

IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN WILLIAMS,

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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8 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE
11 --oOo--

12 STATE OF NEVADA,

Case No. CR20-0630A
CR20-0630B

13 Plaintiff,

Dept. No. 1

14 vs.

15 ADRIANNA MARIE NORMAN,
16 RYAN WILLIAMS,

17 Defendants.
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TRANSCRIPT OF PROCEEDINGS

TRIAL

DAY 11

MONDAY, APRIL 26, 2021

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

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

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4
5 (The following proceedings were held outside
6 the presence of the jury.)

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

10 Is the interpreter ready, Ms. Rosenthal?

11 MS. ROSENTHAL: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

13 Ms. Grosenick.

14 MS. GROSENICK: Thank you, Your Honor.

15 Mr. Williams calls Trooper Aimee Chesebrough.

16
17 AIMEE CHESEBROUGH,
18 having been first duly sworn,
19 was examined and testified as follows:

20
21 THE COURT: Take a seat. You can testify
22 without your mask behind the Plexiglas if you're
23 comfortable doing so.

24 THE WITNESS: Yes, I am. Thank you.

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

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

6
7 DIRECT EXAMINATION

8 BY MS. GROSENICK:

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

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

13 Q Thank you.

14 Can we please start with your current position.

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

18 Q Is that through the Nevada Highway Patrol?

19 A Yes, that is.

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

22 A Correct.

23 Q And how long have you been in that position?

24 A I have been in this position since November 1st

1 of 2018.

2 Q And how long have you been in law enforcement?

3 A Since June 1st of 2015.

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

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

12 And then I have received 80 hours of ART, which
13 is accident reconstruction training, and I have CDR,
14 which is airbag control/little black box training as well
15 as analysis of that, which I believe is either 40 or
16 60 hours. I forget the exact amount of time.

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

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

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

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

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

5 A I did.

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

8 A It was.

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

11 A It was in the westbound lane.

12 Q What was your goal in investigating this
13 collision?

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

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

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

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

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

7 A Correct.

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

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

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

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

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

24 Q Okay. And did you also have access to video

1 recordings of the collision?

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

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

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

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

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

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

16 A I did.

17 Q Was that report reviewed by a supervisor?

18 A Sergeant Killian, yes.

19 Q And was it approved?

20 A It was.

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

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

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

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

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

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

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

18 A Correct. We imaged it.

19 Q And did you analyze that data later?

20 A I did.

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

24 A That is correct.

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

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

5 A (Witness nods head.)

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

8 A Correct.

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

11 A Correct.

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

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

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

23 A D1 in the report, correct.

24 Q Okay. And since the gray Jeep was identified

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

3 A Correct. D2.

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

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

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

11 Q Yes, if you recall.

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

14 A Yes.

15 Q Did you have any reason to doubt them?

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

18 Q All right.

19 A It's very common in our reports.

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

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

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

3 Q So what was that conclusion about the brakes?

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

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

9 A Correct.

10 Q Okay. I want to move on to the white truck.
11 You utilized the software from Bosch to analyze
12 the crash data from the white truck's airbag control
13 module; right?

14 A That is correct.

15 Q And you personally downloaded and analyzed that
16 data?

17 A Correct.

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

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

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

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

7 A That is correct.

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

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

12 Do you recognize that photograph?

13 A I do.

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

15 A I do.

16 Q Can you talk to me about what that is?

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

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

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

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

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

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

6 A Faintly, yes.

7 Q Are there red arrows pointing to them?

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

10 Q Can you circle where they are?

11 A (The witness complied.)

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

14 Is this a diagram that you incorporated into
15 your report?

16 A It is.

17 Q And here we see the blue lines; correct?

18 A That is correct.

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

21 A That's correct.

22 Q And are they straight or curved?

23 A They're curved.

24 Q Did you come to any conclusions about why

1 they're curved?

2 A That the driver input steering to the right.

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

5 A That was my finding. That was my assumption.

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

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

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

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

16 MS. GROSENICK: Pass the witness, Your Honor.

17 THE COURT: Thank you so much.

18 Ms. Rosenthal.

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

21 THE COURT: Thank you so much.

22 Mr. Prengaman.

23 MR. PRENGAMAN: Thank you, Your Honor.

24 /////

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

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

7 Thank you.

8 (A recess was taken.)

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

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

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

18 THE INTERPRETER: Thank you, Your Honor.
19 Can I instruct him how to put that on?

20 THE COURT: Yes, please.

21 THE INTERPRETER: Your Honor, the mask?

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

24 THE INTERPRETER: Your Honor, we can hear each

1 other just fine. Thank you very much.

2 THE COURT: Go ahead and take your seat.

3 Mr. Picker.

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

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

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

11 THE INTERPRETER: Yes.

12 THE COURT: Mr. Picker, you good?

13 MR. PICKER: Good.

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

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

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

21 THE COURT: Mr. Picker.

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

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

1 swear in Mr. Sagrero.

2 Ms. Clerk.

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

5 THE COURT: Thank you. Please be seated.

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

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

9

10 FAUSTINO SAGRERO,
11 having been first duly sworn through the previously sworn
12 English-Spanish court interpreter, Jessica Escobar,
13 was examined and testified as follows:

14

15 THE COURT: Thank you so much.

16 Mr. Picker.

17 MR. PICKER: Thank you.

18

19 DIRECT EXAMINATION

20 BY MR. PICKER:

21 Q Good morning, Mr. Sagrero.

22 A Good morning.

23 Q Could you please state your name and spell it.

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

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

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

4 A (In English) Yes.

5 Q Do you understand English?

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

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

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

12 Q Thank you.

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

15 Do you recall that day?

16 A (In English) Yes.

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

19 A (In English) Yes.

20 Q And did you go on that day, February 22nd of
21 2020?

22 A (In English) Yeah. I remember exactly.

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

1 Do you see the screen in front of you?

2 A (No audible response.)

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

4 A (In English) Yes.

5 Q Do you recognize it?

6 A (In English) Yes.

7 Q Is that Bob & Lucy's?

8 A (In English) Yes, sir.

9 Q And those are the front doors?

10 A (In English) Yes.

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

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

18 THE COURT: Mr. Picker.

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

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

22 BY MR. PICKER:

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

1 translate for you. Otherwise --

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

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

8 BY MR. PICKER:

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

11 A Of course, yes.

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

14 A (In English) Yes.

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

17 A (In English) Yes, sir.

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

20 (Video recording played.)

21 BY MR. PICKER

22 Q Do you recognize who came in the front door?

23 A (In English) John.

24 Q Was John already there when you arrived that

1 morning?

2 A He was not there when I showed up.

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

5 Let me rewind.

6 (Video recording played.)

7 BY MR. PICKER:

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

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

11 Q Okay. Then let me go forward starting at
12 6:20:18.

13 (Video recording played.)

14 BY MR. PICKER:

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

16 A (In English) Yes.

17 Q Do you know this person who just walked in?

18 A (In English) No, no.

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

21 BY MR. PICKER:

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

24 A (No audible response.)

1 Q What was that?

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

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

6 BY MR. PICKER:

7 Q So that was you and Joshua arriving together?

8 A Yes.

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

11 A (In English) Yes.

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

15 A (The witness complied.)

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

17 A (In English) After that moment, I think around
18 45 minutes.

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

20 A (In English) Yes.

21 Q And you know him by sight?

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

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

1 A (In English) Yes.

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

4 A (In English) Yes.

5 Q Was he with anybody?

6 A (In English) That one chick.

7 Q Okay.

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

10 BY MR. PICKER:

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

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

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

17 Q Could you hear them when they were walking
18 through?

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

21 MR. PRENGAMAN: Objection. Hearsay.

22 THE COURT: Mr. Picker, objection, hearsay.

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

1 BY MR. PRENGAMAN:

2 Q So you only heard the woman one time?

3 A (In English) Yes.

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

6 A No. They were by the bar.

7 Q Over by the bar.

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

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

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

14 A (In English) No.

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

17 THE COURT: Thank you, Mr. Picker.

18 Ms. Grosenick. Ms. Hickman.

19 MS. HICKMAN: Thank you.

20

21 CROSS-EXAMINATION

22 BY MS. HICKMAN:

23 Q Good morning.

24 A (In English) Good morning.

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

2 A (In English) Every day.

3 Q Every day.

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

7 A (In English) Yes.

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

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

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

13 A (In English) Yes.

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

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

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

19 A Yes.

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

22 THE COURT: Thank you, Ms. Hickman.

23 Mr. Prengaman.

24 MR. PRENGAMAN: No questions. Thank you, Your

1 Honor.

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

4 THE WITNESS: (In English) Appreciate it.

5 THE INTERPRETER: I appreciate it. Thank you.

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

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

21 (A recess was taken.)

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

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

1 have additional evidence to present in this case?

2 MR. PICKER: We do not, Your Honor.

3 THE COURT: Thank you, Mr. Picker.

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

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

7 THE COURT: I will begin with Ms. Norman.
8 Good morning.

9 DEFENDANT NORMAN: Good morning.

10 THE COURT: Would you please stand.
11 How are you this morning?

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

13 THE COURT: I'm very well. Thanks.

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

16 DEFENDANT NORMAN: Okay.

17 (Defendant Norman was sworn.)

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

22 Do you understand that?

23 DEFENDANT NORMAN: Yes, ma'am.

24 THE COURT: Have you taken any medication in

1 the last 24 hours?

2 DEFENDANT NORMAN: Yes, ma'am.

3 THE COURT: A little louder.

4 DEFENDANT NORMAN: Yes, ma'am.

5 THE COURT: Can you tell me what that is?

6 DEFENDANT NORMAN: Tylenol, Lexapro, and
7 Trileptal.

8 THE COURT: What's the last one?

9 DEFENDANT NORMAN: Trileptal.

10 THE COURT: Trileptal.

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

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

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

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

20 THE COURT: Do they help you?

21 DEFENDANT NORMAN: Yes, they do.

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

1 going on today?

2 DEFENDANT NORMAN: No, ma'am.

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

6 DEFENDANT NORMAN: Yes, ma'am.

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

9 DEFENDANT NORMAN: Yes, ma'am.

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

12 DEFENDANT NORMAN: Yes, ma'am.

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

16 DEFENDANT NORMAN: No, ma'am.

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

18 DEFENDANT NORMAN: Yes, ma'am.

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

21 DEFENDANT NORMAN: Yes, ma'am.

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

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

4 DEFENDANT NORMAN: Yes, ma'am.

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

7 DEFENDANT NORMAN: Yes, ma'am.

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

10 DEFENDANT NORMAN: Yes, ma'am.

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

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

17 DEFENDANT NORMAN: Yes, ma'am.

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

20 DEFENDANT NORMAN: Yes, ma'am.

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

23 DEFENDANT NORMAN: Yes, ma'am.

24 THE COURT: After reviewing the discovery

1 materials, were you able to confer with your counsel?

2 DEFENDANT NORMAN: Yes, ma'am.

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

5 DEFENDANT NORMAN: Yes, ma'am.

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

9 DEFENDANT NORMAN: Yes, ma'am.

10 THE COURT: Thank you.

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

13 MR. PICKER: No, Your Honor.

14 THE COURT: Ms. Rosenthal.

15 MS. ROSENTHAL: No, Your Honor.

16 THE COURT: Thank you so much.

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

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

24 DEFENDANT NORMAN: Yes, ma'am.

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

5 DEFENDANT NORMAN: Yes, ma'am.

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

8 DEFENDANT NORMAN: Yes, ma'am.

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

14 DEFENDANT NORMAN: Yes, ma'am.

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

18 DEFENDANT NORMAN: Yes, ma'am.

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

23 DEFENDANT NORMAN: Yes, ma'am.

24 THE COURT: This is the risk of testifying.

1 Do you understand that?

2 DEFENDANT NORMAN: Yes, ma'am.

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

7 DEFENDANT NORMAN: Yes, ma'am.

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

10 DEFENDANT NORMAN: I'm not going to testify.

11 THE COURT: You are not going to testify?

12 DEFENDANT NORMAN: No.

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

15 DEFENDANT NORMAN: Yes, ma'am.

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

18 DEFENDANT NORMAN: No, ma'am.

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

21 DEFENDANT WILLIAMS: I have my counsel's.

22 THE COURT: Thank you.

23 Good morning, Mr. Williams.

24 DEFENDANT WILLIAMS: Good morning, ma'am.

1 THE COURT: How are this morning?
2 DEFENDANT WILLIAMS: I'm fine.
3 THE COURT: Excellent. I'm going to have our
4 court clerk swear you in.
5 DEFENDANT WILLIAMS: Yes, ma'am.
6 (Defendant Williams was sworn.)
7 THE COURT: Mr. Williams, have you taken any
8 medication in the last 24 hours?
9 DEFENDANT WILLIAMS: Yes, ma'am.
10 THE COURT: Can you tell me what that is?
11 DEFENDANT WILLIAMS: Ibuprofen, Remeron, and a
12 natural herb medicine.
13 THE COURT: A natural herb medicine?
14 DEFENDANT WILLIAMS: Melatonin.
15 THE COURT: Melatonin?
16 DEFENDANT WILLIAMS: Yes, ma'am.
17 THE COURT: Tell me what you're taking the
18 ibuprofen for.
19 DEFENDANT WILLIAMS: For my injuries for my
20 legs.
21 THE COURT: So discomfort? Pain?
22 DEFENDANT WILLIAMS: Yes.
23 THE COURT: What are you taking the melatonin
24 for.

1 DEFENDANT WILLIAMS: To help me sleep at night.
2 THE COURT: And then the other drug is Remfry?
3 DEFENDANT WILLIAMS: Remeron.
4 THE COURT: What are you taking that for?
5 DEFENDANT WILLIAMS: For -- to help me sleep at
6 night with my anxiety.
7 THE COURT: How long have you been taking these
8 medications?
9 DEFENDANT WILLIAMS: I believe about seven to
10 eight months.
11 THE COURT: Anything about taking those
12 medications that at all impairs your ability to
13 understand what's been happening in this trial or what's
14 going on here today?
15 DEFENDANT WILLIAMS: No, ma'am.
16 THE COURT: If that changes during the course
17 of my conversation with you this morning, would you be
18 sure and let me know?
19 DEFENDANT WILLIAMS: Yes, ma'am.
20 THE COURT: Aside for the purpose of taking
21 medication, are you otherwise under the care of a
22 physician or a psychiatrist?
23 DEFENDANT WILLIAMS: No, ma'am.
24 THE COURT: Have you heard each witness testify

1 in this case?

2 DEFENDANT WILLIAMS: Yes, ma'am.

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

5 DEFENDANT WILLIAMS: Yes, ma'am.

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

11 DEFENDANT WILLIAMS: Yes, ma'am.

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

14 DEFENDANT WILLIAMS: Yes, ma'am.

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

17 DEFENDANT WILLIAMS: Yes, ma'am.

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

24 DEFENDANT WILLIAMS: Yes, ma'am.

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

3 DEFENDANT WILLIAMS: Yes, ma'am.

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

6 DEFENDANT WILLIAMS: Yes, ma'am.

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

9 DEFENDANT WILLIAMS: Yes, ma'am.

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

13 DEFENDANT WILLIAMS: Yes, ma'am.

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

17 MS. HICKMAN: No, Your Honor.

18 MS. GROSENICK: No, Your Honor.

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

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

1 to speak with your counsel?

2 DEFENDANT WILLIAMS: Yes, ma'am.

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

7 DEFENDANT WILLIAMS: Yes, ma'am.

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

10 DEFENDANT WILLIAMS: Yes, ma'am.

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

16 DEFENDANT WILLIAMS: Yes, ma'am.

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

20 DEFENDANT WILLIAMS: Yes, ma'am.

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

24 Do you understand that if you testify in this

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

3 DEFENDANT WILLIAMS: Yes, ma'am.

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

6 DEFENDANT WILLIAMS: Yes, ma'am.

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

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

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

15 DEFENDANT WILLIAMS: Yes, ma'am.

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

18 DEFENDANT WILLIAMS: No, ma'am.

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

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

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

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

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

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

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

15 THE COURT: Okay. Deputy Finn.

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

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

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

22 THE COURT: Thank you so much.

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

1 MS. HICKMAN: Thank you, Your Honor.

2 On behalf of Mr. Williams, we also rest.

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

5 MR. PRENGAMAN: No rebuttal, Your Honor.

6 THE COURT: Thank you so much.

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

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

21 Either way, thank you very much for your
22 service today. You are released until tomorrow at
23 8:00 a.m.

24 During this recess you must not discuss or

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

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

15 (The jury was excused.)

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

18 THE COURT: Go ahead and be seated, Counsel.
19 Can you make sure that door is closed, Deputy
20 Coss.

21 Thank you.

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

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

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

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

8 THE COURT: Thank you.

9 Mr. Picker and Ms. Rosenthal?

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

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

15 MR. PICKER: I have.

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

18 DEFENDANT NORMAN: Yes, ma'am.

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

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

1 MR. PICKER: Your Honor, can we actually have
2 15 minutes?

3 THE COURT: You can. That's absolutely okay.
4 It's 9:40. Let's come back at 10 o'clock.

5 MR. PICKER: Thank you.

6 (A recess was taken.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 incorrect.

2 THE COURT: The one proposed by Defendant
3 Norman?

4 MR. PRENGAMAN: Yes, Your Honor.

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

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

14 THE COURT: Ms. Hickman.

15 MS. GROSENICK: Thank you, Your Honor.

16 THE COURT: Ms. Grosenick.

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

20 (The reporter asked for clarification.)

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

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

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

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

4 MS. GROSENICK: Thank you, Judge.

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

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

12 (A discussion was held off the record.)

13 MS. GROSENICK: Thank you, Your Honor.

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

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

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

7 And then, also the paragraph on line 7 through
8 9, "If you are satisfied of the defendant's guilt beyond
9 a reasonable doubt, it matters not," that sentence puts
10 an undue emphasis on finding guilt and is not neutral.
11 And so Mr. Williams' instruction is shorter, but I also
12 think it's clearer and less confusing for the jury.

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

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

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

21 Ms. Rosenthal and Mr. Picker.

22 MS. ROSENTHAL: Thank you, Your Honor.

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

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

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

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

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

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

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

6 THE COURT: Slow down for the court reporter.

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Mr. Prengaman --
6 Go ahead.

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

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

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

18 MS. ROSENTHAL: Yes, Your Honor.

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

24 This is giving them, about circumstantial, the

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

8 THE COURT: Thank you so much.

9 Ms. Grosenick.

10 MS. GROSENICK: Thank you.

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

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

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

1 the last two paragraphs proposed by the State.

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

11 So that's the way this instruction will read.

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

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

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

1 direct evidence, to that extent.

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

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

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

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

1 Williams.

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

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

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

22 Mr. Picker.

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

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

4 THE COURT: Okay. The interview or encounter?

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

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

10 Mr. Prengaman.

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

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

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

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

10 THE COURT: As?

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

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

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

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

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

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

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

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

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

7 To the State's argument that it's not
8 appropriate to single out any evidence and explain to the
9 jury things about it, I disagree with that. That's what
10 we do with jury instructions all the time, is help the
11 jury understand what to do with evidence. They should
12 not be expected to be legal experts or make legal
13 inferences, and that's from Brooks vs. State,
14 124 Nev. 203, 211, from 2008.

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

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

1 believe was included with our memorandum.

2 THE COURT: It was.

3 So, Ms. Grosenick, let me clarify something.

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

11 MS. GROSENICK: Yes.

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

14 THE COURT: Yes, you may, of course.

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

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

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

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

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

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

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

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

8 THE COURT: Thank you, Mr. Prengaman.

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

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

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

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

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

24 THE COURT: Ms. Rosenthal, thank you.

1 Ms. Grosenick, anything else?

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

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

13 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Okay. Thank you so much.

5 Ms. Grosenick, Ms. Hickman, anything?

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

15 My other issue --

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

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

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

23 THE COURT: Okay. Thank you.

24 Anything else?

1 Go ahead.

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

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

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

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

24 Next category is "Every person charged with

1 commission of a crime is presumed innocent."

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

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

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

1 Okay. Ms. Grosenick.

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

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

14 But I think that the holding in Blake, which is
15 121 Nev. 779, 799, that indicated that that final
16 sentence that was left out of the State's instruction was
17 necessary to make the instruction complete and accurate.

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

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

22 THE COURT: What is the sentence in Blake?

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

1 verdict of not guilty."

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

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

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

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

7 THE COURT: Thank you, Ms. Grosenick.

8 You did not use that language?

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

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

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

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

23 MS. GROSENICK: Correct.

24 THE COURT: Ms. Rosenthal.

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

4 (The reporter asked for clarification.)

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

9 THE COURT: Say that again, Ms. Rosenthal.

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

13 THE COURT: Thank you.

14 Mr. Prengaman, anything else?

15 MR. PRENGAMAN: Nothing further, Your Honor.

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

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

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

1 you by Ms. Davies.

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

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

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

24 And then I have two others, one which we

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

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

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

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

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

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

1 did.

2 THE COURT: Thank you so much.

3 Mr. Picker, Ms. Rosenthal.

4 MS. ROSENTHAL: Court's indulgence.

5 Thank you, Your Honor, for that.

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

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

13 Okay. Thank you.

14 Mr. Prengaman, any objection to that change?

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

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

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

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

7 THE COURT: Mr. Prengaman, thank you.

8 Ms. Rosenthal, anything in response?

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

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

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

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

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

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

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

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

21 MS. GROSENICK: Yes, Your Honor.

22 Court's indulgence, please.

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

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

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

6 THE COURT: Thank you so much.
7 Ms. Rosenthal.

8 MS. ROSENTHAL: Thank you, Your Honor.

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

12 THE COURT: Okay. Thank you.
13 Mr. Prengaman.

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

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

20 MR. PRENGAMAN: Thank you.

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

24 MR. PRENGAMAN: Your Honor, I would submit

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

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

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

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

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

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

5 Ms. Grosenick.

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

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

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

15 MS. GROSENICK: It will be 18 --

16 THE COURT: 18?

17 MS. GROSENICK: -- 19, and 20.

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

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

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

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

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

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

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

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

19 MS. GROSENICK: Correct.

20 THE COURT: But 19 reads the same.

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

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

24 MS. GROSENICK: Correct.

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

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

5 MS. GROSENICK: Yes.

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

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

9 MS. GROSENICK: Yes.

10 THE COURT: In that order?

11 MS. GROSENICK: Yes.

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

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

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

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

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

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

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

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

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

9 THE COURT: Go ahead, Ms. Grosenick.

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

13 THE COURT: So let's resolve this.

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

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

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

23 MS. GROSENICK: Correct, Your Honor.

24 THE COURT: Ms. Rosenthal, any objection to

1 that?

2 MS. ROSENTHAL: Thank you, Your Honor.

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

9 THE COURT: Mr. Prengaman.

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

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

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

24 So no one has any objection to that language?

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

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

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

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

15 THE COURT: Right. Okay.

16 Now, I have none proposed by Norman.

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

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

24 The State has reported State's 8 regarding

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

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

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

9 Okay. So with regard to the elements of
10 robbery, the instructions proposed by the State, which is
11 State's 8 and Defendant Williams 9, they're identical
12 except that if you look at State's 8, the State at
13 5(c)(ii) and (iii) has left in "The person or property of
14 a member of his or her family; or the person or property
15 of anyone in his or her company at the time of the
16 robbery," and Mr. Williams does not include those, and
17 that's because I'm assuming they don't pertain in this
18 case?

19 MS. GROSENICK: Correct.

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

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

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

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

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

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

14 MS. GROSENICK: Correct. On State's 8, it's
15 lines -- I don't know about the page number. It's lines
16 1 through 3 on the second page of that instruction that
17 says, "A taking constitutes robbery whenever it appears
18 that although the taking was completed without the
19 knowledge of the person from whom the property was taken,
20 such knowledge was prevented by the use of force or
21 fear." That language --

22 THE COURT: You have that in your instruction.

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

1 narrowly tailored to the facts of this case.

2 And there was another difference.

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

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

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

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

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

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

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

12 MR. PRENGAMAN: May I, Your Honor?

13 THE COURT: Yes.

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

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

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

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

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

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

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

24 THE COURT: Okay. Ms. Grosenick.

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

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

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

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

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

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

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

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

1 THE COURT: Yes, of course.

2 MS. ROSENTHAL: Thank you, Your Honor.

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

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

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

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

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

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

22 THE COURT: It is in your instruction.

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

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

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

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

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

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

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

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

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

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

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

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

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

7 "1. Directly committing the offenses; or.

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

10 "3. Conspiring to commit the offenses.

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

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

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

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

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

3 THE COURT: Okay. So no objection --

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

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

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

19 Mr. Prengaman?

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

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

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

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

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

23 MS. ROSENTHAL: Thank you, Your Honor.

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

1 12, which we discussed, I think it might be more clear in
2 the instruction on line 3 if it were -- the sentence
3 beginning on line 2, "Specifically, the State has alleged
4 that the defendants committed robbery, attempted robbery,
5 and burglary either by directly," "or," "or." When it
6 just says, "by," and then all three, I think it can be
7 confusing instead of saying "either by directly
8 committing" or this or --

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

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

19 Okay. So I'll give that one.

20 Now, let's go back.

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

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

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

4 MS. GROSENICK: So the purpose is to comply
5 with Sharma, and that's Sharma vs. State, 118 Nev. 648,
6 658 (2002), and in that case the Supreme Court found --
7 the Supreme Court suggested that a single instruction
8 properly defining all the essential elements of a crime
9 charged would be less confusing for a jury.

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

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

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

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

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

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

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

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

22 MS. GROSENICK: Correct.

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

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

2 THE COURT: Thank you.

3 Mr. Prengaman.

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

11 THE COURT: Hold on. Let me grab mine.

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

15 That instruction?

16 MR. PRENGAMAN: Yes, Your Honor.

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

18 MR. PRENGAMAN: Yes, Your Honor.

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

1 conspiracy liability applies, and likewise with aiding
2 and abetting.

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

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

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

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

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

7 THE COURT: And a conspiracy instruction.

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

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

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

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

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

12 MR. PRENGAMAN: Yes, Your Honor.

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

19 THE COURT: So let me do this, then.

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

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

1 abetting.

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

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

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

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

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

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

24 Is this what you're essentially getting at?

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

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

10 MS. GROSENICK: If I may, Your Honor.

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

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

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

17 THE COURT: Okay. I got it.

18 MS. GROSENICK: Which is number 17.

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

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

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

5 THE COURT: Go ahead.

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

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

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

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

19 THE COURT: Give me just one minute.

20 MS. GROSENICK: That's --

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

23 MS. GROSENICK: Sorry.

24 THE COURT: Go ahead.

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

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

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

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

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

24 Ms. Rosenthal, what are Team Norman's objection

1 to State's 17?

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

4 THE COURT: Okay, Counsel.

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

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

14 Here are the conspiracy instructions: State's
15 18, State's 19, Williams' 17, Williams' 18.

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

23 MS. GROSENICK: Okay.

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

1 the two statements that are not included in Defendant
2 Williams' 18 are the one that begins at line 2 of State's
3 19, "conspiracy or agreement to violate the law," that is
4 not in Defendant Williams' 18, and then if you look at
5 State's 19, line 7, "It is proof of conscious
6 understanding and deliberate agreement," that line is not
7 included in Defendant Williams' 18. Otherwise State's 19
8 and Defendant Williams' 18 are the same. Okay?

9 So let's start with State's 18. I understand
10 that the first three paragraphs are the same as
11 Mr. Williams' 17. Your objection is to lines 16 through
12 25, page 1, and lines 1 through 6, page 2.

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

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

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

1 intent that the attempted robbery be accomplished"?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 Ms. Grosenick, same question for you.

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

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

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

3 Mr. Prengaman, talk to me about this.

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

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

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

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

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

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

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

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

10 THE COURT: Thank you for that.

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

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

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

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

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

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

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

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

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

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

15 MS. GROSENICK: May I be heard on that?

16 THE COURT: Of course.

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

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

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

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

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

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

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

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

23 Mr. Prengaman.

24 MR. PRENGAMAN: Just because it occurs to me,

1 so you want them fixed if that --

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

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

4 THE COURT: Wait, wait, wait.

5 Which one are you going to?

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

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

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

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

16 THE COURT: Line 22, State's 18?

17 MR. PRENGAMAN: Yes.

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

20 THE COURT: Okay.

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

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

3 THE COURT: Mr. Prengaman, stop.

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

8 The proposal is?

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

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

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

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

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

3 THE COURT: So create another section?

4 MR. PRENGAMAN: Yes, Your Honor.

5 THE COURT: Ms. Grosenick.

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

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

12 Thank you.

13 (The midday recess was taken.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. PRENGAMAN: Yes, Your Honor.

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

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

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

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

21 MS. GROSENICK: Yes, Your Honor.

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

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

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

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

16 THE COURT: Go onto the second one.

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

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

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

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

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

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

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

17 MS. GROSENICK: Thank you.

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

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

24 MR. PRENGAMAN: Your Honor, with regard to

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

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

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

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

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

5 THE COURT: I'm going to give Defendant
6 Williams' 17, but I'm going to add the second line of
7 State's 19. So I'm going to add to Defendant Williams'
8 17, after the language "parties' conduct" on line 2, "A
9 conspiracy or agreement to violate the law, like any
10 other kind of agreement or understanding, need not be
11 formal, written or even expressed directly in every
12 detail," given the citations of Thomas, 114 Nev. 1127,
13 with approval of the New Mexico case, and, also, I don't
14 hear anything that says it's -- that it's a violation of
15 the law or the law as written in the State of Nevada. So
16 that's how I would give that instruction.

17 Now, with regard to aiding and abetting --

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

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

1 MS. ROSENTHAL: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. ROSENTHAL: No, Your Honor.

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

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

22 THE COURT: Go ahead. And then where else?

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

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

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

4 MS. GROSENICK: Gotcha.

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

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

9 MS. GROSENICK: On page 1?

10 THE COURT: Page 1.

11 MS. GROSENICK: I would propose that, on line
12 15, "attempted robbery" be changed to "robbery."

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

15 THE COURT: Yes.

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

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

1 and burglary to be committed."

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

3 THE COURT: Why is that confusing?

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

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

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

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

24 "b. Directly or indirectly;

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

3 "3. Before or during the crime;

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

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

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

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

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

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

8 MR. PRENGAMAN: Okay.

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

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

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

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

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

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

11 MR. PRENGAMAN: Sorry, Your Honor.

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

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

15 MR. PRENGAMAN: Okay.

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

23 MR. PRENGAMAN: Yes, Your Honor. Anticipating
24 that in the next paragraph elementizing them, that they

1 are going to be told that it's the intent to commit
2 robbery. That's why I suggested it that way.

3 So I was just going to suggest that in the
4 paragraphs because robbery and attempted robbery both
5 have the same mens rea. So if it's "A person therefore
6 aids and abets" -- so line 1, page 2, "A person therefore
7 aids and abets the commission of robbery and attempted
8 robbery if he or she knowingly does any act," "The acts
9 which constitute the elements of robbery, attempted
10 robbery," and then 3 and 4, "with the intent that robbery
11 be accomplished." The mens rea is the same for both of
12 those, so they can be addressed together. And then for
13 burglary we just have a separate one that says, "with the
14 intent that burglary be accomplished." So that was just
15 my suggestion.

16 THE COURT: Okay. This is the way I'm going to
17 give this one:

18 Lines 13 through 15 on page 1 of aiding and
19 abetting will read, "Regarding attempted robbery (alleged
20 in Count II) and burglary (alleged in Count III), the
21 State must also prove that the defendants encouraged or
22 assisted the crimes with the intent required for
23 attempted robbery and burglary."

24 On page 2, "A person therefore aids and abets

1 in the commission of robbery and attempted robbery if he
2 or she:"

3 Subparagraph 2, "The acts which constitute the
4 elements of robbery or attempted robbery;

5 Subparagraph 4, "With the intent that robbery
6 or" -- excuse me -- "With the intent that robbery or
7 attempted robbery be accomplished."

8 And then the next paragraph would be, "A person
9 may also aid and abet in the commission of robbery if he
10 or she:"

11 That paragraph will stay as is currently
12 written.

13 And then the last paragraph will say, "A person
14 may also aid and abet in the commission of burglary if he
15 or she:"

16 And we'll repeat the elements of the first
17 paragraph.

18 Mr. Prengaman.

19 MR. PRENGAMAN: No objection to that, Your
20 Honor.

21 THE COURT: We'll be sure -- we're going to get
22 all of these to you before we finalize them.

23 MS. ROSENTHAL: Your Honor, just to make -- I'm
24 sorry -- it's a little word, but for the burglary one, if

1 it could read -- like on the first line of that page, "A
2 person therefore aids and abets the burglary" instead of
3 "also," because I think the "also" refers to the one
4 above it, and this is a separate one.

5 THE COURT: Yes. Okay. All right.

6 Now, having resolved these aiding and abetting
7 and conspiracy instructions in that way, I think
8 Mr. Williams' 18, 19, and 20 are duplicative, and I'm not
9 going to give it.

10 Let's stay on this theme, Counsel, and let's go
11 to the State's -- let's go to the perpetration
12 instructions, State's Number 6, which begins, "As applied
13 to felony murder, the term 'perpetration,'" Defendant
14 Williams' Number 6 starts the same way.

15 Actually, let's start with this one. Let's
16 start with Defendant Williams' Number 8 if we're going to
17 stay on that page.

18 "In order to find either defendant guilty of
19 felony murder on a theory that the killing occurred in
20 the perpetration," we're going to take a look at that
21 one. Everybody take a look at that one.

22 It starts, "In order to find the defendant
23 guilty."

24 It's a four-line instruction.

1 Mr. Prengaman, do you have any objection to
2 this instruction?

3 MR. PRENGAMAN: I do, Your Honor.

4 Your Honor, my objection is that this implies
5 to the jury that specific intent is required -- I'm
6 sorry. I'm thinking --

7 THE COURT: Take your time. Read it again.

8 MR. PRENGAMAN: Your Honor, I do have an
9 objection to this because I don't think it's an accurate
10 statement of the law. In order to be liable for felony
11 murder, the defendant has to have liability in the
12 commission of one of those underlying offenses, but that
13 doesn't necessarily mean that they have to have specific
14 intent that one or more of those crimes be committed.

15 In other words, if you were to elementize --
16 state the elements of felony murder, it would be the
17 defendant is liable for the commission of one of the
18 underlying felonies, and there's no intent involved in
19 it.

20 Two, the intent tracks with the underlying
21 felony. So this basically says if you're liable for
22 kidnapping, you have to have the specific intent that
23 that crime be committed. What you have to have is
24 liability for the kidnapping, which the underlying

1 elements of that would require you to have specific
2 intent, but this makes it sound like, on top of that,
3 there's some additional intent element.

4 MS. GROSENICK: Can the Court clarify which
5 instruction we're on?

6 THE COURT: Defendant Williams' Number 8, "In
7 order to find either defendant guilty of felony murder on
8 the theory that."

9 MS. GROSENICK: I'm sorry. I thought we were
10 doing perpetration.

11 THE COURT: I started that way. I didn't mean
12 to confuse you. Since we're still on intent, this is an
13 intent instruction. I wanted to make sure we dealt with
14 this one first.

15 Mr. Prengaman's objection to this is that -- I
16 don't want to put words in your mouth, Mr. Prengaman --
17 it's effectively incorrect because it implies that
18 specific intent is necessary for felony murder as opposed
19 to the underlying offense.

20 MR. PRENGAMAN: Correct, Your Honor. And to
21 the extent the intent is emphasized, the underlying -- it
22 would be duplicative to that extent, but that's
23 exactly -- as the Court just said, that's exactly my
24 concern, because it tells the jury that there's a

1 specific-intent element, which the Court is going to
2 instruct them. I don't have to show intent to kill.
3 It's the liability -- the intent is for the underlying
4 felony, not for felony murder.

5 MS. GROSENICK: I'm really sorry, Judge. I'm
6 not sure what instruction we're looking at.

7 THE COURT: It's your number 8.

8 MS. GROSENICK: Thank you.

9 THE COURT: So the concern is that there's a
10 heightened level of intent here. In other words, the
11 defendants need to have specific intent not only for the
12 underlying offense, but that the felony murder be
13 committed.

14 Counsel, remind me, in these instructions, do
15 we have one that says, "The following offenses require
16 specific intent"?

17 MR. PRENGAMAN: Yes, Your Honor. You have the
18 underlying elements. Each of these would have the
19 underlying elements.

20 THE COURT: Right. I know we've got it with
21 regard to each of the offenses as it's spelled out. We
22 don't have a singular instruction that says, "The
23 following offenses require specific intent."

24 MR. PRENGAMAN: Well, I would suggest that in

1 the aiding and abetting conspiracy instruction you just
2 did, you tell them that. You single them out and say in
3 order to be liable for the specific-intent crimes of
4 burglary, etcetera, you must have that intent, so at
5 least they get it.

6 So basically the instructions -- I'm sorry. Go
7 ahead.

8 MS. GROSENICK: I'm just going to say that's
9 different. That instruction is different. It doesn't
10 encompass all these because the way the case is charged,
11 we need to include attempted burglary and kidnapping and
12 attempted kidnapping.

13 THE COURT: What is -- I'm looking at the
14 reference to Crawford below. What about an instruction
15 that simply says, "The State must prove beyond a
16 reasonable doubt the defendant had a specific intent to
17 commit attempted robbery, burglary, attempted burglary,
18 kidnapping, or attempted kidnapping"?

19 I know we've got it incorporated in others, but
20 I'm sensitive to what Ms. Grosenick is saying about these
21 additional offenses.

22 MR. PRENGAMAN: I would say, Your Honor, that
23 emphasizes -- it is duplicative and emphasizes that
24 burden. In other words, to prove felony murder, the

1 predicate is simply the defense is liable --

2 THE COURT: I'm suggesting -- I'm sorry,
3 Mr. Prengaman, but I'm suggesting you take the felony
4 murder out of this, because I read it that specific
5 intent is not required, and what I want to incorporate is
6 what Ms. Grosenick's concern is and just simply have an
7 instruction that says -- no reference to felony murder --
8 the instruction would start, "The State must prove beyond
9 a reasonable doubt the defendant had the specific intent
10 that" -- "The State must prove beyond a reasonable doubt
11 that the defendant had the specific intent to commit
12 attempted robbery, burglary, attempted burglary,
13 kidnapping, or attempted kidnapping."

14 MR. PRENGAMAN: Your Honor, what I would
15 suggest is that then you'd have, for instance, the
16 elements of attempted robbery, which tell the jury I have
17 to prove beyond a reasonable doubt that they intended to
18 commit robbery, and then that's going to be followed --
19 the next instruction on kidnapping is going to tell them
20 about the intent that has to be proved for kidnapping.

21 And then you're going to tell them, remember,
22 ladies and gentlemen, the State -- remember, I just told
23 you the State has to prove the significant intent for
24 each of those crimes, they really have to do it, and

1 that's what this instruction is saying.

2 MS. GROSENICK: They do.

3 THE COURT: What about Ms. Grosenick's concern
4 related to attempted burglary and attempted kidnapping?

5 MR. PRENGAMAN: Well, there's an instruction on
6 kidnapping that covers those elements, and in that
7 instruction -- well, the instruction on felony murder
8 tells them they have to prove the elements of the
9 underlying offense beyond a reasonable doubt.

10 So they're already told -- if you go back to
11 that felony murder that -- instruction that describes
12 felony murder and what the State has to prove, it states
13 that the State has to prove the underlying felony, the
14 elements.

15 So when they get the kidnapping instruction
16 that has the intent that I have to prove, they've been
17 told, they've been told that's what I have to prove; in
18 order for liability to attach by virtue of kidnapping,
19 the State has to prove the elements of kidnapping.

20 THE COURT: So it's generally duplicative?

21 MR. PRENGAMAN: Yes, Your Honor. As well as --
22 again, it's duplicative and wrong in the form as
23 proposed. If you take out the reference to felony
24 murder, I think then it's duplicative.

1 THE COURT: Ms. Rosenthal.

2 MS. ROSENTHAL: We'll submit on this
3 instruction, Your Honor.

4 THE COURT: I'm going to give it so that it
5 reads the following: "The State must prove beyond a
6 reasonable doubt that the defendant had the specific
7 intent that attempted robbery, burglary, attempted
8 burglary, kidnapping, or attempted kidnapping be
9 committed."

10 MR. PRENGAMAN: I'm just going to say, Your
11 Honor, the complexity, I would suggest, with that is I
12 only have to prove -- kidnapping is not a charged offense
13 in this case. I only have to prove that if I want to
14 support a felony murder conviction. In other words, the
15 way it's alleged --

16 THE COURT: I understand what you're saying.
17 Yes. I can't do it, then.

18 I understand what he's saying, Ms. Grosenick.
19 He doesn't have to prove kidnapping.

20 MS. GROSENICK: He does, though, Your Honor, in
21 order to prove --

22 THE COURT: No, no. But it makes it sound
23 like -- to me, it's confusing in the sense that they're
24 going to go looking for a verdict form on kidnapping.

1 MS. GROSENICK: Fair. But he does have -- if
2 he's going to base felony murder on kidnapping, all of
3 the elements of kidnapping or attempted kidnapping have
4 to be proven beyond a reasonable doubt. And,
5 furthermore, the jury should be instructed on the fact
6 that that's specific intent pursuant to Crocker.

7 THE COURT: Mr. Prengaman.

8 MR. PRENGAMAN: I was just trying to pull up
9 felony murder.

10 And they're told exactly that. They're going
11 to get the elements of kidnapping in the felony murder
12 instruction. It's going to say, "So therefore the
13 elements of felony murder in the first degree as alleged
14 in this case are defensible" --

15 THE COURT: Mr. Prengaman, that's a thousand
16 words a minute. I just don't think Peggy can do that.

17 MR. PRENGAMAN: Sorry.

18 THE COURT: Go ahead.

19 MR. PRENGAMAN: So the felony murder
20 instruction says there are the -- in the first two
21 paragraphs, it says, "Therefore, the elements of felony
22 murder as alleged in this case are: The defendants did
23 willfully and unlawfully perpetrate or attempt to
24 perpetrate the crimes of burglary, robbery and/or

1 kidnapping; and the killing of Jacob Edwards occurred
2 during the perpetration or attempted perpetration," and
3 then they have the elements of kidnapping.

4 THE COURT: I'm going to withhold this one,
5 then. I just am not sure there's a way to give it
6 without making things very confusing for the jury. The
7 specific-intent element is in each of the crimes, so I'm
8 going to withhold giving this one.

9 Let's go to perpetration now. I have a few on
10 perpetration. They are State's Number 6, Defendant
11 Williams' Number 6, and Defendant Williams' Number 7.

12 Let's take a look at State's 6. Everybody got
13 that? Okay. Starting at line 1 through line 7, it's
14 identical to Defendant Williams' Number 6, line 1 through
15 line 8. What's different in these two instructions is
16 that last paragraph.

17 Mr. Prengaman, having looked at your last
18 paragraph and Mr. Williams' last paragraph --

19 MR. PRENGAMAN: Your Honor, I know the defense
20 objects to the last sentence, "Perpetration may include
21 the flight," and both parties address that in their
22 pretrial pleadings.

23 I would submit it on the case law I've cited,
24 that "Perpetration may include the flight of the

1 perpetrator until they reach a place of temporary
2 safety." To me, that's very well-grounded in the law.

3 THE COURT: I read Sanchez-Dominguez. I see
4 Sanchez-Dominguez at 93 citing to People v. Wilkins. I
5 just didn't see a specific reference to "until the
6 perpetrator reaches a place of temporary safety." I
7 didn't see that. I saw a general citation but not with
8 regard to this specific case.

9 MR. PRENGAMAN: I was going to say, Your Honor,
10 I think -- and I don't disagree, but I think
11 Sanchez-Dominguez uses the example of flight as one of
12 the examples of continued perpetration.

13 So I was going to say that I think that
14 actually, in many cases, benefits the defense, but if
15 they don't like it, I would suggest that the Court just
16 say, "Perpetration may include flight of the perpetrator
17 from the scene of the offense," period.

18 THE COURT: I think that's supported by Nevada
19 law.

20 MR. PRENGAMAN: So that's what I would suggest.
21 Again, that's fine with the State. I think it's all --
22 when you look at the case law, that's all supported. For
23 our purposes here, I would offer it with that change.

24 And I do think, for the reasons I stated, that

1 this is a flight case. This case involves flight from
2 the scene, and so including that is significant. It
3 tailors it to the facts of the case and lets the jury
4 know that that is -- that the flight might be included in
5 the perpetration.

6 THE COURT: What about your sentence,
7 "Therefore, perpetration of burglary, robbery, or
8 kidnapping" -- this is line 8 -- compared to
9 Mr. Williams' suggestion at line 9?

10 MR. PRENGAMAN: Your Honor, I think those are,
11 in the State's view, essentially, largely, maybe not in
12 particular, but largely saying the same thing, expressing
13 the same concept, which is the unbroken chain of events,
14 and so it's conveying the same concept.

15 I suggest that the State's language in the case
16 where you're talking about flight is slightly more
17 appropriate because it talks about the chain being
18 broken. But, again, I think those are both essentially
19 expressing the same thing, that it's the chain of events
20 flowing from the initial offense.

21 THE COURT: Ms. Grosenick.

22 MS. GROSENICK: I'll just add that, yeah, I
23 think that last sentence in the State's instruction is
24 not supported by case law and takes the focus away from

1 whether or not the continuous chain of events was broken
2 and puts the focus on the temporary safety, which is not
3 the facts of this case.

4 THE COURT: Mr. Prengaman is acknowledging that
5 the sentence could end at the word "offense,"
6 "Perpetration may include flight of the perpetrator from
7 the scene of the offense," period.

8 MS. GROSENICK: That's fine.

9 THE COURT: Ms. Rosenthal.

10 MS. ROSENTHAL: Thank you.

11 We would submit that in State's Proposed 6,
12 that the last sentence -- the last sentence is confusing
13 as to it relates to Ms. Norman as she did not flee and
14 was not involved in that aspect of it, and so --

15 THE COURT: Thank you.

16 I think that's something you could certainly
17 argue, Ms. Rosenthal, to the jury.

18 So what I'm going to do is I'm going to give
19 Defendant Williams' Number 6, and at the end of the
20 second paragraph I'm going to include from the State's
21 instruction, "Perpetration may include the flight of the
22 perpetrator from the scene of the offense."

23 Let's take a look now at Defendant Williams'
24 Number 7, also a reference to felony murder. It starts,

1 "In order to prove either defendant guilty of felony
2 murder..."

3 Does everyone have this: "In order to prove
4 either defendant guilty of felony murder based on the
5 perpetration or attempted perpetration..."

6 Mr. Prengaman.

7 MR. PRENGAMAN: I'm looking --

8 THE COURT: Take your time. Two paragraphs.
9 It's a Crawford v. State reference.

10 MR. PRENGAMAN: Yes, I have it, Your Honor.

11 THE COURT: Any issues with this instruction?

12 MR. PRENGAMAN: Your Honor, I don't have -- I
13 think it would -- I don't have any objection to the first
14 paragraph, and I would suggest that it be included in the
15 felony murder instruction.

16 THE COURT: I'm sorry? You said --

17 MR. PRENGAMAN: I'm sorry?

18 THE COURT: Your last sentence I did not get.

19 MR. PRENGAMAN: Your Honor, I would suggest
20 that it be incorporated into the felony murder
21 instruction, the language that "The State must prove each
22 element of the underlying felony beyond a reasonable
23 doubt."

24 THE COURT: Which one of the State's

1 instructions? Give me a number.

2 MR. PRENGAMAN: So, Your Honor, I lost track of
3 the numbering. It would be the felony murder, so it
4 would be whenever that occurs in perpetration or
5 attempted perpetration.

6 THE COURT: Mr. Prengaman, are you aware you
7 drop off on the last part of your sentences? I cannot --

8 MR. PRENGAMAN: I'm sorry.

9 MS. ROSENTHAL: Your Honor, I believe it's
10 number 5.

11 THE COURT: State's Number 5?

12 MS. ROSENTHAL: Yes.

13 THE COURT: Take a look at State's Number 5.

14 Mr. Prengaman, if you go after number 3, so
15 you've got the paragraph that starts at line 10,
16 "Therefore, the elements of felony murder in the first
17 degree," and you've got the three elements listed there.

18 MR. PRENGAMAN: Yes, Your Honor.

19 So I would have no objection to that being
20 included as the last paragraph. I do think that
21 instruction after number 5 is just restating the same,
22 but if you incorporate the first paragraph and say the
23 State must prove it beyond a reasonable doubt, that
24 accomplishes the purpose.

1 THE COURT: So instead of putting it at the
2 end?

3 MR. PRENGAMAN: I'm sorry. No. I would
4 suggest not including lines 1 through 4 of the proposed
5 instruction at the end of number 5 but not lines 5
6 through 7 because that's just restating it.

7 THE COURT: Thank you.

8 Ms. Grosenick.

9 MS. GROSENICK: Your Honor, lines 5 through 7
10 of Williams' Number 7 is not just restating anything.
11 They properly word a negative instruction that should be
12 given upon request, and the first paragraph of it is
13 necessary to give context to that second portion of the
14 instruction.

15 THE COURT: Okay. Ms. Grosenick, let me ask
16 you something just so it's clear when I read this.

17 At line 3, "The State must prove each element
18 is" -- is what you're really trying to say here, "The
19 State must prove each element of the underlying felony
20 beyond a reasonable doubt"?

21 MS. GROSENICK: On line 3?

22 THE COURT: Line 3 of Williams' 7. "The State
23 must prove each element" -- is it "underlying felonies
24 beyond a reasonable doubt"?

1 MS. GROSENICK: Yes.

2 THE COURT: Let's make that change, and I'll
3 give it back, and then I'll ask Ms. Rosenthal whether she
4 has any objection, but this is the way number 3 would
5 read, line 3 after the words "attempted kidnapping":
6 "The State must prove each element of one of" -- insert
7 "the underlying" -- switch "felony" to "felonies beyond a
8 reasonable doubt."

9 Ms. Rosenthal, your thoughts on number 7.

10 MS. ROSENTHAL: Your Honor, I don't believe I
11 have an objection. I just am not -- if the Court could
12 repeat the insertion, I'm trying to follow it. Maybe
13 once we get it reprinted --

14 THE COURT: Let's do this: Take a look at the
15 first paragraph. It says, "In order to prove either
16 defendant guilty," and it goes on to list all of the
17 offenses. Then it says on line 3, "attempted kidnapping,
18 the State must prove each element of" -- insert "one of
19 the underlying" -- change "felony" to "felonies beyond a
20 reasonable doubt."

21 So that reads, "The State must prove each
22 element of one of the underlying felonies beyond a
23 reasonable doubt."

24 MS. ROSENTHAL: We have no objection.

1 MR. PRENGAMAN: Your Honor, again, to make it
2 correct, I would suggest that paragraph -- the second
3 paragraph should read, "If you find that the State did
4 not prove beyond a reasonable doubt every element of at
5 least one of these underlying felonies, you cannot find
6 the defendant guilty of felony murder."

7 THE COURT: Ms. Grosenick.

8 MS. GROSENICK: No objection.

9 THE COURT: Ms. Rosenthal.

10 MS. ROSENTHAL: No objection.

11 THE COURT: Okay. That's how we will do it.

12 Let's go to kidnapping, Williams' 21. I call
13 it the Mendoza instruction because it's based on
14 Mendoza v. State.

15 "In order for you to find either defendant
16 guilty of both felony murder..."

17 Based on the Mendoza case, Mr. Prengaman, I'm
18 going to start with you.

19 MR. PRENGAMAN: Your Honor, I'm not entirely
20 sure that's accurate when they're not --

21 THE COURT: Go ahead.

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

23 THE COURT: Let me start here with my question
24 for counsel.

1 Counsel, this is an interesting case, the
2 Mendoza case, but the way I read Mendoza was in that case
3 the State was seeking a guilty verdict for both
4 kidnapping and one other felony.

5 First of all, I want to talk about the
6 instruction itself. In line 1 it says, "In order for you
7 to find either defendant guilty of both felony murder
8 based on the predicate felony of kidnapping and separate
9 offense of robbery or attempted robbery, you must also
10 find beyond a reasonable doubt either: That any movement
11 of the victim was not incidental to the robbery; that any
12 incidental movement of the victim substantially increased
13 the risk of harm to the victim over and above that
14 necessarily present in the robbery; that any incidental
15 movement of the victim substantially exceeded that
16 required to complete the robbery; that the victim was
17 physically restrained and such restraint substantially
18 increased the risk of harm to the victim; or the movement
19 or restraint had an independent purpose or significance."

20 First of all, I don't think "of both" should be
21 in the first line. "In order to find either defendant
22 guilty" -- it should say, "of," not "both" -- "of the
23 felony murder based on the predicate felony of kidnapping
24 and separate offense of robbery or attempted robbery, you

1 must also find beyond a reasonable doubt either..."

2 I want to know if the Court should take any
3 exception to this instruction based on the facts in
4 Mendoza where the State sought a conviction for both
5 crimes whereas here the State is seeking a conviction for
6 one or more of the crimes. Does that even matter?

7 Ms. Grosenick.

8 MS. GROSENICK: Thank you.

9 I argue, Your Honor, that it does not matter
10 because if the felony murder is based on kidnapping or
11 attempted kidnapping, the State has to prove the elements
12 of kidnapping or attempted kidnapping beyond a reasonable
13 doubt, and therefore the holding in Mendoza would apply
14 equally here if there are convictions for both felony
15 murder based on kidnapping and a separate conviction for
16 the robbery.

17 One thing that I would add, though, is that we
18 won't know what the jury bases their decision on. So my
19 concern is not providing the instruction is that it would
20 leave open that possibility, and we would never know, the
21 possibility that they could convict based on -- could
22 convict on first degree murder based on predicate felony
23 of kidnapping and also a separate conviction for a
24 robbery. I don't think that that would be legally sound,

1 but we wouldn't know. We wouldn't know because of the
2 verdict forms.

3 THE COURT: Okay. But Mendoza did not tie the
4 offenses to felony murder.

5 MS. GROSENICK: I don't think that matters
6 because, for felony murder, the State does have to prove
7 the elements of an underlying felony beyond a reasonable
8 doubt.

9 THE COURT: But I'm giving that instruction.

10 MS. GROSENICK: Right. But as far as Mendoza's
11 application, the Court is saying that you can't have dual
12 convictions for kidnapping and robbery unless these facts
13 are met.

14 THE COURT: Actually, what I'm saying is when I
15 read -- when I read Mendoza, what the court seemed to be
16 basing the decision on regarding the elements you have
17 here in the instruction 1 through 5 is that the State was
18 asking for a conviction on both of those offenses
19 unrelated to felony murder.

20 And I thought the fact -- the way I read
21 Mendoza is -- and you even said guilty of both, and I
22 thought that's where you were going with this when I
23 first read it.

24 But the way I read Mendoza is the instruction

1 was because the State was seeking a conviction on both
2 counts and without reference to felony murder, whereas,
3 here, the jury can find guilt on one of these offenses.
4 For example, if they return a guilty verdict on robbery
5 or attempted robbery and felony murder, the inference
6 being they never got to kidnapping, but as you pointed
7 out, you wouldn't know.

8 MS. GROSENICK: Right.

9 THE COURT: Mr. Prengaman.

10 MR. PRENGAMAN: Your Honor, I would submit that
11 this is fundamentally different because the Mendoza case
12 did deal with guilt of two crimes, guilt and sentencing,
13 and essentially I would say the shorthand of Mendoza is
14 if you're going to try to punish overlapping conduct, you
15 have to show that there was additional movement in order
16 to do that.

17 In this case no one charged the defendants with
18 just robbery, and I don't know anything in Mendoza that
19 prevents the State from relying upon kidnapping as a
20 predicate felony because it's that conduct, and the
21 theory behind the felony murder is the inherent danger of
22 engaging in conduct that constitutes kidnapping and/or
23 robbery. That leaves, and subjects, the person to the
24 felony murder liability. And so it's not the attempt to

1 convict for both that was the concern in Mendoza. It is
2 the commission of the conduct that the State has to
3 prove.

4 So, in other words, I would submit that with
5 regard to felony murder -- and especially because both
6 subject the defendant to -- in other words, here's the
7 situation in Mendoza: The jury finds beyond a reasonable
8 doubt the defendant committed the elements of kidnapping
9 and the elements of robbery, and the Supreme Court said,
10 in order to punish them for that overlapping conduct, the
11 State has to show that there was this movement that
12 subjected the defendant -- subjected the victim to, for
13 instance, additional danger in order to convict for both.

14 Now, with felony murder, what you're talking
15 about is not convicting them. What you're talking about
16 is has the State proved beyond a reasonable doubt that
17 they did both.

18 Let's say the State, taking the Mendoza
19 situation -- let's say Mendoza was a felony murder case
20 and that the underlying felonies weren't charged, so it's
21 just felony murder based on robbery and kidnapping. I
22 don't believe anything in Mendoza indicates we have the
23 same concern subjecting the defendant for liability if
24 the State proved that the defendant did both the

1 kidnapping and robbery, especially because both of those
2 subject the defendant to felony murder liability.

3 So the concern is that convicting for both
4 doesn't necessarily subject the defendant to liability,
5 and I submit that there's not that same concern of sort
6 of that overlapping conduct, because if the State has
7 proved beyond a reasonable doubt that the defendant
8 committed robbery, he's subjected to liability for felony
9 murder. If the State proves beyond a reasonable doubt
10 the defendant committed kidnapping, the defense is
11 subjected to liability for felony murder. If the State
12 proves them both beyond a reasonable doubt, the defense
13 is subjected to liability for felony murder, but the
14 concern at issue in those is not applied here when you're
15 talking about liability for something else versus what
16 they were talking about there, which is dual convictions
17 and sentences for overlapping conduct.

18 Because here the overlapping conduct simply
19 suggests -- if there is overlapping conduct, it simply
20 subjects the defendant to the same liability for felony
21 murder. In the Mendoza case, it's subjecting them to
22 additional punishment.

23 And on top of that, even if the Court saw
24 otherwise, I think there's problematic -- this needs to

1 be re-formed in order to be accurate.

2 If I may, Your Honor, our court has already
3 indicated -- for instance, with burglary -- that there is
4 not an issue -- in other words, there's not merger with
5 an underlying felony.

6 In other words, for instance, if the State
7 convicts somebody of burglary and that defendant is
8 subjected to felony murder liability for that burglary,
9 there's not a merger. The name of the case escapes me,
10 but our court has indicated that there's not a merger --
11 in California, it says there's a merger of those
12 offenses, and Nevada doesn't, which I think is
13 significant to what's being considered here.

14 The liability for felony murder does not merge
15 with the underlying felony, so that's a further reason
16 that the situation in Mendoza with dual convictions is
17 not tracked through to felony murder liability.

18 THE COURT: Okay. Give me just a minute. I
19 want to read the rest of this case myself.

20 Here's one of the biggest issues I see --

21 MS. ROSENTHAL: Your Honor, could you please
22 speak into the mic?

23 THE COURT: Thank you.

24 The issue I see is Mendoza is based on the

1 State seeking dual convictions for two offenses. Here
2 the State is not seeking a conviction for kidnapping.

3 This is what the Court said: "The Court held
4 that to sustain convictions for both robbery and
5 kidnapping arising from the same course of conduct, any
6 movement or restraint must stand alone with independent
7 significance from the act of robbery itself, create a
8 risk of danger to the victim substantially exceeding that
9 necessarily present in the crime of robbery, or involve
10 movement, seizure or restraint substantially in excess of
11 that necessary to its completion, but is based on
12 sustained convictions for both robbery and kidnapping."

13 The State is not seeking a conviction for
14 kidnapping in this case, and so I don't see how Mendoza
15 applies. The instruction they offer is -- it's not what
16 the defense has proposed, but what's in the Mendoza case
17 is, "In order for you to find the defendant guilty of
18 both first degree kidnapping or second degree kidnapping
19 and the associated offense of robbery..."

20 In other words, in order for you to find the
21 defendant guilty of both first degree kidnapping and the
22 associated offense of robbery, you must also find beyond
23 a reasonable doubt.

24 And here's the thing: We've got some time to

1 go on this, but that's my ruling on that instruction is
2 I'm not going to give it, but, Counsel, if something else
3 occurs to you -- because I didn't hear anybody arguing
4 that point, if something else occurs to you, let me know.

5 Let's go to kidnapping. I'm sorry. Yes, let's
6 go to kidnapping, State's Number 10.

7 State's Number 10, "Kidnapping occurs when:"

8 So everybody grab that one, grab Defendant
9 Williams' 13, Defendant Williams' 15 -- hang on --

10 THE CLERK: 12, 13, 14.

11 THE COURT: Thank you. Defendant Williams' 12,
12 13, and 14. Grab those as well. Those are all the
13 kidnapping instructions.

14 Okay. Mr. Prengaman, I want you to grab
15 Defendant Williams' Number 12.

16 Do you have that?

17 MR. PRENGAMAN: Yes.

18 THE COURT: Take a look at that first
19 paragraph. I want you to tell me if you have any
20 objection to that. What about that is inaccurate?

21 MR. PRENGAMAN: Well, Your Honor, not only
22 inaccurate, but -- I don't necessarily have an objection
23 to the first two sentences. However, the third line
24 says, "In order to find either defendant guilty of felony

1 murder based on the theory of kidnapping."

2 That's cumulative of the standalone instruction
3 the Court has just indicated would be given, so I don't
4 believe that should be included.

5 THE COURT: Okay. So line 3 through 5. Okay.

6 Then let's -- I'm going to give counsel a
7 chance. Let's go through the rest of this.

8 My review of this instruction, comparing
9 Defendant Williams' 12 to State's 10, is that the State
10 has not identified, at line 10, kidnapping in the second
11 degree. It simply says, "Kidnapping also occurs when:"
12 And Defendant Williams has, "The key elements of
13 kidnapping in the second degree are." And I see the
14 reference, repeated reference, to "beyond a reasonable
15 doubt," too.

16 Okay. "The elements of kidnapping in the
17 second degree are:"

18 Mr. Prengaman, you just called it "Kidnapping
19 also occurs."

20 MR. PRENGAMAN: Yes, Your Honor, because to the
21 jury it doesn't matter. In other words, these were
22 charged offenses, and because we're just talking about
23 liability attaching, the jury doesn't -- to the jury it
24 doesn't matter. And so we shouldn't tell them whether

1 it's first or second degree because it doesn't matter to
2 them. All that matters is the liability, and those are
3 the elements. That's an unnecessary point of confusion
4 because, again, if it's kidnapping, there's liability
5 regardless of first or second.

6 THE COURT: Mr. Prengaman, take -- Ms.
7 Grosenick, Ms. Rosenthal, I'll get to you -- but take a
8 look at Defendant Williams' 14. You've got -- and then
9 compare that to your instruction. They have a definition
10 of "kidnap" which is different than yours. The term
11 "inveigle" and "entice" appear to be the same.

12 And then the "consent" paragraph: "Consent of
13 the person kidnapped" is the same as in yours, but you've
14 got at the top of page 2, "The law does not require the
15 person being kidnapped to be carried away for any minimum
16 distance."

17 MR. PRENGAMAN: So I would say that the main
18 differences are, as the Court indicated, one, that the
19 State defines "kidnap," and the defense instruction does
20 not.

21 THE COURT: The second line of your definition
22 of "kidnap": "The crime of kidnapping does not require
23 force or restraint," and they have that as well.

24 MR. PRENGAMAN: Correct, Your Honor. But the

1 statute uses the word "kidnap," and so it is a term of
2 art. It is used to describe the offense, so it's used to
3 describe what the elements are, and I believe the
4 State -- the Court should define that word, "kidnap," and
5 I believe that's a legally accurate definition, and it's
6 the totality of it. It's not just that it doesn't
7 require force or and restraint but to take and carry
8 away.

9 And so I submit because the term "kidnap" is
10 used to define the elements, it should be defined.

11 And then the --

12 THE COURT: And then here you've got the
13 statement you say is supported by Jensen v. Sheriff,
14 Mendoza v. State, and Eckert v. Sheriff at the top of
15 page 2.

16 MR. PRENGAMAN: Which I think are legally
17 accurate and should be included.

18 THE COURT: And then --

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

20 And then just -- I don't know that we need that
21 "Consent of the person kidnapped." I think it's the same
22 in both.

23 THE COURT: It's the same in both. If you both
24 want to take it out, I'll take it out. If you both want

1 it in, I'll put it in, but it's proposed in both
2 instructions.

3 Then, Mr. Prengaman, one last thing before I
4 get off of Mr. Williams' proposed instruction. Take a
5 look at Defendant Williams' 13. It starts out, "The
6 State alleges that either/or both defendants had the
7 specific intent to commit kidnapping."

8 MR. PRENGAMAN: Your Honor, I don't think that
9 that's inaccurate, but I don't know why we would give
10 that.

11 THE COURT: The citation is 205 -- the citation
12 is 205.060.

13 MR. PRENGAMAN: I think that's just the --
14 that's just the statute, the burglary statute, if I'm not
15 mistaken. That just says what burglary is.

16 I would not request this. It's true of every
17 burglary offense. It's true of robbery. The State
18 doesn't have to prove --

19 THE COURT: I can't understand you.

20 MR. PRENGAMAN: Sorry.

21 Your Honor, it's true of every -- this is
22 essentially true of every offense that goes with robbery:
23 larceny, assault, battery, robbery, any felony. The
24 State need not prove beyond a reasonable doubt that the

1 defendant actually committed the offense. And the
2 burglary instruction covers that. It says that the
3 offense need not be committed after entry. So I'm not
4 sure why kidnapping is being singled out. Nothing jumps
5 out at me that's inaccurate. I don't know why we would
6 single out kidnapping and give this instruction when it
7 applies to every other offense.

8 So if the defense wants it, I would simply ask
9 that it reflects accurately everything. The State need
10 not prove beyond a reasonable doubt that -- if the State
11 alleges the defendant entered with a certain intent to
12 commit a crime, it doesn't have to prove beyond a
13 reasonable doubt that the defendant actually committed
14 the crime.

15 THE COURT: Ms. Grosenick, with regard to those
16 issues.

17 MS. GROSENICK: Thank you.

18 As to the first issue of stating the degree of
19 kidnapping, Defendant Williams' Instruction Number 12, I
20 don't object to taking out the degree.

21 THE COURT: Okay.

22 MS. GROSENICK: I don't object either to just
23 taking out Williams' Instruction Number 13. I think that
24 kidnapping will be confusing for the jury because to use

1 it for the felony murder, it needs to be proven beyond a
2 reasonable doubt, but to prove that there was an intent
3 to commit kidnapping, it does not. So that was the
4 purpose of that, was to clarify it, but if it's going to
5 be more confusing, then we should leave it out.

6 THE COURT: Okay.

7 MS. GROSENICK: And the language that -- the
8 language that I feel strongly about is the State's
9 kidnapping elements instruction. On the first page,
10 lines 21 and 22, that common law definition of "kidnap,"
11 it doesn't need to be in there. It will be confusing to
12 the jury because the elements of the crime of kidnapping
13 are just above it, and those are more complicated and
14 more to look at.

15 My concern is the jury will skip down to that
16 one sentence and use that instead of actually doing the
17 work to go through the elements. I agree that's the
18 correct common law definition of "kidnapping," but in
19 this case the burden is on the State to prove the
20 elements as defined by statute, not the common law
21 definition.

22 THE COURT: Okay. Then what about the
23 language -- two other things: State's 10, the two lines
24 at the top, "The law does not require the person being

1 kidnapped to be carried away for any minimum distance.
2 It is the fact of movement of a victim, not the distance,
3 that constitutes the offense."

4 MS. GROSENICK: I don't object to that.

5 THE COURT: And then the other thing is whether
6 or not you and Mr. Prengaman and Ms. Rosenthal think that
7 paragraph 5 -- excuse me -- paragraph 2 on page 2 at line
8 5, "Consent of the person kidnapped or confined to the
9 kidnapping" is necessary in this instruction.

10 MS. GROSENICK: I don't believe it's necessary.

11 THE COURT: I don't think Mr. Prengaman did
12 either.

13 MR. PRENGAMAN: I just changed my mind. Sorry,
14 Your Honor. I apologize. I was thinking through.

15 THE COURT: "Consent of the person kidnapped or
16 confined to the kidnapping or confinement is not a
17 defense unless the person is above the age of 18 years
18 and the person's consent was not extorted by threats,
19 duress or fraud."

20 The reason I was trying to see what the parties
21 thought about deleting this is I think it's so confusing.
22 I don't want to overuse that word, but what does that
23 mean: "Consent of the person kidnapped or confined to
24 the kidnapping or confinement is not a defense"? Can't

1 it just say, "Consent of the person kidnapped or confined
2 is not a defense" -- "Consent of the person kidnapped is
3 not a defense unless the person is above the age of 18"?

4 MR. PRENGAMAN: Basically, if you go along --
5 if you're threatened and you go along with it, it's not a
6 defense unless -- if your consent is extorted by threats,
7 duress or fraud.

8 THE COURT: As long as it's not a misstatement
9 of the law, I'm willing to leave it in. I'm just asking
10 whether or not you think that first phrase is convoluted,
11 "Consent of the person kidnapped or confined to the
12 kidnapping or confinement."

13 MR. PRENGAMAN: I do not, Your Honor. I
14 think -- I don't know that there's any other way to
15 convey that.

16 THE COURT: Ms. Rosenthal, with regard to each
17 of those issues.

18 Ms. Grosenick, did you have something else?

19 MS. GROSENICK: I did. I just wanted to add
20 that the paragraph on page 2 of the State's kidnapping
21 instruction, lines 6 through 8, dealing with consent, the
22 word "confine" is not really used anywhere else in the
23 instruction, and I wonder if taking out references to
24 "confine" and "confinement" might make it less confusing.

1 THE COURT: That's what I was suggesting.
2 Simply, "Consent of the person kidnapped is not a
3 defense..."

4 MR. PRENGAMAN: But confine is one of the
5 elements.

6 THE COURT: Then we have to list all the
7 elements here. So as long as it's one of the elements --
8 "Seizes, confines inveigles" -- looking on the previous
9 page under 2(a), "Seizes, confines, inveigles, entices,
10 decoys..." It's in the definition.

11 MR. PRENGAMAN: I think the reason it is is
12 because the kidnapping is the -- is that movement aspect
13 and confinement is different.

14 I'll submit to the Court.

15 THE COURT: Ms. Rosenthal, on those topics.

16 MS. ROSENTHAL: Your Honor, we would just join
17 with Mr. Williams' objection.

18 THE COURT: Thank you.

19 This is what I'm prepared to do with this
20 instruction: I am prepared to begin with the two
21 statements in Defendant Williams' 12: "Neither defendant
22 is charged with kidnapping as a separate crime. However,
23 the State alleges that the defendants committed or
24 attempted to commit kidnapping as a predicate felony to

1 felony murder in Count IV." Then I'm going to give the
2 State's instruction right up to line 19.

3 Line 21, "Kidnap means to carry away any person
4 by unlawful force or fraud against his or her will" is
5 coming out, simply because I agree with Ms. Grosenick.
6 It's very well-defined in lines 2 through 10 above or 12
7 through 19.

8 "The crime of kidnapping does not require force
9 or restraint" stays, as does the term "inveigle," the
10 term "entice."

11 I have no objection to "The law does not
12 require the person being kidnapped," those two statements
13 at the top of page 2, and I'm going to leave in the
14 statement at line 5, page 2. It's going to say, "The
15 person kidnapped," delete "or confined to the kidnapping
16 or confinement." So it reads, "Consent of the person
17 kidnapped is not a defense unless," with the rest of that
18 statement.

19 Now, I won't give Defendant Williams' 12
20 because I've adopted most of it -- most of it is included
21 in State's 10. The same with Defendant Williams' 14, and
22 I'm not giving Defendant Williams' 13.

23 Let's move to coercion. Take a look at State's
24 Number 9 and Defendant Williams' Number 12. Tell me when

1 you have those. They're the same instruction as they
2 start out, "Felony coercion occurs when."

3 Does everybody have both of those?

4 They're the same from lines 1 to 6. They're
5 the same in lines 8 to 9. Defendant Williams, at line 9,
6 includes "The standard for the immediacy of the threat is
7 an objective one."

8 The instructions are then the same. With
9 regard to the State, "In determining whether a defendant
10 has made an immediate threat," at the end of that
11 statement, the State adds, "You can and should consider
12 the testimony of any victim or victims, but the ultimate
13 determination of whether a threat was immediate must
14 focus on the viewpoint of a reasonable person under the
15 circumstances."

16 So, Mr. Prengaman, let's begin with Defendant
17 Williams' Number 12 stated at line 9, "The standard for
18 the immediacy of the threat is an objective one."

19 Any objection?

20 MR. PRENGAMAN: Your Honor, I think this would
21 be the same discussion we had previously over the
22 standard, and so my objection is simply that I think it's
23 clearer for the jury -- instead of saying, "objective,"
24 it's easier to just focus on determining the immediacy of

1 the threat, but --

2 THE COURT: You don't think it's necessary?

3 MR. PRENGAMAN: I think it's a little bit more
4 technical to use the term "objective" because that means
5 something to lawyers and not necessarily to the average
6 person, but, again, I know the Court resolved the last
7 objection by including this in the sentence about the
8 victim, by including this instruction, which is very
9 similar to this.

10 THE COURT: It is.

11 MR. PRENGAMAN: I'd just incorporate -- I don't
12 want to prolong it. I would incorporate my prior
13 argument for that. I can't remember if that was the --
14 which instruction that was, but I would --

15 THE COURT: Okay. Thank you.

16 MR. PRENGAMAN: I incorporate my prior
17 arguments about not using "objective" and the case law
18 supporting the jury being able to consider the victim's
19 experience.

20 THE COURT: Okay. Ms. Grosenick, with regard
21 to both those issues, defending "the standard for the
22 immediacy" in your instruction and then addressing "You
23 can and should consider the testimony of any victims" in
24 Mr. Prengaman's instruction.

1 MS. GROSENICK: Your Honor, our main dispute is
2 with that sentence, "You can and should consider the
3 victim's testimony."

4 In this situation we have the Santana case,
5 122 Nev. 1458, 1463, and the court notes that the
6 standard that you use and the viewpoint that the jury
7 focuses on is really significant as far as whether
8 threats were made or whether a reasonable person in that
9 situation would feel threatened.

10 This sentence that the State has included as
11 their last sentence in the coercion instruction
12 contravenes Santana in that sense. The jury is already
13 being instructed that they alone determine the
14 credibility and how to use evidence and how to weigh
15 evidence, and so I think that this is more dangerous here
16 as well because it does -- it does take the focus away
17 from the standard of a reasonable person. I don't think
18 it should be included.

19 THE COURT: Okay. What about defending the
20 statement that you've made, which is "The standard for
21 the immediacy of the threat is an objective one"?

22 MS. GROSENICK: I don't think "objective" is
23 that big of a word, and the State uses "subjective" in
24 their instructions, so I don't see the problem with that,

1 but if the Court wants to make it more plain English, I'm
2 fine with that.

3 THE COURT: Okay.

4 MR. PRENGAMAN: Just briefly, Judge, it doesn't
5 contravene Santana. It's directly out of Santana. The
6 court in Santana said, "While the jury can and should
7 consider the testimony of victims, the jury remains
8 responsible for determining whether the threat was
9 immediate, future, or incapable of being performed."

10 MS. GROSENICK: But the jury wasn't instructed
11 that. That is dicta out of that case.

12 THE COURT: So this is the way I'm going to do
13 this: I'm going to give Mr. Williams' Number 11, "Felony
14 coercion occurs when a defendant," and the reason I'm
15 going to do that is while I don't think there's anything
16 technically wrong with the statement that's proposed by
17 the State, "You can and should consider the testimony of
18 any victim or victims," etcetera, the jury has already
19 been instructed to consider the testimony of victims
20 or -- of all witnesses.

21 Ms. Rosenthal, regarding Defendant Williams'
22 11, any objection to that instruction?

23 MS. ROSENTHAL: No, Your Honor.

24 THE COURT: That's the one that I'm going to

1 give.

2 And then the second half of that statement,
3 "The ultimate determination of whether the threat was
4 immediate must focus on the viewpoint of a reasonable
5 person under the circumstances," read the sentence right
6 before that in the proposed instruction, which both
7 parties have proposed: "In determining whether the
8 defendant has made an immediate threat of physical force
9 or injury, you must decide the immediacy of the threat
10 based upon how a reasonable person under the
11 circumstances..." it seems to just be repeating that.
12 So I will give Defendant's 11 on coercion.

13 Next is DUI, the definition of "causing the
14 death of another" -- excuse me -- the instruction
15 "causing the death of another while driving under the
16 influence of methamphetamine." That's State's 11 and I
17 think Defendant's 22.

18 So let's begin with what they have in common.
19 Does everybody have both of those in front of them?

20 What they have in common is, beginning with the
21 State, the State's, at line 15 through 24, is identical
22 to Defendant's line 9 through 18. The only thing the
23 State has added is "The definition of substantial bodily
24 harm occurs elsewhere in these instructions."

1 I have a question about that. Do we need
2 "substantial bodily harm" in these instructions? Because
3 everything you read about the DUI without the death in
4 this case does not include substantial bodily harm, and
5 I'm wondering if we need the definition of "substantial
6 bodily harm" in these instructions. I just don't see it
7 alleged anywhere.

8 Mr. Prengaman.

9 MR. PRENGAMAN: Well, Your Honor, because death
10 certainly is sufficient, but it's not necessary, and
11 although it's unlikely what the defense might argue, I
12 won't presume what they might argue, and there are
13 certain cases where there might be arguments about the
14 ultimate cause of the death, what I view as a position
15 with an accurate instruction about substantial bodily
16 harm is to say it doesn't matter, that the harm that was
17 caused immediately --

18 For instance, take this case, for instance.
19 I'd submit the evidence shows that upon the collision, at
20 the very moment of the collision, the victim suffered
21 substantial bodily harm, which I proved beyond a
22 reasonable doubt.

23 And then with regards to what happened after --
24 I'm sorry -- then regardless of what happened after that,

1 what aid was rendered, etcetera, I would still be
2 entitled to argue that that alone -- that substantial
3 bodily harm occurred and that the collision alone caused
4 the death -- not caused the death, but met the elements
5 of the statute, which would -- again, the defense may not
6 argue anything in that regard, but I would not want to
7 limit myself from having that available since it is legal
8 and it's still applicable in this case even though
9 there's an outside chance there might be argument about
10 it.

11 THE COURT: I appreciate that. Thank you.

12 But I have a question for Ms. Grosenick
13 regarding the defense's objection.

14 So now we know where they're similar. Where
15 they're different is at the top half where the elements
16 of driving under the influence causing death are laid
17 out. I went through Mr. Prengaman's 1 through 5 at the
18 top of State's 11, and between 484C.110 and 484 --
19 NRS 484.4301, I see those elements set out almost
20 verbatim in the State's instruction, but the defense is
21 different.

22 So explain to me and defend lines 1 through 8
23 of the defense instruction.

24 MS. GROSENICK: Your Honor, I don't have an

1 objection to the State's version if the Court prefers
2 that. The defense's version came directly from the
3 Gonzalez case in which it says to support a conviction,
4 the State must prove the defendant, you know, committed
5 these four elements essentially, and so that's where that
6 language came from.

7 I would note -- I don't think that actual
8 physical control is an issue in this case either. It's
9 something that I just caught while rereviewing
10 everything. So I think that subsection 1(b), line 5 in
11 the State's instruction, I don't think that we need that.

12 And then as to substantial bodily harm, there's
13 no real obligation of substantial bodily harm as to Jacob
14 Edwards. The only evidence presented was that he died as
15 a result of this accident, not that he was injured and
16 suffered prolonged pain, and, furthermore, that was not
17 alleged in the to-wit portion of the Information for any
18 of these counts. They all alleged to wit that
19 Mr. Williams crashed his truck head on into the vehicle
20 being driven in the correct direction by Jacob Edwards
21 which proximately caused Edwards' death.

22 So I don't think that we need the "substantial
23 bodily harm" references or instruction in this case. I
24 don't think we would have a credible argument that he

1 didn't die, and so that's not an argument that we would
2 make, but I do think that these jury instructions are
3 already very lengthy and including ones that we don't
4 need will further confuse the jury.

5 THE COURT: Ms. Rosenthal, just to give you
6 some point of reference, substantial bodily harm is the
7 State's 15.

8 MS. ROSENTHAL: Yes, Your Honor, I'm aware of
9 that.

10 So given that Ms. Norman is not charged in any
11 of this count, she does not have an opinion on this
12 instruction.

13 THE COURT: Thank you so much.

14 I am going to give the instruction as proposed
15 by the State, and I'll leave in the substantial bodily
16 harm reference.

17 All right. Let's go to State's 12, Defendant
18 Williams' 23.

19 Counsel, the only difference between these two
20 instructions -- they're identical -- is that the defense
21 has included "beyond a reasonable doubt," which, as I've
22 indicated, was already going to be given, and so I
23 have -- so otherwise they're identical.

24 MS. GROSENICK: Your Honor, we actually

1 excluded "substantial bodily harm" from Mr. Williams'
2 instruction.

3 THE COURT: You excluded "of or bodily harm."
4 Yes, you did.

5 Mr. Prengaman, I'm going to go back to the
6 substantial bodily harm with you. It's not alleged.
7 It's alleged that he died. The offenses all charge
8 death. Am I right about that? Look at the Information.
9 I looked at it. I checked this this morning. There's no
10 substantial bodily harm in the State's -- in the
11 stipulated instructions.

12 MR. PRENGAMAN: Your Honor, if the defense is
13 saying they are not going to argue anything in that
14 regard, then --

15 THE COURT: Ms. Grosenick, are you going to
16 argue anything in that regard?

17 MS. GROSENICK: Regarding substantial bodily
18 harm? No.

19 THE COURT: Ms. Rosenthal, taking into account
20 your last statement, I assume you're not going to argue
21 substantial bodily harm either?

22 MS. ROSENTHAL: Correct, Your Honor. All the
23 charges that would relate to that, Ms. Norman is not a
24 party to.

1 THE COURT: So let's take a look at State's 11.
2 Let's go back to the causing the death of another by
3 driver instruction.

4 Number 5, "The act" -- this is at line 12 --
5 "The act or neglect of duty proximately causes the death
6 of another."

7 Okay. That's how that instruction will be
8 modified.

9 The last line, 25, "The definition of
10 substantial bodily harm appears elsewhere in these
11 instructions" will come out, and I will not give the
12 State's 15, which is the definition of "substantial
13 bodily harm."

14 MR. PRENGAMAN: However, Your Honor, with the
15 eluding, that is a little different because it's not
16 substantial bodily harm, it's just bodily harm, and I
17 would suggest -- so I would submit that should stay in.
18 That's a different thing. We're not talking about
19 substantial bodily harm. It's just any bodily harm
20 suffices, and I would say the State has is certainly
21 going to allege -- the allegations in this case should
22 include that as well. It doesn't require any additional
23 instruction or definition.

24 THE COURT: Okay. So I'll leave bodily harm.

1 Let's go to reckless driving. These are
2 identical except as follows: Number 5 at line 7, for the
3 defense, Defendant Williams does not include "or
4 substantial bodily harm." It's just "death of another
5 person" and does not include "The definition of
6 substantial bodily harm appears elsewhere in these
7 instructions."

8 Now, reckless driving does not talk about
9 bodily harm. It just talks about death in the
10 Information.

11 Ms. Grosenick, are you willing to stipulate you
12 will not argue substantial bodily harm as to reckless
13 driving?

14 MS. GROSENICK: Yes, Your Honor.

15 Also, as to the eluding, the State wants to
16 leave in "bodily harm," but I would not that in the "to
17 wit" language of the Information, it is not alleged there
18 either, it's only alleged to be death, but we will not
19 argue that the State didn't prove that he wasn't
20 substantially bodily harmed.

21 THE COURT: Or any bodily harm?

22 MS. GROSENICK: We're not going to argue bodily
23 harm at all.

24 THE COURT: Okay. Mr. Prengaman, I'm going to

1 give the instruction that Mr. Williams has proposed
2 because it's identical to yours without the "substantial
3 bodily harm" references.

4 MR. PRENGAMAN: Your Honor, it does include
5 "beyond a reasonable doubt."

6 THE COURT: It does.

7 MS. ROSENTHAL: Your Honor, just to be
8 consistent, can we use just the first line of the State's
9 and then Mr. Williams' just so they can all be similar?

10 THE COURT: Yes.

11 Proximate cause, State's 14, Defendant
12 Williams' Number 27.

13 Mr. Prengaman, I had a pretrial motion
14 regarding the admission of Sparks Police Department
15 items, and in that the parties cited to Williams v.
16 State, 118 Nev. 536 (2002), a Nevada Supreme Court case,
17 and there's a definition of "proximate cause" in that
18 case as instructions to the jury, which is what Defendant
19 Williams proposed, and then I've got your proposed which
20 is significantly differently.

21 MR. PRENGAMAN: Your Honor, I wouldn't
22 necessarily say, "significantly different." I'd say --

23 So one thing in Williams, on the facts of that
24 case, in the Williams case, the court pretrial precluded

1 the defense from arguing their theory of the case on
2 proximate cause, and the reason the court did that as the
3 Williams -- as our supreme court -- so the reason the
4 trial court did that was because of the timing, and the
5 court held that because it was a preexisting condition
6 that the conduct of the defense alleged or wanted to
7 allege as an alternative cause occurred -- did not occur
8 after the defendant's conduct, it ruled it precluded the
9 defendant from doing that, and our supreme court said
10 that was appropriate.

11 So the significant thing or a significant thing
12 for Williams that is reflected in the State's instruction
13 that is not at all addressed in the defense instruction
14 is that the other person's action has to have occurred
15 after the defendant's act or neglect of duty in order to
16 even reach or be considered as proximate cause. So, in
17 other words, it's not just that it has to take over and
18 become the sole cause. It cannot be a preexisting
19 condition, and it must occur after the defendant's
20 conduct. That's what Williams says. So the defense
21 proposed instruction does not include that.

22 Additionally -- Your Honor, and, really, the
23 State -- I would submit the State's instructions simply
24 leaves out the confusing language, which no doubt is

1 accurate, but to a jury, talking about proximate cause,
2 intervening causes, those things are confusing for
3 lawyers, as I think civil case law in Nevada will attest
4 to. And so all the State's instruction does is it leaves
5 out those terms and simply states what they are, so
6 instead of using "intervening cause," it just says what
7 an intervening cause is.

8 So I would submit the State's instruction is
9 not -- what we convey is not complex or technical
10 language. The substance is what an intervening cause is.
11 In other words, it has to break the chain of causation
12 from the defendant's conduct, so they actually know the
13 person became the sole cause of the bodily harm or death.

14 Then, additionally, Your Honor, the State's
15 instruction doesn't include that there can be more than
16 one cause, which, again, is well-grounded in the case
17 law, but I think it's significant in terms of tailoring
18 the instruction in this case because, as the Court has
19 heard in the course of the trial, the defense,
20 particularly Mr. Williams, has tried to cast a light on
21 the Sparks Police Department. It's suggesting their
22 conduct played a role, blaming them, and that's the
23 thrust of much of their examination of the police
24 officers who were involved in the pursuit.

1 So it's particularly, I would suggest,
2 significant to tailor this instruction to the facts of
3 the case and let them know there may be more than one;
4 there could be more than one proximate cause of an
5 injury. However, in spite of that, the defendant's
6 conduct or the conduct of the other person must have
7 taken over and become the sole cause of the event.

8 So I would submit that the -- and then the
9 State's instruction does have "reckless" and "negligence"
10 or definition of "negligence," and I think if the
11 instruction is going to refer to negligent action of
12 another person, you need to tell this jury what language
13 this is.

14 Now, the State's instruction does reference
15 substantial bodily harm, which, of course, would have to
16 come out based on the prior rules on the other
17 instructions, but I would submit that this conveys fully
18 and specifically the timing issue, that the conduct of
19 the person has to be after the defendant's conduct, which
20 the Williams instruction doesn't, as well as the more
21 natural language and telling them there could be more
22 than one proximate cause.

23 So I think this is accurate, and this is the
24 instruction that should be given.

1 THE COURT: I don't see substantial bodily harm
2 defenses.

3 MR. PRENGAMAN: Your Honor, it would be --

4 THE COURT: Am I missing it?

5 MR. PRENGAMAN: I'm sorry. Your Honor, it
6 starts out, "A proximate cause of substantial bodily harm
7 or death." So it would read, "A proximate cause of
8 death," on line 1, and then it refers to "harm or death"
9 throughout. So I would remove that reference to harm
10 based on that.

11 Is that what the Court was asking me?

12 THE COURT: Right. I see in the State's
13 instruction -- I see what you're saying. I understand.
14 Thank you so much. Okay.

15 Ms. Grosenick, with regard to proximate cause?

16 MS. GROSENICK: Your Honor, I request that the
17 Court use Mr. Williams' instruction that's already been
18 upheld as a valid jury instruction under Nevada law. It
19 is not as long and confusing as the State's.

20 I think that the portion of the sentence
21 beginning on line 7 of the State's instruction is
22 actually more confusing, to talk about how another party
23 could also be negligent and also a proximate cause.

24 And then on line 11, I agree with the State

1 that the issue in Williams was that Williams' actions
2 occurred after the teenagers were in the meeting. I
3 think the facts in this case are different. However, we
4 are bound by the Court's pretrial ruling, and so that has
5 affected the evidence we could present and our strategies
6 as well.

7 But I think that -- I don't think that Williams
8 announced a hard-and-fast rule that in every situation
9 the contributory negligence would have to happen after
10 the defendant's actions. I think that in this case
11 that's a different -- this case presents different facts.

12 THE COURT: Okay. Thank you.

13 Ms. Rosenthal.

14 MS. ROSENTHAL: We have no opinion, Your Honor.
15 We would join Mr. Williams' instruction request.

16 THE COURT: Thank you so much.

17 Ms. Grosenick, what do you think about line 16
18 through 17? The proposed Williams instruction references
19 "contributory negligence," and on line 16 and 17 the
20 State has a proposed definition of "negligence."

21 MS. GROSENICK: I don't have an objection to
22 that. I think it's a correct statement of law.

23 THE COURT: What I'm going to do is give
24 Mr. Williams' instruction on proximate cause, and I'm

1 going to add to that the last line in the State's
2 instruction at line 16 through 17 about negligence.

3 Next, this is guilt or innocence of each
4 defendant. There are two instructions proposed. One is
5 the State's Number 2, "You are not called upon to return
6 a verdict as to the guilt or innocence of any other
7 person than the defendants," and then there's
8 Defendant's 26, "You are here to determine the guilt or
9 innocence of each defendant from the evidence in this
10 case."

11 Mr. Prengaman -- they're very similar, Counsel.
12 The only thing that's really different about the two of
13 them is the second sentence. The State's second sentence
14 is "Whether anyone else should be prosecuted for the
15 crimes charged in this case or other crimes is not a
16 proper matter for you to consider." The defense's is
17 "You are not called upon to return a verdict as to the
18 guilt or innocence of any other person."

19 MR. PRENGAMAN: Your Honor, I'd submit it based
20 on the additional case law of Roy vs. State, which talks
21 about -- I've quoted it -- "The criminality of one
22 person's acts cannot rationally depend on whether the
23 State decides to prosecute another."

24 In this case there has been -- again, the

1 defense, notably Norman's counsel, both in opening and in
2 examination, has called attention to the lack of
3 Mr. Kelly's -- not just not being here, but not being
4 charged, and that's not just been in their opening, but
5 in the course of questioning of witnesses, emphasizing
6 that.

7 So I think, again, from the perspective of
8 tailoring the instructions to the facts of this case,
9 whether he was arrested or prosecuted has no bearing on
10 whether the evidence in the case proves the charges
11 alleged against the two defendants.

12 So, again, given that these are pretty close,
13 I'd submit the State's instruction is better tailored to
14 the arguments that have been -- and the things that have
15 been emphasized in this case.

16 THE COURT: Okay. Thank you, Mr. Prengaman.

17 Ms. Grosenick.

18 MS. GROSENICK: I think the State's version of
19 that sentence, "Whether anyone else should be
20 prosecuted," is not necessary, and Mr. Williams'
21 instruction was specifically approved of in Guy vs.
22 State, and that's a published Nevada Supreme Court
23 opinion, and it covers the State's concerns here because
24 it does say, "You are not called upon to return a

1 vertical as to the guilt or innocence of any other
2 person."

3 So this instruction covers the concerns by the
4 State and is more neutral and has already been approved
5 by the Supreme Court.

6 THE COURT: Thank you.

7 Ms. Rosenthal.

8 MS. ROSENTHAL: Thank you, Your Honor. We
9 would join with Mr. Williams' instruction. I believe it
10 reads more clearly and would be easier for the jury to
11 understand.

12 THE COURT: Being that the Williams' proposed
13 instruction is a direct quote right out of Guy v. State
14 and is also quoted, by the way, as a reference or a
15 resource in the State's instruction, I'll give Defendant
16 Williams' instruction regarding guilt or innocence of
17 another person.

18 The State has proposed an instruction which is
19 State's Number 7, "The reduction in the degree of the
20 crime of murder is not available to the jury upon the
21 basis of mitigating circumstances, but only upon the
22 basis of lack of proof of the elements of the crime as
23 fixed by law."

24 After this, Counsel, I'm going to take a brief

1 recess to give our court reporter a break, and we don't
2 have that many more to go.

3 Mr. Prengaman, the purpose of this instruction?

4 Well, let me ask first, Counsel Grosenick, any
5 objection?

6 MS. GROSENICK: I'm sorry. What number?

7 THE COURT: State's Number 7. It's very short,
8 barely three lines. It starts, "The reduction in the
9 degree of the crime of murder."

10 MS. ROSENTHAL: While Ms. Grosenick is finding
11 it, perhaps I can speak to this so we can move along.

12 Ms. Norman's position is that this instruction
13 is unnecessary. The Court instructs on the different
14 elements and what each element is, so I don't believe
15 this is necessary for this case.

16 THE COURT: Okay. Ms. Grosenick.

17 MS. GROSENICK: Your Honor, this is one of
18 those ones we originally did not object to, so we'll just
19 submit on it.

20 THE COURT: Okay. Thank you.

21 Mr. Prengaman, the purpose, the importance of
22 this?

23 MR. PRENGAMAN: Your Honor, this is approved
24 specifically by Scott vs. State, and, again, the emphasis

1 by both defendants in this case has been on what I would
2 term collateral matters like the police conduct, and I
3 anticipate that type of argument, that the police somehow
4 bear responsibility, even though legally there's no basis
5 for that type of allegation, but it has, nonetheless,
6 been emphasized to the jury quite heavily.

7 And so this is appropriate and simply reminds
8 the jurors that such factors as police conduct -- I'm
9 just singling that out as an example -- are not
10 available, and it's strictly evidence and elements.

11 THE COURT: With that, it's directly supported
12 by Scott v. State at 92 Nev. 552, and so I would give it
13 as an accurate statement of law.

14 Counsel, we're going to take a break now. When
15 we come back, we are going to go to State's Instruction
16 Number 16, which is "actual physical control of a
17 vehicle," and then we don't have that many more to go to
18 work our way through these and then talk about where we
19 want to go from there.

20 So let's take a quick 15-minute break. It's
21 3:15. We'll come back somewhere close to 3:30.

22 (A recess was taken.)

23 THE COURT: State's 16, "A person is in actual
24 physical control of a vehicle."

1 MR. PRENGAMAN: Your Honor, didn't we take that
2 out of the DUI instruction?

3 THE COURT: Did we what?

4 MR. PRENGAMAN: I thought we -- I'm sorry. I
5 thought we took that out of the DUI instruction, or did
6 we just discuss it? I thought we took that out.

7 THE COURT: We didn't. It's not in the -- it
8 wasn't in the defense's, but I don't think I took out
9 "actual physical control." I'm almost sure I didn't. I
10 left it in. Ms. Grosenick asked me to take it out, but I
11 did not take it out.

12 MR. PRENGAMAN: We had that discussion, didn't
13 we, about whether it was applicable?

14 THE COURT: Right. It's part of the statute.
15 If you'll stipulate to take it out, then we don't have to
16 deal with this instruction.

17 MR. PRENGAMAN: As long as the defense isn't
18 going to argue actual physical control.

19 THE COURT: Defense, are you going to argue
20 actual physical control?

21 MS. GROSENICK: No, Your Honor.

22 THE COURT: Ms. Rosenthal, you don't even have
23 a dog in this hunt; correct?

24 MS. ROSENTHAL: Correct.

1 THE COURT: Thank you.

2 In State's Instruction Number 11, which defines
3 "cause of death of another by driving a vehicle while
4 under the influence," with modifications based on all our
5 discussions, I'm giving State's 11, again, with
6 modifications.

7 Section 1 of the instruction says, "The
8 defendant willfully drives a vehicle or is in actual
9 physical control of the vehicle." I now have no
10 objection to removing "or is in actual physical control
11 of the vehicle," so that's going to come out, and,
12 therefore, I do not need to give State's 16.

13 That one is withdrawn, Mr. Prengaman?

14 MR. PRENGAMAN: Yes, Your Honor.

15 THE COURT: That's withdrawn.

16 State's 23, "It is not improper for the
17 attorneys to have interviewed witnesses prior to trial in
18 this case. The practice of interviewing witnesses before
19 a trial is expected and completely proper under Nevada
20 law."

21 Mr. Prengaman, do you still want to give this?
22 There's testimony on the record that you may have been
23 present while police were meeting, but I don't know if
24 there's any testimony on the record about you

1 interviewing a witness.

2 MR. PRENGAMAN: There was, Your Honor. It was
3 asked of Mr. Sims, so I would request it.

4 THE COURT: Ms. Grosenick.

5 MS. GROSENICK: Your Honor, this is not a
6 recognized jury instruction. It's unnecessary, calls
7 attention to phone interviews over others, and so we
8 object to this instruction.

9 THE COURT: Because it's not a
10 recognized instruction?

11 MS. GROSENICK: It's not recognized. It's not
12 necessary in this case.

13 You know, where that came out was with
14 Mr. Sims. That was exculpatory information that we were
15 entitled to that we didn't have until, I think, our
16 attorney brought it out of Mr. Sims. But I think that's
17 the only instance where an interview was mentioned with
18 the State outside of trial, so I don't think it's
19 necessary or appropriate.

20 THE COURT: Okay. Ms. Rosenthal.

21 MS. ROSENTHAL: We will join with that, Your
22 Honor.

23 Your Honor, just on that note, I don't believe
24 it was in question whether or not they were allowed to

1 meet with attorneys. There would be no reason to say
2 it's permitted under Nevada law.

3 THE COURT: Ms. Rosenthal, it's funny you
4 should say that. If I give it, I'm only going to give
5 the first sentence. I think it's generic enough if it's
6 just the first sentence, and I'm willing to give that
7 because it applies to all counsel in the case.

8 And I get that it's not -- that there's no
9 Nevada law cited to support it, but I just want to avoid
10 the inference that it was improper. So I'm going to give
11 it but just the first sentence: "It is not improper for
12 the attorney to have interviewed witnesses prior to trial
13 in this case."

14 Okay. Next is Defendant Norman. I have an
15 instruction, "Proof beyond a reasonable doubt."

16 Ms. Rosenthal. And I should say that the proof
17 beyond a reasonable doubt, the reasonable doubt is
18 stipulated in Instruction Number 15 in those that are
19 stipulated.

20 Ms. Rosenthal, are you still offering Defendant
21 Norman's 1?

22 MS. ROSENTHAL: No.

23 THE COURT: Okay. Defendant Norman 1 is
24 withdrawn.

1 Next is something that we talked about and
2 resolved prior to trial. This is Defendants Williams'
3 Number 5. "You cannot find either defendant guilty of
4 felony murder under a theory of murder to prevent lawful
5 arrest unless you find that the murder was committed for
6 the purpose of avoiding identification, apprehension, or
7 lawful arrest."

8 Based on the case law that was provided to this
9 Court and, more importantly, the statutory language, this
10 Court indicated, having heard oral argument before trial,
11 that the proper instruction would be "You cannot find
12 either defendant guilty of felony murder under a theory
13 of murder to prevent lawful arrest unless you find the
14 murder was committed to avoid or prevent lawful arrest."

15 Mr. Prengaman.

16 MR. PRENGAMAN: Your Honor, as I indicated in
17 the State's instruction, I think -- the State's
18 instruction does say that, and essentially there's three
19 kinds of first degree murder: There's felony murder,
20 premeditated murder, and then an unlawful killing of
21 another with malice.

22 The defense instructions suggest to the jury
23 that the killing has to be intentional for the purpose of
24 escape, and that is inconsistent with the nature of a

1 malice killing, and it's based only on cases that are
2 sufficiency-of-the-evidence cases. In other words, the
3 Supreme Court has looked at particular evidence in
4 particular cases and said, yes, this is sufficient, or
5 this met the standard.

6 But the cases cited by the defense don't speak
7 to the definition. Again, a sufficiency-of-the-evidence
8 case does not add anything to the defense argument that
9 it has to be for the purpose of a particular phrase in
10 our request.

11 And the case law is clear as the State cited.
12 The mens rea for a killing to prevent lawful arrest is
13 malice or express malice or implied malice, and,
14 accordingly, implied malice is malignant recklessness.
15 So what that means is a killing that occurs by virtue of
16 malignant recklessness, the underlying conduct. So the
17 conduct, the malignantly reckless conduct that occurs to
18 avoid lawful arrest, that's first degree murder. So you
19 cannot have an implied malice mens rea and then tell the
20 jury it's a purposeful killing.

21 So the defense instruction, to the extent that
22 it suggests that or implies that, that suggests, again,
23 that the killer has to have -- is killing intentionally
24 to avoid arrest, which is inconsistent with the law.

1 So I submit the State's instruction
2 sufficiently addresses it. It tells them -- it tells the
3 jury that it has to be to avoid or prevent lawful arrest,
4 and then it tells them the appropriate mens rea, which is
5 malice.

6 And the State does not have to -- again, the
7 case law is clear. The law in Nevada tells us the State
8 does not have to prove premeditation or intent to kill.
9 Malignant recklessness is all the State has to establish.

10 THE COURT: Mr. Prengaman, the Court has heard
11 all these arguments, but my question for you is, I gave
12 the parties' instruction I'm willing to give based on my
13 review of the case law and the statutory language, and
14 I'm prepared to give that unless there's an objection or
15 a withdrawal with no interest in having it given.

16 MR. PRENGAMAN: Well, Your Honor, I would
17 submit that it is somewhat duplicative of the State's --
18 there was no objection to the State's instruction, so
19 this would be in addition to the State's instruction, is
20 my understanding, and that has not changed since our
21 pretrial ruling; correct, Your Honor. In other words,
22 the State's instruction --

23 THE COURT: Take me to it.

24 MS. GROSENICK: It's State's Number 21 in the

1 unobjected to, but I will be objecting to that.

2 THE COURT: Oh, you changed your position.

3 This is "Murder committed to avoid or prevent
4 the lawful arrest of any person by a peace officer is
5 murder in the first degree."

6 Is that the one?

7 MR. PRENGAMAN: Yes, Your Honor. And I thought
8 that was stipulated to.

9 THE COURT: Ms. Grosenick.

10 MS. GROSENICK: Thank you, Judge.

11 So the one that Mr. Williams has submitted on
12 murder to prevent lawful arrest was submitted in addition
13 to the State's Number 21 that was not objected to, but if
14 the Court is not going to give the defendant's
15 instruction, then I do object to the State's instruction,
16 and I don't think that the Court's instruction goes far
17 enough in accurately instructing what intent is
18 necessary.

19 The State's characterization of my argument
20 regarding intent necessary for murder to prevent arrest
21 is correct. The way that the State is arguing this
22 applies is that if you act malignantly or recklessly
23 while trying to prevent arrest and someone dies, that is
24 first degree murder by definition under the statute, and

1 that is inaccurate.

2 The case law is extremely clear on the purpose
3 of this statute and this theory of liability for murder.
4 Just like in felony murder where the intent from the
5 felony supplies the malice in murder, the purpose of
6 killing someone to avoid apprehension, to avoid arrest,
7 to avoid witnesses against them and identification, that
8 is what replaces the premeditation and deliberation and
9 malice in murder to prevent arrest.

10 And so I think that this instruction is
11 actually one of the most important in the entire packet
12 because the jury should be instructed correctly, and the
13 State should not be able to argue in closing that if
14 someone dies while you are fleeing from police, that
15 that's first degree murder unless it's under the theory
16 of felony murder, which is specifically defined
17 elsewhere, or unless it was intentional and premeditated.

18 The circumstances that the State is describing
19 is already covered by felony eluding, and so the
20 legislature has already said that the circumstances the
21 State is arguing, those are already covered by felony
22 eluding.

23 So I don't know -- I do still object to the
24 Court's version, and I do object to State's unobjected-to

1 21 if the defense's version is not given.

2 THE COURT: Okay. Ms. Rosenthal.

3 MS. ROSENTHAL: Thank you. We would agree with
4 Mr. Williams' counsel.

5 THE COURT: I just want to make clear that the
6 way I read these instructions -- and this is not a
7 comment of support for either one of them -- the one
8 being offered by the State, which was stipulated 21, is
9 "Murder committed to avoid the lawful arrest of any
10 person by a peace officer is murder in the first degree."
11 And Mr. Prengaman cites 200.030, Degrees of Murder, and
12 it's 1(c).

13 The Defense's Number 5: "You cannot find the
14 defendant guilty of felony murder under a theory of
15 murder to prevent lawful arrest unless you find that the
16 murder was committed for the purpose of avoiding
17 identification, apprehension, or lawful arrest."

18 I want everybody to be clear that what's being
19 presented to me in these two instructions, in my view,
20 are different theories of the case.

21 Mr. Prengaman, am I wrong about that?

22 MR. PRENGAMAN: No, Your Honor, but I think the
23 defense is wrong. It's not felony murder. Graham vs.
24 State, 116 Nev. 23, clearly lays that out.

1 Again, there are three kinds of first degree
2 murder: Deliberate premeditated murder; express-malice
3 premeditated murder; there's then felony murder, which
4 the Graham case talks about. That is the type of murder
5 where the commission of an underlying felony supplies the
6 malice by law, by legal theory.

7 Then there is the enumerated means, which are
8 different. And, again, in Graham the supreme court talks
9 about those. "Once it is proved that a homicide was done
10 with malice and thus constitutes murder, the murder is in
11 the first degree as a matter of law if it was done in an
12 enumerated manner as shown by the particular facts of an
13 individual case."

14 The State does not need to prove premeditation,
15 deliberation, and intent. We have to prove malice as the
16 case law tells us in Hernandez and the statute in Chapter
17 200, "Malice, express and implied."

18 So the State has to prove a malice killing, and
19 the State is not -- in this case the theory -- the
20 defense statement of the State's theory is
21 oversimplistic. It's not that they were eluding police.
22 He drove the wrong way on the freeway. In other words,
23 he drove in malignant recklessness of other people's
24 lives. He says in the phone call he did it to create

1 danger to other people. That is the malignant
2 recklessness the State is addressing.

3 I'm not saying that every eluding of the police
4 is first degree murder by avoiding the police. I'm
5 saying I have evidence in this case, this specific case,
6 of conduct that the defendant engaged in to elude the
7 police that was engaged in to the point where he drove on
8 the freeway the wrong way and entered the flow of traffic
9 against traffic that was in malignant recklessness of
10 other people's lives.

11 THE COURT: This is your theory of murder
12 that's an alternate to felony murder?

13 MR. PRENGAMAN: Yes, Your Honor.

14 The felony murder is they committed felonies at
15 Bob & Lucy's, and then in the unbroken chain of events,
16 while waiting, in other words, while waiting to complete
17 one of them, the police arrive, and they fled, and my
18 theory of that is based on those felonies that were
19 committed at Bob & Lucy's, the State's allegation of
20 those felonies.

21 So that's different. That is premised upon
22 those felonies being committed and the flight being in
23 the unbroken chain of events. I don't need to show
24 malice. It could be an accidental killing. All I need

1 to show is that it was connected, and that unbroken chain
2 of events is a felony. That's a different theory.

3 THE COURT: But Instruction Number 21 is
4 something entirely different. This is murder in the
5 first degree with implied malice based upon this
6 malignant recklessness?

7 MR. PRENGAMAN: Yes, Your Honor.

8 As the Graham case says, this is -- it's not
9 its own -- so this is one of the enumerated means in
10 200.030. So, again, it's not felony murder.

11 All the things that the defense is talking
12 about, that's felony murder, not this. This is the
13 enumerated means, and that's what Graham says. With the
14 enumerated means, there must be malice, so you have to
15 show malice, and once you show malice, once you show a
16 killing was committed with malice by one of those
17 enumerated means, here to avoid that lawful arrest, it's
18 first degree murder by legislative fiat.

19 And so that is what the State is -- that's what
20 this instruction is addressing. If I show a malice
21 killing -- in other words, I can show it could be
22 intentional, of course, because malice includes intent to
23 kill, but it doesn't have to. Malice by statute, by case
24 law, is express or implied, and so if I show a malice

1 killing, a malignantly reckless killing, to avoid or
2 prevent lawful arrest, it's first degree. Like it or
3 not, I mean, felony murder or not, this is separate and
4 apart, and that's my theory, is that by driving on the
5 freeway to avoid or prevent lawful arrest, that conduct,
6 driving on the freeway -- in other words, what the
7 evidence shows, driving at freeway speeds against
8 traffic, was malignantly reckless.

9 THE COURT: Now, let me ask Ms. Grosenick this
10 question.

11 Ms. Grosenick, you don't deny the State's
12 ability to pursue that theory of murder in this case?

13 MS. GROSENICK: Can I clarify?

14 THE COURT: Yes.

15 MS. GROSENICK: The use of the words "felony
16 murder" in my instruction was inartful at best. I agree
17 they're separate theories of first degree murder.

18 So for purposes of this argument, I would
19 replace the words "felony murder" with either "first
20 degree murder" or just "murder."

21 MR. PRENGAMAN: Your Honor, that --

22 THE COURT: Wait, Mr. Prengaman.

23 So do you have Defendant Williams' Number 5 in
24 front of you, Mr. Prengaman?

1 MR. PRENGAMAN: I'm sorry?

2 THE COURT: Defendant Williams' Number 5,
3 please. It starts out, "You cannot find either defendant
4 guilty." Let me know when you have it.

5 MR. PRENGAMAN: Yes. I've got it now.

6 THE COURT: Ms. Grosenick has just amended the
7 instruction to take the word "felony" out of the first
8 line. "You cannot find either defendant guilty of murder
9 under a theory of murder to prevent lawful arrest unless
10 you find the murder was committed for the purpose of
11 avoiding identification, apprehension, or wrongful
12 arrest."

13 I just want you to know she made that change.
14 All right?

15 MR. PRENGAMAN: Yes, Your Honor.

16 THE COURT: Okay. Ms. Grosenick, so your
17 Instruction 5, the State has stipulated -- we'll use the
18 term "stipulated" -- stipulated to 21. These two
19 instructions dovetail.

20 MS. GROSENICK: Right.

21 THE COURT: Okay. Go ahead.

22 MS. GROSENICK: But I think there's a
23 fundamental disagreement here about what qualifies as
24 first degree murder under this theory, under murder to

1 avoid lawful arrest. At this point we have a fundamental
2 disagreement about what the State has to show. So I
3 think that's really significant because it's going to
4 affect the jury instructions, and it's also going to
5 affect closing argument for both sides.

6 What the State is arguing is that you can be
7 convicted of first degree murder if you drive malignantly
8 and reckless on the highway and someone dies as a result.
9 That is not consistent with the plain language of the
10 statute or any of the case law interpreting that statute.

11 It is very clear both the word -- the use of the word
12 "to" in "murder to prevent," that implies purpose, and
13 that is not in the dictionary.

14 THE COURT: Look at 200.030, murder of the
15 first degree is murder which is committed to avoid or
16 prevent the lawful arrest of any person by a peace
17 officer or to effect the escape of any person from legal
18 custody." We don't need to talk about the second half of
19 it. So that's what the statute says.

20 If I were going to require the instruction,
21 which is my practice, to quote the statute, it would say,
22 "Murder of the first degree is murder which is committed
23 to avoid or prevent the lawful arrest of any person by a
24 peace officer." That's what the law says.

1 MS. GROSENICK: The difference here, though, is
2 that this alleged conduct of driving the wrong way on the
3 freeway and recklessly driving and either one of those
4 causing death and/or DUI causing death is already covered
5 by three other statutes that have imposed category B
6 liability for that conduct. And so you can't also have
7 felony-level -- well, you can't also have first degree
8 murder liability for that same conduct. It's already
9 been held by the legislature.

10 THE COURT: We're going back to these original
11 arguments. In other words, yeah, I remember your
12 original argument in your briefing was eluding.

13 MS. GROSENICK: Or, you know, fleeing from
14 police to avoid arrest under perpetration theory and
15 felony murder, that's also already covered, and so --

16 THE COURT: I don't want to talk felony murder
17 here because that's where I got -- that's where I got led
18 down a different path because -- so this is murder in the
19 first degree. This is not felony murder. Well, this is
20 murder, not felony murder.

21 MS. GROSENICK: So take a situation where
22 someone steals a candy bar from a gas station, flees from
23 police and drives the wrong way on the interstate, and
24 there's a head-on collision. That's not felony murder

1 because it's a petty larceny, I guess, depending on his
2 criminal history, but let's assume no criminal history.
3 It's a petty larceny. That cannot be felony murder or --

4 THE COURT: I'm not saying it's felony murder.

5 MS. GROSENICK: I know, but I'm dealing with
6 the hypothetical of, like, what the State's position
7 would allow to be a first degree murder is not allowed.
8 If that's what the legislature had intended, then they
9 wouldn't have the penalties for felony eluding or felony
10 reckless causing death, and they wouldn't have limited
11 felony murder to just those enumerated felonies. It
12 would be any crime, in perpetration of any crime would be
13 felony murder.

14 So I think what the State is asking for --

15 THE COURT: Let me ask you something.

16 Where is the malice element in the wording?
17 "The defendant drives" -- I'm reading from the eluding
18 instruction: "The defendant drives a motor vehicle on a
19 highway" -- the instruction the parties proposed is the
20 same, meaning Williams and the State -- "The defendant
21 drives a motor vehicle on a highway or premises to which
22 the public has access; willfully fails or refuses to
23 bring the vehicle to a stop or flees or attempts to elude
24 a peace officer in a readily identifiable vehicle of any

1 police department or regulatory agency; when given a
2 signal to bring the vehicle to a stop by flashing red
3 lamp or siren; and while doing so is the proximate cause
4 of death of another person."

5 There's no malice here. What Mr. Prengaman is
6 accepting is that in order to prove murder under NRS
7 200.030, there's an element of malice, implied or
8 express, and in his case he's saying its implied here,
9 and it's the malignant recklessness.

10 But that's not an element of eluding, so I
11 don't understand how the elements of eluding can take an
12 X to the box of murder under NRS 200.030(1)(c).

13 Same with reckless driving. I don't see a
14 malice element in there either. There's a heightened
15 level of proof, clearly. It's murder.

16 MS. GROSENICK: So, first, I think the analogy
17 here is with a case like Sheriff vs. LaMotte,
18 L-a-m-o-t-t-e, 100 Nev. 270 (1984), there, the court
19 found that --

20 THE COURT: Excuse me. 100 Nev. 270?

21 MS. GROSENICK: Correct.

22 THE COURT: Okay. You said 270. Where am I
23 going? What page?

24 MS. GROSENICK: I would start around 272.

1 THE COURT: Give me just a minute.

2 I've read this case. I want to read it again,
3 though.

4 Okay. Go ahead.

5 MS. GROSENICK: The idea there is that you
6 can't imply the malice for another crime that's already
7 been defined by the legislature saying, look, this
8 conduct, we've decided, is covered by this statute. We
9 can't imply malice from that conduct to replace the
10 premeditation -- well, you can't imply malice from
11 conduct that's already been prescribed by the legislature
12 and it's been determined that this is the penalty that
13 the legislature wants to have for this conduct.

14 THE COURT: But I don't think that's what
15 Sheriff vs. LaMotte says.

16 "The Sheriff presented two theories in support
17 of murder charges: First, the Sheriff argued" -- what
18 I'm getting at is I think you're conflating the malice
19 theory with the DUI theory, and they're separate in this
20 case.

21 "First, the Sheriff argued that in this case
22 LaMotte's erratic driving before the fatal accident
23 demonstrated a sufficiently abandoned and malignant heart
24 to imply malice. Second, the Sheriff contended that

1 under the reasoning of Sheriff v. Morris, the second
2 degree murder charges were proper because drunk driving
3 is unlawful conduct, inherently dangerous in the
4 abstract, which naturally tends to destroy a human life
5 and which immediately and directly caused the victims'
6 deaths."

7 So there were two theories here. What the
8 court said is "Sheriff v. Provenza," which is a 1981
9 Nevada case, "provides that 'malice shall be implied when
10 no considerable provocation appears, or when all the
11 circumstances of the killing show an abandoned or
12 malignant heart.' Our review of the record indicates
13 that the lower court did not commit substantial error in
14 finding that sufficient evidence existed to imply malice
15 in this case."

16 So with regard to the malice, what happened
17 there was the lower court said insufficient to imply
18 malice, but there's no ruling -- and the district
19 court -- the supreme court upheld that, but there's no
20 ruling there that implied malice cannot relate to a DUI
21 just because of the driving. In other words, "Malice
22 shall be implied when no considerable provocation
23 appears, or when the circumstances of the killing show an
24 abandoned or malignant heart." In other words, that in

1 and itself was supported by a finding second degree
2 murder. In this case that standard wasn't met.

3 "The sheriff's second contention invites this
4 court to extend liability for second degree murder to all
5 deaths resulting from drunk driving by ruling that drunk
6 driving per se is inherently dangerous and naturally
7 tends to destroy human life...however, we left such a
8 determination to the legislature."

9 In this case, what I hear the State doing is
10 taking on the first contention that's analogous or that
11 was part of Sheriff vs. LaMotte, which Mr. Prengaman is
12 taking on the implied malice, he's embracing it, he says
13 I have to prove it, and he's acknowledging that it's a
14 higher standard than eluding or reckless driving, because
15 it's malice. I don't hear him saying murder naturally
16 flows from eluding and reckless driving because the
17 driving was bad in this case.

18 Go ahead. Anyway, I don't read LaMotte to be
19 saying what the defense is contending.

20 MS. GROSENICK: Your Honor, I'm not arguing
21 that LaMotte applies to this specific situation. I don't
22 think I'm conflating DUI liability with first degree
23 murder. I'm arguing by analogy.

24 And so take the State's instruction for

1 reckless driving. The jury will already be instructed
2 that "To act wantonly as necessary for reckless driving
3 is to unreasonably or maliciously risk harm while being
4 utterly indifferent to the consequences."

5 How is that any different from the implied
6 malice that the State wants to draw from the driving
7 pattern in this case?

8 THE COURT: Ms. Grosenick, what I'm looking for
9 from you is something that is specific that says, to the
10 extent -- it doesn't have to be reckless driving, but
11 something that -- a case or some body of law that tells
12 this Court that if reckless driving is pursued, the
13 theory of murder can't be.

14 MS. GROSENICK: And, Your Honor, I know that's
15 what you want. I don't have that case, but I also don't
16 think that I need to provide that case to support my
17 position because all of the cases that I have cited,
18 especially in the original memorandum in support of our
19 instructions, talk about how those defendants, there was
20 no evidence that they killed someone for the purpose of
21 avoiding identification, apprehension --

22 THE COURT: But those were all aggravated
23 circumstances cases, as I recollect. They all fell into
24 one category that distinguish them from the argument you

1 are making.

2 MS. GROSENICK: That's not my recollection of
3 those cases. I don't think that they were being used as
4 aggravators. I think that that's -- and that's how the
5 supreme court was reading murder to prevent lawful
6 arrest. And so I don't think that the State can prove
7 first degree murder just based on malignant recklessness
8 resulting from a driving pattern for all those reasons.

9 THE COURT: Okay. So let me understand what
10 you're proposing in this case.

11 If I give the State's stipulated 21, you want
12 me to give the Defendant Williams' 5 without the
13 reference to felony murder, just murder?

14 MS. GROSENICK: Correct.

15 THE COURT: Okay. All right.

16 Mr. Prengaman.

17 MR. PRENGAMAN: Your Honor, they don't like it,
18 but in the candy bar example, the State could -- because
19 it's not the candy bar. The candy bar subjects the
20 defendant to a lawful arrest. It is the malignant
21 recklessness of the flight on the freeway going the wrong
22 way that subjects him, if he kills somebody, to the
23 murder charge.

24 So that example could happen. If a defendant

1 stole a candy bar subjecting him or herself to lawful
2 arrest, a police officer pursued him or her to effectuate
3 that arrest, and then the defendant, to avoid that
4 arrest, to avoid the police officer, drove onto the
5 freeway under the circumstances like the ones in this
6 case, that amounts to malignant recklessness, and the
7 State would be entitled to make that argument to jury in
8 support of a first degree murder conviction.

9 Your Honor, Graham is conclusive. There's no
10 question. Here's Graham vs. State. We've already talked
11 about the enumerated means. They've already discussed
12 them. They include, as specifically mentioned, that to
13 avoid arrest or effect escape from custody is one of
14 those enumerated means.

15 So to quote, "When an enumerated first degree
16 murder is charged, such as murder by child abuse, the
17 presence or absence of deliberation and premeditation is
18 of no consequence. Such murders do not fall within the
19 category of murder that can be reduced in degree by
20 failure to prove deliberation and premeditation. Nor can
21 such a murder be reduced in degree because it is
22 committed without intent to kill and would otherwise fall
23 within the ambit of Morris: if done with malice and in
24 an enumerated manner, the killing constitutes first

1 degree by legislative fiat."

2 That is directly on point. That is directly
3 saying that a killing accomplished with malice to avoid
4 arrest, lawful arrest, is first degree murder, and that's
5 what the State's instruction says.

6 Now, again, the defense is trying to get across
7 to the jury that there's got to be some kind of intent to
8 kill to avoid arrest. That's not what the law says, it's
9 not what the case law says, and, again, Graham directly
10 addresses this situation. It directly states the mens
11 rea of applied malice. It does not have to show intent
12 to kill.

13 THE COURT: Mr. Prengaman, with that in mind,
14 look at Defendant Williams' Number 5 without the word
15 "felony": "You cannot find either defendant guilty of
16 murder under a theory of murder to prevent lawful arrest
17 unless you find the murder was committed for the purpose
18 of avoiding identification, apprehension, or lawful
19 arrest."

20 Clearly, this is what the defense is offering
21 today. I need you to comment specifically on that, why
22 that should not be there.

23 MR. PRENGAMAN: Your Honor, one, it's
24 duplicative of either the State's instruction, the

1 instruction as proposed. And when it says, "committed
2 for the purpose of avoiding identification, apprehension,
3 or lawful arrest," that's not the language of the
4 statute. But "committed for the purpose of," you just
5 heard them say that what they're trying to convey with
6 that is that it has to be intentional or the killing must
7 be intentional and that the mental state must be -- at
8 the time of the killing, the actual killing must be for
9 the purpose of.

10 What the law says, what Graham says, this is,
11 literally, incorrect, and it is inaccurate and distorts
12 the meaning and raises the State's burden of what it has
13 to prove. Really, what Graham says is that "Conduct
14 constituting murder because it's malignantly reckless" --
15 "Conduct constituting murder accomplished to prevent the
16 lawful arrest of any person by a peace officer is murder
17 in the first degree."

18 That's the law. Not that there has to be a
19 purpose of. That's not what the statute says. Again,
20 that's inaccurate. It conveys a higher burden of proof,
21 a higher showing than what the State has to show.

22 THE COURT: All right. Counsel, I'm going
23 to -- knowing now that 21 is no longer stipulated to, I'm
24 going to need a minute. I have to take a look at this,

1 but I don't want to stop there. Let's keep going.

2 Murder of the second degree. This is an
3 instruction proposed by the State: "Murder of the second
4 degree does not require a specific intent to kill, and
5 encompasses all kinds of murder other than first degree
6 murder."

7 MR. PRENGAMAN: That one I stipulate to.

8 MS. GROSENICK: Your Honor, not to belabor the
9 point, but at some point I do need to fill out that
10 record regarding the State's position on that.

11 THE COURT: Go ahead. Finish. I want it all
12 in one place, Ms. Grosenick. I thought you might be
13 through. Finish.

14 MS. GROSENICK: I was also looking at the
15 definition of "eluding" that is included in the State's
16 instruction which I believe the Court will give. It's
17 number 12 from the State that's contested.

18 THE COURT: Okay.

19 MS. GROSENICK: So in NRS 484B.550, felony
20 eluding also includes under subsection 3(b), operating
21 "the motor vehicle in a manner which endangers or is
22 likely to endanger any other person or the property of
23 any other person."

24 And in looking at that, I don't see the State's

1 definition of "eluding."

2 THE COURT: Hang on. Hang on.

3 Ms. Grosenick, the two instructions for
4 eluding -- one was proposed by you, and one was proposed
5 by Mr. Prengaman -- are identical except for the language
6 "beyond a reasonable doubt," which I'm not giving. That
7 was the only reason I selected their instruction, and
8 their instruction let me go one step further.

9 Number 5, "While doing so is the proximate
10 cause of the death of another." I took out your "bodily
11 harm" because your instruction had "bodily harm."

12 So tell me what these two instructions do not
13 have.

14 MS. GROSENICK: Well, I think in looking at
15 484B.550, I think that subsection 3 and subsection 4 may
16 be alternatives to each other as far as punishment.

17 And so in subsection 3, if the driver is
18 fleeing and operates a motor vehicle in a manner which
19 endangers or is likely to endanger any other person or
20 property, then it's a category B carrying a one to six.
21 In the alternative, if the person is eluding and causes
22 the death or bodily harm to a person, it's still category
23 B, but two to twenty.

24 But it's clearly contemplated that that's the

1 conduct involved, is driving in a way that's likely to
2 endanger any other person or the property of another
3 person or that does, in fact, result in death or
4 substantial bodily harm.

5 And so I am now reading that again and not
6 advocating for that to be added to the State's
7 Instruction Number 12, but I do think that it's relevant
8 to whether the State's position is legally valid, and I
9 would argue that it's not.

10 THE COURT: Okay.

11 MR. PRENGAMAN: If I may, Your Honor.
12 That's --

13 THE COURT: Go ahead.

14 MR. PRENGAMAN: Your Honor, that's a different
15 offense. What counsel just talked about is a different
16 offense.

17 Subsection 1 is the primary means of violating
18 or eluding. Subsection 3 says, while violating the
19 provisions of subsection 1, if it endangers or is likely
20 to, or is the proximate cause of property damage, it's a
21 lesser category B.

22 However, if you go to 4, it says if, while
23 violating the provisions of subsection 1, the driver
24 causes death. So subsection 1 plus death equals the main

1 cause of death, and that's exactly what this instruction
2 addresses.

3 Your Honor, the legislature made that
4 enumerated list, and so this is a situation -- this isn't
5 forced, this isn't second degree, it isn't second degree
6 felony murder liability. This is a legislature that was
7 well aware of the statute and decided on top of that, if
8 you do a malice killing to avoid lawful arrest, it's
9 first degree murder. That's a legislative fiat. So this
10 is fundamentally different than what the defense is
11 arguing.

12 THE COURT: Thank you.

13 Counsel, let's move to Defense Instruction 11,
14 "The offense of burglary is complete when the building is
15 entered with the specific intent to commit a larceny."

16 Go ahead and look at stipulated 28 while we
17 review this because I think starting at line 6 at
18 stipulated 28, this is covered.

19 Ms. Grosenick, this is your instruction.
20 Comparing it to 28, stipulated 28.

21 MS. GROSENICK: Your Honor, I think the
22 instruction needs to say that that specific intent has to
23 be proven to exist at the time that entry is made. I
24 think that that specifically needs to be stated, and it's

1 not as appears in the State's instruction.

2 THE COURT: Take a look at line 6. This is
3 stipulated 28: "Burglary occurs and is complete when a
4 shop, warehouse, store, house or other building is
5 entered with the intent to commit larceny, assault,
6 battery," etcetera. No?

7 MR. PRENGAMAN: Your Honor, I wouldn't oppose
8 just tacking onto the end of that paragraph, "However, if
9 the intent to commit larceny, assault or battery,
10 kidnapping, or any felony is formulated after entry, it
11 is not a burglary."

12 THE COURT: Ms. Grosenick. Your offer?

13 MS. GROSENICK: In then the second portion of
14 Mr. Williams' instruction, lines 5 through 7, that is a
15 properly worded negative instruction which should be --

16 THE COURT: Mr. Prengaman has just said to
17 include that specific language in 28.

18 MS. GROSENICK: Oh, all of it? I'm sorry. I
19 thought he said the first paragraph.

20 THE COURT: The first paragraph, I think, is
21 covered by lines 6 through 10 in stipulated 28 because it
22 says, "Burglary occurs and is complete when a building is
23 entered with the intent to commit larceny."

24 Then adding to that your statement, "A burglary

1 is not committed and you are not required to find a
2 defendant" -- "and you are required to find the defendant
3 not guilty if the intent to commit a larceny, assault or
4 battery on any person, kidnapping, felony coercion, or
5 any felony, if any" -- we've got to fix that -- "is
6 formulated after entry is made," tacking that to the
7 paragraph that ends at line 10 in stipulated 28.

8 MS. GROSENICK: The State's instruction did not
9 include the sentence, "Criminal intent formulated after a
10 lawful entry will not satisfy the statute."

11 So I'm advocating for Mr. Williams' instruction
12 as stated.

13 THE COURT: Okay. All right. You want the
14 entire instruction given?

15 MS. GROSENICK: Or combined into the State's,
16 but I don't think that the State's sufficiently covers
17 the fact that criminal intent formulated after lawful
18 entry is not sufficient. I'm asking for the jury to be
19 specifically instructed as to that. I don't mind if it's
20 in the State's instruction.

21 THE COURT: Can we change "not satisfy the
22 statute" because we're not referring to a statute in the
23 instruction.

24 MS. GROSENICK: Sure.

1 THE COURT: "Criminal intent formulated after
2 lawful entry"?

3 MR. PRENGAMAN: I would suggest, however, Your
4 Honor, "If the intent to commit larceny, assault or
5 battery, kidnapping, or any felony is formed after entry,
6 it is not a burglary."

7 MS. GROSENICK: Yes, that's fine.

8 THE COURT: Okay.

9 MS. GROSENICK: Your Honor, my client,
10 Mr. Williams, would like to leave, and he's aware that
11 he'll miss the remainder of these proceedings and is
12 requesting to leave.

13 THE COURT: Okay. Mr. Williams, good day.
14 Thank you so much for your participation today.

15 DEFENDANT WILLIAMS: Yes, ma'am.

16 (Defendant Williams exited the courtroom.)

17 THE COURT: That has been added to 28.

18 Okay, Counsel. Next is Defendant Williams' 28.
19 "You have heard the evidence that Stephen Sims, a
20 witness, has a prior felony conviction. You may consider
21 this evidence in deciding whether or not to believe this
22 witness and how much weight to give to the testimony of
23 this witness."

24 Mr. Prengaman.

1 MS. ROSENTHAL: Your Honor, real quick.

2 Ms. Norman does not object to that burglary
3 instruction being inserted into number 28 as previously
4 stipulated to.

5 THE COURT: Ms. Rosenthal, thank you so much.

6 Mr. Prengaman, number 28?

7 MR. PRENGAMAN: No objection to that, Your
8 Honor.

9 THE COURT: Okay. Last instruction, aside from
10 the limiting we're going to go through in just a minute,
11 is the -- I'm going to call it the Crane v. State, Mason
12 v. State instruction. This is offered by both Defendant
13 Williams' in number 2 and Defendant Norman in number 3.

14 Mr. Prengaman.

15 MR. PRENGAMAN: Your Honor, again, I object to
16 these instructions being given.

17 THE COURT: I want you to address this for me,
18 Mr. Prengaman. I want this right on point.

19 I know what Crane says, but I also know what
20 Mason says. Mason is a 2001 case. Crane is 1972 case.

21 In the Crane case, the instruction that the
22 parties were asking the court to give was Instruction
23 Number 14, and there was really no issue about it except
24 the court saying -- there was no commentary on whether or

1 not it was improper because the focus was not on that,
2 but the court was talking about the sufficiency of the
3 instructions given.

4 Then in Mason, the district court didn't give
5 it, and Mason contended that "The district court erred in
6 refusing to instruct the jury that the evidence is," and
7 then they gave this "susceptible to two constructions,"
8 but it only went as far as guilt.

9 So in Mason, the instruction that the court did
10 not give is the instruction proposed by Norman and
11 Williams beginning at line 1 and going through line 4:
12 "If the evidence in this case is susceptible to two
13 constructions or interpretations, each of which appears
14 to you to be reasonable, and one of which points to the
15 guilt of the defendant and the other to his or her,"
16 adding, "innocence, it is your duty under the law to
17 adopt that interpretation which will admit of the
18 defendants' innocence and reject that which points to his
19 guilt."

20 Now, in Mason, the court rejected this. The
21 rest of the instruction is not offered in this case, and
22 in Mason the Nevada Supreme Court said, "This court has
23 held that it is not error to refuse to give this kind of
24 instruction where the jury has been properly instructed

1 on the standard of reasonable doubt." They did not opine
2 on the rest of the instruction which begins, "You will
3 notice that this rule applies."

4 So focusing on the case law, Mr. Prengaman, any
5 other case law you want to offer me as to why you object
6 to this instruction?

7 MR. PRENGAMAN: Well, Your Honor, I would refer
8 to the cases cited in the State's Trial Memorandum or
9 Trial Statement, particularly Holland -- the U.S. Supreme
10 Court's observations in Holland about this type of
11 instruction.

12 In other words, the Court has told the jury --
13 and I'm not quoting, but I'm summarizing -- the Court has
14 told this jury that circumstantial evidence is no
15 different than any other evidence, and they should
16 consider all evidence and weigh the sufficiency.

17 What this does is -- particularly that language
18 that the Court is talking about, when two possible
19 opposing conclusions appear to be reasonable, that
20 really -- that could be two opposing conclusions about a
21 certain piece of evidence; it could be two opposing
22 conclusions about ultimate guilt or innocence -- but this
23 suggests that the jury needs to --

24 For instance, if they're just considering what

1 time something occurred, this could be read to suggest
2 there's two different conclusions, and if one points to
3 innocence and the other towards guilt, they have to
4 accept the one that points towards innocence.

5 THE COURT: That's when the instruction says.

6 MR. PRENGAMAN: And that's absolutely untrue,
7 Your Honor. It may be true that ultimately it is, and
8 even according to Holland, this is not really true, but
9 the reason for the instruction is that circumstantial
10 evidence case where the ultimate conclusion -- there's
11 two competing about the guilt or innocence, not about
12 constituent pieces of evidence or inferences about pieces
13 of evidence that build on each other to lead up to
14 elements or bigger things.

15 This essentially conveys to the jury that you
16 have to look at circumstantial evidence differently than
17 other evidence, and no matter the conclusions, if there's
18 one that leads this ways and one that -- and it doesn't
19 tell you about considering those in light of the other
20 evidence and the totality of the other evidence and what
21 corroborates or doesn't.

22 So it basically singles out for the jury in a
23 very misleading way because it doesn't address when it's
24 appropriate to do that. It suggests that it's always

1 necessary. It's a rule, in fact. This calls it a rule,
2 and there's no basis for doing that.

3 So I think it basically points them to handle
4 evidence in a way that the law does not require them to
5 do. What the law requires them to do is determine -- as
6 Holland says, look at the evidence and determine the
7 weight of the evidence, and does that weight of the
8 evidence prove or disprove the elements, because the
9 ultimate issues are only elements. That's all. How they
10 get from a constituent piece of evidence and reason from
11 that to something happening and reason from that to an
12 element of the crime is up to them.

13 But, again, to suggest an artificial and, I
14 would submit, confusing method of dealing with evidence
15 is going to be unclear, especially that's divorced
16 from -- if you were to just give that statute.

17 So as our supreme court has noted in Bailey vs.
18 State, which I cite, they even mention giving a proper
19 instruction about reasonable doubt, and no additional
20 instruction was required, and none would have been
21 proper.

22 Our court has -- again, I cite a number of
23 cases in my pleading. The supreme court has
24 repeatedly --

1 THE COURT: You're dropping off.

2 MR. PRENGAMAN: -- not to give this type of
3 instruction, Your Honor.

4 And, here, what is the purpose of giving it in
5 this case? This is a mixed case. In other words,
6 there's direct evidence and circumstantial evidence; it's
7 a direct evidence case, too. So this is not one of those
8 solely circumstantial evidence cases.

9 Again, a number of the courts in the cases I
10 cite have said, well, if it's completely a circumstantial
11 evidence case, you might find such an instruction. This
12 is not that case. This would be confusing, it would be
13 incorrect, and there's no need for this type of
14 instruction in this case.

15 So I would -- again, I would rely upon the case
16 law in Nevada, Holland, which points out these type of
17 instructions are confusing and incorrect, and the Court
18 should not give them because the Court is, as the Court
19 has already indicated, is going to give this jury a
20 correct instruction about reasonable doubt and an
21 appropriate instruction about direct and circumstantial
22 evidence.

23 This is contrary, I submit, to that direct and
24 circumstantial evidence instruction. You're saying

1 consider all the evidence but don't, in certain
2 circumstances.

3 THE COURT: Okay. Ms. Rosenthal.

4 MS. GROSENICK: Your Honor, if it's okay, I'll
5 start.

6 THE COURT: All right.

7 MS. GROSENICK: A couple of things to address.

8 First of all, in Holland, that was a 1952 case,
9 United States Supreme Court. Crane is from 1972 and is
10 specific to Nevada.

11 THE COURT: Mason is specific to Nevada, and
12 it's a 2001 case.

13 MS. GROSENICK: Right.

14 The second thing -- and I will address that.
15 The other thing I wanted to address as well is that the
16 Crane instruction is proposed by both defendants, and I
17 think our instructions are largely the same.

18 That instruction was given in addition to an
19 instruction on direct versus circumstantial evidence in
20 the Crane case --

21 THE COURT: It was.

22 MS. GROSENICK: -- and the court upheld that as
23 a correct statement of Nevada law.

24 Now, as far as circumstantial evidence, I think

1 that the Crane instruction is not appropriate in all
2 cases, but it is appropriate where there is a big
3 question about circumstantial evidence, and, here, one of
4 the main issues is what was the intent of either/or both
5 defendants as they walked into the building, and what was
6 their intent in talking to Stephen Sims or in leaving the
7 building, and all of those gaps have to be filled in
8 largely with circumstantial evidence.

9 And so this instruction is appropriate. It's
10 also consistent with the burden on the State to prove the
11 charges beyond a reasonable doubt, because what it's
12 saying is, if you've got two interpretations that are
13 even and you could go either way, then you go towards
14 innocence, and that is consistent with burden beyond a
15 reasonable doubt.

16 THE COURT: Ms. Rosenthal.

17 MR. PICKER: I'll take this one.

18 I just echo what Ms. Grosenick has just argued.
19 Because of the nature of the way this case was charged
20 and how the evidence has come in, the Crane instruction
21 is appropriate under all the case law that addresses it.

22 There is -- they use "in addition to, not "to
23 replace," and it is simply a clarification for the jury
24 should they reach that point where there are a 50-50

1 split in their minds of where the evidence falls.

2 Reasonable doubt always falls at that point
3 with the defense in a 50-50 split, and that's where that
4 instruction becomes important, so that's why I'm asking
5 for it.

6 THE COURT: Okay. Thank you.

7 Counsel, here's what I'm going to do. You're
8 going to need a decision on this -- let me stop right
9 there.

10 There are three other instructions. They are
11 the three --

12 Ms. Davies, has counsel been provided with
13 copies of these?

14 MS. DAVIES: Yes. I emailed them.

15 THE COURT: You emailed these, the limiting
16 instructions.

17 The first is "Prior handgun evidence, Defendant
18 Ryan Williams"; the second is, "You heard testimony
19 related to text messages Defendant Adrianna Norman"; the
20 last is, "You heard recordings of telephone calls made by
21 Defendant Ryan Williams."

22 Do you all have all of those, and do you have
23 any objection to those?

24 Mr. Prengaman, starting with you.

1 MR. PRENGAMAN: Your Honor, I haven't had a
2 chance to look at the email, but those are the ones the
3 court gave during the trial. I'll defer to the defense.
4 They're to the benefit of the defense. If they're
5 requesting them, I have no objection to giving them.

6 THE COURT: Actually, all I've done to them in
7 court is I said, "You are about to hear" or "You just
8 heard," and these say, "You heard." So the tense is
9 different. Other than that, they're identical.

10 MR. PRENGAMAN: As long as the defense made the
11 strategic decision to request it or not, the State will
12 not object.

13 THE COURT: Ms. Grosenick.

14 MS. GROSENICK: Thank you, Your Honor.

15 That first instruction is the Court's version
16 for murder to prevent arrest, so I will just stand on the
17 record that I've already made regarding that.

18 THE COURT: Say that again.

19 MS. GROSENICK: The first instruction in the
20 packet, I believe, is the Court's instruction on --

21 THE COURT: Yes. You made a record on that.

22 MS. GROSENICK: The second instruction is on
23 text messages. We do not object to that and ask that it
24 be given in the final instructions.

1 THE COURT: Okay.

2 MS. GROSENICK: And then the third instruction,
3 the Court has already given this instruction
4 substantially with -- well, I guess it says, "You heard
5 evidence."

6 THE COURT: You're talking about the prior
7 handgun possession?

8 MS. GROSENICK: Yes. So after that
9 instruction, I do renew the objections that we had
10 previously regarding directing the jury how to determine
11 that as far as elements of robbery and attempted robbery,
12 but the Court has already given its instruction. I'll
13 just stand on the record there.

14 The last one is the recordings of telephone
15 calls, and I'll just submit on that.

16 THE COURT: Okay. Ms. Rosenthal. Mr. Picker.

17 MS. ROSENTHAL: Thank you, Your Honor.

18 We would ask that the limiting instruction
19 related to not -- presumably to the jail calls and the
20 prior possession not being used against Ms. Norman be
21 reread to the jury.

22 THE COURT: And are you leaving it up to the
23 Court regarding the text messages from Ms. Norman to
24 Mr. Sims?

1 MS. ROSENTHAL: Yes.

2 THE COURT: All right. Counsel, it's important
3 that we do a few things this evening. One is that I get
4 you a decision on these last two instructions that we
5 debated. One I'm calling the Crane instruction, and the
6 other is the murder instruction principally related to
7 stipulated 21, and I'm going to need a minute to do that.

8 And then we're going to need some time to make
9 sure that all of the changes that have been gone through
10 today and accepted by the Court as instructions that are
11 being given are going to be provided to you.

12 Ms. Davies has been making the changes as we go
13 along, so it's not like I have to go back and make all of
14 those changes now, but we do need to dot some i's and
15 cross some t's. And then I want you to have them this
16 evening because you're going to be retuning your closing
17 arguments.

18 Most importantly, we have a court reporter here
19 who has been here for most of the day, and I do want to
20 let her go, but I don't want to render my opinion on
21 these two instructions that are outstanding.

22 I'm going to leave the bench here. We're going
23 to take care of that. I'll be back as quick as I can,
24 and we'll put that on the record, and then, Counsel, we

1 can number them ourselves off the record and then
2 renumber them tomorrow or talk about how we want to do
3 that. I just don't want to keep our court reporter too
4 late. So be thinking about that.

5 (A recess was taken.)

6 THE COURT: Counsel, let's start with
7 stipulated 21 and Defendant Williams' Number 5.

8 It was very important to this Court that I read
9 LaMotte, and the reason I'm -- most importantly is this:
10 I know the proposition for which it was offered, but the
11 fact is it actually proves the opposite of that
12 proposition.

13 It is a case, as we've gone through, where the
14 Court considered a DUI and the activity involved in what
15 ultimately resulted in a DUI conviction versus -- and,
16 not versus -- and also a second degree murder charge.

17 It is important for this Court -- while this
18 case was used by the State for purposes, rather, of
19 analogy, the importance of me reading this case is, the
20 one thing the court did not do is say -- let's start
21 here -- what the court did say regarding the malice that
22 was needed for the second degree murder was to say, "Our
23 review of the record indicates the lower court did not
24 commit substantial error in finding that insufficient

1 evidence existed to apply malice in this case."

2 What does that mean? It means if the lower
3 court had found substantial -- sufficient evidence, then
4 malice would have been applied. In other words, the
5 theory of the second degree murder could have gone
6 forward under the same factual scenario as the DUI.

7 The thing the court, the Nevada Supreme Court,
8 did not say in LaMotte is, even if the court had found
9 sufficient evidence to imply malice in this case, the
10 second degree murder charge could not have gone forward
11 because you could not use the same set of facts, and they
12 did not say that.

13 So relying on that in LaMotte and relying on
14 Thomas v. State -- and, by the way, LaMotte is at
15 100 Nev. 270 -- and then Thomas v. State at 114 Nev. 127,
16 a 1998 case -- it's actually cited by Defendant
17 Williams -- importantly, at 1145 it says this: "NRS
18 200.030(1) provides in part," and then it cites to the
19 section of the law, specifically 'Murder of the first
20 degree is murder which is...committed to avoid or prevent
21 the lawful arrest of any person by a peace officer.'

22 "Although Thomas could have been convicted of
23 first degree murder under any one of these three
24 theories," again, having cited all three, "he argues that

1 insufficient evidence exists only for premeditated murder
2 under 200.030(1)(a). Specifically, he argues that the
3 evidence fails to show his specific intent to kill.

4 "We conclude that sufficient evidence exists to
5 support Thomas' conviction under the felony-murder and
6 avoid-arrest theories. As discussed above, sufficient
7 evidence exists that Thomas committed burglary, robbery
8 and kidnapping, and Dixon and Gianakis were both killed
9 during those crimes. Also, Hall testified that in the
10 car after the incident, Thomas expressed his preference
11 for not leaving witnesses when committing a robbery.
12 Nash and Smith testified that Thomas explained that he
13 had to get rid of two people. Accordingly, regardless of
14 whether sufficient evidence exists under a premeditation
15 theory, Thomas was properly convicted of first degree
16 murder under either felony-murder or avoid-arrest
17 theorys."

18 And so the instruction and the way I'm prepared
19 to give it is the stipulated 21, the way it currently
20 reads, and add to that last line of the instruction that
21 this Court indicated it would be willing to give because
22 the Defendant Williams' Number 5 does not accurately
23 convey or represent the statutory language of 200.030.

24 So the instruction I will give is the one

1 proposed by the State and add to that the last paragraph
2 of "You cannot find either defendant guilty of murder
3 under a theory of murder to prevent lawful arrest unless
4 you find the murder was committed to avoid or prevent
5 lawful arrest."

6 And then as to the Crane instruction, which is
7 Defendant Williams' Number 2 and Defendant Norman Number
8 3, the most recent case this Court has to rely on is a
9 Nevada Supreme Court case, Mason v. State, 118 Nev. 554,
10 2001 case, and it specifically says that "It is not error
11 for a district court to fail to give this instruction
12 provided they adequately instruct the jury on reasonable
13 doubt."

14 And the reasonable doubt instruction that the
15 parties have stipulated to and that this Court is going
16 to give is the reasonable doubt instruction that has been
17 repeatedly approved by the Nevada Supreme Court.
18 Accordingly, I'm not going to give the instruction that
19 is Defendant Williams' 2 and Defendant Norman's 3. They
20 are identical.

21 Now, Counsel, with that, we have resolved all
22 of the instructions. Now, what I would like to do is get
23 you a set of the instructions tonight that is everything
24 that we have agreed to.

1 I'm willing to let the court reporter go if
2 you'll stay, we'll get everybody a complete set, and we
3 will organize and order them off the record, number them
4 off the record, and then in the morning we'll go back on
5 the record before I bring the jury out, indicate that
6 we've agreed to the order off the record the night before
7 and then put on the record how they've been numbered.
8 Okay?

9 Mr. Prengaman, are you agreeable to doing it
10 that way tonight so we can let our court reporter go home
11 for the evening?

12 MR. PRENGAMAN: Yes, Your Honor.

13 THE COURT: Ms. Hickman and Ms. Grosenick.

14 MS. GROSENICK: Yes, Your Honor.

15 THE COURT: Mr. Picker, Ms. Rosenthal.

16 MS. ROSENTHAL: Yes, Your Honor.

17 There is one thing I would ask, though. Since
18 the Court has incorporated proposed instructions for both
19 the State and defense, that anytime the State uses all
20 caps, that it be changed to be coherent throughout the
21 instructions so that it's not in all caps.

22 THE COURT: It is not my habit to use all caps,
23 and I'm not going to use all caps in any of the
24 instructions, so we will take all of that out.

1 Also, Counsel, do you have a preference as to
2 whether the word "defendant" is capitalized or small "d"
3 throughout the instructions?

4 Ms. Hickman and Ms. Grosenick.

5 MS. GROSENICK: Your Honor, we're requesting
6 that "Defendant" be capitalized.

7 THE COURT: Capital D.

8 Ms. Rosenthal?

9 MS. ROSENTHAL: Your Honor, I would join with
10 that given, especially on the first page, that it is
11 capitalized on the heading.

12 THE COURT: We'll go through and capitalize
13 "Defendant" throughout the instructions, and we'll just
14 keep you posted just as soon as we've got them ready,
15 because not only do we have to prepare them all, but we
16 have to make you all copies. Okay.

17 So we'll be off the record. Ms. Court
18 Reporter, thank you so much.

19 Counsel, we'll come back into the courtroom as
20 soon as we're ready with the full stack. We will give
21 you time to review them, make sure we've made all the
22 corrections you've asked for, and I've indicated we're
23 going to make them. As soon as you're ready, we will do
24 that. So give us some time off the record.

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(The proceedings were adjourned.)

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF WASHOE)

4 I, PEGGY B. HOOGS, Certified Court Reporter in
5 and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me
7 at the time and place therein set forth; that the
8 proceedings were recorded stenographically by me and
9 thereafter transcribed via computer under my supervision;
10 that the foregoing is a full, true and correct
11 transcription of the proceedings to the best of my
12 knowledge, skill and ability.

13 I further certify that I am not a relative nor
14 an employee of any attorney or any of the parties, nor am
15 I financially or otherwise interested in this action.

16 I declare under penalty of perjury under the
17 laws of the State of Nevada that the foregoing statements
18 are true and correct.

19 Dated this 5th day of September, 2021.

20
21 /s/ Peggy B. Hoogs

22 Peggy B. Hoogs, CCR #160, RDR

23
24 The document to which this certificate is
attached is a full, true and correct copy of the
original on file and of record in my office.

By: ALICIA L. LERUD, Clerk of the Second
Judicial District Court, in and for the County of
Washoe.

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