. Rosenthal, any objection to

that?

MS. ROSENTHAL: Thank you, Your Honor.

In regards to the paragraph starting at line 9, on line 12, we would ask that it state, "each defendant," not "the defendant," because there's multiple defendants in this case, and the line above it, "for each defendant, you must unanimously agree that each defendant is guilty of the particular offense."

THE COURT: Mr. Prengaman.

MR. PRENGAMAN: Your Honor, I don't know if that's a huge issue. However, I think the State's is grammatically correct because we're saying that for each defendant you must unanimously agree that that defendant, referring to each respective defendant, so I think that's grammatically correct. I don't think it's unreasonably -- again, I don't think --

MR. PICKER: Your Honor, actually, the way that Mr. Prengaman just read it, "each defendant" instead of "that defendant." That's different than -- that's why it's confusing.

THE COURT: It's going to read, "You must unanimously agree that each defendant is guilty of a particular offense." That's the way I read it.

So no one has any objection to that language?

Now, thinking about that -- and I don't know -- obviously we're going to have a blanket discussion -- thinking about that as a stand-alone instruction that we have agreement on here, let's take a look at the rest of these.

Okay. Now, what I want to focus on, just based on what the parties have said here, is, let's take some of the others that I originally said we're going to talk about and take them off the table.

So, Ms. Grosenick, for purposes of this discussion related to the elements, if you would direct me to Williams' 18, 19, and 20.

MS. GROSENICK: Yes. In relation to only Instruction Number 21 that we're talking about here.

THE COURT: Right. Okay.

Now, I have none proposed by Norman.

Now, let's take a look at the stipulated instructions. I just want to confirm for myself we do not have -- do we have --

So we don't have any instructions in the stipulated instructions as to the elements of robbery. So let's do this: Let's start with robbery and attempted robbery.

The State has reported State's 8 regarding

robbery. Defendant Williams has proposed 9, their 9 and their 10.

MS. GROSENICK: I think it's just 9, Your Honor. It goes two pages.

THE COURT: You're right in terms of the elements, but in terms of robbery, 10 is "It's not necessary to have force or violence involved for robbery to be committed." Let's stick with the elements, then.

Okay. So with regard to the elements of robbery, the instructions proposed by the State, which is State's 8 and Defendant Williams 9, they're identical except that if you look at State's 8, the State at 5(c)(ii) and (iii) has left in "The person or property of a member of his or her family; or the person or property of anyone in his or her company at the time of the robbery," and Mr. Williams does not include those, and that's because I'm assuming they don't pertain in this case?

MS. GROSENICK: Correct.

THE COURT: So I'd be inclined to give the instruction without those elements because they don't pertain in this case.

MR. PRENGAMAN: Your Honor, I think the other difference is, in every one of the defense's proposed

elements instructions, they repeat the burden, so, in other words, they say every time that the elements must be proved beyond a reasonable doubt, and the State objected to that because it's cumulative.

THE COURT: I'm not going to do that just because I give a reasonable doubt instruction, so I'll give the State's, then, but take those two elements out that the defense has excluded.

MS. GROSENICK: Your Honor, I do have another objection to language that's both in Mr. Williams' instruction and the State's.

THE COURT: On the robbery? We're talking about State's 8 and Defendant Williams' 9?

MS. GROSENICK: Correct. On State's 8, it's lines -- I don't know about the page number. It's lines 1 through 3 on the second page of that instruction that says, "A taking constitutes robbery whenever it appears that although the taking was completed without the knowledge of the person from whom the property was taken, such knowledge was prevented by the use of force or fear." That language --

THE COURT: You have that in your instruction.

MS. GROSENICK: I do, Your Honor, but after seeing the evidence in this case, I don't think it's

narrowly tailored to the facts of this case.

And there was another difference.

THE COURT: Yes. Let me tell you what I have here. That's a good point. There's a page 2. Let's look at page 2 of the State's 8.

The paragraph that begins, "A taking constitutes robbery," which was just read by Ms. Grosenick, is the same as Defendant Williams' 9 at line 21.

The next paragraph in the State's, "The State is not required to prove the value of property taken in a robbery. However, the State must prove that some property was indeed taken," that is the same as Defendant Williams' line 25.

The next paragraph -- and I'm going to just read the first sentence of this paragraph -- "It is not necessary that the force or violence involved in a robbery be committed with the specific intent to steal property." That is the same as Defendant Williams' proposed number 10, first paragraph, lines 1 through 5. Okay. That's the same.

But then this paragraph that starts with "The determination of whether a taking was by 'fear or injury'" is the same -- that first sentence which says,

"The determination of whether the taking was by 'fear of injury, immediate or future'" -- this is where they're different -- the State says, "depends not upon the subjective courageousness or timidity of the particular victim, but instead on how a reasonable person under the circumstances would perceive the situation."

And Defendant Williams' is different. It says, "The determination of whether the taking was by fear of injury, immediate or future, is an objective one. The subjective courageousness or timidity of a particular victim is irrelevant." I think they're so similar.

MR. PRENGAMAN: May I, Your Honor?

THE COURT: Yes.

MR. PRENGAMAN: So here's what I would submit.

So they're similar except for in two respects. I would submit the word "objective" means something to lawyers, it is a particular concept, but for lay jurors, "objective" does not. I submit using the language of "a reasonable person under the circumstances." It conveys to them the objectivity in language that they're more likely to understand and access.

The second difference I would submit -- or I believe the second difference is the State includes the sentence, "You can and you should" -- and you can also

substitute "you may consider the testimony of any victim or victims, but the ultimate standard must focus on the viewpoint of a reasonable person."

I submit that's significant because the case law indicates that a juror can consider the victim's testimony as well as facts and circumstances, but, again, the ultimate standard is a reasonable person.

If you read Defendant Williams', I think it suggests that you don't even consider -- that basically the subjective courageousness or timidity -- Defendant Williams' in stating, "the subjective courageousness or timidity of a particular victim is irrelevant," suggests they shouldn't consider the subjective experience of the victim. I think that's an implication that could easily be carried to the average juror. So I think it's significant, again, supported by the case law, and that's an issue we've already pretrialed about considering the victim's testimony.

So I think, again, it should be pointed out to the jury that the standard is reasonable person. However, they may consider the victim's testimony, and, again, I think Williams suggests that they should not consider the subjective experience of the victim.

THE COURT: Okay. Ms. Grosenick.

MS. GROSENICK: I disagree with the State's characterization that Mr. Williams' instruction tells the jury not to consider the victim's point of view. We shouldn't be taking dicta from every case and giving it to the jury. I mean, the standard is an objective one, a reasonable person in that position, and then to tell them -- to highlight you can and should consider a victim's testimony, that's duplicative. It's already covered by the credibility of witnesses and the other instruction that it's up to the jury alone to weigh the evidence and what to do with it, and it does pick out and highlight the victim's point of view, and that will be confusing to a jury. So we object to that statement in the State's version.

Again, as far as where I got that wording, it came straight out of a jury instruction that's been given in this district before, and the State argued that the weight shouldn't be given to that, but I don't know why not because -- you know, jury instructions are hard. Where do we get the language? And it sure would be nice if we had some instruction we could rely on.

And I do also -- I don't know -- I think Your Honor heard me, but then we went on to the second page. I did want to make sure the Court heard --

THE COURT: I'm going to go back to that. Let's go back to that in a minute.

So let's look at the change that's been made to the State's robbery instruction thus far. It's to take out 5(c)(ii) and (iii), simply because they don't apply in this case, and we're going to talk about this paragraph that begins, "A taking constitutes," because that is Ms. Grosenick's point here, but I want to get to the paragraph that begins, "The determination."

What I'm going to do here is, as to this last paragraph, my reading of Mangerich is -- it says, "The courageousness or timidity of the victim is irrelevant." The standard is objective.

And so I'm going to insert the Williams paragraph -- actually, I can just give the Williams instruction because of that paragraph, but the one sentence I am going to insert after "the subjective courageousness or timidity of the particular victim is irrelevant," I'm going to insert the State's sentence, "You can and should consider the testimony of any victim or victims, but the ultimate standard must focus on the viewpoint of a reasonable person."

MS. ROSENTHAL: Your Honor, if I may be heard on this as well.

THE COURT: Yes, of course.

MS. ROSENTHAL: Thank you, Your Honor.

I think it should read, "You can consider," not "should." I believe it leads the jury to decide, and "should" puts more weight when they're told that it's not limited to testimony but a reasonable person's testimony.

And I believe in regards to the first part as to elements, I would ask that the Williams instruction as it's listed -- 1, 2, 3, 4, 5 -- be what's read and just the first sentence be changed out and then breaking it down into 5(a), (b), (c), etcetera.

THE COURT: So read it the way that Defendant Williams has proposed it in Defendant Williams' Number 9?

MS. ROSENTHAL: Yes, Your Honor. The first sentence, as the Court indicated, would be "The crime of robbery consists of the following elements," and then begin with the Williams instruction from there.

THE COURT: Okay. Ms. Grosenick, let's go back to "A taking constitutes robbery." This is another issue you had.

MS. GROSENICK: Yes. I propose that that's --

THE COURT: It is in your instruction.

MS. GROSENICK: It is in my instruction. After hearing the evidence in this case, I don't think it

applies here, and we should take it out so the instruction is narrowly scaled to the facts of the case.

THE COURT: Mr. Prengaman, what do you think about that? I mean, the witness testified he knew what was being taken.

MR. PRENGAMAN: I don't necessarily disagree. There was a point in the case where there could have been an issue about knowledge, but as I'm thinking through the testimony, I don't disagree necessarily that -- that hasn't been taken out, so I don't necessarily disagree with that, no.

THE COURT: The way I'm going to give the robbery instruction is this: I'm going to give Mr. Williams' instruction. I'm going to change the first sentence of his instruction to "The elements of robbery the State must prove beyond a reasonable doubt" is omitted. The sentence that goes in its place is, "The crime of robbery consists of the following elements," and then I will give it the way it's drafted by the -- in that instruction would be the following changes:

The paragraph at line 21, which begins, "A taking constitutes a robbery whenever it appears," will be deleted based upon my discussions with counsel, and the last paragraph on page 2 of the Williams instruction

at line 6, that paragraph will be given as Mr. Williams has proposed it.

I will note, Counsel, beginning with the phrase at line -- the sentence at line 8, "Therefore, fear of immediate or future injury." That to the end is the same in both instructions.

But between lines 7 and 8, after the sentence which reads, "The subjective courageousness or timidity of a particular victim is irrelevant," I am going to insert from page 2, line 16, of the State's instruction, modified to read as follows: "You can consider the testimony of any victim or victims, but the ultimate standard must focus on the viewpoint of a reasonable person." The words "and should" are out. That's up to the jury. So that's how robbery is going to read. So now we've settled the robbery instruction.

I'm taking suggestions, Counsel. Based on what you've proposed, what is the next logical one to address?

MS. ROSENTHAL: Your Honor, I believe if we go through the rest of these, attempted robbery and burglary as laid out in State's 21 were at issue.

THE COURT: So in State's 21, what I've resolved and what is unobjected to by Williams -- and I've got Defendant Norman's comments on the record -- is

lines 1 through 8, which is "The State has alleged alternative theories of robbery, attempted robbery, and burglary in Counts I, II, and III, respectively, as allowed by law. Specifically, the State has alleged that the defendants committed robbery, attempted robbery, and burglary by:"

"1. Directly committing the offenses; or.

"2. Aiding and abetting commission of the offenses; or

"3. Conspiring to commit the offenses.

"As explained in previous instructions, the State has also alleged alternative theories of first degree murder in Count IV."

So I don't view those as the elements of robbery, attempted robbery, or burglary. I view those as the theory by which all three of the offenses were committed as proposed by the State.

So, Ms. Grosenick, going to you now, you directed the Court to Defendant Williams' 18, 19, and 20.

MS. GROSENICK: Yes, Your Honor. The way I understand it after hearing more from the State is that the State's main goal was to get lines 9 through 16 in front of the jury, and that portion was to give context to that. So in light of that, I don't object to it

necessarily, but I am advocating for our proposed Sharma instructions to come in in addition.

THE COURT: Okay. So no objection --

Okay. Understanding that, Ms. Rosenthal, with regards to lines 1 through 8 of State's 21.

MS. ROSENTHAL: Your Honor, is that assuming, as we talked about, making 9 through 14 a separate instruction or leaving it as-is? Because my understanding when we talked before, the parties agreed that this section, 9 through 14, was what was -- was the part of the instruction the State wished to have read and that it on its own was appropriate. So my understanding was that the State was not wanting 1 through 8 to remain in that instruction, but if I'm wrong, I would just like some clarity.

THE COURT: That's incorrect. I want to hear from Mr. Prengaman if he is still asking for all of State's 21 to be given.

Mr. Prengaman?

MR. PRENGAMAN: It is, Your Honor. And the reason is simply to instruct the jury in the context. So the context of the alternative theories is as the Court just read it. There's three separate ways that the defendants could theoretically commit robbery, attempted

robbery, and burglary, the first three charges. There are alternative ways separate and apart from that that the defendants could commit murder in Count IV.

So this is informing the jury you can consider when you deliberate -- it's not going into detail; that's for a separate instruction to explain to the jury what those are and what they mean -- but I do want this because I think it's necessary in informing the jury when you're considering alternative theories, and, again, that the State does not have to prove you have to be unanimous as to the theory. This tells them exactly what the theories are to illuminate their deliberations so it's not confusing.

If you were to just give 9 through 16, it would -- the heart of the Schad part is there, but this case has more than the average alternatives, especially as to different offenses. In other words, while there's some overlap, I think it's appropriate to orient the jury with that context before they go into the limiting part.

THE COURT: Ms. Rosenthal, with that explanation, what is Ms. Norman's position with respect to State's 21?

MS. ROSENTHAL: Thank you, Your Honor.

So with the change of the word "each" at line

12, which we discussed, I think it might be more clear in the instruction on line 3 if it were -- the sentence beginning on line 2, "Specifically, the State has alleged that the defendants committed robbery, attempted robbery, and burglary either by directly," "or," "or." When it just says, "by," and then all three, I think it can be confusing instead of saying "either by directly committing" or this or --

THE COURT: Okay. I think that the use of "or" after phrase 1 and "or" after phrase 2 actually accomplishes that, and I agree with Mr. Prengaman that lines 9 through 14 don't make any sense without lines 1 through 8.

So I'm going to give the instruction. There is a typo on line 7. The word "the" should be before "State," and I'm going to accept Ms. Rosenthal's proposed change at line 12, which is the words "the defendants" is replaced by the words "each defendant."

Okay. So I'll give that one.

Now, let's go back.

Ms. Grosenick, I want to get to 18, 19, and 20 here as proposed by Williams.

Do we need -- let's start with 18. Let me just review this one again. Tell me how 18 works with 21

given that -- you've explained to me your position with regard to lines 1 through 8 in State's 21. Explain to me the purpose of Defendant Williams' Number 18.

MS. GROSENICK: So the purpose is to comply with Sharma, and that's Sharma vs. State, 118 Nev. 648, 658 (2002), and in that case the Supreme Court found -- the Supreme Court suggested that a single instruction properly defining all the essential elements of a crime charged would be less confusing for a jury.

THE COURT: Do you think we've not accomplished that, though, in our discussions on number 9 regarding all the elements of robbery?

MS. GROSENICK: I do not because it doesn't show the jury how to apply those elements when it comes down to defensible liability, conspiracy, and aiding and abetting.

And I recognize we're giving individual instructions on conspiracy; we're giving an individual instruction on the definition of "aiding and abetting"; we're hopefully giving some individual instructions on specific intent for certain crimes. But I think the point that the court was trying to make in Sharma is that -- well, the jury is going to get all of these instructions, they're going to have eight counts to look

at with Mr. Williams, and how do they put all those theories together? What do they actually look at to see what actually needs to be proven to prove a robbery beyond a reasonable doubt? And there are three different ways that the State can do that under principal conspiracy and aiding and abetting liability.

And so that's why I organized it that way, but I tried to follow the Sharma edict of having a single -- for a single charge with multiple theories of liability, explaining the different theories for that single charge.

Because what they may do is take the verdict forms and say, how do we find on Count I? Well, how do we know -- so there's robbery. Is the aiding and abetting relevant to that? Is conspiracy relevant to that? What are the elements?

So I think the reason it's proposed this way is to hopefully reduce the confusion to the jury of the number of charges and the number of different theories of liability under each one.

THE COURT: And so with regard to 19 and 20, also supported by Sharma, the theory is the same?

MS. GROSENICK: Correct.

THE COURT: All right. Ms. Rosenthal, Mr. Picker, your sense of Williams 18, 19, and 20?

MS. ROSENTHAL: We'll submit to the Court.

THE COURT: Thank you.

Mr. Prengaman.

MR. PRENGAMAN: Your Honor, I would submit that it will result in duplication, and for this reason, if you look at State's -- for instance, with regard to -- I just pulled mine out so I don't have the number -- but the State's aiding and abetting, which is towards the back, "Where two or more persons are accused of committing" --

THE COURT: Hold on. Let me grab mine.

"Where two or more persons are accused of committing a crime together, guilt may be established without proof..."

That instruction?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: Okay. You cite to Sharma as well.

MR. PRENGAMAN: Yes, Your Honor.

I would submit -- I would submit the following: There's a core of information about each alternative theory, aiding and abetting or conspiracy, that the Court is going to have to deal with no matter what. In other words, the Court is going to define conspiracy, it's going to have to tell the jury the circumstances in which

conspiracy liability applies, and likewise with aiding and abetting.

So the defense proposed instruction doesn't obviate the need to define what aiding and abetting liability is and tell them, again, what each one is and how it applies.

And so what the State has done is -- so you have that. You have your basic what I would call the fundamental definition of the culpability, so, here, aiding and abetting. And then it elementizes for each of the three specific-intent crimes -- I'm sorry -- for each of the two -- for the two specific-intent crimes and the one general-intent crime all together. So when the jury is reading about what aiding and abetting liability is, it then goes down and has the elements of that liability for each crime.

Now, it doesn't repeat the individual elements. In other words, it doesn't repeat that "robbery is the unlawful taking of," etcetera, because there's already a separate instruction that tells them that, but it does tell them they have to knowingly aid and abet, so, again, addressing sort of the specific intent.

That's the first one with the elements, that they do the acts which constitute the crime before doing

the crime with the intent of -- the specific intent that those crimes be committed, and then a person may also aid and abet robbery, and that's the probable consequences doctrine. So that is all together. So I would submit the benefit here is you have an elements instruction; you have an aiding and abetting instruction --

THE COURT: And a conspiracy instruction.

MR. PRENGAMAN: -- and a conspiracy instruction, and it addresses all the crimes. Again, when they're getting the doctrine, they're getting the elements of how it will apply to each offense, and it just isn't repeating the individual elements.

So you've got a total of -- for instance, for burglary, you've got the burglary main elements instruction, then you have one instruction on aiding and abetting, one instruction on conspiracy. With the defense, you'll have to have, again, the elements instruction, then you'll have to have the instruction that defines aiding and abetting liability and conspiracy liability, what a conspiracy is, the acts of one are the acts of all, that type of definition, and then you're going to have this additional elements third instruction that covers all three of them together.

So you have three -- I don't think it's

necessarily wrong, although it does repeat the individual elements all over again in one instruction in an elementized way, which is not necessarily the best way to lay it out for the jury when you're talking about elements, but it results in more instructions, and it divorces sort of the doctrine from the elements of each, in other words, whereas here you're looking at the doctrine, then you're looking at the elements of that doctrine.

THE COURT: "Here," you're pointing to the State's instruction?

MR. PRENGAMAN: Yes, Your Honor.

So I submit here you're looking at the doctrine and the elements as they apply, and they apply the same to each crime, so, in other words, they apply in the same way. But doctrine elements that apply to each set of -- repetitively saying the same thing about each but with a third instruction that is separated from the doctrine.

THE COURT: So let me do this, then.

Ms. Grosenick, I want you to take a look at your 16. We're going to start here with aiding and abetting. Our base instruction is State's 21.

I want you to take a look at your 16 on aiding and abetting and then pull out State's 17 on aiding and

abetting.

Now, the State's instruction starts out with "Where two or more persons are accused of committing a crime together, guilt may be established without proof that each person did every act constituting the offense charged," and Mr. Prengaman has cited NRS 195.020, Sharma vs. State, for that proposition.

Now, beginning with the next paragraph, which starts, "A person can be liable," and the next paragraph, "In order to hold a defendant liable for aiding and abetting," to line 11, which ends with "assist in the commission of the offense," my review of State's 17 on aiding and abetting and Defendant Williams' 16 on aiding and abetting is that they're identical.

MS. GROSENICK: Right. So State's lines 3 through 11 would be identical to Mr. Williams'.

THE COURT: Right. Mr. Williams' 1 through 9.

Now, you've added Sharma vs. State "mere presence" line. Okay? We'll get to that.

Now, with regard to the rest of the State's proposed instruction, aiding and abetting, beginning at line 11, take a look at what's in the rest of that instruction.

Is this what you're essentially getting at?

MS. GROSENICK: I don't think they're similar at all in that sense because they're organized differently; right? So the State --

THE COURT: They're organized differently. The organization is different, because you've got an instruction for each offense, robbery, attempted robbery. And I'm looking at Defendant Williams' 18, 19, and 20. You've got a different instruction for robbery, attempted robbery, and burglary.

MS. GROSENICK: If I may, Your Honor.

First, I think that page 2, line 4, where it says, "With the intent that the robbery, attempted robbery and/or burglary be accomplished" --

THE COURT: Hang on. Page 2, line 4 of what?

MS. GROSENICK: I'm sorry. The State's aiding and abetting instruction.

THE COURT: Okay. I got it.

MS. GROSENICK: Which is number 17.

I don't think that it's legally accurate that you can have the intent to fail to accomplish a crime, which is what an attempt is, and so I think the intent necessary in an attempted robbery is to complete the robbery. So I don't think that that's legally accurate, and I think that this is very confusing the way that it's

written, and it does lump together general- and specific-intent crimes.

And then I have a couple of other things to note when you are ready.

THE COURT: Go ahead.

MS. GROSENICK: So that first two lines of the State's instruction that starts, "Where two or more persons are accused of committing a crime together," I know that that language does not come directly from either -- I don't believe that comes from either source cited by the State.

THE COURT: You don't -- say again.

MS. GROSENICK: I don't believe that that language in lines 1 to 2 on page 1 of the State's aiding and abetting instruction comes from Sharma vs. State or NRS 195.020, so I object to that.

And I'll go down to lines 19 and 20 because this is related.

THE COURT: Give me just one minute.

MS. GROSENICK: That's --

THE COURT: Hold on. Ms. Grosenick, just one second.

MS. GROSENICK: Sorry.

THE COURT: Go ahead.

MS. GROSENICK: Lines 19 to 20 of the State's instruction states that "The State is not required to prove precisely which participants actually committed the crime and which participants aided and abetted," and that is a correct statement of Nevada law. However, I think where that statement at lines 19 to 20 and lines 1 to 2 can get us into trouble is it needs to be clarified that even though -- even though the State doesn't have to prove exactly who did what, they still have to establish all of the elements and that each element was, in fact, committed or proven, if that makes sense.

So I would likely not object to that language, if the State wants it in there, if we could clarify that all of the elements still must be proven.

THE COURT: Understanding that you don't agree that the first statement is supported by the statute or the case law and understanding your objection at lines 19 and 20 on page 1 and your objection at lines 4 and 5 on page 2, any other objections to State's 17?

MS. GROSENICK: None other than the ones I've already raised.

THE COURT: Now, let's take a look at Ms. Rosenthal's -- I'm sorry.

Ms. Rosenthal, what are Team Norman's objection

to State's 17?

MS. ROSENTHAL: Your Honor, we would join in the objection or comments brought up by Ms. Grosenick.

THE COURT: Okay, Counsel.

This is what I want to do with these. We've been at this almost two hours now, if my clock is right. What I'd like to do is give you all about a 45-minute lunch break. I'm going to take a look at -- let me do this before we take that break.

Ms. Grosenick, let's take -- because I want to wrap this all up at the same time, let's take a look at State's 18, which is the State's conspiracy instruction, and Defendant Williams' 17, Defendant Williams' 18 --

Here are the conspiracy instructions: State's 18, State's 19, Williams' 17, Williams' 18.

Okay. Ms. Grosenick, Defendant Williams' objections to State's 18 and State's 19, understanding that some of this is the same as what has been proposed. For example, take a look at State's 18. You see how it starts at "Conspiracy is an agreement" at line 1 and ends at the end with "of the conspiracy"? That's identical to Defendant Williams' 17, those three paragraphs.

MS. GROSENICK: Okay.

THE COURT: And then if you look at State's 19,

the two statements that are not included in Defendant Williams' 18 are the one that begins at line 2 of State's 19, "conspiracy or agreement to violate the law," that is not in Defendant Williams' 18, and then if you look at State's 19, line 7, "It is proof of conscious understanding and deliberate agreement," that line is not included in Defendant Williams' 18. Otherwise State's 19 and Defendant Williams' 18 are the same. Okay?

So let's start with State's 18. I understand that the first three paragraphs are the same as Mr. Williams' 17. Your objection is to lines 16 through 25, page 1, and lines 1 through 6, page 2.

MS. GROSENICK: Well, to begin with, I think that to give this instruction with our alternative instruction would be duplicative, and I also think that bullet points 3 and 4 -- that would be lines 20 to 23 -- again, I don't think that it is an intent to commit attempted robbery. I think it's an intent to commit robbery and then failed to do so.

I don't think you can legally have -- I don't think that criminal responsibility would attach to an agreement to fail to commit a crime, so I think that that's confusing, and it's not accurate.

THE COURT: This is lines 22 and 23, "With the

intent that the attempted robbery be accomplished"?

MS. GROSENICK: Yes. It would also be lines 20 and 21 of 18. It says, "Enters into an express or implied agreement with another person or persons to commit the unlawful acts which constitute attempted robbery."

THE COURT: And you think that's an incorrect statement of the law?

MS. GROSENICK: I do. I think that the conspiracy would be to commit a robbery, not to fail to commit a robbery.

MR. PRENGAMAN: Your Honor, it does say to commit. On that, I have -- on number 4, I think you could probably correct that. I don't necessarily oppose the correction that Ms. Grosenick suggests on line 4. However --

THE COURT: What is that you don't oppose?

MR. PRENGAMAN: So when she talks about the attempted robbery, I don't think it's as confusing as is suggested, but I wouldn't oppose the words "with the intent that a robbery and/or burglary be accomplished," which I think is express -- that's what she's saying.

THE COURT: Does that address your concern, Ms. Grosenick, at line 22 through 23, number 4, "With the

intent that a robbery and/or burglary be accomplished"?

MS. GROSENICK: Yes, it does, Your Honor.

THE COURT: And then the same with regard to line 3, "To commit the unlawful acts which constitute a robbery and/or burglary"?

MR. PRENGAMAN: I would say, Your Honor, that that's different, because the conspiracy is to commit the underlying acts. In other words, what they're conspiring to do is acts.

THE COURT: Let's start with a lead-in, though, Mr. Prengaman.

Line 16, "A defendant is therefore liable as a conspirator for the commission of the specific-intent crimes of attempted robbery and/or burglary if he or she" --

How can we change line 4 to talk about robbery if what's needed is attempted robbery?

Ms. Grosenick, same question for you.

MS. GROSENICK: Well, I think that that's why this instruction is problematic and the Court should use ours instead.

THE COURT: And the one that you -- so yours -- Mr. Prengaman's are broken out by topic. Yours are broken out by effects.

So he does aiding and abetting and conspiracy. You do robbery, attempted robbery, and burglary. Okay.

Mr. Prengaman, talk to me about this.

MR. PRENGAMAN: So, Your Honor, I think what you could do is simply say, "To commit the unlawful acts which constitute attempted robbery and/or burglary," and then you could say, "With a specific intent that robbery and/or burglary, respectively, be accomplished."

THE COURT: But the lead-in is attempted robbery, and then we're directing them to robbery. See, your lead-in statement that applies to 1 through 5 is "A defendant is therefore liable as a conspirator for the commission of the specific-intent crimes of attempted robbery and/or burglary."

I can't change number 4, the criteria, to say, "With the intent that a robbery and/or burglary be accomplished," because that's not what we're talking about.

MR. PRENGAMAN: Your Honor, with just a few minutes, I'm sure I could come up with the --

Well, before I forget, I just want to briefly go back to the aiding and abetting instruction because the Court had made reference that the defense's instruction were identical in some respects.

I want to point out that the one perspective they're not is that the defense instructions says, "A person can be liable" -- it's the first sentence. It says, "A person can be liable for the commission" --

THE COURT: And yours says, "A person is liable."

MR. PRENGAMAN: I submit that is an accurate statement of the law, and so I just wanted to point that out before I forgot.

THE COURT: Thank you for that.

MR. PRENGAMAN: But, again, going back to the conspiracy, I'm sure with a few minutes I can address that.

THE COURT: Okay. The other issue I need you to address is what Ms. Grosenick raised with regards to State's 17, aiding and abetting. She has an issue beginning at the bottom of page 22 and shifting over -- excuse me -- beginning at the bottom of page 1, line 22, to page 2, line 5, lumping -- first of all, she says Statement Number 4 on the second page of line 4, "With the intent that robbery, attempted robbery, and/or burglary be accomplished," is not a legally accurate statement and does not agree with lumping specific- and general-intent crimes together.

MR. PRENGAMAN: Your Honor, I disagree. I think if you were to take that, "With the intent that robbery, attempted robbery, and/or burglary be accomplished," you can go back to those instructions and know what the intent is, and that answers your question.

So, in other words, this is telling the jury -- and it's accurate because you can commit -- so there's two ways to aid and abet a general-intent crime. You can either have specific intent that it be committed or you can have the -- it's the natural and probable consequences.

So I think it's accurate to lump those all together because even though robbery is a general-intent crime, you can still commit it by having the specific intent, you know, a higher intent that robbery be committed, but you can also commit robbery as an aider and abettor as a natural and probable consequence.

So I think that is accurate to begin with, but then, again, it tells you this isn't purporting to lay out all the elements; This is simply telling you you have to have the intent that those crimes be committed, those crimes.

So if you go back to those instructions on what the intent is, it tells you you have to have an intent to

commit a robbery and it's failed. If you go back to burglary, you have to have intent to enter -- specific intent to enter with the intent to commit whatever offenses inside.

So I think that is not inaccurate because -- again, the purpose of this is not to repeat to them the elements of the underlying offenses. It's how you aid and abet by assisting in the commission of those elements with the specific intent required for each of the offenses.

So, again, I would submit that to a lawyer you could maybe say, well, that's maybe a little bit inaccurate, but to a jury who's going to go back and look at the elements and intent, it's not.

MS. GROSENICK: May I be heard on that?

THE COURT: Of course.

MS. GROSENICK: Your Honor, it is inaccurate, and it is significant because what this says is that the intent -- Mr. Williams could have the intent that Ms. Norman try but fail to commit a robbery, and that's not the intent necessary for a specific-intent crime.

So if you look at Sharma, murder is the charge there, attempted murder, and what makes it specific intent is the attempt, and the necessary intent is to

have the person actually die, actually be killed, the ultimate crime, not the attempted crime.

And so I do have concerns with jury, in looking at that, in looking at that, could not give the correct weight to the intent necessary for an attempted robbery. In an attempted robbery, the necessary intent is that a robbery be accomplished. That's the specific intent, not that someone attempted and failed to rob someone.

So I think it is more significant and also legally inaccurate.

THE COURT: All right. Counsel, having heard all of this, let's do this: I'm going to take the conspiracy instructions, which is State's 18, Defendant Williams' 17, State's 19, State's 17. I'm not going to go in any particular order, as you can tell.

Mr. Williams' conspiracy instruction, which begins, "Conspiracy is an agreement between two or more persons," and Mr. Williams' 18, 19, and 20, and during the break, I'm going to go through each of these and make a decision about how they're going to be given.

All right. Let's do this: It's 12:10. Let's come back right at 1 o'clock.

Mr. Prengaman.

MR. PRENGAMAN: Just because it occurs to me,

so you want them fixed if that --

THE COURT: Yes, please, I need your fix.

MR. PRENGAMAN: If that's your concern --

THE COURT: Wait, wait, wait.

Which one are you going to?

MR. PRENGAMAN: State's 18. So State's 18, for example.

So one of fix is simply to -- again, if it's equivalent, one fix is to simply break out attempted robbery into its own. And so we would agree that "A person therefore aids and abets in the commission of robbery and/or burglary if he or she" --

THE COURT: Wait, wait, wait. Where --

MR. PRENGAMAN: I'm at line 22, Your Honor. So I'm addressing the intent.

THE COURT: Line 22, State's 18?

MR. PRENGAMAN: Yes.

So it would just -- so you would just strike "attempted robbery."

THE COURT: Okay.

MR. PRENGAMAN: And it would then say, "A person therefore aids and abets the commission of robbery and/or burglary if he or she," and then it just addresses the robbery and burglary, and going down to line 4, "With

the intent that the robbery and/or burglary be accomplished."

THE COURT: Mr. Prengaman, stop.

I'm on State's 18. I'm looking at line 16. It starts, "A defendant is therefore liable as a conspirator." We have four elements at line 22 -- excuse me -- five elements. At line 22 is number 4.

The proposal is?

MR. PRENGAMAN: Oh, I see. I messed up the numbers.

So now looking at it that way, 18, so I would simply remove "attempted robbery." From line 17 I'd strike "attempted robbery"; at line 20 I'd strike it; at line 22 I'd strike it; and then at line 25. And then I would simply add "A defendant is liable as a conspirator for the commission of attempted robbery if he or she enters into an agreement with another person or persons to commit the unlawful acts that constitute the attempted robbery with the intent that robbery --

THE COURT: "With the intent that attempted robbery --

MR. PRENGAMAN: "Robbery," because that is what Ms. Grosenick's point is. So that allows you to keep the doctrine and the elements all together, and I think that

addresses what the concern is. And then you could do the same thing with regard to aiding and abetting.

THE COURT: So create another section?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: Ms. Grosenick.

MS. GROSENICK: Yeah, I'm not agreeing to that. I'm still objecting. I don't think that this format follows the edict from Sharma, and so I'm still advocating for our instructions.

THE COURT: All right. Counsel, let's come back right around 1 o'clock, and we'll continue this.

Thank you.

(The midday recess was taken.)

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RENO, NEVADA; WEDNESDAY, APRIL 24, 2021; 1:09 P.M.

-oOo-

(The following proceedings were held outside the presence of the jury.)

THE COURT: In consideration of all the arguments I've heard prior to the break, this is what I'm going to do.

Ms. Davies is handing some instructions out to you, and I'm going to explain them to you.

Let's start with the instruction that begins, "A conspiracy is an agreement between two or more persons for an unlawful purpose."

This is the one I'm going to give, and the first three paragraphs are the same in the instructions that were proposed by the parties. The latter half of the conspiracy instruction does what -- it addresses the concern by Ms. Grosenick with the proposal by Mr. Prengaman, which is it breaks out attempted robbery and burglary into separate sections.

So at line 15 on page 1, "A defendant is therefore liable as a conspirator," that relates to attempted robbery. The next page, "A defendant is liable

as a conspirator," that relates to burglary. And, lastly, at line 10, "A defendant is liable as a conspirator for the general-intent crime of robbery."

I should note that the language for burglary and attempted robbery are very specific, both specific-intent crimes.

Accordingly, I'm not going to give State's 18, and I'm saying I'm not going to give Mr. Williams' 16 simply because it's been fully incorporated into the one I'm going to give with regard to conspiracy.

Now let's talk about -- I'm going to get to some of the others in a minute, but one thing we didn't discuss before the break with regard to conspiracy is Defendant Williams' 17 -- yes -- Defendant Williams' 17 and the State's 19.

MS. ROSENTHAL: Your Honor, could you just read the first line so we make sure we're on the same numbers?

THE COURT: Of course. With regard to State's 19, it starts, "The existence of a conspiracy need not be demonstrated by direct proof." And Defendant Williams' instruction starts exactly the same way, and that's number 17.

Now, these two instructions are very similar, except at line 2 of State's 19, the statement appears, "A

conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail."

And then at line 7 it states, "It is proof of conscious understanding and deliberate agreement by the alleged members that should be central to your consideration."

Mr. Prengaman, I'm going to start with you. Legal authority for those statements and justification for including them.

MR. PRENGAMAN: Yes, Your Honor.

Just give me a moment. Mine got kind of out of order.

So the sentence, "A conspiracy to violate the law respecting the second sentence.

THE COURT: The other one is at line 7, your last sentence, "It is proof of conscious understanding."

Let me first ask Ms. Grosenick, objections to those statements, Ms. Grosenick?

MS. GROSENICK: Yes, Your Honor.

The first sentence you referred to on lines 2-3 of the State's instruction, that language does not appear in the cases cited by the State, and that was part of an

instruction given in another case. We don't have the rest of that instruction, and I think that it will confuse the jury.

I agree that it's probably correct that not every detail has to be laid out, but I think that not having the benefit of the other instructions, it does have the potential to confuse the jury if the Court is going to give the rest of the instruction, which is that "The existence of a conspiracy does not need to be demonstrated by direct proof and can be established by conduct," that already covers what I think the State is trying to get at here and could further reduce the State's burden in proving the conspiracy theories.

Do you want me to stop there, or do you want me to go onto the second?

THE COURT: Go onto the second one.

MS. GROSENICK: As to the second instruction, again, that portion of the instruction does appear to be unsupported by the case law cited by the State, and I think that it will confuse the jury as well because it does tell the jury, here's what you should be looking at, here's what you should be focusing on, and where's the support for that, especially if in these instructions we are taking a more general view of not zeroing in on

certain types of evidence or certain areas and just trying to give accurate statements of the law.

And then, Your Honor, I would like to make a record with regard to the conspiracy instruction that was just passed out when there's time.

THE COURT: Okay. Go ahead and do that now.

MS. GROSENICK: I'd just note that this does not address our concerns regarding attempted robbery, and this is the conspiracy instruction handed out by the Court, so I do still object to lines 15 through 21.

Again, I don't think that the correct intent is to attempt to commit a robbery but fail, so I think it should be robbery, not attempted robbery.

THE COURT: You're right. We did not catch that. I meant to have that "attempted" come out. That's a great catch. Thank you.

MS. GROSENICK: Thank you.

THE COURT: So that instruction will be changed. Line 4 should say, "With the intent that the robbery be accomplished." That was my intention. Thank you so much.

Mr. Prengaman, with regard to State's 19, the conspiracy instruction.

MR. PRENGAMAN: Your Honor, with regard to

that, there are a number of cases as cited in supporting case law, among them the State vs. Dressel, which is a New Mexico case which was cited with approval in Thomas, and it discusses the essence of a "Conspiracy is a common design or agreement to accomplish an unlawful purpose," "Conspiracy is seldom susceptible of direct proof," and that "A formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy."

And the Nevada Supreme Court has recognized that conspiracy is essentially common law, its common law origins. And so I cite a number of additional authorities, People vs. Thompson and Sanchez-Dominguez vs. State, although not Nevada case law, addressed that same issue touched on or addressed in Dressel, with approval in Thomas, for that same proposition that it need not be written or formal.

So I believe that's consistent with the law and is helpful to the jury to explain, because, again, you're telling them that it is an agreement, but it need not be formal or expressed in every way.

Now, the last sentence, I'm not going to object to taking that out. The purpose of having that in there is to emphasize the State's burden, not to undermine it.

It tells the jury your focus is -- the conspirators have to have a conscious understanding and deliberate agreement. If the defense wants that out, I have no objection.

THE COURT: I'm going to give Defendant Williams' 17, but I'm going to add the second line of State's 19. So I'm going to add to Defendant Williams' 17, after the language "parties' conduct" on line 2, "A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written or even expressed directly in every detail," given the citations of Thomas, 114 Nev. 1127, with approval of the New Mexico case, and, also, I don't hear anything that says it's -- that it's a violation of the law or the law as written in the State of Nevada. So that's how I would give that instruction.

Now, with regard to aiding and abetting --

MS. ROSENTHAL: Your Honor, if I may, we didn't get to be heard on that at all. I just wanted to make a record that --

THE COURT: I'm sorry, Ms. Rosenthal. I did that only because -- that's my error because I had instructions from two parties. But you're right. Go ahead.

MS. ROSENTHAL: Thank you, Your Honor.

Given that the Court has adopted Mr. Williams' instruction, that's one we were in line with. We also were not in objection to the State's, but I would just like to make a record as to which one we agree with.

THE COURT: And I want you to do that. So thank you for that. I appreciate that so much, and I will make sure to go to each party because there are places where you actually proposed instructions, Ms. Rosenthal, on behalf of your client, none in those categories.

So let's go to aiding and abetting. Having heard all the arguments of counsel with regard to the aiding and abetting instructions, this is what I'm proposing to do.

You've been handed out a document by Ms. Davies, and it's the instruction I'm prepared to give. The first three paragraphs of that instruction, lines 1 through 12, are out of Defendant Williams' 15 with the exception of the third word on line 1. Defendant Williams' 15 says, "A person can be liable," and my reading of the law is "A person is liable," and that's the way it appeared in the State's instruction, and that's the way it appears in the law.

Then what I've done after using the first three paragraphs of Mr. Williams' aiding and abetting instruction, I went to the State's 17, and I began at line 11 regarding attempted robbery, and that's the next paragraph that appears, "Regarding attempted robbery (alleged in Count II) and burglary (alleged in Count III), the State must also prove the defendants encouraged or assisted the crimes with the specific intent that the attempted robbery and burglary be committed."

Also from the State, "As to robbery (alleged in Count I)," and it goes on to copy that full paragraph that's in State's 17, lines 15 to 18.

The next statement at line 20 of the instruction that's been provided to you, "The State is not required, however, to prove precisely which participants actually committed the crime and which participants aided and abetted." That's right out of State's 17, 19 through 20.

Ms. Grosenick asked the Court to add something to the effect -- and this is the Court's language, not Ms. Grosenick's -- "However, the State must establish that each element of the underlying crime was committed."

And the rest of the instruction is taken from State's 17, beginning at page 1, line 22, through

page 12, line 3, taking into consideration Ms. Grosenick's argument about the fact that, as to the first paragraph, that robbery, attempted robbery, and burglary should not be lumped together because they're different intent crimes.

That, in this Court's mind, is solved by the paragraphs in the instruction at lines 13 -- beginning at lines 13 and 16, which sets forth what is required for those various offenses. And this is the one I'm prepared to give with regard to aiding and abetting.

Ms. Rosenthal, any record you'd like to make on this instruction?

MS. ROSENTHAL: No, Your Honor.

THE COURT: Ms. Grosenick, I have all of your comments. Anything to add?

MS. GROSENICK: Yes. Just so that the record is clear, we are advocating for our Sharma version of this instead of this. However, if the Court is going to use it, I don't think that the specific intent regarding attempted robbery is accurate on page 1, line 15, and again on --

THE COURT: Go ahead. And then where else?

MS. GROSENICK: And then on page 2, I think probably robbery is supposed to be taken out of that

first paragraph on page 2 at the top. Is that right?

THE COURT: No. Look at line 12, "A person may also aid and abet."

MS. GROSENICK: Gotcha.

And I still think that "an attempted robbery be committed" is incorrect.

THE COURT: Looking at the paragraph, line 13 through 15, what language would you propose?

MS. GROSENICK: On page 1?

THE COURT: Page 1.

MS. GROSENICK: I would propose that, on line 15, "attempted robbery" be changed to "robbery."

MR. PRENGAMAN: May I make a suggestion, Your Honor?

THE COURT: Yes.

MR. PRENGAMAN: May I make the following suggestion: That line 15 read "intent," strike "that," and substitute "required for the attempted robbery and burglary," insert "to be committed."

So it would read -- that sentence would read, "Regarding the attempted robbery (alleged in Count II) and burglary (alleged in Count III), the State must also prove that the defendant encouraged or assisted in crimes with specific intent required for the attempted robbery

and burglary to be committed."

MS. GROSENICK: I think that's very confusing.

THE COURT: Why is that confusing?

MS. GROSENICK: I think that we need to tell the jury what intent is required for attempted robbery under the theory of aiding and abetting, and that intent is the intent that the robbery be committed.

MR. PRENGAMAN: Then, Your Honor, I believe that on the second page it would be appropriate to do the same thing that the Court just did on the conspiracy instruction, which is to split out the attempted robbery with the same verbiage. It's the same concept, it's the same specific intent. The court did the exact same thing with the conspiracy instruction, which is create a second paragraph that addresses attempted robbery, attempt to commit robbery.

Because they function with two doctrines, they both require that specific intent. I think that would then tell them specifically that it's the robbery, just as the Court did on the prior charge.

THE COURT: "A person therefore aids and abets in the commission of attempted robbery and/or burglary if he or she knowingly," is 1.a;

"b. Directly or indirectly;

"2. The acts which constitute the elements of attempted robbery and/or burglary;

"3. Before or during the crime;

"4. With the intent that the robbery or burglary be accomplished."

MS. ROSENTHAL: Your Honor, I believe the way Mr. Prengaman just suggested with using the same format as the one that was just proposed and having it read the same with regards to separating the attempted robbery, burglary, and robbery would be easier than how the Court just read it.

THE COURT: So, Counsel, a separate -- so it would end up being four paragraphs here. I would do what I did in the conspiracy instruction, and I would do a separate paragraph for attempted robbery, a separate paragraph for burglary, a paragraph for robbery, and then yet a fourth paragraph, which is "A person may also aid and abet in the commission of a robbery if he or she."

MR. PRENGAMAN: I would actually suggest, Your Honor, that you could do -- looking at page 2 of that, it would be three paragraphs. It would simply be the first paragraph would address robbery and burglary, so it would be robbery and/or burglary. The second paragraph would then address attempted robbery just as the Court did in

the conspiracy instruction. So that would just be -- attempted robbery would be by itself, a separate paragraph, then the third paragraph would be as-is, which is "A person may also aid and abet."

THE COURT: I'm sensitive to what Ms. Grosenick is saying about lumping two crimes together that have different intents.

MR. PRENGAMAN: Okay.

MS. ROSENTHAL: Again, Your Honor, on the first page, regarding the paragraph starting 13, I do believe it would be appropriate to take out the "attempted" there and that the intent would be for the robbery be committed, not the intent to attempt to do something.

THE COURT: That is one option. The other option is the one proposed by Mr. Prengaman, which says, "Regarding attempted robbery (alleged in Count II) and burglary (alleged in Count III), the State must also prove that the defendants encouraged or assisted the crimes with the specific intent required for attempted robbery and burglary."

MR. PRENGAMAN: Your Honor, I'm thinking back through. I think I was wrong that the Court suggested burglary because you suggested taking burglary separately. Is that correct?

THE COURT: No. I suggested what Ms. Rosenthal suggested, which is taking out the "attempted," and you'd have to take out "specific" as well.

MR. PRENGAMAN: If robbery and attempted robbery are there together, it's the intent to commit a robbery. So if that paragraphs just reads, "A person therefore aids in the execution of robbery and attempted robbery if he or she" --

THE COURT: You have to start over. You're speaking too fast, and I don't know where you are.

MR. PRENGAMAN: Sorry, Your Honor.

So I'm looking at page 2, paragraph 1.

THE COURT: I'm looking at page 1, lines 13 through 15.

MR. PRENGAMAN: Okay.

THE COURT: So Ms. Rosenthal is suggesting what I suggested, which is "Regarding attempted robbery and burglary, the State must also prove the defendant encouraged or assisted the crimes with the intent that the robbery and burglary be committed," but you suggested "encouraged or assisted the crimes with the specific intent required for attempted robbery and burglary."

MR. PRENGAMAN: Yes, Your Honor. Anticipating that in the next paragraph elementizing them, that they

are going to be told that it's the intent to commit robbery. That's why I suggested it that way.

So I was just going to suggest that in the paragraphs because robbery and attempted robbery both have the same mens rea. So if it's "A person therefore aids and abets" -- so line 1, page 2, "A person therefore aids and abets the commission of robbery and attempted robbery if he or she knowingly does any act," "The acts which constitute the elements of robbery, attempted robbery," and then 3 and 4, "with the intent that robbery be accomplished." The mens rea is the same for both of those, so they can be addressed together. And then for burglary we just have a separate one that says, "with the intent that burglary be accomplished." So that was just my suggestion.

THE COURT: Okay. This is the way I'm going to give this one:

Lines 13 through 15 on page 1 of aiding and abetting will read, "Regarding attempted robbery (alleged in Count II) and burglary (alleged in Count III), the State must also prove that the defendants encouraged or assisted the crimes with the intent required for attempted robbery and burglary."

On page 2, "A person therefore aids and abets

in the commission of robbery and attempted robbery if he or she:"

Subparagraph 2, "The acts which constitute the elements of robbery or attempted robbery;

Subparagraph 4, "With the intent that robbery or" -- excuse me -- "With the intent that robbery or attempted robbery be accomplished."

And then the next paragraph would be, "A person may also aid and abet in the commission of robbery if he or she:"

That paragraph will stay as is currently written.

And then the last paragraph will say, "A person may also aid and abet in the commission of burglary if he or she:"

And we'll repeat the elements of the first paragraph.

Mr. Prengaman.

MR. PRENGAMAN: No objection to that, Your Honor.

THE COURT: We'll be sure -- we're going to get all of these to you before we finalize them.

MS. ROSENTHAL: Your Honor, just to make -- I'm sorry -- it's a little word, but for the burglary one, if

it could read -- like on the first line of that page, "A person therefore aids and abets the burglary" instead of "also," because I think the "also" refers to the one above it, and this is a separate one.

THE COURT: Yes. Okay. All right.

Now, having resolved these aiding and abetting and conspiracy instructions in that way, I think Mr. Williams' 18, 19, and 20 are duplicative, and I'm not going to give it.

Let's stay on this theme, Counsel, and let's go to the State's -- let's go to the perpetration instructions, State's Number 6, which begins, "As applied to felony murder, the term 'perpetration,'" Defendant Williams' Number 6 starts the same way.

Actually, let's start with this one. Let's start with Defendant Williams' Number 8 if we're going to stay on that page.

"In order to find either defendant guilty of felony murder on a theory that the killing occurred in the perpetration," we're going to take a look at that one. Everybody take a look at that one.

It starts, "In order to find the defendant guilty."

It's a four-line instruction.

Mr. Prengaman, do you have any objection to this instruction?

MR. PRENGAMAN: I do, Your Honor.

Your Honor, my objection is that this implies to the jury that specific intent is required -- I'm sorry. I'm thinking --

THE COURT: Take your time. Read it again.

MR. PRENGAMAN: Your Honor, I do have an objection to this because I don't think it's an accurate statement of the law. In order to be liable for felony murder, the defendant has to have liability in the commission of one of those underlying offenses, but that doesn't necessarily mean that they have to have specific intent that one or more of those crimes be committed.

In other words, if you were to elementize -- state the elements of felony murder, it would be the defendant is liable for the commission of one of the underlying felonies, and there's no intent involved in it.

Two, the intent tracks with the underlying felony. So this basically says if you're liable for kidnapping, you have to have the specific intent that that crime be committed. What you have to have is liability for the kidnapping, which the underlying

elements of that would require you to have specific intent, but this makes it sound like, on top of that, there's some additional intent element.

MS. GROSENICK: Can the Court clarify which instruction we're on?

THE COURT: Defendant Williams' Number 8, "In order to find either defendant guilty of felony murder on the theory that."

MS. GROSENICK: I'm sorry. I thought we were doing perpetration.

THE COURT: I started that way. I didn't mean to confuse you. Since we're still on intent, this is an intent instruction. I wanted to make sure we dealt with this one first.

Mr. Prengaman's objection to this is that -- I don't want to put words in your mouth, Mr. Prengaman -- it's effectively incorrect because it implies that specific intent is necessary for felony murder as opposed to the underlying offense.

MR. PRENGAMAN: Correct, Your Honor. And to the extent the intent is emphasized, the underlying -- it would be duplicative to that extent, but that's exactly -- as the Court just said, that's exactly my concern, because it tells the jury that there's a

specific-intent element, which the Court is going to instruct them. I don't have to show intent to kill. It's the liability -- the intent is for the underlying felony, not for felony murder.

MS. GROSENICK: I'm really sorry, Judge. I'm not sure what instruction we're looking at.

THE COURT: It's your number 8.

MS. GROSENICK: Thank you.

THE COURT: So the concern is that there's a heightened level of intent here. In other words, the defendants need to have specific intent not only for the underlying offense, but that the felony murder be committed.

Counsel, remind me, in these instructions, do we have one that says, "The following offenses require specific intent"?

MR. PRENGAMAN: Yes, Your Honor. You have the underlying elements. Each of these would have the underlying elements.

THE COURT: Right. I know we've got it with regard to each of the offenses as it's spelled out. We don't have a singular instruction that says, "The following offenses require specific intent."

MR. PRENGAMAN: Well, I would suggest that in

the aiding and abetting conspiracy instruction you just did, you tell them that. You single them out and say in order to be liable for the specific-intent crimes of burglary, etcetera, you must have that intent, so at least they get it.

So basically the instructions -- I'm sorry. Go ahead.

MS. GROSENICK: I'm just going to say that's different. That instruction is different. It doesn't encompass all these because the way the case is charged, we need to include attempted burglary and kidnapping and attempted kidnapping.

THE COURT: What is -- I'm looking at the reference to Crawford below. What about an instruction that simply says, "The State must prove beyond a reasonable doubt the defendant had a specific intent to commit attempted robbery, burglary, attempted burglary, kidnapping, or attempted kidnapping"?

I know we've got it incorporated in others, but I'm sensitive to what Ms. Grosenick is saying about these additional offenses.

MR. PRENGAMAN: I would say, Your Honor, that emphasizes -- it is duplicative and emphasizes that burden. In other words, to prove felony murder, the

predicate is simply the defense is liable --

THE COURT: I'm suggesting -- I'm sorry, Mr. Prengaman, but I'm suggesting you take the felony murder out of this, because I read it that specific intent is not required, and what I want to incorporate is what Ms. Grosenick's concern is and just simply have an instruction that says -- no reference to felony murder -- the instruction would start, "The State must prove beyond a reasonable doubt the defendant had the specific intent that" -- "The State must prove beyond a reasonable doubt that the defendant had the specific intent to commit attempted robbery, burglary, attempted burglary, kidnapping, or attempted kidnapping."

MR. PRENGAMAN: Your Honor, what I would suggest is that then you'd have, for instance, the elements of attempted robbery, which tell the jury I have to prove beyond a reasonable doubt that they intended to commit robbery, and then that's going to be followed -- the next instruction on kidnapping is going to tell them about the intent that has to be proved for kidnapping.

And then you're going to tell them, remember, ladies and gentlemen, the State -- remember, I just told you the State has to prove the significant intent for each of those crimes, they really have to do it, and

that's what this instruction is saying.

MS. GROSENICK: They do.

THE COURT: What about Ms. Grosenick's concern related to attempted burglary and attempted kidnapping?

MR. PRENGAMAN: Well, there's an instruction on kidnapping that covers those elements, and in that instruction -- well, the instruction on felony murder tells them they have to prove the elements of the underlying offense beyond a reasonable doubt.

So they're already told -- if you go back to that felony murder that -- instruction that describes felony murder and what the State has to prove, it states that the State has to prove the underlying felony, the elements.

So when they get the kidnapping instruction that has the intent that I have to prove, they've been told, they've been told that's what I have to prove; in order for liability to attach by virtue of kidnapping, the State has to prove the elements of kidnapping.

THE COURT: So it's generally duplicative?

MR. PRENGAMAN: Yes, Your Honor. As well as -- again, it's duplicative and wrong in the form as proposed. If you take out the reference to felony murder, I think then it's duplicative.

THE COURT: Ms. Rosenthal.

MS. ROSENTHAL: We'll submit on this instruction, Your Honor.

THE COURT: I'm going to give it so that it reads the following: "The State must prove beyond a reasonable doubt that the defendant had the specific intent that attempted robbery, burglary, attempted burglary, kidnapping, or attempted kidnapping be committed."

MR. PRENGAMAN: I'm just going to say, Your Honor, the complexity, I would suggest, with that is I only have to prove -- kidnapping is not a charged offense in this case. I only have to prove that if I want to support a felony murder conviction. In other words, the way it's alleged --

THE COURT: I understand what you're saying. Yes. I can't do it, then.

I understand what he's saying, Ms. Grosenick. He doesn't have to prove kidnapping.

MS. GROSENICK: He does, though, Your Honor, in order to prove --

THE COURT: No, no. But it makes it sound like -- to me, it's confusing in the sense that they're going to go looking for a verdict form on kidnapping.

MS. GROSENICK: Fair. But he does have -- if he's going to base felony murder on kidnapping, all of the elements of kidnapping or attempted kidnapping have to be proven beyond a reasonable doubt. And, furthermore, the jury should be instructed on the fact that that's specific intent pursuant to Crocker.

THE COURT: Mr. Prengaman.

MR. PRENGAMAN: I was just trying to pull up felony murder.

And they're told exactly that. They're going to get the elements of kidnapping in the felony murder instruction. It's going to say, "So therefore the elements of felony murder in the first degree as alleged in this case are defensible" --

THE COURT: Mr. Prengaman, that's a thousand words a minute. I just don't think Peggy can do that.

MR. PRENGAMAN: Sorry.

THE COURT: Go ahead.

MR. PRENGAMAN: So the felony murder instruction says there are the -- in the first two paragraphs, it says, "Therefore, the elements of felony murder as alleged in this case are: The defendants did willfully and unlawfully perpetrate or attempt to perpetrate the crimes of burglary, robbery and/or

kidnapping; and the killing of Jacob Edwards occurred during the perpetration or attempted perpetration," and then they have the elements of kidnapping.

THE COURT: I'm going to withhold this one, then. I just am not sure there's a way to give it without making things very confusing for the jury. The specific-intent element is in each of the crimes, so I'm going to withhold giving this one.

Let's go to perpetration now. I have a few on perpetration. They are State's Number 6, Defendant Williams' Number 6, and Defendant Williams' Number 7.

Let's take a look at State's 6. Everybody got that? Okay. Starting at line 1 through line 7, it's identical to Defendant Williams' Number 6, line 1 through line 8. What's different in these two instructions is that last paragraph.

Mr. Prengaman, having looked at your last paragraph and Mr. Williams' last paragraph --

MR. PRENGAMAN: Your Honor, I know the defense objects to the last sentence, "Perpetration may include the flight," and both parties address that in their pretrial pleadings.

I would submit it on the case law I've cited, that "Perpetration may include the flight of the

perpetrator until they reach a place of temporary safety." To me, that's very well-grounded in the law.

THE COURT: I read Sanchez-Dominguez. I see Sanchez-Dominguez at 93 citing to People v. Wilkins. I just didn't see a specific reference to "until the perpetrator reaches a place of temporary safety." I didn't see that. I saw a general citation but not with regard to this specific case.

MR. PRENGAMAN: I was going to say, Your Honor, I think -- and I don't disagree, but I think Sanchez-Dominguez uses the example of flight as one of the examples of continued perpetration.

So I was going to say that I think that actually, in many cases, benefits the defense, but if they don't like it, I would suggest that the Court just say, "Perpetration may include flight of the perpetrator from the scene of the offense," period.

THE COURT: I think that's supported by Nevada law.

MR. PRENGAMAN: So that's what I would suggest. Again, that's fine with the State. I think it's all -- when you look at the case law, that's all supported. For our purposes here, I would offer it with that change.

And I do think, for the reasons I stated, that

this is a flight case. This case involves flight from the scene, and so including that is significant. It tailors it to the facts of the case and lets the jury know that that is -- that the flight might be included in the perpetration.

THE COURT: What about your sentence, "Therefore, perpetration of burglary, robbery, or kidnapping" -- this is line 8 -- compared to Mr. Williams' suggestion at line 9?

MR. PRENGAMAN: Your Honor, I think those are, in the State's view, essentially, largely, maybe not in particular, but largely saying the same thing, expressing the same concept, which is the unbroken chain of events, and so it's conveying the same concept.

I suggest that the State's language in the case where you're talking about flight is slightly more appropriate because it talks about the chain being broken. But, again, I think those are both essentially expressing the same thing, that it's the chain of events flowing from the initial offense.

THE COURT: Ms. Grosenick.

MS. GROSENICK: I'll just add that, yeah, I think that last sentence in the State's instruction is not supported by case law and takes the focus away from

whether or not the continuous chain of events was broken and puts the focus on the temporary safety, which is not the facts of this case.

THE COURT: Mr. Prengaman is acknowledging that the sentence could end at the word "offense," "Perpetration may include flight of the perpetrator from the scene of the offense," period.

MS. GROSENICK: That's fine.

THE COURT: Ms. Rosenthal.

MS. ROSENTHAL: Thank you.

We would submit that in State's Proposed 6, that the last sentence -- the last sentence is confusing as to it relates to Ms. Norman as she did not flee and was not involved in that aspect of it, and so --

THE COURT: Thank you.

I think that's something you could certainly argue, Ms. Rosenthal, to the jury.

So what I'm going to do is I'm going to give Defendant Williams' Number 6, and at the end of the second paragraph I'm going to include from the State's instruction, "Perpetration may include the flight of the perpetrator from the scene of the offense."

Let's take a look now at Defendant Williams' Number 7, also a reference to felony murder. It starts,

"In order to prove either defendant guilty of felony murder..."

Does everyone have this: "In order to prove either defendant guilty of felony murder based on the perpetration or attempted perpetration..."

Mr. Prengaman.

MR. PRENGAMAN: I'm looking --

THE COURT: Take your time. Two paragraphs. It's a Crawford v. State reference.

MR. PRENGAMAN: Yes, I have it, Your Honor.

THE COURT: Any issues with this instruction?

MR. PRENGAMAN: Your Honor, I don't have -- I think it would -- I don't have any objection to the first paragraph, and I would suggest that it be included in the felony murder instruction.

THE COURT: I'm sorry? You said --

MR. PRENGAMAN: I'm sorry?

THE COURT: Your last sentence I did not get.

MR. PRENGAMAN: Your Honor, I would suggest that it be incorporated into the felony murder instruction, the language that "The State must prove each element of the underlying felony beyond a reasonable doubt."

THE COURT: Which one of the State's

instructions? Give me a number.

MR. PRENGAMAN: So, Your Honor, I lost track of the numbering. It would be the felony murder, so it would be whenever that occurs in perpetration or attempted perpetration.

THE COURT: Mr. Prengaman, are you aware you drop off on the last part of your sentences? I cannot --

MR. PRENGAMAN: I'm sorry.

MS. ROSENTHAL: Your Honor, I believe it's number 5.

THE COURT: State's Number 5?

MS. ROSENTHAL: Yes.

THE COURT: Take a look at State's Number 5.

Mr. Prengaman, if you go after number 3, so you've got the paragraph that starts at line 10, "Therefore, the elements of felony murder in the first degree," and you've got the three elements listed there.

MR. PRENGAMAN: Yes, Your Honor.

So I would have no objection to that being included as the last paragraph. I do think that instruction after number 5 is just restating the same, but if you incorporate the first paragraph and say the State must prove it beyond a reasonable doubt, that accomplishes the purpose.

THE COURT: So instead of putting it at the end?

MR. PRENGAMAN: I'm sorry. No. I would suggest not including lines 1 through 4 of the proposed instruction at the end of number 5 but not lines 5 through 7 because that's just restating it.

THE COURT: Thank you.

Ms. Grosenick.

MS. GROSENICK: Your Honor, lines 5 through 7 of Williams' Number 7 is not just restating anything. They properly word a negative instruction that should be given upon request, and the first paragraph of it is necessary to give context to that second portion of the instruction.

THE COURT: Okay. Ms. Grosenick, let me ask you something just so it's clear when I read this.

At line 3, "The State must prove each element is" -- is what you're really trying to say here, "The State must prove each element of the underlying felony beyond a reasonable doubt"?

MS. GROSENICK: On line 3?

THE COURT: Line 3 of Williams' 7. "The State must prove each element" -- is it "underlying felonies beyond a reasonable doubt"?

MS. GROSENICK: Yes.

THE COURT: Let's make that change, and I'll give it back, and then I'll ask Ms. Rosenthal whether she has any objection, but this is the way number 3 would read, line 3 after the words "attempted kidnapping": "The State must prove each element of one of" -- insert "the underlying" -- switch "felony" to "felonies beyond a reasonable doubt."

Ms. Rosenthal, your thoughts on number 7.

MS. ROSENTHAL: Your Honor, I don't believe I have an objection. I just am not -- if the Court could repeat the insertion, I'm trying to follow it. Maybe once we get it reprinted --

THE COURT: Let's do this: Take a look at the first paragraph. It says, "In order to prove either defendant guilty," and it goes on to list all of the offenses. Then it says on line 3, "attempted kidnapping, the State must prove each element of" -- insert "one of the underlying" -- change "felony" to "felonies beyond a reasonable doubt."

So that reads, "The State must prove each element of one of the underlying felonies beyond a reasonable doubt."

MS. ROSENTHAL: We have no objection.

MR. PRENGAMAN: Your Honor, again, to make it correct, I would suggest that paragraph -- the second paragraph should read, "If you find that the State did not prove beyond a reasonable doubt every element of at least one of these underlying felonies, you cannot find the defendant guilty of felony murder."

THE COURT: Ms. Grosenick.

MS. GROSENICK: No objection.

THE COURT: Ms. Rosenthal.

MS. ROSENTHAL: No objection.

THE COURT: Okay. That's how we will do it.

Let's go to kidnapping, Williams' 21. I call it the Mendoza instruction because it's based on Mendoza v. State.

"In order for you to find either defendant guilty of both felony murder..."

Based on the Mendoza case, Mr. Prengaman, I'm going to start with you.

MR. PRENGAMAN: Your Honor, I'm not entirety sure that's accurate when they're not --

THE COURT: Go ahead.

MR. PRENGAMAN: I'm sorry, Your Honor.

THE COURT: Let me start here with my question for counsel.

Counsel, this is an interesting case, the Mendoza case, but the way I read Mendoza was in that case the State was seeking a guilty verdict for both kidnapping and one other felony.

First of all, I want to talk about the instruction itself. In line 1 it says, "In order for you to find either defendant guilty of both felony murder based on the predicate felony of kidnapping and separate offense of robbery or attempted robbery, you must also find beyond a reasonable doubt either: That any movement of the victim was not incidental to the robbery; that any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery; that any incidental movement of the victim substantially exceeded that required to complete the robbery; that the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or the movement or restraint had an independent purpose or significance."

First of all, I don't think "of both" should be in the first line. "In order to find either defendant guilty" -- it should say, "of," not "both" -- "of the felony murder based on the predicate felony of kidnapping and separate offense of robbery or attempted robbery, you

must also find beyond a reasonable doubt either..."

I want to know if the Court should take any exception to this instruction based on the facts in Mendoza where the State sought a conviction for both crimes whereas here the State is seeking a conviction for one or more of the crimes. Does that even matter?

Ms. Grosenick.

MS. GROSENICK: Thank you.

I argue, Your Honor, that it does not matter because if the felony murder is based on kidnapping or attempted kidnapping, the State has to prove the elements of kidnapping or attempted kidnapping beyond a reasonable doubt, and therefore the holding in Mendoza would apply equally here if there are convictions for both felony murder based on kidnapping and a separate conviction for the robbery.

One thing that I would add, though, is that we won't know what the jury bases their decision on. So my concern is not providing the instruction is that it would leave open that possibility, and we would never know, the possibility that they could convict based on -- could convict on first degree murder based on predicate felony of kidnapping and also a separate conviction for a robbery. I don't think that that would be legally sound,

but we wouldn't know. We wouldn't know because of the verdict forms.

THE COURT: Okay. But Mendoza did not tie the offenses to felony murder.

MS. GROSENICK: I don't think that matters because, for felony murder, the State does have to prove the elements of an underlying felony beyond a reasonable doubt.

THE COURT: But I'm giving that instruction.

MS. GROSENICK: Right. But as far as Mendoza's application, the Court is saying that you can't have dual convictions for kidnapping and robbery unless these facts are met.

THE COURT: Actually, what I'm saying is when I read -- when I read Mendoza, what the court seemed to be basing the decision on regarding the elements you have here in the instruction 1 through 5 is that the State was asking for a conviction on both of those offenses unrelated to felony murder.

And I thought the fact -- the way I read Mendoza is -- and you even said guilty of both, and I thought that's where you were going with this when I first read it.

But the way I read Mendoza is the instruction

was because the State was seeking a conviction on both counts and without reference to felony murder, whereas, here, the jury can find guilt on one of these offenses. For example, if they return a guilty verdict on robbery or attempted robbery and felony murder, the inference being they never got to kidnapping, but as you pointed out, you wouldn't know.

MS. GROSENICK: Right.

THE COURT: Mr. Prengaman.

MR. PRENGAMAN: Your Honor, I would submit that this is fundamentally different because the Mendoza case did deal with guilt of two crimes, guilt and sentencing, and essentially I would say the shorthand of Mendoza is if you're going to try to punish overlapping conduct, you have to show that there was additional movement in order to do that.

In this case no one charged the defendants with just robbery, and I don't know anything in Mendoza that prevents the State from relying upon kidnapping as a predicate felony because it's that conduct, and the theory behind the felony murder is the inherent danger of engaging in conduct that constitutes kidnapping and/or robbery. That leaves, and subjects, the person to the felony murder liability. And so it's not the attempt to

convict for both that was the concern in Mendoza. It is the commission of the conduct that the State has to prove.

So, in other words, I would submit that with regard to felony murder -- and especially because both subject the defendant to -- in other words, here's the situation in Mendoza: The jury finds beyond a reasonable doubt the defendant committed the elements of kidnapping and the elements of robbery, and the Supreme Court said, in order to punish them for that overlapping conduct, the State has to show that there was this movement that subjected the defendant -- subjected the victim to, for instance, additional danger in order to convict for both.

Now, with felony murder, what you're talking about is not convicting them. What you're talking about is has the State proved beyond a reasonable doubt that they did both.

Let's say the State, taking the Mendoza situation -- let's say Mendoza was a felony murder case and that the underlying felonies weren't charged, so it's just felony murder based on robbery and kidnapping. I don't believe anything in Mendoza indicates we have the same concern subjecting the defendant for liability if the State proved that the defendant did both the

kidnapping and robbery, especially because both of those subject the defendant to felony murder liability.

So the concern is that convicting for both doesn't necessarily subject the defendant to liability, and I submit that there's not that same concern of sort of that overlapping conduct, because if the State has proved beyond a reasonable doubt that the defendant committed robbery, he's subjected to liability for felony murder. If the State proves beyond a reasonable doubt the defendant committed kidnapping, the defense is subjected to liability for felony murder. If the State proves them both beyond a reasonable doubt, the defense is subjected to liability for felony murder, but the concern at issue in those is not applied here when you're talking about liability for something else versus what they were talking about there, which is dual convictions and sentences for overlapping conduct.

Because here the overlapping conduct simply suggests -- if there is overlapping conduct, it simply subjects the defendant to the same liability for felony murder. In the Mendoza case, it's subjecting them to additional punishment.

And on top of that, even if the Court saw otherwise, I think there's problematic -- this needs to

be re-formed in order to be accurate.

If I may, Your Honor, our court has already indicated -- for instance, with burglary -- that there is not an issue -- in other words, there's not merger with an underlying felony.

In other words, for instance, if the State convicts somebody of burglary and that defendant is subjected to felony murder liability for that burglary, there's not a merger. The name of the case escapes me, but our court has indicated that there's not a merger -- in California, it says there's a merger of those offenses, and Nevada doesn't, which I think is significant to what's being considered here.

The liability for felony murder does not merge with the underlying felony, so that's a further reason that the situation in Mendoza with dual convictions is not tracked through to felony murder liability.

THE COURT: Okay. Give me just a minute. I want to read the rest of this case myself.

Here's one of the biggest issues I see --

MS. ROSENTHAL: Your Honor, could you please speak into the mic?

THE COURT: Thank you.

The issue I see is Mendoza is based on the

State seeking dual convictions for two offenses. Here the State is not seeking a conviction for kidnapping.

This is what the Court said: "The Court held that to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion, but is based on sustained convictions for both robbery and kidnapping."

The State is not seeking a conviction for kidnapping in this case, and so I don't see how Mendoza applies. The instruction they offer is -- it's not what the defense has proposed, but what's in the Mendoza case is, "In order for you to find the defendant guilty of both first degree kidnapping or second degree kidnapping and the associated offense of robbery..."

In other words, in order for you to find the defendant guilty of both first degree kidnapping and the associated offense of robbery, you must also find beyond a reasonable doubt.

And here's the thing: We've got some time to

go on this, but that's my ruling on that instruction is I'm not going to give it, but, Counsel, if something else occurs to you -- because I didn't hear anybody arguing that point, if something else occurs to you, let me know.

Let's go to kidnapping. I'm sorry. Yes, let's go to kidnapping, State's Number 10.

State's Number 10, "Kidnapping occurs when:"

So everybody grab that one, grab Defendant Williams' 13, Defendant Williams' 15 -- hang on --

THE CLERK: 12, 13, 14.

THE COURT: Thank you. Defendant Williams' 12, 13, and 14. Grab those as well. Those are all the kidnapping instructions.

Okay. Mr. Prengaman, I want you to grab Defendant Williams' Number 12.

Do you have that?

MR. PRENGAMAN: Yes.

THE COURT: Take a look at that first paragraph. I want you to tell me if you have any objection to that. What about that is inaccurate?

MR. PRENGAMAN: Well, Your Honor, not only inaccurate, but -- I don't necessarily have an objection to the first two sentences. However, the third line says, "In order to find either defendant guilty of felony

murder based on the theory of kidnapping."

That's cumulative of the standalone instruction the Court has just indicated would be given, so I don't believe that should be included.

THE COURT: Okay. So line 3 through 5. Okay.

Then let's -- I'm going to give counsel a chance. Let's go through the rest of this.

My review of this instruction, comparing Defendant Williams' 12 to State's 10, is that the State has not identified, at line 10, kidnapping in the second degree. It simply says, "Kidnapping also occurs when:" And Defendant Williams has, "The key elements of kidnapping in the second degree are." And I see the reference, repeated reference, to "beyond a reasonable doubt," too.

Okay. "The elements of kidnapping in the second degree are:"

Mr. Prengaman, you just called it "Kidnapping also occurs."

MR. PRENGAMAN: Yes, Your Honor, because to the jury it doesn't matter. In other words, these were charged offenses, and because we're just talking about liability attaching, the jury doesn't -- to the jury it doesn't matter. And so we shouldn't tell them whether

it's first or second degree because it doesn't matter to them. All that matters is the liability, and those are the elements. That's an unnecessary point of confusion because, again, if it's kidnapping, there's liability regardless of first or second.

THE COURT: Mr. Prengaman, take -- Ms. Grosenick, Ms. Rosenthal, I'll get to you -- but take a look at Defendant Williams' 14. You've got -- and then compare that to your instruction. They have a definition of "kidnap" which is different than yours. The term "inveigle" and "entice" appear to be the same.

And then the "consent" paragraph: "Consent of the person kidnapped" is the same as in yours, but you've got at the top of page 2, "The law does not require the person being kidnapped to be carried away for any minimum distance."

MR. PRENGAMAN: So I would say that the main differences are, as the Court indicated, one, that the State defines "kidnap," and the defense instruction does not.

THE COURT: The second line of your definition of "kidnap": "The crime of kidnapping does not require force or restraint," and they have that as well.

MR. PRENGAMAN: Correct, Your Honor. But the

statute uses the word "kidnap," and so it is a term of art. It is used to describe the offense, so it's used to describe what the elements are, and I believe the State -- the Court should define that word, "kidnap," and I believe that's a legally accurate definition, and it's the totality of it. It's not just that it doesn't require force or and restraint but to take and carry away.

And so I submit because the term "kidnap" is used to define the elements, it should be defined.

And then the --

THE COURT: And then here you've got the statement you say is supported by Jensen v. Sheriff, Mendoza v. State, and Eckert v. Sheriff at the top of page 2.

MR. PRENGAMAN: Which I think are legally accurate and should be included.

THE COURT: And then --

MR. PRENGAMAN: I'm sorry, Your Honor.

And then just -- I don't know that we need that "Consent of the person kidnapped." I think it's the same in both.

THE COURT: It's the same in both. If you both want to take it out, I'll take it out. If you both want

it in, I'll put it in, but it's proposed in both instructions.

Then, Mr. Prengaman, one last thing before I get off of Mr. Williams' proposed instruction. Take a look at Defendant Williams' 13. It starts out, "The State alleges that either/or both defendants had the specific intent to commit kidnapping."

MR. PRENGAMAN: Your Honor, I don't think that that's inaccurate, but I don't know why we would give that.

THE COURT: The citation is 205 -- the citation is 205.060.

MR. PRENGAMAN: I think that's just the -- that's just the statute, the burglary statute, if I'm not mistaken. That just says what burglary is.

I would not request this. It's true of every burglary offense. It's true of robbery. The State doesn't have to prove --

THE COURT: I can't understand you.

MR. PRENGAMAN: Sorry.

Your Honor, it's true of every -- this is essentially true of every offense that goes with robbery: larceny, assault, battery, robbery, any felony. The State need not prove beyond a reasonable doubt that the

defendant actually committed the offense. And the burglary instruction covers that. It says that the offense need not be committed after entry. So I'm not sure why kidnapping is being singled out. Nothing jumps out at me that's inaccurate. I don't know why we would single out kidnapping and give this instruction when it applies to every other offense.

So if the defense wants it, I would simply ask that it reflects accurately everything. The State need not prove beyond a reasonable doubt that -- if the State alleges the defendant entered with a certain intent to commit a crime, it doesn't have to proof beyond a reasonable doubt that the defendant actually committed the crime.

THE COURT: Ms. Grosenick, with regard to those issues.

MS. GROSENICK: Thank you.

As to the first issue of stating the degree of kidnapping, Defendant Williams' Instruction Number 12, I don't object to taking out the degree.

THE COURT: Okay.

MS. GROSENICK: I don't object either to just taking out Williams' Instruction Number 13. I think that kidnapping will be confusing for the jury because to use

it for the felony murder, it needs to be proven beyond a reasonable doubt, but to prove that there was an intent to commit kidnapping, it does not. So that was the purpose of that, was to clarify it, but if it's going to be more confusing, then we should leave it out.

THE COURT: Okay.

MS. GROSENICK: And the language that -- the language that I feel strongly about is the State's kidnapping elements instruction. On the first page, lines 21 and 22, that common law definition of "kidnap," it doesn't need to be in there. It will be confusing to the jury because the elements of the crime of kidnapping are just above it, and those are more complicated and more to look at.

My concern is the jury will skip down to that one sentence and use that instead of actually doing the work to go through the elements. I agree that's the correct common law definition of "kidnapping," but in this case the burden is on the State to prove the elements as defined by statute, not the common law definition.

THE COURT: Okay. Then what about the language -- two other things: State's 10, the two lines at the top, "The law does not require the person being

kidnapped to be carried away for any minimum distance. It is the fact of movement of a victim, not the distance, that constitutes the offense."

MS. GROSENICK: I don't object to that.

THE COURT: And then the other thing is whether or not you and Mr. Prengaman and Ms. Rosenthal think that paragraph 5 -- excuse me -- paragraph 2 on page 2 at line 5, "Consent of the person kidnapped or confined to the kidnapping" is necessary in this instruction.

MS. GROSENICK: I don't believe it's necessary.

THE COURT: I don't think Mr. Prengaman did either.

MR. PRENGAMAN: I just changed my mind. Sorry, Your Honor. I apologize. I was thinking through.

THE COURT: "Consent of the person kidnapped or confined to the kidnapping or confinement is not a defense unless the person is above the age of 18 years and the person's consent was not extorted by threats, duress or fraud."

The reason I was trying to see what the parties thought about deleting this is I think it's so confusing. I don't want to overuse that word, but what does that mean: "Consent of the person kidnapped or confined to the kidnapping or confinement is not a defense"? Can't

it just say, "Consent of the person kidnapped or confined is not a defense" -- "Consent of the person kidnapped is not a defense unless the person is above the age of 18"?

MR. PRENGAMAN: Basically, if you go along -- if you're threatened and you go along with it, it's not a defense unless -- if your consent is extorted by threats, duress or fraud.

THE COURT: As long as it's not a misstatement of the law, I'm willing to leave it in. I'm just asking whether or not you think that first phrase is convoluted, "Consent of the person kidnapped or confined to the kidnapping or confinement."

MR. PRENGAMAN: I do not, Your Honor. I think -- I don't know that there's any other way to convey that.

THE COURT: Ms. Rosenthal, with regard to each of those issues.

Ms. Grosenick, did you have something else?

MS. GROSENICK: I did. I just wanted to add that the paragraph on page 2 of the State's kidnapping instruction, lines 6 through 8, dealing with consent, the word "confine" is not really used anywhere else in the instruction, and I wonder if taking out references to "confine" and "confinement" might make it less confusing.

THE COURT: That's what I was suggesting. Simply, "Consent of the person kidnapped is not a defense..."

MR. PRENGAMAN: But confine is one of the elements.

THE COURT: Then we have to list all the elements here. So as long as it's one of the elements -- "Seizes, confines inveigles" -- looking on the previous page under 2(a), "Seizes, confines, inveigles, entices, decoys..." It's in the definition.

MR. PRENGAMAN: I think the reason it is is because the kidnapping is the -- is that movement aspect and confinement is different.

I'll submit to the Court.

THE COURT: Ms. Rosenthal, on those topics.

MS. ROSENTHAL: Your Honor, we would just join with Mr. Williams' objection.

THE COURT: Thank you.

This is what I'm prepared to do with this instruction: I am prepared to begin with the two statements in Defendant Williams' 12: "Neither defendant is charged with kidnapping as a separate crime. However, the State alleges that the defendants committed or attempted to commit kidnapping as a predicate felony to

felony murder in Count IV." Then I'm going to give the State's instruction right up to line 19.

Line 21, "Kidnap means to carry away any person by unlawful force or fraud against his or her will" is coming out, simply because I agree with Ms. Grosenick. It's very well-defined in lines 2 through 10 above or 12 through 19.

"The crime of kidnapping does not require force or restraint" stays, as does the term "inveigle," the term "entice."

I have no objection to "The law does not require the person being kidnapped," those two statements at the top of page 2, and I'm going to leave in the statement at line 5, page 2. It's going to say, "The person kidnapped," delete "or confined to the kidnapping or confinement." So it reads, "Consent of the person kidnapped is not a defense unless," with the rest of that statement.

Now, I won't give Defendant Williams' 12 because I've adopted most of it -- most of it is included in State's 10. The same with Defendant Williams' 14, and I'm not giving Defendant Williams' 13.

Let's move to coercion. Take a look at State's Number 9 and Defendant Williams' Number 12. Tell me when

you have those. They're the same instruction as they start out, "Felony coercion occurs when."

Does everybody have both of those?

They're the same from lines 1 to 6. They're the same in lines 8 to 9. Defendant Williams, at line 9, includes "The standard for the immediacy of the threat is an objective one."

The instructions are then the same. With regard to the State, "In determining whether a defendant has made an immediate threat," at the end of that statement, the State adds, "You can and should consider the testimony of any victim or victims, but the ultimate determination of whether a threat was immediate must focus on the viewpoint of a reasonable person under the circumstances."

So, Mr. Prengaman, let's begin with Defendant Williams' Number 12 stated at line 9, "The standard for the immediacy of the threat is an objective one."

Any objection?

MR. PRENGAMAN: Your Honor, I think this would be the same discussion we had previously over the standard, and so my objection is simply that I think it's clearer for the jury -- instead of saying, "objective," it's easier to just focus on determining the immediacy of

the threat, but --

THE COURT: You don't think it's necessary?

MR. PRENGAMAN: I think it's a little bit more technical to use the term "objective" because that means something to lawyers and not necessarily to the average person, but, again, I know the Court resolved the last objection by including this in the sentence about the victim, by including this instruction, which is very similar to this.

THE COURT: It is.

MR. PRENGAMAN: I'd just incorporate -- I don't want to prolong it. I would incorporate my prior argument for that. I can't remember if that was the -- which instruction that was, but I would --

THE COURT: Okay. Thank you.

MR. PRENGAMAN: I incorporate my prior arguments about not using "objective" and the case law supporting the jury being able to consider the victim's experience.

THE COURT: Okay. Ms. Grosenick, with regard to both those issues, defending "the standard for the immediacy" in your instruction and then addressing "You can and should consider the testimony of any victims" in Mr. Prengaman's instruction.

MS. GROSENICK: Your Honor, our main dispute is with that sentence, "You can and should consider the victim's testimony."

In this situation we have the Santana case, 122 Nev. 1458, 1463, and the court notes that the standard that you use and the viewpoint that the jury focuses on is really significant as far as whether threats were made or whether a reasonable person in that situation would feel threatened.

This sentence that the State has included as their last sentence in the coercion instruction contravenes Santana in that sense. The jury is already being instructed that they alone determine the credibility and how to use evidence and how to weigh evidence, and so I think that this is more dangerous here as well because it does -- it does take the focus away from the standard of a reasonable person. I don't think it should be included.

THE COURT: Okay. What about defending the statement that you've made, which is "The standard for the immediacy of the threat is an objective one"?

MS. GROSENICK: I don't think "objective" is that big of a word, and the State uses "subjective" in their instructions, so I don't see the problem with that,

but if the Court wants to make it more plain English, I'm fine with that.

THE COURT: Okay.

MR. PRENGAMAN: Just briefly, Judge, it doesn't contravene Santana. It's directly out of Santana. The court in Santana said, "While the jury can and should consider the testimony of victims, the jury remains responsible for determining whether the threat was immediate, future, or incapable of being performed."

MS. GROSENICK: But the jury wasn't instructed that. That is dicta out of that case.

THE COURT: So this is the way I'm going to do this: I'm going to give Mr. Williams' Number 11, "Felony coercion occurs when a defendant," and the reason I'm going to do that is while I don't think there's anything technically wrong with the statement that's proposed by the State, "You can and should consider the testimony of any victim or victims," etcetera, the jury has already been instructed to consider the testimony of victims or -- of all witnesses.

Ms. Rosenthal, regarding Defendant Williams' 11, any objection to that instruction?

MS. ROSENTHAL: No, Your Honor.

THE COURT: That's the one that I'm going to

give.

And then the second half of that statement, "The ultimate determination of whether the threat was immediate must focus on the viewpoint of a reasonable person under the circumstances," read the sentence right before that in the proposed instruction, which both parties have proposed: "In determining whether the defendant has made an immediate threat of physical force or injury, you must decide the immediacy of the threat based upon how a reasonable person under the circumstances..." it seems to just be repeating that. So I will give Defendant's 11 on coercion.

Next is DUI, the definition of "causing the death of another" -- excuse me -- the instruction "causing the death of another while driving under the influence of methamphetamine." That's State's 11 and I think Defendant's 22.

So let's begin with what they have in common. Does everybody have both of those in front of them?

What they have in common is, beginning with the State, the State's, at line 15 through 24, is identical to Defendant's line 9 through 18. The only thing the State has added is "The definition of substantial bodily harm occurs elsewhere in these instructions."

I have a question about that. Do we need "substantial bodily harm" in these instructions? Because everything you read about the DUI without the death in this case does not include substantial bodily harm, and I'm wondering if we need the definition of "substantial bodily harm" in these instructions. I just don't see it alleged anywhere.

Mr. Prengaman.

MR. PRENGAMAN: Well, Your Honor, because death certainly is sufficient, but it's not necessary, and although it's unlikely what the defense might argue, I won't presume what they might argue, and there are certain cases where there might be arguments about the ultimate cause of the death, what I view as a position with an accurate instruction about substantial bodily harm is to say it doesn't matter, that the harm that was caused immediately --

For instance, take this case, for instance. I'd submit the evidence shows that upon the collision, at the very moment of the collision, the victim suffered substantial bodily harm, which I proved beyond a reasonable doubt.

And then with regards to what happened after -- I'm sorry -- then regardless of what happened after that,

what aid was rendered, etcetera, I would still be entitled to argue that that alone -- that substantial bodily harm occurred and that the collision alone caused the death -- not caused the death, but met the elements of the statute, which would -- again, the defense may not argue anything in that regard, but I would not want to limit myself from having that available since it is legal and it's still applicable in this case even though there's an outside chance there might be argument about it.

THE COURT: I appreciate that. Thank you.

But I have a question for Ms. Grosenick regarding the defense's objection.

So now we know where they're similar. Where they're different is at the top half where the elements of driving under the influence causing death are laid out. I went through Mr. Prengaman's 1 through 5 at the top of State's 11, and between 484C.110 and 484 -- NRS 484.4301, I see those elements set out almost verbatim in the State's instruction, but the defense is different.

So explain to me and defend lines 1 through 8 of the defense instruction.

MS. GROSENICK: Your Honor, I don't have an

objection to the State's version if the Court prefers that. The defense's version came directly from the Gonzalez case in which it says to support a conviction, the State must prove the defendant, you know, committed these four elements essentially, and so that's where that language came from.

I would note -- I don't think that actual physical control is an issue in this case either. It's something that I just caught while rereviewing everything. So I think that subsection 1(b), line 5 in the State's instruction, I don't think that we need that.

And then as to substantial bodily harm, there's no real obligation of substantial bodily harm as to Jacob Edwards. The only evidence presented was that he died as a result of this accident, not that he was injured and suffered prolonged pain, and, furthermore, that was not alleged in the to-wit portion of the Information for any of these counts. They all alleged to wit that Mr. Williams crashed his truck head on into the vehicle being driven in the correct direction by Jacob Edwards which proximately caused Edwards' death.

So I don't think that we need the "substantial bodily harm" references or instruction in this case. I don't think we would have a credible argument that he

didn't die, and so that's not an argument that we would make, but I do think that these jury instructions are already very lengthy and including ones that we don't need will further confuse the jury.

THE COURT: Ms. Rosenthal, just to give you some point of reference, substantial bodily harm is the State's 15.

MS. ROSENTHAL: Yes, Your Honor, I'm aware of that.

So given that Ms. Norman is not charged in any of this count, she does not have an opinion on this instruction.

THE COURT: Thank you so much.

I am going to give the instruction as proposed by the State, and I'll leave in the substantial bodily harm reference.

All right. Let's go to State's 12, Defendant Williams' 23.

Counsel, the only difference between these two instructions -- they're identical -- is that the defense has included "beyond a reasonable doubt," which, as I've indicated, was already going to be given, and so I have -- so otherwise they're identical.

MS. GROSENICK: Your Honor, we actually

excluded "substantial bodily harm" from Mr. Williams' instruction.

THE COURT: You excluded "of or bodily harm." Yes, you did.

Mr. Prengaman, I'm going to go back to the substantial bodily harm with you. It's not alleged. It's alleged that he died. The offenses all charge death. Am I right about that? Look at the Information. I looked at it. I checked this this morning. There's no substantial bodily harm in the State's -- in the stipulated instructions.

MR. PRENGAMAN: Your Honor, if the defense is saying they are not going to argue anything in that regard, then --

THE COURT: Ms. Grosenick, are you going to argue anything in that regard?

MS. GROSENICK: Regarding substantial bodily harm? No.

THE COURT: Ms. Rosenthal, taking into account your last statement, I assume you're not going to argue substantial bodily harm either?

MS. ROSENTHAL: Correct, Your Honor. All the charges that would relate to that, Ms. Norman is not a party to.

THE COURT: So let's take a look at State's 11. Let's go back to the causing the death of another by driver instruction.

Number 5, "The act" -- this is at line 12 -- "The act or neglect of duty proximately causes the death of another."

Okay. That's how that instruction will be modified.

The last line, 25, "The definition of substantial bodily harm appears elsewhere in these instructions" will come out, and I will not give the State's 15, which is the definition of "substantial bodily harm."

MR. PRENGAMAN: However, Your Honor, with the eluding, that is a little different because it's not substantial bodily harm, it's just bodily harm, and I would suggest -- so I would submit that should stay in. That's a different thing. We're not talking about substantial bodily harm. It's just any bodily harm suffices, and I would say the State has is certainly going to allege -- the allegations in this case should include that as well. It doesn't require any additional instruction or definition.

THE COURT: Okay. So I'll leave bodily harm.

Let's go to reckless driving. These are identical except as follows: Number 5 at line 7, for the defense, Defendant Williams does not include "or substantial bodily harm." It's just "death of another person" and does not include "The definition of substantial bodily harm appears elsewhere in these instructions."

Now, reckless driving does not talk about bodily harm. It just talks about death in the Information.

Ms. Grosenick, are you willing to stipulate you will not argue substantial bodily harm as to reckless driving?

MS. GROSENICK: Yes, Your Honor.

Also, as to the eluding, the State wants to leave in "bodily harm," but I would not that in the "to wit" language of the Information, it is not alleged there either, it's only alleged to be death, but we will not argue that the State didn't prove that he wasn't substantially bodily harmed.

THE COURT: Or any bodily harm?

MS. GROSENICK: We're not going to argue bodily harm at all.

THE COURT: Okay. Mr. Prengaman, I'm going to

give the instruction that Mr. Williams has proposed because it's identical to yours without the "substantial bodily harm" references.

MR. PRENGAMAN: Your Honor, it does include "beyond a reasonable doubt."

THE COURT: It does.

MS. ROSENTHAL: Your Honor, just to be consistent, can we use just the first line of the State's and then Mr. Williams' just so they can all be similar?

THE COURT: Yes.

Proximate cause, State's 14, Defendant Williams' Number 27.

Mr. Prengaman, I had a pretrial motion regarding the admission of Sparks Police Department items, and in that the parties cited to Williams v. State, 118 Nev. 536 (2002), a Nevada Supreme Court case, and there's a definition of "proximate cause" in that case as instructions to the jury, which is what Defendant Williams proposed, and then I've got your proposed which is significantly differently.

MR. PRENGAMAN: Your Honor, I wouldn't necessarily say, "significantly different." I'd say --

So one thing in Williams, on the facts of that case, in the Williams case, the court pretrial precluded

the defense from arguing their theory of the case on proximate cause, and the reason the court did that as the Williams -- as our supreme court -- so the reason the trial court did that was because of the timing, and the court held that because it was a preexisting condition that the conduct of the defense alleged or wanted to allege as an alternative cause occurred -- did not occur after the defendant's conduct, it ruled it precluded the defendant from doing that, and our supreme court said that was appropriate.

So the significant thing or a significant thing for Williams that is reflected in the State's instruction that is not at all addressed in the defense instruction is that the other person's action has to have occurred after the defendant's act or neglect of duty in order to even reach or be considered as proximate cause. So, in other words, it's not just that it has to take over and become the sole cause. It cannot be a preexisting condition, and it must occur after the defendant's conduct. That's what Williams says. So the defense proposed instruction does not include that.

Additionally -- Your Honor, and, really, the State -- I would submit the State's instructions simply leaves out the confusing language, which no doubt is

accurate, but to a jury, talking about proximate cause, intervening causes, those things are confusing for lawyers, as I think civil case law in Nevada will attest to. And so all the State's instruction does is it leaves out those terms and simply states what they are, so instead of using "intervening cause," it just says what an intervening cause is.

So I would submit the State's instruction is not -- what we convey is not complex or technical language. The substance is what an intervening cause is. In other words, it has to break the chain of causation from the defendant's conduct, so they actually know the person became the sole cause of the bodily harm or death.

Then, additionally, Your Honor, the State's instruction doesn't include that there can be more than one cause, which, again, is well-grounded in the case law, but I think it's significant in terms of tailoring the instruction in this case because, as the Court has heard in the course of the trial, the defense, particularly Mr. Williams, has tried to cast a light on the Sparks Police Department. It's suggesting their conduct played a role, blaming them, and that's the thrust of much of their examination of the police officers who were involved in the pursuit.

So it's particularly, I would suggest, significant to tailor this instruction to the facts of the case and let them know there may be more than one; there could be more than one proximate cause of an injury. However, in spite of that, the defendant's conduct or the conduct of the other person must have taken over and become the sole cause of the event.

So I would submit that the -- and then the State's instruction does have "reckless" and "negligence" or definition of "negligence," and I think if the instruction is going to refer to negligent action of another person, you need to tell this jury what language this is.

Now, the State's instruction does reference substantial bodily harm, which, of course, would have to come out based on the prior rules on the other instructions, but I would submit that this conveys fully and specifically the timing issue, that the conduct of the person has to be after the defendant's conduct, which the Williams instruction doesn't, as well as the more natural language and telling them there could be more than one proximate cause.

So I think this is accurate, and this is the instruction that should be given.

THE COURT: I don't see substantial bodily harm defenses.

MR. PRENGAMAN: Your Honor, it would be --

THE COURT: Am I missing it?

MR. PRENGAMAN: I'm sorry. Your Honor, it starts out, "A proximate cause of substantial bodily harm or death." So it would read, "A proximate cause of death," on line 1, and then it refers to "harm or death" throughout. So I would remove that reference to harm based on that.

Is that what the Court was asking me?

THE COURT: Right. I see in the State's instruction -- I see what you're saying. I understand. Thank you so much. Okay.

Ms. Grosenick, with regard to proximate cause?

MS. GROSENICK: Your Honor, I request that the Court use Mr. Williams' instruction that's already been upheld as a valid jury instruction under Nevada law. It is not as long and confusing as the State's.

I think that the portion of the sentence beginning on line 7 of the State's instruction is actually more confusing, to talk about how another party could also be negligent and also a proximate cause.

And then on line 11, I agree with the State

that the issue in Williams was that Williams' actions occurred after the teenagers were in the meeting. I think the facts in this case are different. However, we are bound by the Court's pretrial ruling, and so that has affected the evidence we could present and our strategies as well.

But I think that -- I don't think that Williams announced a hard-and-fast rule that in every situation the contributory negligence would have to happen after the defendant's actions. I think that in this case that's a different -- this case presents different facts.

THE COURT: Okay. Thank you.

Ms. Rosenthal.

MS. ROSENTHAL: We have no opinion, Your Honor. We would join Mr. Williams' instruction request.

THE COURT: Thank you so much.

Ms. Grosenick, what do you think about line 16 through 17? The proposed Williams instruction references "contributory negligence," and on line 16 and 17 the State has a proposed definition of "negligence."

MS. GROSENICK: I don't have an objection to that. I think it's a correct statement of law.

THE COURT: What I'm going to do is give Mr. Williams' instruction on proximate cause, and I'm

going to add to that the last line in the State's instruction at line 16 through 17 about negligence.

Next, this is guilt or innocence of each defendant. There are two instructions proposed. One is the State's Number 2, "You are not called upon to return a verdict as to the guilt or innocence of any other person than the defendants," and then there's Defendant's 26, "You are here to determine the guilt or innocence of each defendant from the evidence in this case."

Mr. Prengaman -- they're very similar, Counsel. The only thing that's really different about the two of them is the second sentence. The State's second sentence is "Whether anyone else should be prosecuted for the crimes charged in this case or other crimes is not a proper matter for you to consider." The defense's is "You are not called upon to return a verdict as to the guilt or innocence of any other person."

MR. PRENGAMAN: Your Honor, I'd submit it based on the additional case law of Roy vs. State, which talks about -- I've quoted it -- "The criminality of one person's acts cannot rationally depend on whether the State decides to prosecute another."

In this case there has been -- again, the

defense, notably Norman's counsel, both in opening and in examination, has called attention to the lack of Mr. Kelly's -- not just not being here, but not being charged, and that's not just been in their opening, but in the course of questioning of witnesses, emphasizing that.

So I think, again, from the perspective of tailoring the instructions to the facts of this case, whether he was arrested or prosecuted has no bearing on whether the evidence in the case proves the charges alleged against the two defendants.

So, again, given that these are pretty close, I'd submit the State's instruction is better tailored to the arguments that have been -- and the things that have been emphasized in this case.

THE COURT: Okay. Thank you, Mr. Prengaman.

Ms. Grosenick.

MS. GROSENICK: I think the State's version of that sentence, "Whether anyone else should be prosecuted," is not necessary, and Mr. Williams' instruction was specifically approved of in Guy vs. State, and that's a published Nevada Supreme Court opinion, and it covers the State's concerns here because it does say, "You are not called upon to return a

vertical as to the guilt or innocence of any other person."

So this instruction covers the concerns by the State and is more neutral and has already been approved by the Supreme Court.

THE COURT: Thank you.

Ms. Rosenthal.

MS. ROSENTHAL: Thank you, Your Honor. We would join with Mr. Williams' instruction. I believe it reads more clearly and would be easier for the jury to understand.

THE COURT: Being that the Williams' proposed instruction is a direct quote right out of Guy v. State and is also quoted, by the way, as a reference or a resource in the State's instruction, I'll give Defendant Williams' instruction regarding guilt or innocence of another person.

The State has proposed an instruction which is State's Number 7, "The reduction in the degree of the crime of murder is not available to the jury upon the basis of mitigating circumstances, but only upon the basis of lack of proof of the elements of the crime as fixed by law."

After this, Counsel, I'm going to take a brief

recess to give our court reporter a break, and we don't have that many more to go.

Mr. Prengaman, the purpose of this instruction?

Well, let me ask first, Counsel Grosenick, any objection?

MS. GROSENICK: I'm sorry. What number?

THE COURT: State's Number 7. It's very short, barely three lines. It starts, "The reduction in the degree of the crime of murder."

MS. ROSENTHAL: While Ms. Grosenick is finding it, perhaps I can speak to this so we can move along.

Ms. Norman's position is that this instruction is unnecessary. The Court instructs on the different elements and what each element is, so I don't believe this is necessary for this case.

THE COURT: Okay. Ms. Grosenick.

MS. GROSENICK: Your Honor, this is one of those ones we originally did not object to, so we'll just submit on it.

THE COURT: Okay. Thank you.

Mr. Prengaman, the purpose, the importance of this?

MR. PRENGAMAN: Your Honor, this is approved specifically by Scott vs. State, and, again, the emphasis

by both defendants in this case has been on what I would term collateral matters like the police conduct, and I anticipate that type of argument, that the police somehow bear responsibility, even though legally there's no basis for that type of allegation, but it has, nonetheless, been emphasized to the jury quite heavily.

And so this is appropriate and simply reminds the jurors that such factors as police conduct -- I'm just singling that out as an example -- are not available, and it's strictly evidence and elements.

THE COURT: With that, it's directly supported by Scott v. State at 92 Nev. 552, and so I would give it as an accurate statement of law.

Counsel, we're going to take a break now. When we come back, we are going to go to State's Instruction Number 16, which is "actual physical control of a vehicle," and then we don't have that many more to go to work our way through these and then talk about where we want to go from there.

So let's take a quick 15-minute break. It's 3:15. We'll come back somewhere close to 3:30.

(A recess was taken.)

THE COURT: State's 16, "A person is in actual physical control of a vehicle."

MR. PRENGAMAN: Your Honor, didn't we take that out of the DUI instruction?

THE COURT: Did we what?

MR. PRENGAMAN: I thought we -- I'm sorry. I thought we took that out of the DUI instruction, or did we just discuss it? I thought we took that out.

THE COURT: We didn't. It's not in the -- it wasn't in the defense's, but I don't think I took out "actual physical control." I'm almost sure I didn't. I left it in. Ms. Grosenick asked me to take it out, but I did not take it out.

MR. PRENGAMAN: We had that discussion, didn't we, about whether it was applicable?

THE COURT: Right. It's part of the statute. If you'll stipulate to take it out, then we don't have to deal with this instruction.

MR. PRENGAMAN: As long as the defense isn't going to argue actual physical control.

THE COURT: Defense, are you going to argue actual physical control?

MS. GROSENICK: No, Your Honor.

THE COURT: Ms. Rosenthal, you don't even have a dog in this hunt; correct?

MS. ROSENTHAL: Correct.

THE COURT: Thank you.

In State's Instruction Number 11, which defines "cause of death of another by driving a vehicle while under the influence," with modifications based on all our discussions, I'm giving State's 11, again, with modifications.

Section 1 of the instruction says, "The defendant willfully drives a vehicle or is in actual physical control of the vehicle." I now have no objection to removing "or is in actual physical control of the vehicle," so that's going to come out, and, therefore, I do not need to give State's 16.

That one is withdrawn, Mr. Prengaman?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: That's withdrawn.

State's 23, "It is not improper for the attorneys to have interviewed witnesses prior to trial in this case. The practice of interviewing witnesses before a trial is expected and completely proper under Nevada law."

Mr. Prengaman, do you still want to give this? There's testimony on the record that you may have been present while police were meeting, but I don't know if there's any testimony on the record about you

interviewing a witness.

MR. PRENGAMAN: There was, Your Honor. It was asked of Mr. Sims, so I would request it.

THE COURT: Ms. Grosenick.

MS. GROSENICK: Your Honor, this is not a recognized jury instruction. It's unnecessary, calls attention to phone interviews over others, and so we object to this instruction.

THE COURT: Because it's not a recognized instruction?

MS. GROSENICK: It's not recognized. It's not necessary in this case.

You know, where that came out was with Mr. Sims. That was exculpatory information that we were entitled to that we didn't have until, I think, our attorney brought it out of Mr. Sims. But I think that's the only instance where an interview was mentioned with the State outside of trial, so I don't think it's necessary or appropriate.

THE COURT: Okay. Ms. Rosenthal.

MS. ROSENTHAL: We will join with that, Your Honor.

Your Honor, just on that note, I don't believe it was in question whether or not they were allowed to

meet with attorneys. There would be no reason to say it's permitted under Nevada law.

THE COURT: Ms. Rosenthal, it's funny you should say that. If I give it, I'm only going to give the first sentence. I think it's generic enough if it's just the first sentence, and I'm willing to give that because it applies to all counsel in the case.

And I get that it's not -- that there's no Nevada law cited to support it, but I just want to avoid the inference that it was improper. So I'm going to give it but just the first sentence: "It is not improper for the attorney to have interviewed witnesses prior to trial in this case."

Okay. Next is Defendant Norman. I have an instruction, "Proof beyond a reasonable doubt."

Ms. Rosenthal. And I should say that the proof beyond a reasonable doubt, the reasonable doubt is stipulated in Instruction Number 15 in those that are stipulated.

Ms. Rosenthal, are you still offering Defendant Norman's 1?

MS. ROSENTHAL: No.

THE COURT: Okay. Defendant Norman 1 is withdrawn.

Next is something that we talked about and resolved prior to trial. This is Defendants Williams' Number 5. "You cannot find either defendant guilty of felony murder under a theory of murder to prevent lawful arrest unless you find that the murder was committed for the purpose of avoiding identification, apprehension, or lawful arrest."

Based on the case law that was provided to this Court and, more importantly, the statutory language, this Court indicated, having heard oral argument before trial, that the proper instruction would be "You cannot find either defendant guilty of felony murder under a theory of murder to prevent lawful arrest unless you find the murder was committed to avoid or prevent lawful arrest."

Mr. Prengaman.

MR. PRENGAMAN: Your Honor, as I indicated in the State's instruction, I think -- the State's instruction does say that, and essentially there's three kinds of first degree murder: There's felony murder, premeditated murder, and then an unlawful killing of another with malice.

The defense instructions suggest to the jury that the killing has to be intentional for the purpose of escape, and that is inconsistent with the nature of a

malice killing, and it's based only on cases that are sufficiency-of-the-evidence cases. In other words, the Supreme Court has looked at particular evidence in particular cases and said, yes, this is sufficient, or this met the standard.

But the cases cited by the defense don't speak to the definition. Again, a sufficiency-of-the-evidence case does not add anything to the defense argument that it has to be for the purpose of a particular phrase in our request.

And the case law is clear as the State cited. The mens rea for a killing to prevent lawful arrest is malice or express malice or implied malice, and, accordingly, implied malice is malignant recklessness. So what that means is a killing that occurs by virtue of malignant recklessness, the underlying conduct. So the conduct, the malignantly reckless conduct that occurs to avoid lawful arrest, that's first degree murder. So you cannot have an implied malice mens rea and then tell the jury it's a purposeful killing.

So the defense instruction, to the extent that it suggests that or implies that, that suggests, again, that the killer has to have -- is killing intentionally to avoid arrest, which is inconsistent with the law.

So I submit the State's instruction sufficiently addresses it. It tells them -- it tells the jury that it has to be to avoid or prevent lawful arrest, and then it tells them the appropriate mens rea, which is malice.

And the State does not have to -- again, the case law is clear. The law in Nevada tells us the State does not have to prove premeditation or intent to kill. Malignant recklessness is all the State has to establish.

THE COURT: Mr. Prengaman, the Court has heard all these arguments, but my question for you is, I gave the parties' instruction I'm willing to give based on my review of the case law and the statutory language, and I'm prepared to give that unless there's an objection or a withdrawal with no interest in having it given.

MR. PRENGAMAN: Well, Your Honor, I would submit that it is somewhat duplicative of the State's -- there was no objection to the State's instruction, so this would be in addition to the State's instruction, is my understanding, and that has not changed since our pretrial ruling; correct, Your Honor. In other words, the State's instruction --

THE COURT: Take me to it.

MS. GROSENICK: It's State's Number 21 in the

unobjected to, but I will be objecting to that.

THE COURT: Oh, you changed your position.

This is "Murder committed to avoid or prevent the lawful arrest of any person by a peace officer is murder in the first degree."

Is that the one?

MR. PRENGAMAN: Yes, Your Honor. And I thought that was stipulated to.

THE COURT: Ms. Grosenick.

MS. GROSENICK: Thank you, Judge.

So the one that Mr. Williams has submitted on murder to prevent lawful arrest was submitted in addition to the State's Number 21 that was not objected to, but if the Court is not going to give the defendant's instruction, then I do object to the State's instruction, and I don't think that the Court's instruction goes far enough in accurately instructing what intent is necessary.

The State's characterization of my argument regarding intent necessary for murder to prevent arrest is correct. The way that the State is arguing this applies is that if you act malignantly or recklessly while trying to prevent arrest and someone dies, that is first degree murder by definition under the statute, and

that is inaccurate.

The case law is extremely clear on the purpose of this statute and this theory of liability for murder. Just like in felony murder where the intent from the felony supplies the malice in murder, the purpose of killing someone to avoid apprehension, to avoid arrest, to avoid witnesses against them and identification, that is what replaces the premeditation and deliberation and malice in murder to prevent arrest.

And so I think that this instruction is actually one of the most important in the entire packet because the jury should be instructed correctly, and the State should not be able to argue in closing that if someone dies while you are fleeing from police, that that's first degree murder unless it's under the theory of felony murder, which is specifically defined elsewhere, or unless it was intentional and premeditated.

The circumstances that the State is describing is already covered by felony eluding, and so the legislature has already said that the circumstances the State is arguing, those are already covered by felony eluding.

So I don't know -- I do still object to the Court's version, and I do object to State's unobjected-to

21 if the defense's version is not given.

THE COURT: Okay. Ms. Rosenthal.

MS. ROSENTHAL: Thank you. We would agree with Mr. Williams' counsel.

THE COURT: I just want to make clear that the way I read these instructions -- and this is not a comment of support for either one of them -- the one being offered by the State, which was stipulated 21, is "Murder committed to avoid the lawful arrest of any person by a peace officer is murder in the first degree." And Mr. Prengaman cites 200.030, Degrees of Murder, and it's 1(c).

The Defense's Number 5: "You cannot find the defendant guilty of felony murder under a theory of murder to prevent lawful arrest unless you find that the murder was committed for the purpose of avoiding identification, apprehension, or lawful arrest."

I want everybody to be clear that what's being presented to me in these two instructions, in my view, are different theories of the case.

Mr. Prengaman, am I wrong about that?

MR. PRENGAMAN: No, Your Honor, but I think the defense is wrong. It's not felony murder. Graham vs. State, 116 Nev. 23, clearly lays that out.

Again, there are three kinds of first degree murder: Deliberate premeditated murder; express-malice premeditated murder; there's then felony murder, which the Graham case talks about. That is the type of murder where the commission of an underlying felony supplies the malice by law, by legal theory.

Then there is the enumerated means, which are different. And, again, in Graham the supreme court talks about those. "Once it is proved that a homicide was done with malice and thus constitutes murder, the murder is in the first degree as a matter of law if it was done in an enumerated manner as shown by the particular facts of an individual case."

The State does not need to prove premeditation, deliberation, and intent. We have to prove malice as the case law tells us in Hernandez and the statute in Chapter 200, "Malice, express and implied."

So the State has to prove a malice killing, and the State is not -- in this case the theory -- the defense statement of the State's theory is oversimplistic. It's not that they were eluding police. He drove the wrong way on the freeway. In other words, he drove in malignant recklessness of other people's lives. He says in the phone call he did it to create

danger to other people. That is the malignant recklessness the State is addressing.

I'm not saying that every eluding of the police is first degree murder by avoiding the police. I'm saying I have evidence in this case, this specific case, of conduct that the defendant engaged in to elude the police that was engaged in to the point where he drove on the freeway the wrong way and entered the flow of traffic against traffic that was in malignant recklessness of other people's lives.

THE COURT: This is your theory of murder that's an alternate to felony murder?

MR. PRENGAMAN: Yes, Your Honor.

The felony murder is they committed felonies at Bob & Lucy's, and then in the unbroken chain of events, while waiting, in other words, while waiting to complete one of them, the police arrive, and they fled, and my theory of that is based on those felonies that were committed at Bob & Lucy's, the State's allegation of those felonies.

So that's different. That is premised upon those felonies being committed and the flight being in the unbroken chain of events. I don't need to show malice. It could be an accidental killing. All I need

to show is that it was connected, and that unbroken chain of events is a felony. That's a different theory.

THE COURT: But Instruction Number 21 is something entirely different. This is murder in the first degree with implied malice based upon this malignant recklessness?

MR. PRENGAMAN: Yes, Your Honor.

As the Graham case says, this is -- it's not its own -- so this is one of the enumerated means in 200.030. So, again, it's not felony murder.

All the things that the defense is talking about, that's felony murder, not this. This is the enumerated means, and that's what Graham says. With the enumerated means, there must be malice, so you have to show malice, and once you show malice, once you show a killing was committed with malice by one of those enumerated means, here to avoid that lawful arrest, it's first degree murder by legislative fiat.

And so that is what the State is -- that's what this instruction is addressing. If I show a malice killing -- in other words, I can show it could be intentional, of course, because malice includes intent to kill, but it doesn't have to. Malice by statute, by case law, is express or implied, and so if I show a malice

killing, a malignantly reckless killing, to avoid or prevent lawful arrest, it's first degree. Like it or not, I mean, felony murder or not, this is separate and apart, and that's my theory, is that by driving on the freeway to avoid or prevent lawful arrest, that conduct, driving on the freeway -- in other words, what the evidence shows, driving at freeway speeds against traffic, was malignantly reckless.

THE COURT: Now, let me ask Ms. Grosenick this question.

Ms. Grosenick, you don't deny the State's ability to pursue that theory of murder in this case?

MS. GROSENICK: Can I clarify?

THE COURT: Yes.

MS. GROSENICK: The use of the words "felony murder" in my instruction was inartful at best. I agree they're separate theories of first degree murder.

So for purposes of this argument, I would replace the words "felony murder" with either "first degree murder" or just "murder."

MR. PRENGAMAN: Your Honor, that --

THE COURT: Wait, Mr. Prengaman.

So do you have Defendant Williams' Number 5 in front of you, Mr. Prengaman?

MR. PRENGAMAN: I'm sorry?

THE COURT: Defendant Williams' Number 5, please. It starts out, "You cannot find either defendant guilty." Let me know when you have it.

MR. PRENGAMAN: Yes. I've got it now.

THE COURT: Ms. Grosenick has just amended the instruction to take the word "felony" out of the first line. "You cannot find either defendant guilty of murder under a theory of murder to prevent lawful arrest unless you find the murder was committed for the purpose of avoiding identification, apprehension, or wrongful arrest."

I just want you to know she made that change. All right?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: Okay. Ms. Grosenick, so your Instruction 5, the State has stipulated -- we'll use the term "stipulated" -- stipulated to 21. These two instructions dovetail.

MS. GROSENICK: Right.

THE COURT: Okay. Go ahead.

MS. GROSENICK: But I think there's a fundamental disagreement here about what qualifies as first degree murder under this theory, under murder to

avoid lawful arrest. At this point we have a fundamental disagreement about what the State has to show. So I think that's really significant because it's going to affect the jury instructions, and it's also going to affect closing argument for both sides.

What the State is arguing is that you can be convicted of first degree murder if you drive malignantly and reckless on the highway and someone dies as a result. That is not consistent with the plain language of the statute or any of the case law interpreting that statute. It is very clear both the word -- the use of the word "to" in "murder to prevent," that implies purpose, and that is not in the dictionary.

THE COURT: Look at 200.030, murder of the first degree is murder which is committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody." We don't need to talk about the second half of it. So that's what the statute says.

If I were going to require the instruction, which is my practice, to quote the statute, it would say, "Murder of the first degree is murder which is committed to avoid or prevent the lawful arrest of any person by a peace officer." That's what the law says.

MS. GROSENICK: The difference here, though, is that this alleged conduct of driving the wrong way on the freeway and recklessly driving and either one of those causing death and/or DUI causing death is already covered by three other statutes that have imposed category B liability for that conduct. And so you can't also have felony-level -- well, you can't also have first degree murder liability for that same conduct. It's already been held by the legislature.

THE COURT: We're going back to these original arguments. In other words, yeah, I remember your original argument in your briefing was eluding.

MS. GROSENICK: Or, you know, fleeing from police to avoid arrest under perpetration theory and felony murder, that's also already covered, and so --

THE COURT: I don't want to talk felony murder here because that's where I got -- that's where I got led down a different path because -- so this is murder in the first degree. This is not felony murder. Well, this is murder, not felony murder.

MS. GROSENICK: So take a situation where someone steals a candy bar from a gas station, flees from police and drives the wrong way on the interstate, and there's a head-on collision. That's not felony murder

because it's a petty larceny, I guess, depending on his criminal history, but let's assume no criminal history. It's a petty larceny. That cannot be felony murder or --

THE COURT: I'm not saying it's felony murder.

MS. GROSENICK: I know, but I'm dealing with the hypothetical of, like, what the State's position would allow to be a first degree murder is not allowed. If that's what the legislature had intended, then they wouldn't have the penalties for felony eluding or felony reckless causing death, and they wouldn't have limited felony murder to just those enumerated felonies. It would be any crime, in perpetration of any crime would be felony murder.

So I think what the State is asking for --

THE COURT: Let me ask you something.

Where is the malice element in the wording? "The defendant drives" -- I'm reading from the eluding instruction: "The defendant drives a motor vehicle on a highway" -- the instruction the parties proposed is the same, meaning Williams and the State -- "The defendant drives a motor vehicle on a highway or premises to which the public has access; willfully fails or refuses to bring the vehicle to a stop or flees or attempts to elude a peace officer in a readily identifiable vehicle of any

police department or regulatory agency; when given a signal to bring the vehicle to a stop by flashing red lamp or siren; and while doing so is the proximate cause of death of another person."

There's no malice here. What Mr. Prengaman is accepting is that in order to prove murder under NRS 200.030, there's an element of malice, implied or express, and in his case he's saying its implied here, and it's the malignant recklessness.

But that's not an element of eluding, so I don't understand how the elements of eluding can take an X to the box of murder under NRS 200.030(1)(c).

Same with reckless driving. I don't see a malice element in there either. There's a heightened level of proof, clearly. It's murder.

MS. GROSENICK: So, first, I think the analogy here is with a case like Sheriff vs. LaMotte, L-a-m-o-t-t-e, 100 Nev. 270 (1984), there, the court found that --

THE COURT: Excuse me. 100 Nev. 270?

MS. GROSENICK: Correct.

THE COURT: Okay. You said 270. Where am I going? What page?

MS. GROSENICK: I would start around 272.

THE COURT: Give me just a minute.

I've read this case. I want to read it again, though.

Okay. Go ahead.

MS. GROSENICK: The idea there is that you can't imply the malice for another crime that's already been defined by the legislature saying, look, this conduct, we've decided, is covered by this statute. We can't imply malice from that conduct to replace the premeditation -- well, you can't imply malice from conduct that's already been prescribed by the legislature and it's been determined that this is the penalty that the legislature wants to have for this conduct.

THE COURT: But I don't think that's what Sheriff vs. LaMotte says.

"The Sheriff presented two theories in support of murder charges: First, the Sheriff argued" -- what I'm getting at is I think you're conflating the malice theory with the DUI theory, and they're separate in this case.

"First, the Sheriff argued that in this case LaMotte's erratic driving before the fatal accident demonstrated a sufficiently abandoned and malignant heart to imply malice. Second, the Sheriff contended that

under the reasoning of Sheriff v. Morris, the second degree murder charges were proper because drunk driving is unlawful conduct, inherently dangerous in the abstract, which naturally tends to destroy a human life and which immediately and directly caused the victims' deaths."

So there were two theories here. What the court said is "Sheriff v. Provenza," which is a 1981 Nevada case, "provides that 'malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart.' Our review of the record indicates that the lower court did not commit substantial error in finding that sufficient evidence existed to imply malice in this case."

So with regard to the malice, what happened there was the lower court said insufficient to imply malice, but there's no ruling -- and the district court -- the supreme court upheld that, but there's no ruling there that implied malice cannot relate to a DUI just because of the driving. In other words, "Malice shall be implied when no considerable provocation appears, or when the circumstances of the killing show an abandoned or malignant heart." In other words, that in

and itself was supported by a finding second degree murder. In this case that standard wasn't met.

"The sheriff's second contention invites this court to extend liability for second degree murder to all deaths resulting from drunk driving by ruling that drunk driving per se is inherently dangerous and naturally tends to destroy human life...however, we left such a determination to the legislature."

In this case, what I hear the State doing is taking on the first contention that's analogous or that was part of Sheriff vs. LaMotte, which Mr. Prengaman is taking on the implied malice, he's embracing it, he says I have to prove it, and he's acknowledging that it's a higher standard than eluding or reckless driving, because it's malice. I don't hear him saying murder naturally flows from eluding and reckless driving because the driving was bad in this case.

Go ahead. Anyway, I don't read LaMotte to be saying what the defense is contending.

MS. GROSENICK: Your Honor, I'm not arguing that LaMotte applies to this specific situation. I don't think I'm conflating DUI liability with first degree murder. I'm arguing by analogy.

And so take the State's instruction for

reckless driving. The jury will already be instructed that "To act wantonly as necessary for reckless driving is to unreasonably or maliciously risk harm while being utterly indifferent to the consequences."

How is that any different from the implied malice that the State wants to draw from the driving pattern in this case?

THE COURT: Ms. Grosenick, what I'm looking for from you is something that is specific that says, to the extent -- it doesn't have to be reckless driving, but something that -- a case or some body of law that tells this Court that if reckless driving is pursued, the theory of murder can't be.

MS. GROSENICK: And, Your Honor, I know that's what you want. I don't have that case, but I also don't think that I need to provide that case to support my position because all of the cases that I have cited, especially in the original memorandum in support of our instructions, talk about how those defendants, there was no evidence that they killed someone for the purpose of avoiding identification, apprehension --

THE COURT: But those were all aggravated circumstances cases, as I recollect. They all fell into one category that distinguish them from the argument you

are making.

MS. GROSENICK: That's not my recollection of those cases. I don't think that they were being used as aggravators. I think that that's -- and that's how the supreme court was reading murder to prevent lawful arrest. And so I don't think that the State can prove first degree murder just based on malignant recklessness resulting from a driving pattern for all those reasons.

THE COURT: Okay. So let me understand what you're proposing in this case.

If I give the State's stipulated 21, you want me to give the Defendant Williams' 5 without the reference to felony murder, just murder?

MS. GROSENICK: Correct.

THE COURT: Okay. All right.

Mr. Prengaman.

MR. PRENGAMAN: Your Honor, they don't like it, but in the candy bar example, the State could -- because it's not the candy bar. The candy bar subjects the defendant to a lawful arrest. It is the malignant recklessness of the flight on the freeway going the wrong way that subjects him, if he kills somebody, to the murder charge.

So that example could happen. If a defendant

stole a candy bar subjecting him or herself to lawful arrest, a police officer pursued him or her to effectuate that arrest, and then the defendant, to avoid that arrest, to avoid the police officer, drove onto the freeway under the circumstances like the ones in this case, that amounts to malignant recklessness, and the State would be entitled to make that argument to jury in support of a first degree murder conviction.

Your Honor, Graham is conclusive. There's no question. Here's Graham vs. State. We've already talked about the enumerated means. They've already discussed them. They include, as specifically mentioned, that to avoid arrest or effect escape from custody is one of those enumerated means.

So to quote, "When an enumerated first degree murder is charged, such as murder by child abuse, the presence or absence of deliberation and premeditation is of no consequence. Such murders do not fall within the category of murder that can be reduced in degree by failure to prove deliberation and premeditation. Nor can such a murder be reduced in degree because it is committed without intent to kill and would otherwise fall within the ambit of Morris: if done with malice and in an enumerated manner, the killing constitutes first

degree by legislative fiat."

That is directly on point. That is directly saying that a killing accomplished with malice to avoid arrest, lawful arrest, is first degree murder, and that's what the State's instruction says.

Now, again, the defense is trying to get across to the jury that there's got to be some kind of intent to kill to avoid arrest. That's not what the law says, it's not what the case law says, and, again, Graham directly addresses this situation. It directly states the mens rea of applied malice. It does not have to show intent to kill.

THE COURT: Mr. Prengaman, with that in mind, look at Defendant Williams' Number 5 without the word "felony": "You cannot find either defendant guilty of murder under a theory of murder to prevent lawful arrest unless you find the murder was committed for the purpose of avoiding identification, apprehension, or lawful arrest."

Clearly, this is what the defense is offering today. I need you to comment specifically on that, why that should not be there.

MR. PRENGAMAN: Your Honor, one, it's duplicative of either the State's instruction, the

instruction as proposed. And when it says, "committed for the purpose of avoiding identification, apprehension, or lawful arrest," that's not the language of the statute. But "committed for the purpose of," you just heard them say that what they're trying to convey with that is that it has to be intentional or the killing must be intentional and that the mental state must be -- at the time of the killing, the actual killing must be for the purpose of.

What the law says, what Graham says, this is, literally, incorrect, and it is inaccurate and distorts the meaning and raises the State's burden of what it has to prove. Really, what Graham says is that "Conduct constituting murder because it's malignantly reckless" -- "Conduct constituting murder accomplished to prevent the lawful arrest of any person by a peace officer is murder in the first degree."

That's the law. Not that there has to be a purpose of. That's not what the statute says. Again, that's inaccurate. It conveys a higher burden of proof, a higher showing than what the State has to show.

THE COURT: All right. Counsel, I'm going to -- knowing now that 21 is no longer stipulated to, I'm going to need a minute. I have to take a look at this,

but I don't want to stop there. Let's keep going.

Murder of the second degree. This is an instruction proposed by the State: "Murder of the second degree does not require a specific intent to kill, and encompasses all kinds of murder other than first degree murder."

MR. PRENGAMAN: That one I stipulate to.

MS. GROSENICK: Your Honor, not to belabor the point, but at some point I do need to fill out that record regarding the State's position on that.

THE COURT: Go ahead. Finish. I want it all in one place, Ms. Grosenick. I thought you might be through. Finish.

MS. GROSENICK: I was also looking at the definition of "eluding" that is included in the State's instruction which I believe the Court will give. It's number 12 from the State that's contested.

THE COURT: Okay.

MS. GROSENICK: So in NRS 484B.550, felony eluding also includes under subsection 3(b), operating "the motor vehicle in a manner which endangers or is likely to endanger any other person or the property of any other person."

And in looking at that, I don't see the State's

definition of "eluding."

THE COURT: Hang on. Hang on.

Ms. Grosenick, the two instructions for eluding -- one was proposed by you, and one was proposed by Mr. Prengaman -- are identical except for the language "beyond a reasonable doubt," which I'm not giving. That was the only reason I selected their instruction, and their instruction let me go one step further.

Number 5, "While doing so is the proximate cause of the death of another." I took out your "bodily harm" because your instruction had "bodily harm."

So tell me what these two instructions do not have.

MS. GROSENICK: Well, I think in looking at 484B.550, I think that subsection 3 and subsection 4 may be alternatives to each other as far as punishment.

And so in subsection 3, if the driver is fleeing and operates a motor vehicle in a manner which endangers or is likely to endanger any other person or property, then it's a category B carrying a one to six. In the alternative, if the person is eluding and causes the death or bodily harm to a person, it's still category B, but two to twenty.

But it's clearly contemplated that that's the

conduct involved, is driving in a way that's likely to endanger any other person or the property of another person or that does, in fact, result in death or substantial bodily harm.

And so I am now reading that again and not advocating for that to be added to the State's Instruction Number 12, but I do think that it's relevant to whether the State's position is legally valid, and I would argue that it's not.

THE COURT: Okay.

MR. PRENGAMAN: If I may, Your Honor. That's --

THE COURT: Go ahead.

MR. PRENGAMAN: Your Honor, that's a different offense. What counsel just talked about is a different offense.

Subsection 1 is the primary means of violating or eluding. Subsection 3 says, while violating the provisions of subsection 1, if it endangers or is likely to, or is the proximate cause of property damage, it's a lesser category B.

However, if you go to 4, it says if, while violating the provisions of subsection 1, the driver causes death. So subsection 1 plus death equals the main

cause of death, and that's exactly what this instruction addresses.

Your Honor, the legislature made that enumerated list, and so this is a situation -- this isn't forced, this isn't second degree, it isn't second degree felony murder liability. This is a legislature that was well aware of the statute and decided on top of that, if you do a malice killing to avoid lawful arrest, it's first degree murder. That's a legislative fiat. So this is fundamentally different than what the defense is arguing.

THE COURT: Thank you.

Counsel, let's move to Defense Instruction 11, "The offense of burglary is complete when the building is entered with the specific intent to commit a larceny."

Go ahead and look at stipulated 28 while we review this because I think starting at line 6 at stipulated 28, this is covered.

Ms. Grosenick, this is your instruction. Comparing it to 28, stipulated 28.

MS. GROSENICK: Your Honor, I think the instruction needs to say that that specific intent has to be proven to exist at the time that entry is made. I think that that specifically needs to be stated, and it's

not as appears in the State's instruction.

THE COURT: Take a look at line 6. This is stipulated 28: "Burglary occurs and is complete when a shop, warehouse, store, house or other building is entered with the intent to commit larceny, assault, battery," etcetera. No?

MR. PRENGAMAN: Your Honor, I wouldn't oppose just tacking onto the end of that paragraph, "However, if the intent to commit larceny, assault or battery, kidnapping, or any felony is formulated after entry, it is not a burglary."

THE COURT: Ms. Grosenick. Your offer?

MS. GROSENICK: In then the second portion of Mr. Williams' instruction, lines 5 through 7, that is a properly worded negative instruction which should be --

THE COURT: Mr. Prengaman has just said to include that specific language in 28.

MS. GROSENICK: Oh, all of it? I'm sorry. I thought he said the first paragraph.

THE COURT: The first paragraph, I think, is covered by lines 6 through 10 in stipulated 28 because it says, "Burglary occurs and is complete when a building is entered with the intent to commit larceny."

Then adding to that your statement, "A burglary

is not committed and you are not required to find a defendant" -- "and you are required to find the defendant not guilty if the intent to commit a larceny, assault or battery on any person, kidnapping, felony coercion, or any felony, if any" -- we've got to fix that -- "is formulated after entry is made," tacking that to the paragraph that ends at line 10 in stipulated 28.

MS. GROSENICK: The State's instruction did not include the sentence, "Criminal intent formulated after a lawful entry will not satisfy the statute."

So I'm advocating for Mr. Williams' instruction as stated.

THE COURT: Okay. All right. You want the entire instruction given?

MS. GROSENICK: Or combined into the State's, but I don't think that the State's sufficiently covers the fact that criminal intent formulated after lawful entry is not sufficient. I'm asking for the jury to be specifically instructed as to that. I don't mind if it's in the State's instruction.

THE COURT: Can we change "not satisfy the statute" because we're not referring to a statute in the instruction.

MS. GROSENICK: Sure.

THE COURT: "Criminal intent formulated after lawful entry"?

MR. PRENGAMAN: I would suggest, however, Your Honor, "If the intent to commit larceny, assault or battery, kidnapping, or any felony is formed after entry, it is not a burglary."

MS. GROSENICK: Yes, that's fine.

THE COURT: Okay.

MS. GROSENICK: Your Honor, my client, Mr. Williams, would like to leave, and he's aware that he'll miss the remainder of these proceedings and is requesting to leave.

THE COURT: Okay. Mr. Williams, good day. Thank you so much for your participation today.

DEFENDANT WILLIAMS: Yes, ma'am.

(Defendant Williams exited the courtroom.)

THE COURT: That has been added to 28.

Okay, Counsel. Next is Defendant Williams' 28. "You have heard the evidence that Stephen Sims, a witness, has a prior felony conviction. You may consider this evidence in deciding whether or not to believe this witness and how much weight to give to the testimony of this witness."

Mr. Prengaman.

MS. ROSENTHAL: Your Honor, real quick.

Ms. Norman does not object to that burglary instruction being inserted into number 28 as previously stipulated to.

THE COURT: Ms. Rosenthal, thank you so much.

Mr. Prengaman, number 28?

MR. PRENGAMAN: No objection to that, Your Honor.

THE COURT: Okay. Last instruction, aside from the limiting we're going to go through in just a minute, is the -- I'm going to call it the Crane v. State, Mason v. State instruction. This is offered by both Defendant Williams' in number 2 and Defendant Norman in number 3.

Mr. Prengaman.

MR. PRENGAMAN: Your Honor, again, I object to these instructions being given.

THE COURT: I want you to address this for me, Mr. Prengaman. I want this right on point.

I know what Crane says, but I also know what Mason says. Mason is a 2001 case. Crane is 1972 case.

In the Crane case, the instruction that the parties were asking the court to give was Instruction Number 14, and there was really no issue about it except the court saying -- there was no commentary on whether or

not it was improper because the focus was not on that, but the court was talking about the sufficiency of the instructions given.

Then in Mason, the district court didn't give it, and Mason contended that "The district court erred in refusing to instruct the jury that the evidence is," and then they gave this "susceptible to two constructions," but it only went as far as guilt.

So in Mason, the instruction that the court did not give is the instruction proposed by Norman and Williams beginning at line 1 and going through line 4: "If the evidence in this case is susceptible to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his or her," adding, "innocence, it is your duty under the law to adopt that interpretation which will admit of the defendants' innocence and reject that which points to his guilt."

Now, in Mason, the court rejected this. The rest of the instruction is not offered in this case, and in Mason the Nevada Supreme Court said, "This court has held that it is not error to refuse to give this kind of instruction where the jury has been properly instructed

on the standard of reasonable doubt." They did not opine on the rest of the instruction which begins, "You will notice that this rule applies."

So focusing on the case law, Mr. Prengaman, any other case law you want to offer me as to why you object to this instruction?

MR. PRENGAMAN: Well, Your Honor, I would refer to the cases cited in the State's Trial Memorandum or Trial Statement, particularly Holland -- the U.S. Supreme Court's observations in Holland about this type of instruction.

In other words, the Court has told the jury -- and I'm not quoting, but I'm summarizing -- the Court has told this jury that circumstantial evidence is no different than any other evidence, and they should consider all evidence and weigh the sufficiency.

What this does is -- particularly that language that the Court is talking about, when two possible opposing conclusions appear to be reasonable, that really -- that could be two opposing conclusions about a certain piece of evidence; it could be two opposing conclusions about ultimate guilt or innocence -- but this suggests that the jury needs to --

For instance, if they're just considering what

time something occurred, this could be read to suggest there's two different conclusions, and if one points to innocence and the other towards guilt, they have to accept the one that points towards innocence.

THE COURT: That's when the instruction says.

MR. PRENGAMAN: And that's absolutely untrue, Your Honor. It may be true that ultimately it is, and even according to Holland, this is not really true, but the reason for the instruction is that circumstantial evidence case where the ultimate conclusion -- there's two competing about the guilt or innocence, not about constituent pieces of evidence or inferences about pieces of evidence that build on each other to lead up to elements or bigger things.

This essentially conveys to the jury that you have to look at circumstantial evidence differently than other evidence, and no matter the conclusions, if there's one that leads this ways and one that -- and it doesn't tell you about considering those in light of the other evidence and the totality of the other evidence and what corroborates or doesn't.

So it basically singles out for the jury in a very misleading way because it doesn't address when it's appropriate to do that. It suggests that it's always

necessary. It's a rule, in fact. This calls it a rule, and there's no basis for doing that.

So I think it basically points them to handle evidence in a way that the law does not require them to do. What the law requires them to do is determine -- as Holland says, look at the evidence and determine the weight of the evidence, and does that weight of the evidence prove or disprove the elements, because the ultimate issues are only elements. That's all. How they get from a constituent piece of evidence and reason from that to something happening and reason from that to an element of the crime is up to them.

But, again, to suggest an artificial and, I would submit, confusing method of dealing with evidence is going to be unclear, especially that's divorced from -- if you were to just give that statute.

So as our supreme court has noted in Bailey vs. State, which I cite, they even mention giving a proper instruction about reasonable doubt, and no additional instruction was required, and none would have been proper.

Our court has -- again, I cite a number of cases in my pleading. The supreme court has repeatedly --

THE COURT: You're dropping off.

MR. PRENGAMAN: -- not to give this type of instruction, Your Honor.

And, here, what is the purpose of giving it in this case? This is a mixed case. In other words, there's direct evidence and circumstantial evidence; it's a direct evidence case, too. So this is not one of those solely circumstantial evidence cases.

Again, a number of the courts in the cases I cite have said, well, if it's completely a circumstantial evidence case, you might find such an instruction. This is not that case. This would be confusing, it would be incorrect, and there's no need for this type of instruction in this case.

So I would -- again, I would rely upon the case law in Nevada, Holland, which points out these type of instructions are confusing and incorrect, and the Court should not give them because the Court is, as the Court has already indicated, is going to give this jury a correct instruction about reasonable doubt and an appropriate instruction about direct and circumstantial evidence.

This is contrary, I submit, to that direct and circumstantial evidence instruction. You're saying

consider all the evidence but don't, in certain circumstances.

THE COURT: Okay. Ms. Rosenthal.

MS. GROSENICK: Your Honor, if it's okay, I'll start.

THE COURT: All right.

MS. GROSENICK: A couple of things to address.

First of all, in Holland, that was a 1952 case, United States Supreme Court. Crane is from 1972 and is specific to Nevada.

THE COURT: Mason is specific to Nevada, and it's a 2001 case.

MS. GROSENICK: Right.

The second thing -- and I will address that. The other thing I wanted to address as well is that the Crane instruction is proposed by both defendants, and I think our instructions are largely the same.

That instruction was given in addition to an instruction on direct versus circumstantial evidence in the Crane case --

THE COURT: It was.

MS. GROSENICK: -- and the court upheld that as a correct statement of Nevada law.

Now, as far as circumstantial evidence, I think

that the Crane instruction is not appropriate in all cases, but it is appropriate where there is a big question about circumstantial evidence, and, here, one of the main issues is what was the intent of either/or both defendants as they walked into the building, and what was their intent in talking to Stephen Sims or in leaving the building, and all of those gaps have to be filled in largely with circumstantial evidence.

And so this instruction is appropriate. It's also consistent with the burden on the State to prove the charges beyond a reasonable doubt, because what it's saying is, if you've got two interpretations that are even and you could go either way, then you go towards innocence, and that is consistent with burden beyond a reasonable doubt.

THE COURT: Ms. Rosenthal.

MR. PICKER: I'll take this one.

I just echo what Ms. Grosenick has just argued. Because of the nature of the way this case was charged and how the evidence has come in, the Crane instruction is appropriate under all the case law that addresses it.

There is -- they use "in addition to, not "to replace," and it is simply a clarification for the jury should they reach that point where there are a 50-50

split in their minds of where the evidence falls.

Reasonable doubt always falls at that point with the defense in a 50-50 split, and that's where that instruction becomes important, so that's why I'm asking for it.

THE COURT: Okay. Thank you.

Counsel, here's what I'm going to do. You're going to need a decision on this -- let me stop right there.

There are three other instructions. They are the three --

Ms. Davies, has counsel been provided with copies of these?

MS. DAVIES: Yes. I emailed them.

THE COURT: You emailed these, the limiting instructions.

The first is "Prior handgun evidence, Defendant Ryan Williams"; the second is, "You heard testimony related to text messages Defendant Adrianna Norman"; the last is, "You heard recordings of telephone calls made by Defendant Ryan Williams."

Do you all have all of those, and do you have any objection to those?

Mr. Prengaman, starting with you.

MR. PRENGAMAN: Your Honor, I haven't had a chance to look at the email, but those are the ones the court gave during the trial. I'll defer to the defense. They're to the benefit of the defense. If they're requesting them, I have no objection to giving them.

THE COURT: Actually, all I've done to them in court is I said, "You are about to hear" or "You just heard," and these say, "You heard." So the tense is different. Other than that, they're identical.

MR. PRENGAMAN: As long as the defense made the strategic decision to request it or not, the State will not object.

THE COURT: Ms. Grosenick.

MS. GROSENICK: Thank you, Your Honor.

That first instruction is the Court's version for murder to prevent arrest, so I will just stand on the record that I've already made regarding that.

THE COURT: Say that again.

MS. GROSENICK: The first instruction in the packet, I believe, is the Court's instruction on --

THE COURT: Yes. You made a record on that.

MS. GROSENICK: The second instruction is on text messages. We do not object to that and ask that it be given in the final instructions.

THE COURT: Okay.

MS. GROSENICK: And then the third instruction, the Court has already given this instruction substantially with -- well, I guess it says, "You heard evidence."

THE COURT: You're talking about the prior handgun possession?

MS. GROSENICK: Yes. So after that instruction, I do renew the objections that we had previously regarding directing the jury how to determine that as far as elements of robbery and attempted robbery, but the Court has already given its instruction. I'll just stand on the record there.

The last one is the recordings of telephone calls, and I'll just submit on that.

THE COURT: Okay. Ms. Rosenthal. Mr. Picker.

MS. ROSENTHAL: Thank you, Your Honor.

We would ask that the limiting instruction related to not -- presumably to the jail calls and the prior possession not being used against Ms. Norman be reread to the jury.

THE COURT: And are you leaving it up to the Court regarding the text messages from Ms. Norman to Mr. Sims?

MS. ROSENTHAL: Yes.

THE COURT: All right. Counsel, it's important that we do a few things this evening. One is that I get you a decision on these last two instructions that we debated. One I'm calling the Crane instruction, and the other is the murder instruction principally related to stipulated 21, and I'm going to need a minute to do that.

And then we're going to need some time to make sure that all of the changes that have been gone through today and accepted by the Court as instructions that are being given are going to be provided to you.

Ms. Davies has been making the changes as we go along, so it's not like I have to go back and make all of those changes now, but we do need to dot some i's and cross some t's. And then I want you to have them this evening because you're going to be retuning your closing arguments.

Most importantly, we have a court reporter here who has been here for most of the day, and I do want to let her go, but I don't want to render my opinion on these two instructions that are outstanding.

I'm going to leave the bench here. We're going to take care of that. I'll be back as quick as I can, and we'll put that on the record, and then, Counsel, we

can number them ourselves off the record and then renumber them tomorrow or talk about how we want to do that. I just don't want to keep our court reporter too late. So be thinking about that.

(A recess was taken.)

THE COURT: Counsel, let's start with stipulated 21 and Defendant Williams' Number 5.

It was very important to this Court that I read LaMotte, and the reason I'm -- most importantly is this: I know the proposition for which it was offered, but the fact is it actually proves the opposite of that proposition.

It is a case, as we've gone through, where the Court considered a DUI and the activity involved in what ultimately resulted in a DUI conviction versus -- and, not versus -- and also a second degree murder charge.

It is important for this Court -- while this case was used by the State for purposes, rather, of analogy, the importance of me reading this case is, the one thing the court did not do is say -- let's start here -- what the court did say regarding the malice that was needed for the second degree murder was to say, "Our review of the record indicates the lower court did not commit substantial error in finding that insufficient

evidence existed to apply malice in this case."

What does that mean? It means if the lower court had found substantial -- sufficient evidence, then malice would have been applied. In other words, the theory of the second degree murder could have gone forward under the same factual scenario as the DUI.

The thing the court, the Nevada Supreme Court, did not say in LaMotte is, even if the court had found sufficient evidence to imply malice in this case, the second degree murder charge could not have gone forward because you could not use the same set of facts, and they did not say that.

So relying on that in LaMotte and relying on Thomas v. State -- and, by the way, LaMotte is at 100 Nev. 270 -- and then Thomas v. State at 114 Nev. 127, a 1998 case -- it's actually cited by Defendant Williams -- importantly, at 1145 it says this: "NRS 200.030(1) provides in part," and then it cites to the section of the law, specifically 'Murder of the first degree is murder which is...committed to avoid or prevent the lawful arrest of any person by a peace officer.'

"Although Thomas could have been convicted of first degree murder under any one of these three theories," again, having cited all three, "he argues that

insufficient evidence exists only for premeditated murder under 200.030(1)(a). Specifically, he argues that the evidence fails to show his specific intent to kill.

"We conclude that sufficient evidence exists to support Thomas' conviction under the felony-murder and avoid-arrest theories. As discussed above, sufficient evidence exists that Thomas committed burglary, robbery and kidnapping, and Dixon and Gianakis were both killed during those crimes. Also, Hall testified that in the car after the incident, Thomas expressed his preference for not leaving witnesses when committing a robbery. Nash and Smith testified that Thomas explained that he had to get rid of two people. Accordingly, regardless of whether sufficient evidence exists under a premeditation theory, Thomas was properly convicted of first degree murder under either felony-murder or avoid-arrest theorys."

And so the instruction and the way I'm prepared to give it is the stipulated 21, the way it currently reads, and add to that last line of the instruction that this Court indicated it would be willing to give because the Defendant Williams' Number 5 does not accurately convey or represent the statutory language of 200.030.

So the instruction I will give is the one

proposed by the State and add to that the last paragraph of "You cannot find either defendant guilty of murder under a theory of murder to prevent lawful arrest unless you find the murder was committed to avoid or prevent lawful arrest."

And then as to the Crane instruction, which is Defendant Williams' Number 2 and Defendant Norman Number 3, the most recent case this Court has to rely on is a Nevada Supreme Court case, Mason v. State, 118 Nev. 554, 2001 case, and it specifically says that "It is not error for a district court to fail to give this instruction provided they adequately instruct the jury on reasonable doubt."

And the reasonable doubt instruction that the parties have stipulated to and that this Court is going to give is the reasonable doubt instruction that has been repeatedly approved by the Nevada Supreme Court. Accordingly, I'm not going to give the instruction that is Defendant Williams' 2 and Defendant Norman's 3. They are identical.

Now, Counsel, with that, we have resolved all of the instructions. Now, what I would like to do is get you a set of the instructions tonight that is everything that we have agreed to.

I'm willing to let the court reporter go if you'll stay, we'll get everybody a complete set, and we will organize and order them off the record, number them off the record, and then in the morning we'll go back on the record before I bring the jury out, indicate that we've agreed to the order off the record the night before and then put on the record how they've been numbered. Okay?

Mr. Prengaman, are you agreeable to doing it that way tonight so we can let our court reporter go home for the evening?

MR. PRENGAMAN: Yes, Your Honor.

THE COURT: Ms. Hickman and Ms. Grosenick.

MS. GROSENICK: Yes, Your Honor.

THE COURT: Mr. Picker, Ms. Rosenthal.

MS. ROSENTHAL: Yes, Your Honor.

There is one thing I would ask, though. Since the Court has incorporated proposed instructions for both the State and defense, that anytime the State uses all caps, that it be changed to be coherent throughout the instructions so that it's not in all caps.

THE COURT: It is not my habit to use all caps, and I'm not going to use all caps in any of the instructions, so we will take all of that out.

Also, Counsel, do you have a preference as to whether the word "defendant" is capitalized or small "d" throughout the instructions?

Ms. Hickman and Ms. Grosenick.

MS. GROSENICK: Your Honor, we're requesting that "Defendant" be capitalized.

THE COURT: Capital D.

Ms. Rosenthal?

MS. ROSENTHAL: Your Honor, I would join with that given, especially on the first page, that it is capitalized on the heading.

THE COURT: We'll go through and capitalize "Defendant" throughout the instructions, and we'll just keep you posted just as soon as we've got them ready, because not only do we have to prepare them all, but we have to make you all copies. Okay.

So we'll be off the record. Ms. Court Reporter, thank you so much.

Counsel, we'll come back into the courtroom as soon as we're ready with the full stack. We will give you time to review them, make sure we've made all the corrections you've asked for, and I've indicated we're going to make them. As soon as you're ready, we will do that. So give us some time off the record.

(The proceedings were adjourned.)

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, PEGGY B. HOOGS, Certified Court Reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true and correct transcription of the proceedings to the best of my knowledge, skill and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

Dated this 5th day of September, 2021.

/s/ Peggy B. Hoogs

Peggy B. Hoogs, CCR #160, RDR

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of January 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy,
Washoe County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Ryan Williams (#96845)
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office