

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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APPEAL FROM JUDGMENT OF
THE HONORABLE RICHARD WAGNER

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME 3

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1 and talk with no affect that would lead you to believe he
2 was impaired, correct?

3 A. That's correct.

4 Q. And would you agree that for the normal or for the
5 average person, based upon your history and your -- what you
6 do for a living, .267, you would be pretty impaired?

7 MR. WILLIAMS: Objection, Your Honor.

8 THE COURT: If he can answer the question.

9 BY MR. MOLEZZO:

10 Q. I mean, a.08 is legal impairment.

11 A. Legal impairment for driving, sir.

12 Q. Well, Officer Garrison, I don't want to fence with
13 you. Based upon your experience, isn't it fair to say
14 that .267, most normal -- most human beings would be visibly
15 impaired?

16 A. Yeah, I think that's fair to say; that a.276 and
17 a.266 is very high alcohol content.

18 Q. Now, I understand different human beings react to
19 alcohol differently. You would agree with that?

20 A. Most definitely.

21 Q. But based upon your experience, .267 is -- a lot of
22 alcohol in the system, fair?

23 A. Yes.

24 Q. And, again, all we have to go in reference to that
25 initial meeting is your testimony, correct?

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A. Yes.

Q. We have no video or audio, correct?

A. That's correct.

Q. Now, I'm not sure if I hit this. I'm sure the Court will tell me if I did. The trajectory tests, you did not do a test, correct?

THE COURT: That's about the third time, sir.

MR. MOLEZZO: About the fifth time, Judge?

THE COURT: We're getting there.

BY MR. MOLEZZO:

Q. What is the -- if you have knowledge on training and experience, what does a trajectory test do or supposed to do?

THE COURT: We've been down this road. I don't want to prevent you from asking the question. But I think we're just repeating what we've heard.

MR. MOLEZZO: Okay.

THE COURT: If there's something that you want with regard to that, I don't have a problem. But seems to me we're just repeating the same things over again.

MR. MOLEZZO: Cumulative. I understand. Thank you, Your Honor.

BY MR. MOLEZZO:

Q. And you recall interviewing Robert in this case, Robert Morton?

1 A. Yes.

2 Q. And pursuant to your report, it's understood that
3 Robert tells you that he heard his mother scream after the
4 thud; isn't that correct?

5 A. Yes.

6 Q. Did you take any measurements or direct anybody in
7 law enforcement to take any measurements of the home?

8 A. I did.

9 Q. I'm sorry, you did?

10 A. I did.

11 Q. Did you have Robert Morton hang around so you
12 could have him tell you where he was at when he heard the
13 noises?

14 A. No, sir.

15 Q. Okay. So we don't have a measurement where Robert
16 allegedly was when the noises were made and -- from there to
17 the area of the noises, correct?

18 A. No.

19 Q. Did you -- well, I'm going to try one more time.
20 I know the judge may stop me.

21 But we know that there was a struggle over a
22 weapon, correct?

23 A. Yes.

24 Q. Did you have Robert -- you secured the weapon and
25 made sure it was safe, correct?

1 A. That's correct.

2 Q. And thank you. Did you have Robert Morton show
3 you how the weapon was being held by his father or show you
4 -- kind of set the scene on how he was holding the weapon?

5 A. No.

6 Q. So it's fair to say you did no demonstrations with
7 Robert Morton at all?

8 A. That's correct.

9 Q. Did you find out through your investigation of
10 whether or not the deceased at Renown was telling anybody
11 who the shooter was?

12 A. No.

13 Q. During your interview of my client, did you ask
14 him any questions of how the gun went off or where it was
15 when the gun went off? Again, this is you asking the
16 questions.

17 A. I don't think we were able to get into that.

18 Q. May I interpret that as you did not ask those type
19 of questions?

20 THE COURT: Just a second, Counselor. Do you want
21 to approach?

22 (Bench conference between Court and counsel.)

23 MR. MOLEZZO: Thank you, Your Honor.

24 BY MR. MOLEZZO:

25 Q. Did you have an opportunity to interview any

1 nurses or medical staff from the hospital?

2 A. No.

3 Q. And, again, your monitoring of the deceased was
4 merely by phone calls, correct?

5 A. That's correct.

6 Q. In reference to Jessica Morton, Anastasia
7 Barsness, they were present during this event, correct?

8 A. Yes.

9 Q. And this is August 5th, 2009?

10 A. Yes.

11 Q. And you did not interview these individuals,
12 possible witnesses, until 77 days later, correct?

13 A. Yes, I believe it was October 22nd that I
14 conducted an interview with them.

15 MR. MOLEZZO: Court's indulgence, please, Judge.

16 THE COURT: Yes.

17 MR. MOLEZZO: Thank you. I have no further
18 questions at this time. Thank
19 you, Your Honor.

20 THE COURT: All right. Let's take our last recess
21 for this morning, and then let me see counsel in chambers.

22 It is your duty not to discuss among yourselves or
23 with anyone else any matter having to do with this case. It
24 is your further duty not to form or express any opinion
25 regarding the guilt or innocence of the defendant until the

1 case has been finally submitted to you for your decision.

2 You are not to read any newspaper articles or
3 listen to or view any radio or television broadcasts
4 concerning this case.

5 Should any person attempt to discuss the case with
6 you or in any manner attempt to influence you with respect
7 to it, you are to advise the bailiff, who will in turn
8 advise the Court.

9 We'll be in recess until the call of the Court.

10 (Jury excused, whereupon the following proceedings were
11 held in open court, outside
12 the presence of the jury.)

13 THE COURT: Court will come back to order, please.
14 The record should reflect the absence of the jury and
15 alternates. We've had several side bar discussions.
16 Counsel, the concern I have, and I want to make a record of
17 this, we talked about what's called the Doyle violation.

18 In your examination or cross-examination of the
19 officer, in your questions you are asking certain questions
20 obviously to impeach his investigation and what he did.
21 When you get into the area of talking to your client and
22 you're asking him the implication as to "why didn't you ask
23 him" about certain things, the answer at some point would be
24 because your client invoked his Miranda rights.

25 That creates a mistrial. It's called a Doyle

1 violation. And we have simply hundreds of those kinds of
2 cases in this state with regard to those violations.

3 And if you at any point get up and start asking
4 those questions or argue to the jury at some point "he
5 didn't do a thorough investigation because he didn't ask my
6 client these questions," it's going to open a door for
7 possible mistrial or the ability of the State to open -- go
8 through that door that you're opening.

9 So I just want to be very careful and put on the
10 record what my concern here is. We're into this trial too
11 far. I don't want to declare a mistrial. So I'm trying to
12 be very careful with that.

13 MR. MOLEZZO: Thank you very much, Your Honor.
14 And thank the District Attorney as well.

15 I think we're still on safe footing. It was
16 close. I've dealt with Doyle in the past. At closing, I
17 will steer 50 miles away from any type of Doyle violation.

18 THE COURT: I understand. One tactic is to try
19 the officers and how they do their job of investigation.
20 That's a fair tactic here. But when you get into the issue
21 of the interview, why they didn't ask your client certain
22 questions, it's a very dangerous ground, both in asking
23 questions as well as argument.

24 I juts want to point that out so we don't go down
25 that road.

1 MR. MOLEZZO: Yes, sir.

2 THE COURT: Counselor? Did you want to be
3 addressed?

4 MR. HARDY: Del Hardy. I don't know who these
5 folks are right over here, but they've been discussing
6 matters during certain points. We've been up here talking
7 about stuff and turning around and they're within earshot of
8 the jury. And I don't know what they're saying. And if --
9 but actually they attracted my attention to the point where
10 I could hear them at one point when I was walking back. If
11 I can hear it from this far, I'm afraid the jury --

12 THE COURT: Please don't do anything that might
13 cause a problem with the jury.

14 MR. PHILLIPS: May I speak, please?

15 THE COURT: Sir, would you tell me what your name
16 is. I don't know who you are.

17 MR. PHILLIPS: Jessie Phillips. My wife had a
18 cramp in her leg; that's why we were talking. That's why
19 she went outside.

20 THE COURT: But be very careful that you don't say
21 anything that might influence the jury. You're very close
22 there. So please be careful of that. If there's a problem,
23 I have to have people leave the courtroom. So please be
24 careful with that.

25 Is there anything we need to put on the record,

1 counsel?

2 MR. HARDY: Yes, one other thing. I know I had
3 discussions with you in front of the jury in regards to
4 certain matters. But I certainly didn't want to upset the
5 Court. I wasn't trying to argue with you; I was trying to
6 make the best record I can.

7 THE COURT: One way to do that is to ask for an
8 offer of proof outside their presence which makes it so it
9 doesn't have to be done in that fashion.

10 But I think we have to be careful of arguing the
11 law in front of the jury through questions and other things.

12 So it's just that. And I understand you folks are
13 here to advocate for your client. I don't want to interfere
14 with that right. I want to make sure your client gets a
15 fair trial.

16 So I'm asking that when I make a ruling that you
17 at least respect that. And if you disagree, then you can
18 say we want to have a hearing outside the presence of the
19 jury, which will then make that simpler, and I would request
20 you do that.

21 MR. HARDY: In the heat of it, while I was
22 standing here talking to you about that, Judge, that simply
23 just didn't come to mind. It should have after 28 years of
24 doing this. It probably should have. So my apologies in
25 regards to that, Your Honor.

1 THE COURT: That's fine. It's advocacy. And I
2 just want to be sure that we're all doing the appropriate
3 things here.

4 MR. HARDY: But I do think the Court made a
5 statement here that I'm not sure how we're going to correct
6 it. I believe that you stated that homicide was the
7 intentional killing of another.

8 THE COURT: And I was wrong in that. With the
9 instructions I will correct that. This is a killing of
10 another.

11 MR. HARDY: Right.

12 THE COURT: And it can be excusable and so forth.
13 But there's a difference, and that will be defined within
14 the instructions and I will make sure that I cover that
15 carefully with the jury.

16 MR. HARDY: All right. Thank you very much, Your
17 Honor.

18 THE COURT: What I can tell you, though, is that
19 Black's Law Dictionary doesn't carry a huge amount of weight
20 sometimes with regard to what I deem to be the law
21 specifically. That's like kids in school quoting Webster's
22 Dictionary.

23 I understand it has some value, but with the law
24 they're very technical definitions, as we know, with
25 homicide, and really my -- I mixed that up with the term

1 "murder." Murder is the unlawful killing of a human being.

2 And the fact is that one of the issues that was
3 being litigated here with regard to the pathologist is the
4 issue of corpus delicti, which requires that the State show
5 that a person has died as a result of criminal agency, which
6 is homicide. And so homicide was the appropriate term being
7 used for that purpose.

8 MR. HARDY: I understand what the Court's ruling
9 was, yes. Thank you.

10 THE COURT: I'll make sure that I get appropriate
11 -- there's going to be a lot of instructions to make sure
12 that the jury understands the definitions of all of those
13 words involved in the case.

14 MR. HARDY: My only concern was is what you said
15 was intentional. When that word "intentional" came out, it
16 concerned me. But it is what it is.

17 THE COURT: I will correct that.

18 MR. HARDY: Thank you very much.

19 THE COURT: Anything else? We'll take about a
20 ten-minute recess.

21 (Recess taken at 11:14 a.m.)

22 THE COURT: Court will come to order. Please be
23 seated.

24 Will counsel stipulate to the presence of the jury
25 and the alternate?

1 MR. MOLEZZO: The defense so stipulates.

2 MR. WILLIAMS: State does as well.

3 THE COURT: Ladies and gentlemen of the jury,
4 during the course of the testimony of the pathologist there
5 was a discussion between myself and Mr. Hardy with regard to
6 the definition concerning homicide. I want you to know he
7 was correct; I was incorrect. It really applied to another
8 term, murder.

9 But I don't want you to be concerned with the
10 definitions at this point. At the end of the trial I will
11 give you written instructions that will define all of those
12 things, and I just want to make sure that you don't get off
13 track with regard to something I said.

14 Is that correct, Mr. Hardy?

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

16 THE COURT: Thank you, sir. Now, you may proceed.

17 MR. WILLIAMS: Thank you, Your Honor.

18 THE COURT: This is redirect. I'll remind you,
19 redirect is for things that have not been covered or what's
20 been brought up on cross-examination.

21 MR. WILLIAMS: Thank you, Your Honor. Try to keep
22 it as brief as I can.

23 THE COURT: Thank you, sir.

24 ///

25 ///

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Officer Garrison, there was a lot of talk on cross-examination about keeping a log for people who go in on crime scenes. Is this your standard department policy?

A. No.

Q. Have you ever kept a log at a crime scene that you've been involved in?

A. In 11 years, I can't remember one.

Q. Has anybody else in your department that you know of?

A. Not that I know of.

Q. There's also some talk about giving blood alcohol tests to Robert, Stasia, and Jessica. Was there ever any evidence on the night of August 5, 2009, that they had been consuming any alcohol?

A. Not to my knowledge. But, again, I go back to I did not actually speak to any one of them. I may have spoken to Robert briefly, but that was it.

Q. And you performed a follow-up investigation. And during that follow-up investigation, did you see any evidence of that?

A. No.

Q. You stated before it was not your choice to allow Robert, Stasia, and Jessica to leave on that evening?

1 A. That's correct.

2 Q. You weren't involved in that because you were busy
3 with other things in the investigation?

4 A. Yes.

5 Q. There was some talk on cross-examination about
6 your opinions that you formed as of this investigation. Did
7 you form the opinion, through your investigation, this was
8 an intentional shooting?

9 A. Yes.

10 Q. What did you base that opinion on?

11 A. The weapon used was a bolt-action rifle. If I can
12 use an analogy. I carry a semi-automatic pistol. I pull
13 the trigger, it fires and it fires and it fires until the
14 magazine is empty. I carry a semi-automatic rifle for my
15 SWAT team duties. I pull the trigger, it fires and fires
16 and fires, each time I pull the trigger, until the magazine
17 is empty. There is no manual -- I don't have to do any
18 manual movements to activate that gun or to chamber another
19 round in that gun.

20 With the a bolt-action rifle, you actually have to
21 manually manipulate the bolt to chamber another round in
22 that rifle.

23 Because of where at least the round in the living
24 room was located, Mr. Morton had to manually manipulate that
25 bolt to not only eject the round that was currently in the

1 chamber, but to load another round.

2 Q. Is there any other evidence that you found to
3 support that? Or is that what you based that conclusion on?

4 A. That's what leads me to believe that, yes, it was
5 an intentional act.

6 Q. When you talked to the defendant during your
7 interview, did you ever ask him whether or not he went in
8 the bathroom when his wife was in there and she was shot?

9 A. Yes.

10 Q. What was his response?

11 A. He stated that he stayed outside the bathroom,
12 that he did not go into the bathroom.

13 Q. Did you ever feel that it was necessary for you to
14 intervene in the victim's medical treatment and get a
15 toxicology done?

16 A. No.

17 Q. Why not?

18 A. Because I'm a law enforcement officer, not a
19 medical professional. And the saving of her life took
20 priority over any investigation that I was conducting.

21 Q. So you didn't feel it was appropriate, then, to
22 intervene and ask for that?

23 A. No.

24 Q. There was a lot of talk on cross-examination about
25 recording of testimony, of interviews -- not testimony.

1 Interviews.

2 As a law enforcement officer, do you try to record
3 things whenever possible?

4 A. As I stated earlier, it's a nice tool to have, but
5 I do not have my recorder more often than I do have it.
6 It's not something that I use on a regular basis.

7 Q. Would you always prefer to have a recorder if
8 possible, though?

9 A. Yes, it's a good idea.

10 Q. Now, is one of the reasons you didn't have your
11 recorder on the night of August 5th and August 6th is you
12 got called straight from home at approximately 11:50 p.m.?

13 A. That's totally correct.

14 Q. Did you go straight from your house to the crime
15 scene?

16 A. Yes.

17 Q. There was some talk about you not going to Renown
18 Hospital in person. Why did you feel it was not necessary
19 to drive to Reno?

20 A. Because, like I testified, I made multiple phone
21 calls and talked to her attending nurse each time to see if
22 she was able to speak with me.

23 It would have been a waste of five hours there and
24 back to go down there just to find out that she wasn't able
25 to talk with me.

1 Q. Was it your strong desire to get a statement from
2 Cynthia if you could?

3 A. That was one of the main points of my
4 investigation.

5 MR. WILLIAMS: I have nothing further, Your Honor.

6 THE COURT: You may recross on those questions.

7 MR. MOLEZZO: Thank you, Judge.

8 RECROSS-EXAMINATION

9 BY MR. MOLEZZO:

10 Q. It's not a waste to do your job, is it?

11 A. Are you talking about my statement of driving to
12 Reno?

13 Q. Yeah. It's not a waste.

14 A. The drive to Reno, nothing would have been
15 accomplished that the telephone call did not accomplish.

16 Q. Because the call didn't generate any information
17 for you to go upon; isn't that correct?

18 A. I don't -- I'm sorry, sir, I don't understand what
19 you're asking.

20 Q. Officer, this is, in your opinion, a murder case,
21 isn't it? Isn't it?

22 A. Yes.

23 Q. And I think based upon your testimony you tell us
24 that you were aware that she was stable, right?

25 A. Stable medically. But I --

1 Q. You were aware she was able to communicate, right,
2 while in the hospital, on various occasions?

3 A. I think her father had told me that she was able
4 to answer simple questions with a nod of her head.

5 I don't know that she was ever able to actually
6 speak.

7 Q. A nod of the head could convey information of yes
8 or no, correct?

9 A. Yes.

10 Q. You're not sitting here (pointing to Defendant),
11 are you, Officer?

12 A. No, I'm not.

13 Q. And policy and procedure -- following policy and
14 procedure doesn't mean that you don't have to put forth
15 effort, correct?

16 A. I'm unsure of what one has to do with the other.

17 Q. You talk about this on-the-scene log.

18 A. Yes.

19 Q. You admit to us under testimony that it's a good
20 tool. I'm paraphrasing. But when I asked you about it,
21 it's a good thing to have done. Do you recall that?

22 A. Yes.

23 Q. And the mere fact that you haven't done it, or
24 it's not your department's policy, doesn't excuse the fact
25 that it wasn't done, you would agree?

1 MR. WILLIAMS: Objection, Your Honor.

2 Argumentative.

3 MR. MOLEZZO: This is not a bake sale. This is a
4 murder trial.

5 THE COURT: Counselor, I'm overruling the
6 question. He can answer the question. This is not about a
7 bake sale.

8 MR. MOLEZZO: Yes, sir. I'll stop being so
9 theatrical.

10 BY MR. MOLEZZO:

11 Q. Just because it's policy doesn't mean that -- let
12 me ask it this way: If it's policy and procedure, do you
13 blindly follow, if that's part of your department not to
14 have a crime scene log?

15 A. I didn't say it wasn't part of policy and
16 procedure. I said it wasn't common practice.

17 Policy and procedure is what directs the
18 activities of the police department.

19 Q. But you're a detective. You're the lead detective
20 on this case, correct?

21 A. Correct.

22 Q. You're a man possessing free will, correct?

23 A. Correct.

24 Q. Now, on redirect examination, you base your
25 opinion that it was an intentional act because of the bolt

1 action, correct?

2 A. Yes.

3 Q. I mean, that's one -- I'm sorry, that's one of the
4 things that leads you to believe it was an intentional act?

5 A. Yes.

6 Q. But we also know that there were three other
7 individuals there, correct?

8 A. Yes.

9 Q. And we also know that one of those individuals was
10 Robert Morton, who had possession of the gun, correct?

11 A. At a point during the struggle, yes.

12 Q. So isn't it possible that Robert Morton could have
13 been the shooter?

14 A. I don't believe so.

15 Q. The fact is, it's possible; isn't that true?

16 A. I don't believe so.

17 Q. I respect your belief. And we have no direct
18 information or knowledge that the bolt wasn't -- the bolt
19 action wasn't manipulated by someone else, correct? You
20 didn't interview anybody who said, Yeah, I messed with the
21 gun first, correct?

22 A. In the interview with Robert, he had stated that
23 he had not manipulated the gun.

24 Q. Well, he could have also said that he flies during
25 the daytime; it doesn't mean that it's true, correct?

1 MR. WILLIAMS: Objection, Your Honor.

2 MR. MOLEZZO: Withdrawn.

3 BY MR. MOLEZZO:

4 Q. Did you interview or canvass the area around the
5 home --

6 A. No.

7 Q. -- or is that just on TV? -- to see if other folks
8 heard sound, saw things? Did you do any of that?

9 A. I did not.

10 Q. Now, in reference to the shell casings, the
11 prosecution is attempting to make some points with the shell
12 casings.

13 We don't have --

14 MR. WILLIAMS: Misstatement, Your Honor.

15 THE COURT: Sustained. Counselor.

16 MR. MOLEZZO: Yes, sir.

17 BY MR. MOLEZZO:

18 Q. You photographed the shell casings, isn't that
19 true, after the healthcare folks were there? Did I get that
20 right, that the ambulance folks --

21 A. That's correct.

22 Q. So it's clearly possible that people in that
23 residence could have manipulated or moved those shell
24 casings, correct?

25 MR. WILLIAMS: Your Honor, I'm going to object.

1 This is outside the scope of redirect examination.

2 MR. MOLEZZO: If I may make a record, Judge. I
3 think he was talking about the importance of the placement
4 or the area where the shell casings were, sir. I think that
5 was redirect.

6 THE COURT: Go ahead. I'll give you some
7 latitude.

8 MR. MOLEZZO: I'm sorry, Your Honor? May I go
9 ahead?

10 THE COURT: Yes.

11 BY MR. MOLEZZO:

12 Q. So the images that we have of the shell, where the
13 shells were, right, we have those images; you took those
14 images?

15 A. Yes.

16 Q. Those images -- or in some of those images it also
17 tells us some packaging of ambulance, medical personnel,
18 correct?

19 A. Yes.

20 Q. So the images were taken when other individuals
21 were in that home, correct?

22 A. Following them being in the home.

23 Q. Thank you. So it's entirely possible any number
24 of individuals could have stepped or kicked those shells
25 somewhere, correct?

1 A. That's correct.

2 Q. So the placement of the shells really tell us
3 nothing. You would agree with that, correct?

4 A. I think I would have to disagree with that.

5 Q. Well, it tells you maybe a weapon was fired
6 because you have a spent casing, correct?

7 A. Yes.

8 Q. But the shells that are intact, they could have
9 fell out of a pocket for all we know, correct?

10 A. It's possible.

11 Q. I know no one was there, but it's possible, isn't
12 it?

13 A. It's possible.

14 Q. And, again -- in line with redirect, Your Honor --
15 it's also possible that the person who manipulated the gun
16 or had the weapon was attempting to make the gun safe.
17 That's possible as well, correct?

18 A. Correct.

19 Q. Because we've seen the gun and it has a magazine
20 and it's a spring-type gun, right?

21 A. Yes.

22 Q. And you would agree that a head nod or a
23 side-to-side head motion can convey information, you would
24 agree?

25 A. Yes, it can.

1 Q. And without going into detail, months prior to
2 this tragic event law enforcement gained possession of that
3 gun, correct, and in fact took the bolt?

4 MR. WILLIAMS: Objection, Your Honor.

5 THE COURT: What was that question?

6 BY MR. MOLEZZO:

7 Q. Do you have personal knowledge --

8 MR. MOLEZZO: Your Honor, I'll rephrase.

9 MR. WILLIAMS: Your Honor, he said months earlier
10 they gained possession of the firearm, and I don't know
11 where that's testimony.

12 THE COURT: That's what I'm trying to find out.
13 What's your question?

14 MR. MOLEZZO: I'll rephrase.

15 THE COURT: You said months prior to the tragic
16 event law enforcement gained possession of the gun.

17 MR. MOLEZZO: I'll withdraw the question, Your
18 Honor.

19 THE COURT: Okay.

20 BY MR. MOLEZZO:

21 Q. Did anybody, as far as you know, fingerprint that
22 weapon?

23 MR. WILLIAMS: Objection, Your Honor. It's
24 outside the scope of redirect.

25 MR. MOLEZZO: A little latitude, please, Judge.

1 THE COURT: Okay, but that's it.

2 MR. MOLEZZO: Thank you. That's why I asked.

3 BY MR. MOLEZZO:

4 Q. Did anybody fingerprint that weapon, sir?

5 A. To my knowledge, the crime lab examined it for
6 fingerprints.

7 Q. One more. You secured the weapon when you found
8 it in the grass, or did someone else? If you remember.

9 A. It was either myself or Officer Cassinelli.

10 MR. MOLEZZO: Thank you. Nothing further. The
11 jury may have some questions, Your Honor. Thank you.

12 THE COURT: Ladies and gentlemen of the jury, if
13 you have any questions, now is the time. Write those down
14 and give them to the bailiff.

15 Pick up any questions. Counselors, if you'll step
16 outside with me, we'll examine the questions and I'll
17 determine if they're appropriate questions.

18 (Brief recess taken.)

19 THE COURT: I've determined the questions are
20 appropriate. These are questions of your own personal
21 knowledge, sir.

22 If you know, did you order and was the gun tested
23 for possible malfunctions?

24 THE WITNESS: Yes. Yes, it was. And, yes, I did.

25 THE COURT: And to your knowledge, from your own

1 personal information, were there any malfunctions found with
2 regard to the firearm?

3 THE WITNESS: No, the information that I received
4 was that it operated normally.

5 THE COURT: Second, how many shells is the clip
6 capable of holding, if you know?

7 THE WITNESS: I do not know that.

8 THE COURT: As I understand it, gentlemen, the
9 clip is here empty, in evidence is an empty clip.

10 MR. MOLEZZO: It is.

11 THE COURT: The other question to your knowledge,
12 and I'm assuming on the night of their investigation: Were
13 there any live shells left in the clip to your knowledge?

14 THE WITNESS: Yes. Yes, there was. There was one
15 in the chamber and one in the magazine or clip.

16 THE COURT: To your knowledge, on that evening, do
17 you know how the two live rounds became ejected that were
18 located in the home? Of your own personal knowledge.

19 THE WITNESS: No. No.

20 THE COURT: Counselors?

21 MR. MOLEZZO: Defense satisfied. No follow-up
22 questions.

23 THE COURT: Sir?

24 MR. WILLIAMS: I can't think of any from the
25 State, Your Honor.

1 THE COURT: Thank you, ladies and gentlemen. I'm
2 going to give those questions to the clerk. They'll become
3 part of the record in this matter.

4 It's just about time for lunch, and we're not
5 going to call another witness before lunch. What I'm going
6 to do is give you your admonition. Please abide by it very
7 carefully. If you have any special needs, please let the
8 bailiff know.

9 It is your duty to not discuss among yourselves or
10 with anyone else any matter having to do with this case.
11 It's your further duty not to form or express any opinion
12 regarding the guilt or innocence of the defendant until the
13 case has been finally submitted to you for decision.

14 You are not to read any newspaper articles or
15 listen to or view any radio or television broadcasts
16 concerning this case. Should any person attempt to discuss
17 the case with you or in any manner attempt to influence you
18 with respect to it, you are to advise the bailiff, who in
19 turn will advise the Court.

20 We'll be in recess until 1:30.

21 (Noon recess taken at 11:47 a.m.)

22 (Whereupon, the following proceedings were had outside
23 the presence of the jury and the alternates.)

24 THE COURT: Court will come to order. Please be
25 seated. Go ahead and be seated.

1 Counselors, the clerk first informs me that the
2 number of photographs is different than what you've
3 indicated.

4 MR. WILLIAMS: Oh, is it? Okay.

5 MR. SMITH: That is correct, Your Honor. The
6 clerk and I were discussing that this morning. On item 12,
7 we had originally written down yesterday that there were
8 photographs 1 through 234.

9 She indicates on a few of those they were
10 misnumbered, a couple duplicate numbers, and there actually
11 is 244. So there's 10 more than were originally indicated.

12 And the State would stipulate that now that
13 they're numbered correctly that those are the photographs
14 that were introduced.

15 MR. MOLEZZO: I'll submit it.

16 THE COURT: Okay. That's exhibit -- what's the
17 initial number on it?

18 MR. SMITH: Twelve, Your Honor.

19 THE COURT: This is 12-1 through -244, now will be
20 Exhibit 12.

21 MR. WILLIAMS: And that matches the original
22 number I had on them. And then Laura thought there were 10
23 less. So that makes sense, Your Honor.

24 THE COURT: Okay.

25 MR. WILLIAMS: One other thing, Your Honor,

1 looking at this list she gave me, 22 received and admitted,
2 and it's not marked on here.

3 THE COURT: Which item?

4 MR. WILLIAMS: Exhibit 22, which is the shell
5 casing. I remember reviewing the transcript. I want to
6 make sure it's clear on the record.

7 THE COURT: Counselor, how do you have it?

8 MR. MOLEZZO: I'm sorry, 22, Your Honor?

9 THE COURT: Not from the clerk's list.

10 MR. MOLEZZO: I'll just submit it, Judge.

11 THE COURT: Okay. Well, 22 is admitted. You have
12 no objection?

13 MR. MOLEZZO: No, sir.

14 THE COURT: Okay.

15 MR. MOLEZZO: Thank you. Shell casing? No
16 objection.

17 THE COURT: All right. Now, the record should
18 reflect we've convened outside the presence of the jury. Is
19 there a reason that we're doing that?

20 MR. MOLEZZO: Yes, sir. I'm going to request a
21 limiting instruction, a late endorsement, though endorsed
22 within the statutory time is a Chad Morton, Your Honor.

23 Mr. Morton, at the time of this event, let me know
24 if I don't get it right -- was residing in Utah. I'm not
25 sure why he's being called.

1 Though it's not my province to understand the
2 prosecution's theory, but we -- it's a slippery slope, as
3 we've seen in this trial. If he tries to bring in outside
4 conduct of his father's, then we have a major problem.

5 THE COURT: Can you give me an offer of proof of
6 what Chad Morton is going to be testifying about?

7 MR. SMITH: Yes, Your Honor. Um, taking into
8 consideration our conversations we had around Robert, his
9 younger brother. I am not asking any questions about any
10 prior conduct or bad act by his father.

11 What I will be asking, and what Chad will be
12 testifying to, however, is that he recognizes the rifle.
13 That he has seen his father with the rifle doing things with
14 the rifle. That, um, he and his father, um -- his father
15 introduced him to guns. His father taught him about gun
16 safety. His father had taught him about muzzle or barrel
17 safety. Not to point the gun at anybody, to make sure that
18 you always treat a gun as if it's loaded.

19 That his father also taught him not to put your
20 finger in the trigger housing, because it wasn't safe. And
21 only put your finger in the trigger housing when you're
22 ready to fire a weapon. And that had, um -- that he, as
23 growing up, watched his father around guns. I asked him how
24 many guns his father has. He tells me those in specific
25 that he can remember. He's seen his father cleaning them

1 and spending time with them. And then, it's his opinion
2 that his father is comfortable around firearms and knows how
3 the rifles and the handguns operate.

4 THE COURT: Sir?

5 MR. MOLEZZO: Um, I don't really see any problem
6 with that, Your Honor.

7 THE COURT: It appears to be relevant particularly
8 to your defense of accidental shooting. You folks have been
9 referring to it. In fact, your cocounsel called it an
10 accident here.

11 MR. MOLEZZO: Yes, sir.

12 THE COURT: And so I think it's relevant to the
13 issue, the knowledge that your client has with regard to
14 firearms, specifically the firearm involved in this case is
15 totally relevant, it would appear.

16 MR. MOLEZZO: Yes, sir.

17 THE COURT: So if there are things that do come up
18 though, you certainly need to object --

19 MR. MOLEZZO: Yes, sir.

20 THE COURT: -- contemporaneously at the
21 appropriate time.

22 MR. MOLEZZO: I will.

23 THE COURT: Okay. Is that it?

24 MR. SMITH: Yes, Your Honor.

25 THE COURT: What else are we going to be doing

1 this afternoon?

2 MR. SMITH: That's the only one that the State
3 has, Your Honor. Then we have State lab people, as we
4 indicated, will be here first thing tomorrow morning.

5 THE COURT: What do you have tomorrow morning?

6 MR. SMITH: We have the person who tested the gun.
7 We have --

8 MR. WILLIAMS: A DNA expert and the fingerprint
9 expert, Your Honor.

10 THE COURT: Gun, DNA, and fingerprint?

11 MR. WILLIAMS: Yes. They're all scheduled to be
12 here at nine.

13 THE COURT: Okay. So they will be taking -- and
14 do you have other witnesses that you intend to call in your
15 case in chief after that?

16 MR. SMITH: Um, no, Your Honor.

17 THE COURT: Okay. Then what position are you
18 going to be in, sir?

19 MR. MOLEZZO: Well, thank you, Judge. Well, I'm
20 going to be driving home around 1:00 tomorrow, unless you
21 don't want that to occur. I will not be proffering any
22 witnesses. I've cataloged my witnesses, the expert Tuesday
23 morning. And lay witnesses, a few of them, Monday --
24 Monday.

25 THE COURT: So we start Monday at 9:00, is that --

1 MR. MOLEZZO: Yes.

2 THE COURT: And you will have your case ready to
3 go Monday, except you have one expert on Tuesday; is that
4 correct?

5 MR. MOLEZZO: Yes, sir.

6 THE COURT: Tuesday at 9:00?

7 MR. MOLEZZO: 11:00, Your Honor.

8 THE COURT: 11:00.

9 MR. MOLEZZO: And that's our gun expert. And the
10 lay witnesses Monday at nine. And that again, will be a
11 very short day. Does that help the Court?

12 THE COURT: Yes. I'm trying to visualize and give
13 this jury some idea what's happening with their life as
14 well.

15 MR. MOLEZZO: In reference to tomorrow, my
16 examination, although I like to talk, I'm pretty sure we
17 will be wrapped up with everything by 12 is my guesstimate.

18 The fingerprint documentation is like a page and a
19 half.

20 THE COURT: Okay.

21 MR. MOLEZZO: And the DNA is a couple pages.

22 THE COURT: All right. Do you have -- best case
23 scenario is your expert is the one that we're going to
24 really be waiting on for Tuesday at 11?

25 MR. MOLEZZO: Yes, sir. And that would be my only

1 witness.

2 THE COURT: Well, what I don't want to happen is
3 waste a half a day tomorrow, and then you run out of time on
4 Monday. Will you for sure have your witnesses able to be
5 done by Monday?

6 MR. MOLEZZO: Oh, yes, sir. Yes, sir.

7 THE COURT: Okay.

8 MR. MOLEZZO: Two witnesses will be done with a
9 full day easily.

10 THE COURT: Okay. All right. As I've been going
11 along, I have been trying to do jury instructions. And so
12 as you go along, I will tell you some of the instructions
13 that I have been working on.

14 One is a, um, processing instruction with regard
15 to shepherding the jury through the various charges
16 including lesser-included.

17 With regard to defenses, I expect that you will
18 have jury instructions concerning any defenses that you
19 intend to bring forth. I'm not sure what they are at this
20 point, but there are some that I'm guessing?

21 MR. MOLEZZO: Yes, sir. I have a theory of the
22 defense instruction and secondary instructions.

23 THE COURT: Okay. And, um, there's an instruction
24 with regard to cause of death. And that is, there's an
25 instruction that I have reviewed out of CALJIC that has to

1 do with cause of death. And as those instructions come
2 along, I don't have a secretary here.

3 MR. MOLEZZO: Okay.

4 THE COURT: So I'm giving those to the district
5 attorney's secretary to prepare those.

6 MR. MOLEZZO: Okay.

7 THE COURT: Do you have any problem with that
8 anybody?

9 MR. SMITH: No, Your Honor.

10 MR. MOLEZZO: No. I trust the DA, Your Honor.

11 THE COURT: Well, it's either that or you're going
12 to be doing them.

13 MR. MOLEZZO: No. No. Thank you.

14 THE COURT: I've asked Miss Jurad, I've given you
15 a book with CALJIC instructions.

16 MS. JURAD: Yes, you did.

17 THE COURT: Would you bring that to me? I want to
18 read this to you, because I expect you folks to come up with
19 any other instruction if you think there is something
20 different. I haven't been able to see or find anything
21 different. But this has to do with an issue that you have
22 brought up having to do with improper treatment.

23 MR. MOLEZZO: Yes, sir.

24 THE COURT: And here's how the instruction reads:
25 "Where the original injury is a cause of the death, the fact

1 that the immediate cause of death was a medical or surgical
2 treatment administered, or that the treatment was a factor
3 contributing to the cause of death will not relieve the
4 person who inflicted the original injury from
5 responsibility. Where, however, the original injury is not
6 a cause of the death and the death was caused by medical or
7 surgical treatment or some other cause, then the defendant
8 is not guilty of an unlawful homicide."

9 It's the only instruction that I can see that
10 somewhat goes with your evidence. If you have something
11 else, I expect you to produce it.

12 MR. MOLEZZO: Okay.

13 THE COURT: Anyway, that's the instruction I'm
14 presently contemplating. And unless you --

15 MR. MOLEZZO: That's sounds fair and balanced.
16 What edition is that CALJIC, Your Honor?

17 THE COURT: This is 2010.

18 MR. MOLEZZO: Thank you.

19 THE COURT: And it is instruction 8.75.

20 Thank you, Miss Jurad.

21 Anyway, I'm going to have her at least do that up
22 and a number of the other instructions. The set that I
23 received from the district attorney's office, some of those
24 are not appropriate. And I'm going through and having some
25 of them redone. Just so that you know so that when we get

1 to than point, we're ready.

2 MR. MOLEZZO: Yes, sir. And I have mine ready.

3 THE COURT: Okay. At some point if you get to me
4 the ones you do anticipate, it would be helpful.

5 MR. MOLEZZO: All right. Yes, sir.

6 THE COURT: All right. Now, is there anything
7 else before we proceed with Mr. Morton?

8 MR. SMITH: Not from the State, Your Honor.

9 THE COURT: Okay. Then let's bring in the jury,
10 please, sir.

11 (Whereupon, the jury and the alternates were brought
12 into court.)

13 THE COURT: Court will come back to order. Please
14 be seated.

15 Will counsel stipulate to the presence of the jury
16 and the alternates?

17 MR. MOLEZZO: Defense so stipulates.

18 MR. SMITH: The State would so stipulate, Your
19 Honor.

20 THE COURT: Ladies and gentlemen, I have just
21 learned from counsel somewhat -- when I talk about counsel,
22 that's the attorneys -- somewhat as to their schedule with
23 regard to their witnesses. And this is just so that you can
24 kind of plan your life. I know you used to have a life out
25 there. And we want to make sure that you can plan ahead as

1 to what's going to happen here. What I'm informed is that
2 the State has one witness today, and then we will be
3 finishing up probably early today, it would appear.

4 Tomorrow, on behalf of the district attorney's
5 office, it's my understanding they have, again, witnesses
6 from the crime lab that are coming. And again, it's
7 difficult in scheduling these various experts on both sides
8 of the case, but they will be here in the morning. You
9 could be done by about noon tomorrow as well. So it might
10 be a short day tomorrow as well, on Friday.

11 Monday, it's my understanding that the defense
12 will probably begin their case, put on various witnesses,
13 depending on how many witnesses, we will go as long as it
14 takes, except for they have one expert witness who was not
15 scheduled to be here until 11:00 on Tuesday. And that's out
16 of necessity of availability of this witness.

17 Is that correct, sir?

18 MR. MOLEZZO: It is, Your Honor. Thank you.

19 THE COURT: Okay. And so, um, we kind of
20 anticipate that that may or may not be the end of all of the
21 evidence, but that's what it's looking like.

22 At that point, then what will happen, the
23 attorneys and I will be working on instructions. And the
24 case will probably go to you sometime Wednesday morning is
25 what I'm anticipating. That's how it appears right now.

1 And I will try to keep you updated as I find out additional
2 information. So you can kind of plan your life around that.

3 Sir, will you call your next witness on behalf of
4 the State?

5 MR. SMITH: The State calls Chad Morton.

6 THE COURT: Would you please come forward to be
7 sworn, sir? Would you raise your right hand and face the
8 clerk?

9 CHAD MORTON,

10 Having been first duly sworn to tell the truth, the whole
11 truth, and nothing but the truth, was examined and testified
12 as follows:

13 THE WITNESS: I do.

14 THE COURT: Sir, would you please come and be
15 seated here in the witness stand? After you're seated, if
16 you would please pull up to the microphone and speak right
17 into the microphone. Could you pull up just a little bit
18 more there? Thank you. Would you please state your name
19 for the record, sir?

20 THE WITNESS: Chad Allan Morton.

21 THE COURT: Would you spell your names for the
22 court reporter?

23 THE WITNESS: C-h-a-d, A-l-l-a-n, M-o-r-t-o-n.

24 THE COURT: Mr. Morton, what is your age?

25 THE WITNESS: Twenty-six.

1 THE COURT: Okay. You may proceed on direct
2 examination.

3 MR. SMITH: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 (BY MR. SMITH:)

6 Q. Chad, who are your parents?

7 A. David and Cynthia Morton.

8 Q. Are either of your parents in court today?

9 A. Uh, yes, sir.

10 Q. Could you please point to and describe to the
11 Court -- well, let me first ask you, which parent is in
12 court today?

13 A. I'm pretty sure both of them are, but David C.
14 Morton is sitting right there.

15 MR. MOLEZZO: Objection, nonresponsive, as to both
16 of them.

17 THE COURT: Well, physically, your father is
18 here --

19 THE WITNESS: Right.

20 THE COURT: -- is that correct?

21 THE WITNESS: Right. I apologize.

22 THE COURT: Go ahead.

23 THE WITNESS: David C. Morton.

24 (BY MR. SMITH:)

25 Q. Could I have you please point to him and describe

1 to the Court what he is wearing?

2 MR. MOLEZZO: We'll stipulate that his father is
3 present with counsel.

4 THE COURT: Okay. The record should reflect the
5 presence of the defendant as being the father of the witness
6 at this time.

7 MR. SMITH: Bailiff, could I have you show Chad
8 Morton Exhibit No. 6?

9 THE COURT: Take that over close where he can
10 examine it and do it safely if you would.

11 THE WITNESS: Do you want me to take it?

12 THE COURT: No, I'd rather that he hold it.

13 THE WITNESS: Right.

14 THE COURT: Do you need to get closer to look at
15 it?

16 THE WITNESS: No. I know what rifle that is.

17 THE COURT: Okay. And for the record that was
18 what, sir?

19 MR. SMITH: Exhibit 6, Your Honor.

20 THE COURT: Exhibit 6?

21 MR. SMITH: And it is State's exhibit, yes.

22 THE COURT: Okay. State's Exhibit 6 is in
23 evidence and has been shown to the witness.

24 You may proceed.

25 MR. SMITH: Thank you, Your Honor.

1 (BY MR. SMITH:)

2 Q. Do you recognize that rifle?

3 I need you to answer out loud, please, because the
4 court reporter --

5 THE COURT: Take your time, sir. If you need a
6 drink, take a drink.

7 THE WITNESS: Yes, I recognize that rifle.

8 (BY MR. SMITH:)

9 Q. How are you able to recognize it?

10 A. I grew -- it's a 303. Um, by the barrel, by
11 the -- just the look of the gun.

12 Q. Have you seen that rifle before today?

13 A. Yes, I have.

14 Q. And where have you seen that rifle?

15 A. I grew up with that rifle.

16 Q. So is it fair to say that that rifle has been in
17 your home?

18 A. Yes, sir.

19 Q. Have you ever seen your father with that rifle?

20 A. Yes, sir.

21 Q. Could you explain to the Court what you've seen
22 your father do with that rifle?

23 A. Clean the rifle, take out all the shells, clean
24 the barrel, clean the clip, make sure the chambers correctly
25 in the chambers.

1 Q. Chad, are you a shooter yourself?

2 A. I am.

3 Q. Who first taught you about guns?

4 A. My father, David.

5 Q. Did your father teach you any of the safety issues

6 that go along with guns?

7 A. He did.

8 Q. What, if anything, did your father teach you about

9 barrel or muzzle safety?

10 A. Um, to act as if a weapon is always loaded. Never

11 get careless with a rifle. Never have your finger on the

12 trigger, you know, unless you intend to shoot; safety always

13 on. Point at what you're shooting at, you know. Stuff like

14 that.

15 Q. Did he ever have a discussion with you about

16 playing around with weapons?

17 A. He did.

18 Q. And what did he tell you in regard to that?

19 A. That you could hurt somebody if you, you know,

20 mess around with rifles. They're not a toy.

21 Q. Growing up did you ever see your father with other

22 rifles besides this 303?

23 A. I did.

24 Q. Did you have other rifles in the home when you

25 were growing up besides this one?

1 A. Yes, sir, I did.

2 Q. What other rifles were there in the home?

3 A. Uh, there was three or four different .22s. There

4 was two or three guns that weren't fully put together yet.

5 They were just kind of wood. They didn't have a barrel or

6 anything. They weren't completely put together. That's

7 about it.

8 Q. Any handguns?

9 A. Uh, yes, one pistol, .357 magnum.

10 Q. Now, these guns that you said weren't fully put

11 together, um, can you tell me about those?

12 A. Yeah, I'm not sure what type, you know, what size

13 rifle they were. But, I mean, one of them looked like an

14 old, powder, powder rifle. You shoot the little marble

15 balls through them.

16 Q. Okay.

17 A. And then the .22 lever-actions we had. And then,

18 um, my .22s, stuff like that.

19 Q. Okay. The rifles that weren't fully put together,

20 um, whose were they?

21 A. David's.

22 Q. And David, you're referring to your father?

23 A. My father, yes.

24 Q. What was he doing with them?

25 A. Um, putting them together. Um, building rifles.

1 We had a handful of them.

2 Q. Knowing your father as you do, would you say that
3 your father's comfortable around rifles?

4 A. Yes, sir.

5 Q. Would you say that your father knows how rifles
6 work?

7 A. Yes, sir.

8 Q. That he knows how to treat them in a safe manner?

9 MR. MOLEZZO: Objection, calls for speculation.

10 THE COURT: Based upon his observation. You can
11 indicate based upon your own observations, sir.

12 THE WITNESS: Yes, sir. He does know how to
13 handle a rifle.

14 MR. SMITH: Thank you. No further questions, Your
15 Honor.

16 THE COURT: You may cross-examine.

17 MR. MOLEZZO: Your Honor, may I remain seated?

18 THE COURT: You certainly can.

19 MR. MOLEZZO: Thank you.

20 CROSS-EXAMINATION

21 (BY MR. MOLEZZO:)

22 Q. Good afternoon, sir.

23 A. How you doing?

24 Q. In reference to your testimony cleaning the -- I'm
25 sorry. How old are you, please?

1 A. Twenty-six.

2 Q. And in reference to your testimony of cleaning --
3 do you recall saying cleaning the rifle? You saw your
4 father cleaning the rifle?

5 A. Yes.

6 Q. And that was close to 20 years ago; isn't that
7 correct?

8 A. No.

9 Q. And, in fact, it was very infrequent; isn't that
10 correct?

11 A. Can you rephrase that?

12 Q. Well, let me ask you this. How did you prepare
13 today to testify?

14 A. Um, I didn't.

15 Q. Well, isn't it true that you spoke with the
16 district attorney?

17 A. Well, yes, I talked to him.

18 Q. And where did you learn the word rephrase?

19 A. Um, I have a brain.

20 Q. And how long did you spend with the district
21 attorney in preparation for today?

22 A. Five minutes.

23 Q. Uh, okay. It's now 2010, when, under oath, is the
24 last time you saw your father clean that weapon?

25 A. I'd say probably 15 years ago, at the most.

1 Q. And thank you for your honesty. Do you have any
2 personal -- strike that.

3 Had you ever operated that weapon, Mr. Morton?

4 A. No, sir.

5 Q. And what I mean operate, cocking it, shooting it,
6 nothing like that, sir?

7 A. I did not like that rifle, no.

8 Q. And but for your testimony that he cleaned the
9 rifle, isn't it true that you never saw him fire the rifle?

10 A. No, sir, I've never seen him fire the rifle.

11 Q. And thank you. Do you have any personal knowledge
12 yourself of any defects that rifle may have?

13 A. No, sir.

14 Q. And again, I'm sorry, you never manipulated or
15 fired that gun; is that correct?

16 A. I never fired it, no.

17 Q. May I call you Chad?

18 A. Go ahead.

19 MR. MOLEZZO: Your Honor, would that be okay?

20 THE COURT: That's fine with me, sir, if it's okay
21 with him.

22 THE WITNESS: (Nods head.)

23 MR. MOLEZZO: Thank you.

24 (BY MR. MOLEZZO:)

25 Q. So it's your testimony, under oath, that you saw

1 your father clean it about 15 years ago, correct?

2 A. Yes, sir, about that.

3 Q. Thank you. And isn't it true your first weapon

4 was a .22 caliber rifle?

5 A. My first weapon?

6 Q. Yes, please.

7 A. Yes, it was a .22.

8 Q. I'm sorry? 22?

9 A. Twenty-two.

10 Q. And isn't it also true that it was your uncle who

11 purchased for you that weapon?

12 A. Yes, my Uncle Rick and my father and I went out

13 and purchased it, yeah.

14 Q. Okay. Okay. And in reference to your

15 testimony -- your dad was -- put guns together, did I

16 understand that?

17 A. Yeah, he used to put guns together. He'd tell me

18 about it all the time. You know, I mean, because --

19 Q. I'm sorry, Chad. He wasn't a gun manufacturer,

20 was he?

21 A. Well, no.

22 Q. And you didn't have any tools or hardware in your

23 residence to make guns, did you?

24 A. Uh, yes, we had plenty of tools.

25 Q. In reference to these guns, isn't it true that

1 these were black powder, like, kit guns? You can buy a kit
2 and put them together?

3 A. Um, yeah. Probably.

4 Q. Well, is that your testimony probably, but you're
5 not certain?

6 A. Yeah, they were the powder rifles. Yeah. Well,
7 actually, one of them was an old powder rifle, yes.

8 Q. Okay. And you had never seen your father
9 manipulate or fire these weapons; isn't that correct?

10 A. Uh, no, not that one. It wasn't built. It wasn't
11 finished.

12 Q. In reference to these kit guns, Chad, isn't it
13 true that they were for display? They weren't actually
14 working guns?

15 A. That I don't know.

16 Q. Had you ever seen your father, personal knowledge,
17 of him firing one of the kit guns that he put together?

18 A. I never saw him shoot one, no.

19 Q. Okay. And around the house or anything like that,
20 you never seen diplomas or paperwork that would lead you to
21 believe your father was a gunsmith?

22 A. No.

23 Q. Correct?

24 A. No.

25 MR. MOLEZZO: May I have the Court's indulgence,

1 please?

2 THE COURT: Yes, sir.

3 MR. MOLEZZO: Thank you, Judge.

4 (BY MR. MOLEZZO:)

5 Q. And during the time that you were residing with
6 your parents, you had never gone hunting with your father;
7 isn't that true?

8 A. Rephrase that.

9 Q. During the time that you were living with your
10 family, your dad never took you hunting, did he?

11 A. Uh, yes, he did.

12 Q. Oh, he did?

13 A. Yeah.

14 Q. And what year was that, please?

15 A. When we lived here in '95, '96.

16 Q. And can you share with us other folks that may
17 have gone on that hunt? Names?

18 A. Uh, Robert Morton.

19 Q. And was that bird hunting or game --

20 A. Rabbit.

21 Q. Rabbit hunting?

22 A. Just go out shooting, rabbit hunting. Yeah.

23 Q. And how often did this occur, please?

24 A. Whenever he felt like it. David felt like it.

25 Q. That's a bad question. Chad, how often -- can you

1 give us a number how many times you did this with your
2 father?

3 A. More than 10 times.

4 Q. All right. And the gun in question was what,
5 please?

6 A. Twenty-twos.

7 Q. Okay.

8 A. And then he usually carried his .357.

9 Q. Had you ever gone on an organized hunt with your
10 father, where you have to get a license and go hunting that
11 way?

12 A. No. No.

13 Q. And you had never hunted with your father using
14 any type of a large rifle; is that correct?

15 A. No.

16 Q. And but for the, I'll call it varmint hunting, you
17 had never gone hunting birds with your father, correct?

18 A. No.

19 Q. Okay. Did you -- growing up, did you ever take an
20 organized hunter safety class?

21 A. I did.

22 Q. So when you testify that your dad -- well, your
23 dad really didn't teach you the gun safety, it was the
24 class, correct?

25 A. Well, no, my father taught me before. I put

1 myself through hunter safety.

2 Q. Okay. And isn't it primarily your father said be
3 careful, keep away from the trigger, point the barrel down,
4 stuff like that, correct?

5 A. Yes. He taught me, yes, the basics pretty much of
6 hunter safety.

7 Q. Okay. In reference to the weapon in this case,
8 had you ever seen it out in the open, propped against a
9 wall, or anything like that, Chad?

10 A. That rifle?

11 Q. Please.

12 A. Uh, no. It stayed in the closet a lot of the
13 time.

14 Q. Okay. A lot of time, sometimes --

15 A. There was some, like if he cleaned it --

16 Q. I'm sorry?

17 A. Yeah. Yes, if it was out, like if he cleaned it
18 or something it would be sitting out, but not for very long.

19 Q. Okay. And other than the closet, maybe propped
20 against the wall, any other places where you know this was
21 at?

22 A. Uh, no, sir.

23 MR. MOLEZZO: I have no further questions at this
24 time, Your Honor. Thank you.

25 THE COURT: Any redirect, sir?

1 MR. SMITH: No, Your Honor.

2 THE COURT: Does the jury have any questions you
3 would like to ask of this witness? Now is the time. It
4 appears that there's no questions from the jury.

5 May this witness be excused?

6 MR. MOLEZZO: Defense, no objection.

7 MR. SMITH: We would excuse him subject to recall,
8 Your Honor.

9 THE COURT: Okay. Keep in touch with the district
10 attorney's office, but you're excused. Thank you.

11 THE WITNESS: Thank you.

12 MR. SMITH: And with that, Your Honor, as the
13 State -- as the Court has already indicated, the State will
14 need to rest today as our other witnesses won't be available
15 till tomorrow.

16 THE COURT: You're not resting your case?

17 MR. SMITH: No, no, no. Rest for the day or stop
18 for today. Let's use a different word.

19 THE COURT: Don't use the word rest, sir.

20 MR. SMITH: We're going to stop for the day.

21 THE COURT: Do you agree, sir?

22 MR. MOLEZZO: Sure. They can stop today.

23 THE COURT: And follow pretty much the schedule
24 that I've outlined to the jury?

25 MR. MOLEZZO: Oh, you bet, Your Honor. I think

1 we'll be right on time tomorrow.

2 THE COURT: All right. Ladies and gentlemen, you
3 get to go home early today and probably tomorrow as well.
4 It's just a matter of -- and I will tell you that there's
5 great difficulty in getting some of these witnesses here.
6 That's just the nature of the world we live in, but we have
7 to live with that.

8 I'm going to admonish you it is your duty not to
9 discuss among yourselves or with anyone else any matter
10 having to do with this case.

11 It is your further duty not to form or express any
12 opinion regarding the guilt or innocence of the defendant
13 until the case has been finally submitted to you for your
14 decision.

15 You are not to read any newspaper articles or
16 listen to or view any radio or television broadcasts
17 concerning this case.

18 Should any person attempt to discuss the case with
19 you or in any manner attempt to influence you with respect
20 to it, you are to advise the bailiff who will, in turn,
21 advise the Court.

22 We will be in recess until 9:00 a.m. tomorrow
23 morning. All rise.

24 (Whereupon, the following proceedings were had outside
25 the presence of the jury and the alternates.)

1 THE COURT: Court will come back to order, please.
2 Counselor, you indicated you wished to go back on
3 the record, the district attorney?
4 MR. SMITH: Your Honor, when I was putting away my
5 evidence sheet that I keep track of, it reminded me on page
6 one, I had written down on, um, 9-15 we had entered
7 Exhibit 8-1 and Exhibit 8-2. And as I was reviewing that
8 with the clerk of the court, she indicated that Exhibits 8-1
9 through -57 were all entered, and that Brian exhibited only
10 8-1 and 8-2, and I just wanted to make sure --
11 MR. WILLIAMS: That's true.
12 MR. SMITH: -- that that was everybody's
13 understanding. Just to keep the record straight.
14 THE COURT: That's what my notes show.
15 MR. SMITH: Okay.
16 THE COURT: That 8 was introduced, all the
17 photographs, even though they were not all shown.
18 MR. SMITH: Thank you.
19 THE COURT: Is that what your understanding is,
20 counselor?
21 MR. MOLEZZO: It is, Your Honor. Thank you.
22 THE COURT: So Exhibit 8 with the sub numbers 1
23 through 57 are -- have been admitted into evidence.
24 MR. MOLEZZO: If I may -- I'm sorry, Russ.
25 MR. SMITH: No. Thank you, Your Honor. I just

1 wanted to make sure that we're all clear on that matter.

2 THE COURT: Okay. Sir?

3 MR. MOLEZZO: Your Honor, may I give our proposed
4 jury instructions?

5 THE COURT: Yes, please.

6 MR. MOLEZZO: You bet. And I apologize to the
7 Court, it seems that some entity stapled them where they
8 shouldn't have. I apologize.

9 THE COURT: Thank you.

10 MR. MOLEZZO: For the record, the district
11 attorney has an identical copy.

12 THE COURT: Okay. By tomorrow I should have an
13 instruction -- our supreme court in the past few years have
14 changed the instruction with regard to treatment of
15 lesser-included offenses.

16 And it is a -- a process by which they describe
17 how it is to be considered lesser-included offenses. And I
18 just want you to know that I'm having that done up, typed up
19 by the district attorney's office. I will give that to you
20 tomorrow.

21 MR. MOLEZZO: Yes, sir.

22 THE COURT: Okay?

23 MR. MOLEZZO: Yes, sir.

24 THE COURT: And with regard to lesser-includeds,
25 I'm supposing that you have something in here with regard to

1 those?

2 MR. MOLEZZO: Um, you bet. And I also have a
3 verdict form. And I can supplement if I'm missing something
4 easily, Your Honor.

5 THE COURT: Okay.

6 MR. MOLEZZO: Thank you.

7 THE COURT: What we'll do is that, with regard to
8 any of the instructions, so that they're all on the same
9 form and the same, um, format that, if they need to be
10 redone, we will run them through the district attorney's
11 office, who can then do your instructions up as well.

12 MR. MOLEZZO: I would be grateful. And I
13 apologize; they're probably not in the same format.

14 MR. SMITH: Well, and that's okay. We just have
15 the secretarial staff here that you don't, so --

16 THE COURT: All right. Anything else before we
17 adjourn for the day?

18 MR. MOLEZZO: No, sir.

19 MR. SMITH: Not from the State, Your Honor.

20 THE COURT: All right. We will see you all back
21 here at 9:00 tomorrow morning.

22 MR. SMITH: Thank you, Your Honor.

23 (Whereupon, the proceedings adjourned.)
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Case No. CR-09-5709

Department I

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

THE STATE OF NEVADA,)
)
Plaintiff,)
)
v.)
)
DAVID CRAIG MORTON,)
)
Defendant.)
/

JURY TRIAL - VOLUME IV

TAMMIE SPERO
DIST. COURT CLERK
Tammie Spero

2010 SEP 20 AM 8:01

FILED

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter
came on for hearing on September 17, 2010, of said
day, before the HONORABLE RICHARD A. WAGNER, District
Judge.

The plaintiff was present in court and
represented by Russell Smith, Humboldt County District
Attorney, and Brian Williams, Deputy District
Attorney.

The defendant was present in court and
represented by Richard Molezzo, Attorney at Law.

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19 - Control No. W-208221	--	18
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WINNEMUCCA, NEVADA, FRIDAY, SEPTEMBER 17, 2010.

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(Whereupon the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Court will come to order. Please be seated.

Does counsel stipulate to the presence of the jury and the alternates?

MR. MOLEZZO: Yes.

MR. WILLIAMS: The State does.

THE COURT: Call your next witness.

MR. WILLIAMS: The State will call Monica Siewertsen.

THE COURT: All right, sir. Please raise your right hand and be sworn by the clerk.

(Witness sworn.)

THE COURT: Please be seated. After you're seated in the witness stand, if would you please pull up to the microphone and speak directly into the microphone.

Would you please state your name for the record and spell your name for the court reporter.

THE WITNESS: Monica Siewertsen,
S-i-e-w-e-r-t-s-e-n.

1 THE COURT: You may proceed on direct examination,
2 sir.

3 MONICA SIEWERTSEN called as a witness on behalf of
4 the Plaintiff, having been first duly sworn, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WILLIAMS:

8 Q. First of all, it's Siewertsen? Did I say that
9 right?

10 A. Siewertsen.

11 Q. Okay. I wanted to make sure I had that right.
12 Ms. Siewertsen, where do you currently work at?

13 A. I'm currently a criminalist with the Washoe County
14 Sheriff's Department in Reno, Nevada.

15 Q. How long have you worked for them?

16 A. I have been employed with them since January of
17 2009.

18 Q. As a criminalist, what's your current assignment
19 at the crime lab? What do you do?

20 A. I'm currently assigned to the forensic biology
21 unit.

22 MR. MOLEZZO: I'm sorry. I apologize, Your Honor.
23 May we approach, please?

24 THE COURT: Yes.

25 MR. MOLEZZO: Thank you.

1 (Bench conference between Court and counsel.)

2 THE COURT: You may proceed, sir.

3 MR. WILLIAMS: Thank you.

4 BY MR. WILLIAMS:

5 Q. All right. Let's go back to that question again.
6 What is your current assignment at the Washoe County Crime
7 Lab?

8 A. I'm currently assigned to the forensic biology
9 unit.

10 Q. What does the forensic biology unit -- what do you
11 guys do in the forensic biology unit?

12 A. My primary function is to deal with physical
13 evidence that's left at crime scenes or associated with
14 particular investigations.

15 My first job is to look at those items and attempt
16 to identify or locate biological materials. When I say
17 "biological materials," I mean something that comes from a
18 person's body: Blood, hair, saliva, semen. Depending on
19 what type of investigation it is, I'll be looking for a
20 particular material.

21 Once we identify that particular material or
22 locate it, we then attempt to pull out the DNA from whatever
23 cells that we've located in order to attempt to obtain a DNA
24 typing profile from that sample.

25 The DNA from any one individual, no matter what

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1 the source of the sample, will be the same if it comes from
2 the same individual. So if I have a blood sample from
3 someone and a saliva sample from someone, it will give me
4 the same DNA typing profile if it's from the same
5 individual.

6 The next step is to obtain reference samples from
7 individuals who are potentially involved in the
8 investigation and perform the DNA typing analysis on those
9 reference samples as well.

10 Then the comparison is made between the question
11 samples and the reference samples in an attempt to determine
12 the possible origin of that questioned sample. An
13 individual can be excluded as a possible source or they can
14 be included as a possible source.

15 Q. I'm sure you had to go through specialized
16 training to be able to perform these type of tasks.

17 A. Yes.

18 Q. What type of training have you gone through?

19 A. I've been employed at a number of different
20 agencies. And in each of those agencies I've undergone a
21 training program which involves doing practical DNA typing
22 profiling of all kinds of samples that may be encountered
23 during the analysis, as well as written and oral
24 examinations in order to demonstrate knowledge and
25 competence in the areas that I've looked at.

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1 I've successfully passed those requirements at
2 each of the places where I have worked.

3 Q. Did you obtain a degree at a university?

4 A. I have an Honours Bachelor of Science from the
5 University of Waterloo in Waterloo, Canada.

6 MR. WILLIAMS: At this time I'd move to have the
7 witness qualified in the field of DNA analysis. I believe
8 her testimony would assist the trier of fact in this case.

9 MR. MOLEZZO: No objection.

10 THE COURT: The Court will recognize Ms.
11 Siewertsen as an expert to give opinion testimony.

12 Again, ladies and gentlemen, in doing that, I do
13 not comment on the weight that you are to give that
14 evidence; that would be entirely up to you. But she's able
15 to give opinion testimony within that discipline, and I have
16 recognized it.

17 You may proceed.

18 MR. WILLIAMS: Thank you. May I approach the
19 witness?

20 THE COURT: You may, sir.

21 BY MR. WILLIAMS:

22 Q. For the record, I'll hand you what's been marked
23 as State's Exhibit 30 for identification.

24 Ms. Siewertsen, in your time in the Washoe County
25 Crime Lab, did you perform duties in a case with a defendant

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1 by the name of David Morton?

2 A. Yes, I did.

3 Q. Did you prepare an affidavit that detailed the
4 different things you did for this case?

5 A. I have generated a report which includes the items
6 that I received for the particular case and the analysis
7 that I performed and any results and conclusions that I
8 generated during my analysis.

9 Q. Is that report -- is a copy of that report now in
10 front of you?

11 A. That's correct.

12 Q. And the second page of that report, does it have
13 your signature on it?

14 A. It does.

15 Q. What date did you sign it?

16 A. The date on it is the 9th of February, 2010.

17 Q. Does that appear to be a fair and accurate copy of
18 the report you prepared?

19 A. It does.

20 Q. Has it been altered in any way that you can see?

21 A. Not that's apparently obvious, without reading
22 every word.

23 MR. WILLIAMS: Your Honor, I would move to have
24 admitted Exhibit 30.

25 MR. MOLEZZO: No objection.

1 THE COURT: It is hereby admitted as Exhibit 30.

2 (Exhibit 30 admitted.)

3 MR. WILLIAMS: Thank you.

4 BY MR. WILLIAMS:

5 Q. So in this case, what was the first action that
6 you took?

7 A. Was to retrieve the items of evidence that I was
8 requested to examine, and those were a stain, a faint
9 red-brown stain swab, that was taken from the bathroom wall
10 near the toilet, and also a .303 rifle. And it was to
11 examine both of those items for possible biological
12 material. And also, with regards to the rifle, to do swabs
13 from a number of locations for possible handler DNA.

14 Q. And once you had obtained those, what action did
15 you take?

16 A. I was able to -- or I obtained a positive result
17 for the presumptive presence of blood from the red-brown
18 stain swab which was from the bathroom wall near the toilet.
19 And for the rifle, I visually examined it and there was no
20 apparent bloodstains observed.

21 And I took a swabbing from the muzzle end and the
22 opening from the wood stock and barrel as a separate swab.

23 And then as a third swab I took a swab of the area
24 of the bolt-action mechanism, the trigger guard, and the
25 trigger, and those three areas were all combined.

1 For each of those four swabs that I have now, the
2 one from the bathroom and the three that were taken from the
3 rifle, I performed DNA typing analysis, and I obtained
4 results or attempted to obtain results for those samples.

5 I also obtained three reference samples in this
6 particular case -- one from David Morton, one from Robert
7 Morton, and one from Cynthia Morton -- and I performed DNA
8 typing analysis on each of those three reference samples as
9 well.

10 MR. WILLIAMS: May I approach, Your Honor?

11 THE COURT: You may.

12 MR. WILLIAMS: Approach the witness, Your Honor?

13 THE COURT: You may, sir.

14 BY MR. WILLIAMS:

15 Q. Okay. We're going to go through some evidence
16 here. I'll first hand you Exhibit 20.

17 MR. MOLEZZO: For the record, Your Honor, the
18 closing of that bag has already been breached.

19 THE COURT: It has. And it's in an open condition
20 as reflected previously from the record.

21 BY MR. WILLIAMS:

22 Q. So you said you had some blood swabs from the
23 bathroom?

24 A. Yes.

25 Q. How many swabs did you have?

1 A. In what was given to me as Control No. W-208222,
2 there was seven swabs.

3 Q. Could you open that bag, please.

4 A. Do you have gloves?

5 Q. Yes. Sorry. Pull out one of these swabs, please.
6 When you performed an analysis, would you have written
7 something on these swabs?

8 A. Yes. When I received the envelope from the
9 evidence section, I would have placed my name and the date I
10 received the item on the outside of the envelope, which I
11 have here and recognize my signature.

12 And then on the swab box inside, I would have the
13 case number, the Washoe County Crime Lab case number, the
14 date, and my initials.

15 Q. In looking at that --

16 A. And I do recognize that.

17 Q. Is that on there?

18 A. Yes.

19 Q. Do you recognize that as one of the swabs that you
20 performed -- you took out to perform an analysis on?

21 A. This -- actually I did not perform analysis on
22 this swab, but this is one of the swabs that was in the
23 container that -- they were all received together.

24 Q. Thank you. Could you look at each box and just
25 make sure that those are all the swabs that came to you.

1 A. And on each of these swabs, I am looking for the
2 red writing, which has the case number, the date, and my
3 initials.

4 MR. MOLEZZO: Objection. Nonresponsive.

5 THE COURT: Overruled. Go ahead. Please proceed.

6 BY MR. WILLIAMS:

7 Q. Did you observe your writing on each of those
8 swabs?

9 A. That's just what I'm doing as I place them back
10 in, yes.

11 Yes. Each one of these boxes possesses the case
12 number, the date, and my initials.

13 MR. WILLIAMS: I move to have this bag admitted
14 into evidence at this time.

15 MR. MOLEZZO: According to testimony, if I
16 understood correctly, at least one of the boxes, if I
17 understand, did not -- I'm sorry, I did not see her
18 testimony that she did not perform an analysis. Did I have
19 that correct?

20 THE COURT: Do you wish to do voir dire?

21 MR. MOLEZZO: May I, Judge, please? Thank you.

22 VOIR DIRE EXAMINATION

23 BY MR. MOLEZZO:

24 Q. Ms. Siewertsen, did you just testify that at least
25 to one of those containers you did not perform analysis?

1 Did I understand that, ma'am?

2 A. I only performed analysis on two of the swabs
3 located in this particular envelope: The swab which was
4 from the bathroom wall near a toilet and the water control
5 swab.

6 The other swabs, I examined the outside of them
7 but did not perform analysis on them.

8 MR. MOLEZZO: I would submit the authentication
9 process is complete as to only two of those items and ask
10 only those two that she performed the analysis be admitted.
11 Thank you.

12 MR. WILLIAMS: Your Honor, I think that's kind of
13 impractical. She testified that each of them were present
14 when she was performing analysis, and she only analyzed two
15 of them but the other four were there. I think they have
16 some evidentiary value. We would ask they all be admitted.

17 THE COURT: What is the evidentiary value, sir?

18 MR. WILLIAMS: Well, Your Honor, I think --

19 THE COURT: Having been analyzed, have evidentiary
20 value?

21 MR. WILLIAMS: Can I ask a follow-up question?

22 THE COURT: Yes, sir.

23 DIRECT EXAMINATION

24 (Resumed)

25 BY MR. WILLIAMS:

1 Q. Is there a way to tell which one of those swabs
2 were the ones you used for analysis, Ms. Siewertsen?

3 A. Yes.

4 Q. Could you pull out the two used for analysis,
5 then.

6 THE COURT: It might be helpful if you ask why the
7 others were not analyzed.

8 BY MR. WILLIAMS:

9 Q. Why were the other four swabs not analyzed as
10 evidence?

11 A. In this particular case they were all collected
12 from an area where there was a large amount of blood, and
13 the one swab was considered a representative swab for the
14 blood. There was no indications that there was more than
15 one bleeder.

16 THE COURT: Those analyzed are certainly
17 admissible. The others I don't know that they have any
18 evidentiary value, although I would suggest that we identify
19 them separately and they can be all be put back into the
20 same container. I don't want these floating loose, because
21 of the possible blood contamination.

22 But as far as being admissible, they have to be
23 relevant and assist the trier of fact with regard to any of
24 the facts here to make it admissible.

25 MR. WILLIAMS: That's fine, Your Honor.

1 MR. MOLEZZO: May I suggest, and thank you, Judge,
2 in reference to identification, if it's appropriate, for Ms.
3 Siewertsen to verify the two she did analyze and in front of
4 the jury, with a marker or something, add some type of
5 identifier since they're all going back into one bag, if
6 that makes sense.

7 MR. WILLIAMS: That's what she's doing right now,
8 Your Honor, finding the two she analyzed.

9 THE WITNESS: These are the two swabs that I
10 analyzed. Do you wish me to make a mark on them?

11 MR. MOLEZZO: If the Court would allow, I would
12 ask that.

13 MR. WILLIAMS: I'll get one of my pens, Your
14 Honor.

15 THE WITNESS: I would need a marker. I'm not sure
16 a pen will actually stay. That will.

17 MR. WILLIAMS: I figured red would be appropriate,
18 Your Honor, since it's blood.

19 THE COURT: The record should reflect that the two
20 items that she's identified she's now marking them with --
21 what kind of a marker is this?

22 THE WITNESS: I will write on the two boxes that
23 I'm going to use. They'll say "analyzed," and then I have
24 today's date with my initial.

25 THE COURT: What color pen is that?

1 THE WITNESS: Red marker.

2 THE COURT: Red marker. All right. The record
3 will so reflect. And those two are admitted into evidence.

4 (Portion of Exhibit 20 admitted.)

5 MR. WILLIAMS: We need a bag to put those two that
6 are in evidence separate.

7 THE COURT: We usually don't put evidence into
8 plastic bags.

9 THE WITNESS: I would recommend not a plastic bag.

10 MR. WILLIAMS: Whatever we can put it in that
11 would separate it, that would work.

12 THE COURT: What we'll do, we'll get some type of
13 paper envelope. Is that correct, ma'am.

14 THE WITNESS: An envelope would be best, yes.
15 Actually, if I can just wrap these two swabs in this
16 Kleenex, that will keep them separate in this envelope.

17 THE COURT: We will. I'll direct the clerk of the
18 court to prepare a separate envelope for those items so they
19 go to the jury appropriately in a separate envelope.

20 MR. WILLIAMS: Thank you, Your Honor. I'll take
21 the bag back from you and give it back to the clerk.

22 BY MR. WILLIAMS:

23 Q. Next I'm going to show you Exhibit 22. This bag
24 hasn't been opened, but there is a swab contained in it.

25 Did you analyze any of the items in that bag?

1 A. No, I did not.

2 Q. We'll move on, then. Do you need to open it to
3 see?

4 A. No, I believe this envelope and the envelope you
5 gave me initially were actually stapled together as one
6 item.

7 Q. Okay. I'll take that one back from you and we'll
8 move on.

9 THE COURT: The record should reflect we've been
10 handed an exhibit -- what's the number --

11 THE WITNESS: Court Exhibit 25.

12 THE COURT: Exhibit 25 for identification.

13 THE WITNESS: Yes, I recognize this. This is
14 under Control No. W-248359, and this is a reference sample
15 from Robert Morton.

16 BY MR. WILLIAMS:

17 Q. Did you perform an analysis using that sample?

18 A. This is the swab I used for analysis for the
19 reference sample from Robert Morton, yes.

20 Q. Thank you.

21 A. And I recognize it with the case number, the date,
22 and my initials.

23 MR. WILLIAMS: Has 25 been admitted? I move for
24 it to be admitted at this time.

25 MR. MOLEZZO: We have no objection.

1 THE COURT: It will be hereby admitted as Exhibit
2 25.

3 (Exhibit 25 admitted.)

4 BY MR. WILLIAMS:

5 Q. Hand you what's been marked as Exhibit 19.

6 A. Yes, I recognize this item. This item came in
7 under our Control No. W-208221, and this is the reference
8 sample from David Morton.

9 Q. Did you use that for analysis, that reference
10 sample?

11 A. This is the reference sample I used for analysis,
12 yes.

13 MR. WILLIAMS: I would move to have Exhibit 19
14 admitted into evidence, Your Honor.

15 MR. MOLEZZO: No objection.

16 THE COURT: It's hereby admitted as Exhibit 19.

17 (Exhibit 19 admitted.)

18 BY MR. WILLIAMS:

19 Q. Let's go back to the analysis you performed. You
20 stated the first thing you did was look at one of the blood
21 swabs that had come in. And then did you compare that blood
22 swab against anything?

23 A. I compared it against the three reference samples
24 I had in this case: One for David Morton, one for Robert
25 Morton, and one for Cynthia Morton.

1 Q. What conclusion did you come to when you made that
2 comparison?

3 A. Comparison of the DNA results show that the DNA
4 typing profile obtained from Cynthia Morton's reference
5 sample to be the same as the DNA typing profile obtained
6 from the red-stained bathroom wall near toilet swabs. Based
7 upon these results, Cynthia Morton is the source of this DNA
8 profile.

9 And this conclusion assumes that Cynthia Morton
10 does not have an identical twin. That assumption is there
11 because identical twins have the same DNA typing profile.
12 So I would not be able to distinguish identical twins.

13 Q. Once you were done with comparing the blood swabs,
14 did you next compare swabs that had come from the gun?

15 A. Yes, I did.

16 Q. Where did the first swab that you compared from
17 the gun -- what part of the gun did that come from?

18 A. The muzzle end and opening.

19 Q. And what comparison did you do with that swab?

20 A. I obtained no DNA typing results from that
21 particular swab. And so there was no comparison to perform.

22 Q. After you were done comparing that swab from that
23 part of the gun, did you compare a swab from another part of
24 the gun?

25 A. Yes. The swab from the wood stock and barrel of

1 the gun.

2 Q. What were the results of that comparison?

3 A. And for that one I obtained a low level of DNA
4 typing results, and I was unable to make any conclusions by
5 comparing to the reference samples. Just the amount of DNA
6 that I obtained was very low and I was not able to make any
7 conclusions.

8 Q. Did you compare next a swab from another part of
9 the gun?

10 A. The third area on the gun was the bolt-action
11 mechanism, trigger guard, and trigger. I swabbed all three
12 of those areas together on one swab.

13 Q. Were you able to come to any conclusions from that
14 part of the gun?

15 A. Robert Morton and Cynthia Morton are excluded as
16 sources of the low-level DNA that I obtained from the
17 bolt-action mechanism, trigger guard, trigger -- the trigger
18 itself -- swab. Due to a low level of DNA, I was not able
19 to make any conclusions with regards to the David Morton
20 reference sample.

21 Q. Now, not being able to make any conclusions, why
22 is that?

23 A. The detection limit or the ability for us to
24 detect the amount of DNA, there's a certain threshold that
25 we need to cross in order to be able to make conclusions for

1 that particular -- the questioned samples that we looked at.

2 We have actually two different levels at our lab.
3 One level is a level where we're confident that what we see
4 the results are are true results. And we can make
5 exclusions based on that particular level. So by comparing
6 the results from the questioned sample and the results from
7 the reference sample, if the reference samples do not
8 possess the results that the questioned samples do, we are
9 able to exclude those individuals.

10 We have a slightly higher threshold or a higher
11 level of DNA that's required in order to be able to include
12 some. The reason for that is the higher level is where
13 we're able to apply a statistic that gives you some idea of
14 how common or rare the results are that we obtained.

15 In this particular case, the results are above the
16 threshold where we're able to exclude individuals. But
17 where I'm unable to exclude an individual, the threshold has
18 not been met, we're unable to make a positive association
19 with the reference sample.

20 So in this particular case I was able to exclude
21 or had enough information to exclude Robert Morton and
22 Cynthia Morton, but I did not have sufficient information to
23 make any conclusions on the third reference sample.

24 MR. WILLIAMS: Thank you. No further questions
25 for this witness, Your Honor.

1 THE COURT: You may cross-examine.

2 MR. MOLEZZO: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. MOLEZZO:

5 Q. Ms. Siewertsen, you're employed by the Washoe
6 County Crime Lab?

7 A. Yes.

8 Q. I'll ask a closed question. And that works
9 closely with the police department, correct? You work
10 closely with law enforcement, correct?

11 A. I have associations with law enforcement, yes.

12 Q. Again, the title is Washoe County Crime Lab,
13 correct?

14 A. That's correct.

15 Q. And in a criminal case, in a capacity as a DNA
16 profiler -- these are my words -- you never testified for
17 the defense, have you?

18 A. Yes, I have.

19 Q. Have you testified for the defense as long as
20 you've been employed at the Washoe County Crime Lab?

21 A. No, I have not. I have not been required to
22 testify, no.

23 Q. Nor have you been called by a defense attorney in
24 the capacity you have now to testify, correct?

25 A. In the last year and a half, no.

1 Q. So, in fact, you're support staff for law
2 enforcement?

3 A. That's not correct.

4 Q. Well, we're going to talk about that. In
5 reference to cases, you primarily get assignments from law
6 enforcement; is that correct?

7 A. I receive assignments from individuals who are
8 investigating particular crimes. In the vast majority of
9 situations, that is generally law enforcement.

10 Q. But you're truly not an independent laboratory,
11 correct?

12 A. An independent laboratory? No. No, the
13 laboratory is part of the Washoe County Justice Department,
14 I guess.

15 Q. Thank you for your honesty. In fact, your checks
16 or your wages are from Washoe County. Do I have that
17 correct?

18 A. That's correct. I get paid by Washoe County.

19 Q. What I want to learn, and maybe you can help me,
20 is when you -- you get assigned various cases from law
21 enforcement; is that fair?

22 A. I get assigned various cases by individuals
23 investigating particular crimes. And in general that
24 usually is a police force.

25 Q. Ms. Siewertsen -- did I say that correctly?

1 A. Siewertsen, yes.

2 Q. I apologize. I notice you look at the jury.
3 You've testified before?

4 A. Yes, I have. I've been performing this type of
5 work for approximately 20 years.

6 Q. So you're comfortable testifying, clearly, you
7 would agree?

8 A. Comfortable, no.

9 Q. But you understand the dynamics of what you're
10 doing on the stand, correct?

11 A. My position on the stand is I'm a scientist. I
12 take items of evidence, and they are items of evidence, and
13 I perform DNA typing analysis, and I attempt to determine
14 the possible source of whatever evidence it is that I look
15 at. I do not get paid by who I happen to match things to or
16 who I don't happen to match things to.

17 The results are what the results are.

18 Q. Ms. Siewertsen, thank you for that. As a
19 scientist, your goal is to seek the truth. That's the
20 fundamental effort of science, would you agree?

21 A. My goal, I believe, would be able to get the most
22 information out of whatever it is that I'm doing within the
23 limitations of the technology that I'm using. Yes.

24 Q. Is that a yes or no, ma'am? I notice when I ask
25 you questions, you're testifying to the jury.

1 A. My understanding is the jury are the individuals
2 who are going to make the decisions in this particular case.
3 So they're the ones that need to hear the answers to the
4 questions you're asking.

5 Q. And thank you. So science is a search for truth
6 -- yes or no, please -- true science?

7 A. A search for -- it's a search for an answer to a
8 question. Truth, I hope, is the answer to the question.
9 So, I guess, yes.

10 Q. And thank you. And, in fact, true science is the
11 search for truth without violence, if that can be obtained,
12 you would agree?

13 A. I definitely would agree with that.

14 Q. Thank you for that. Now, in reference to this
15 case specifically, isn't it true that you get a request to
16 do what it is you do in this case from law enforcement? Is
17 that correct?

18 A. In this particular case, yes.

19 Q. Thank you. And these are my words. The
20 foundation of that -- in that request, you receive reports,
21 correct, before you do any testing, correct?

22 A. No. I very rarely receive reports. I receive
23 what's called investigative information. When I first
24 talked about what it is that I look at, I attempt to
25 identify a biological material. I need to know what kind of

1 biological material I'm looking for in order to --

2 Q. Ms. Siewertsen, thank you very much. Let me go a
3 little bit further, okay? I'm not trying to stop you from
4 sharing your knowledge, but I need to stay on track with a
5 few questions.

6 MR. WILLIAMS: Your Honor, I would object. She's
7 answering his questions. She has a right to finish her
8 answer.

9 MR. MOLEZZO: I would submit it's nonresponsive
10 and I need to --

11 THE COURT: Go ahead.

12 MR. MOLEZZO: -- ask questions.

13 THE COURT: Ask your next question.

14 MR. MOLEZZO: Thank you, Judge.

15 BY MR. MOLEZZO:

16 Q. If you can, let me finish the question and try to
17 answer as efficiently as you can. So you get reports.

18 A. No, I don't. I very rarely get reports.

19 Q. So it's your testimony under oath in this case you
20 did not get any reports? Yes or no.

21 A. I said I very rarely -- in this particular case.

22 Q. Ms. Siewertsen, please don't fence with me. In
23 this case, did you get a report?

24 MR. WILLIAMS: Objection, Your Honor. Badgering
25 the witness. She was trying to answer his question.

1 THE COURT: Do you understand the question now?

2 THE WITNESS: Yes.

3 THE COURT: The question is: Did you get reports
4 in this case.

5 THE WITNESS: I would have to look at my notes to
6 see if I had reports. I have no personal recollection of
7 obtaining reports.

8 BY MR. MOLEZZO:

9 Q. How did you prepare to testify today?

10 A. By reading my report.

11 Q. Well, Ms. Siewertsen, isn't it true that you
12 didn't just get a package and begin testing, correct?

13 A. I got a number of items, or a number of items were
14 submitted to the laboratory. I got a brief synopsis of the
15 particular scenario and what questions law enforcement was
16 attempting to answer in this particular case.

17 Q. And that answers my question. Thank you. In
18 reference to your testimony on a brief scenario, isn't it
19 true that that scenario shared with you a murder
20 investigation?

21 A. Oh, absolutely.

22 Q. Prior to you actually performing your tests,
23 correct?

24 A. As I was attempting to explain, I need to have
25 some idea of what I'm looking for when I look at the items.

1 So to know that it's a homicide investigation and I'm
2 potentially looking for blood is very important to my
3 analysis, yes.

4 Q. Well, Ms. Siewertsen, I don't see how that makes
5 sense. If you get blood swabs, isn't it fair to say that
6 you can perform your duties without knowing what the case is
7 about with a directive "check this blood against this gun"?
8 You could do that, correct, and not know what the case is
9 about, right?

10 A. Sure.

11 Q. Okay. In this case, it's your testimony that you
12 were aware there was a murder investigation, correct?

13 A. Yes.

14 Q. Would you agree or disagree that's inherently
15 biased?

16 A. I'm not sure I understand how it can be biased.

17 Q. Well, you work at the Washoe County Crime Lab,
18 correct?

19 A. That's correct.

20 Q. And it's a facility employed in the vast majority
21 by law enforcement; isn't that true? Or utilized, I'm
22 sorry. Utilized by law enforcement.

23 A. It's utilized by the justice system, through law
24 enforcement, but utilized for the justice system.

25 Q. In the prosecutorial area, you would agree, as

1 part of the justice system?

2 A. It's used to provide scientific evidence or
3 physical evidence from items left at crime scenes. I would
4 agree that in the vast majority of cases that particular
5 information generally supports the prosecution. However, it
6 does not always support the prosecution.

7 And who it supports is totally irrelevant to me.
8 I perform the analysis and I produce reports that had the
9 results of my analysis.

10 Q. Well, who it supports may be very relevant to this
11 jury. So let me ask you this: When you testified recently,
12 it doesn't always support -- you just said it doesn't always
13 support the prosecution; is that correct?

14 A. That's correct.

15 Q. And how do you base that testimony on? What do
16 you base that testimony on?

17 A. In the majority of cases where it does support the
18 prosecution, then a prosecution goes ahead. If I have a DNA
19 typing analysis where I have a reference sample from an
20 individual who is a suspect in a case and they do not match
21 the blood or whatever material is left behind at the crime,
22 that particular individual is very rarely charged with that
23 particular crime. The investigation goes to a different
24 avenue.

25 Q. In reference to this case, specifically, you were

1 not the individual in the field who collected the red or --
2 the bloodstains, correct?

3 A. That's correct, I was not.

4 Q. And thank you. What quality controls do you have
5 in place when you receive alleged evidence for law
6 enforcement? For example, do you photograph the package?

7 A. In my notes I record markings that are located on
8 the outside of the package, the unique identifier that we
9 use to trace the package itself, the packaging of the items
10 inside the package. Those are all particular things as far
11 as packaging goes.

12 Q. And thank you. So if I understand correctly, you
13 received materials, if you will, in packages for testing,
14 correct?

15 A. That's correct.

16 Q. And is that in an controlled environment? In
17 other words, do they just drop it off in a room? Or does it
18 depend what's in there? Do they put it in a fridge? Does
19 that make sense?

20 A. We have an evidence section at the Sheriff's
21 Department. Evidence is checked in in that evidence
22 section, and it's stored in particular locations. It may be
23 room temperature. It may be in a freezer. It may be in a
24 fridge, depending on the type of evidence that it is.

25 Q. Now, in reference -- and thank you. You testified

1 -- and this has already been admitted into evidence. For
2 the record, this is my photocopy per discovery.

3 Now, the prosecution -- and you corrected him, I
4 believe. This is not an affidavit, not a sworn affidavit,
5 correct?

6 A. That's correct. It's a report that's generated
7 that shows the items that I removed or took out from the
8 evidence section, what those particular items were, and the
9 results and conclusions of the particular analysis that I
10 performed.

11 Q. And thank you. And you testified in reference to
12 testing of the rifle; is that correct?

13 I'm sorry, ma'am?

14 A. I don't know what your question is.

15 Q. You testified regarding testing a rifle just
16 recently?

17 A. I didn't test the rifle for shooting. I --

18 Q. Swabbing the rifle?

19 A. I looked at the rifle for biological evidence, and
20 then I swabbed a number of areas to attempt to obtain
21 handler DNA.

22 Q. Now, in reference to your swabbing of that rifle,
23 you tell us in testimony that you swabbed the mechanism,
24 trigger guard, trigger. Do I have that correct?

25 A. I believe the third swab that I utilized I have

1 labeled as the bolt-action mechanism, trigger guard,
2 trigger.

3 Q. And thank you. And in your report, you tell us
4 that Robert Morton and Cynthia Morton are excluded, correct?

5 A. They are excluded from the low-level DNA results
6 that I obtained from that particular swab, yes.

7 Q. And then you go on further -- well, pursuant to
8 your report, you say that there was no conclusion of
9 reference to my client David Morton. Do I understand that
10 correctly?

11 A. That's correct. Due to the low level of DNA.

12 Q. Ma'am, I understand the low level. But you have
13 him excluded as well, correct?

14 A. No, I do not. I say that I cannot make any
15 conclusions for that particular reference sample.

16 Q. Ms. Siewertsen, I don't want to fence with you
17 over words, but if there's no conclusions, why isn't it
18 excluded?

19 A. Because I do not have sufficient information to
20 exclude that individual.

21 Q. Well, then draft a sentence as follows -- I'm
22 sorry. I'll rephrase.

23 You could easily say: Due to the low level of
24 DNA, no additional conclusions are being offered with
25 regards to Cynthia Morton. Couldn't you?

1 A. I have sufficient information from the low-level
2 DNA results that I was able to exclude her as the possible
3 source of that sample.

4 Q. And I apologize, Ms. Siewertsen. It seems to me
5 that you're hedging.

6 MR. WILLIAMS: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MR. MOLEZZO:

9 Q. I'm not very smart in DNA, so be patient. Robert
10 Morton and Cynthia Morton, the deceased, are excluded,
11 correct, from the trigger area?

12 A. That's correct.

13 Q. In your words, no additional conclusions in
14 regards to David Morton; is that correct?

15 A. Correct.

16 Q. Okay. So that means that in reference to the
17 rifle trigger area, Mr. Morton's DNA was not found?

18 A. That's not correct.

19 Q. Can I say that?

20 A. I can make no conclusions for his reference sample
21 because of the low level of DNA that I have.

22 Q. Ms. Siewertsen, there was no match, correct?

23 A. I can make no conclusion of his reference sample.
24 I cannot include or exclude. I can make no conclusion,
25 because I do not possess sufficient information.

1 Q. Again, one more time: So there's no match,
2 correct?

3 MR. WILLIAMS: Asked and answered. Objection.

4 MR. MOLEZZO: Your Honor, this is
5 cross-examination. May I have some leeway?

6 THE COURT: I know, but you only get to ask it
7 once. I think this has been asked and answered a couple of
8 times, maybe three times.

9 BY MR. MOLEZZO:

10 Q. So we don't know if his DNA was on it. Can I say
11 that?

12 MR. WILLIAMS: Objection. Same question.

13 MR. MOLEZZO: No, it's not the same question.

14 THE COURT: Ask the question.

15 BY MR. MOLEZZO:

16 Q. Can I say that? You don't know if his DNA was on
17 the gun.

18 A. I can make no conclusion regarding his reference
19 sample.

20 Q. I'll take that as a yes, Ms. Siewertsen.

21 MR. WILLIAMS: Objection, Your Honor.

22 THE COURT: Sustained.

23 MR. MOLEZZO: Withdrawn.

24 BY MR. MOLEZZO:

25 Q. And, again, looking at this report, is it fair to

1 say that you found no other DNA evidence referencing my
2 client on anything you received, in looking at this report?
3 Can I say that, ma'am?

4 A. For the one swab, which was from the muzzle end
5 and opening, I did not retain any DNA. From the swab that
6 was from the wood stock and barrel, I did obtain DNA but it
7 was of such a low level that I couldn't make any conclusions
8 regarding any reference samples.

9 So therefore the answer to your question is no, I
10 did not find any DNA -- other DNA or any DNA that
11 associates.

12 Q. Would you adopt this, then: You found no DNA in
13 reference to my client of evidentiary value. Can you adopt
14 that?

15 A. For the two swabs that I obtained too low DNA, I
16 do adopt that. For the other one, I can make no conclusion
17 with his reference sample.

18 MR. MOLEZZO: Court's indulgence, please, Your
19 Honor.

20 THE COURT: Yes, sir.

21 MR. MOLEZZO: Thank you. I have no further
22 questions for this witness.

23 THE COURT: Any redirect?

24 MR. WILLIAMS: No redirect, Your Honor.

25 THE COURT: All right. May she be excused to

1 return to her duties?

2 MR. MOLEZZO: Thank you for that courtesy. Would
3 I ask if the jury has any questions.

4 THE COURT: Ladies and gentlemen of the jury, do
5 you have any questions at this point that you would like to
6 ask? Now is the time. It appears not.

7 MR. MOLEZZO: Thank you.

8 THE COURT: You're excused to return to your
9 duties.

10 Thank you, ma'am, if you'd leave that. Is there
11 anything else you have as far as evidence?

12 THE WITNESS: No.

13 THE COURT: Let's take our first recess for this
14 morning.

15 Ladies and gentlemen, it's your duty not to
16 discuss among yourselves or with anyone else any matter
17 having to do with this case. It is your further duty not to
18 form or express any opinion with regard to the guilt or
19 innocence of the defendant until the case has been finally
20 submitted to you for your decision.

21 You're not to read any newspaper articles or
22 listen to or view any radio or television broadcasts
23 concerning this case.

24 Should any person attempt to discuss the case with
25 you or in any manner attempt to influence you with respect

1 to it, you are to advise the bailiff who will in turn advise
2 the Court.

3 We'll be in recess until the call of the Court.

4 (Recess taken at 9:54 a.m.)

5 (Whereupon the following proceedings were held in open
6 court, outside the presence of the jury.)

7 THE COURT: Court will come to order. Please be
8 seated. The record should reflect this is continuation of
9 Case No. CR09-5709, State of Nevada, plaintiff, versus David
10 Craig Morton, the defendant.

11 The record should reflect the presence of the
12 attorneys as well as the defendant. The record should
13 reflect the absence of the jury and the alternates.

14 Did you wish to go on the record prior to bringing
15 the jury in?

16 MR. WILLIAMS: The State has a request to bring
17 up, and we'll get the Court's ruling to this. Pursuant to
18 the testimony and questioning by the defense of the expert,
19 Dr. Clark, yesterday, Your Honor, in regards to cause of
20 death, the State is going to ask that it be allowed to call
21 Jessie Phillips, the victim of the mother -- I'm sorry, the
22 father of the victim. Got that wrong -- the father of the
23 victim, to testify concerning circumstances that went on
24 when our victim was in the hospital, Your Honor.

25 He has been in the courtroom. That's why I bring

1 it to the Court's attention. I know the rule of exclusion
2 was in place. He was not under subpoena. We were not aware
3 we were going to need him until the testimony was elicited
4 yesterday. That's why I put it before the Court, and I've
5 talked --

6 THE COURT: What is it you expect him to testify
7 to?

8 MR. WILLIAMS: Well, Your Honor, there was
9 significant testimony and implication by defense that
10 somehow the family could have been an intervening cause here
11 as to death. He would testify as to circumstances and why
12 they decided to pull the plug.

13 And also there was a lot of questioning of Officer
14 Garrison about him not being able to go to Reno to talk to
15 her. He would testify concerning how she was when she was
16 in the hospital. He visited her every day and would be the
17 person that would best know what her condition was when she
18 was in the hospital, whether he could communicate with her.
19 So it would be specific testimony to solely that topic.

20 THE COURT: Well, I'm not going to allow you to
21 call him in your case in chief. In the event there's some
22 appropriate rebuttal testimony, I might allow that. But
23 certainly not during your case in chief.

24 As you both know, I've prepared and shown you a
25 jury instruction that deals with that type of intervening

1 cause. And at this point I don't believe there's any
2 evidence that has been produced with regard to that. I know
3 there's been some questions about it, but I don't see at
4 this point it would necessitate being allowed to call a
5 person particularly that's been here during the trial in
6 your case in chief for that.

7 MR. WILLIAMS: We were not seeking to do it in our
8 case in chief. He would be a rebuttal witness.

9 THE COURT: We'll see how that works out. I'm not
10 going to rule on that.

11 Sir, do you have any comment?

12 MR. WILLIAMS: Thank you, Your Honor.

13 MR. MOLEZZO: For the most part, Your Honor, it's
14 not our duty to assist the prosecution in their theory of
15 the case. The question that we had in reference to Dr.
16 Ellen Clark was right on point. And it was derived
17 specifically from the discovery received.

18 This is fraught with reversible error, and we
19 would certainly object to it, and there's no question that
20 we're going to object to it if it's even called for
21 rebuttal.

22 And, again, Judge, I just want to make a record if
23 we agree on testimony from a gentleman who has been in these
24 proceedings the entire time, then the floodgates are open to
25 rebuttal, rebuttal, rebuttal.

1 But I don't see the foundation has been met. Of
2 course rebuttal is a different animal. But we object
3 throughout this trial process.

4 THE COURT: I understand that. But you need to
5 understand if you happen to open a door with regard to that
6 intervening cause in some fashion, that may open the door to
7 allow that to come in.

8 Now, as I understand the questioning from your
9 colleague with regard to Ellen Clark, the implication is
10 that your client didn't kill the decedent here but that she
11 died from some other cause.

12 MR. MOLEZZO: That's fine. But the medical
13 reports and the discovery suggests that there's an
14 alternative theory that may have occurred. It's not our
15 province to show our hand in reference to our theories.

16 THE COURT: I understand that. But they're going
17 to produce evidence if you open certain doors to rebut that.
18 I'm just putting you on notice.

19 MR. MOLEZZO: Judge, that's fine. Let me make a
20 record. If they want to rebut that, I submit let's get some
21 of the physicians out here from Renown in Reno as opposed to
22 a lay witness who has a passionate issue and it's his
23 daughter who is deceased.

24 Nothing further.

25 MR. WILLIAMS: Your Honor, he would also provide

1 testimony in regards to the questioning of Officer Garrison
2 with regard to whether the victim could communicate. That's
3 the other topic he would address in rebuttal.

4 THE COURT: I understand that. But the whole
5 point is that he's been sitting here during the trial.
6 Exclusion of witnesses indicates that you can't have a
7 witness sitting in here, a potential witness, and call them.
8 So you've got a problem with that.

9 So at this point I'm not allowing the testimony.

10 MR. WILLIAMS: That's fine, Your Honor. Thank
11 you. That's all we have.

12 THE COURT: Let's bring in the jury.

13 (Whereupon the following proceedings were held in open
14 court, in the presence of the jury.)

15 THE COURT: Court will come back to order. Please
16 be seated.

17 Counsel stipulate to the presence of the jury and
18 alternates?

19 MR. MOLEZZO: Defense so stipulates.

20 MR. WILLIAMS: The State will stipulate.

21 THE COURT: You may call your next witness, sir.

22 MR. WILLIAMS: The State will call Kevin Byrne to
23 the stand.

24 THE COURT: Sir, come forward and be sworn by the
25 court clerk. Raise your right hand.

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(Witness sworn.)

THE COURT: Please come and be seated at the witness stand. Please pull up to the microphone and state your name for the court reporter.

THE WITNESS: Kevin Byrne, B-y-r-n-e.

THE COURT: You may proceed on direct examination, sir.

MR. WILLIAMS: Thank you.

KEVIN BYRNE

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Byrne, where do you currently work at?

A. I work at the Washoe County Crime Lab.

Q. What is your position at the Washoe County Crime Lab?

A. I'm a certified latent print examiner.

THE COURT: Say that again.

THE WITNESS: A certified latent print examiner.

BY MR. WILLIAMS:

Q. Does that mean you deal with fingerprints?

A. That's correct.

Q. What kind of training have you had to go through to be a certified latent print examiner?

1 A. As a certified latent print examiner, I've had to
2 go through a training period. My certification is based off
3 of my years of experience as well as my educational
4 background, as well as a proficiency exam to become
5 certified.

6 Q. You mentioned education. Have you obtained a
7 degree?

8 A. Yes. I have a master's degree in general forensic
9 science from National in San Diego. I have a bachelor's
10 degree in criminal justice from Michigan State University.
11 And I have a certificate degree in forensic technology from
12 Grossmont College. That's also in San Diego.

13 Q. How long have you worked in the field of criminal
14 justice --

15 MR. MOLEZZO: We'll stipulate to Kevin's
16 qualifications, Mr. Byrne's qualifications.

17 THE COURT: And he will qualify to give his
18 opinion with regard to fingerprint analysis in comparison.

19 And again, ladies and gentlemen, you determine the
20 weight to be given to his testimony. But I've determined
21 that he can give opinion testimony in this field in which he
22 is qualified.

23 You may proceed.

24 MR. WILLIAMS: Thank you. Approach the witness,
25 Your Honor?

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1 THE COURT: You may, sir.

2 MR. WILLIAMS: Thank you.

3 BY MR. WILLIAMS:

4 Q. I'm going to hand you two things: First an
5 envelope marked Exhibit 28; secondly, a report marked as
6 Exhibit 29.

7 Let's turn first to the report, Mr. Byrne. Could
8 you look at that document, please.

9 A. Yes.

10 Q. And, first of all, did you perform analysis in the
11 case involving a suspect known as David Morton?

12 A. Yes, that's correct.

13 Q. And as part of your analysis, did you prepare a
14 report?

15 A. Yes, I did.

16 Q. Now, looking at that document, is that your name
17 at the bottom of the document?

18 A. That is.

19 Q. And is that your signature on the document?

20 A. Yes, it is.

21 Q. Now, are you the one that prepared that report?

22 A. Yes, I did.

23 Q. And looking at it, is that a fair and accurate
24 copy of your report?

25 A. Yes.

1 Q. Has it been altered in any way since you prepared
2 it?

3 A. No, it hasn't.

4 MR. WILLIAMS: I'd move to have this admitted into
5 evidence.

6 MR. MOLEZZO: No objection.

7 THE COURT: Exhibit 29 is hereby admitted.

8 (Exhibit 29 admitted.)

9 BY MR. WILLIAMS:

10 Q. Now, does that report detail the analysis you
11 performed in this case?

12 A. Yes.

13 Q. Okay. Let's go through your report, then. First
14 item in your report is that you received six latent lift
15 cards; is that correct?

16 A. Correct.

17 Q. Could you look at the other exhibit up there with
18 you, Exhibit 30. Is that Exhibit 30? Could you look on it,
19 make sure I have the right number?

20 A. 28.

21 Q. 28. Look at Exhibit 28. Do you recognize that
22 envelope?

23 A. Yes, I do.

24 Q. What is that envelope?

25 A. It is a S153 envelope, we term that, with six

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1 latent lift cards enclosed.

2 Q. Who did you get those cards from?

3 A. I received those from Washoe County evidence.

4 Q. Could you open up the envelope and look inside of
5 it. Are there six latent lift cards in that envelope?

6 A. Yes, there is.

7 Q. Are those the cards you were given?

8 A. Yes.

9 MR. WILLIAMS: Move to have Exhibit 28 admitted
10 into evidence, Your Honor.

11 MR. MOLEZZO: I apologize, Your Honor. I didn't
12 hear if Mr. Byrne indicated those were the cards he
13 analyzed. So I would submit the foundation has not been
14 met, if that's correct.

15 MR. WILLIAMS: I'm pretty sure I asked him the
16 question. I'll ask it again.

17 BY MR. WILLIAMS:

18 Q. Are those the cards that you analyzed in regard to
19 the suspect, David Morton?

20 A. Yes.

21 MR. MOLEZZO: I'm sorry, Counselor. No objection
22 to admission of Exhibit 28.

23 THE COURT: Exhibit 28 hereby admitted.

24 (Exhibit 28 admitted.)

25 BY MR. WILLIAMS:

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1 Q. When you received those cards, did you receive
2 some information where the cards came from?

3 A. The information where the cards came from is
4 included on the rear of the cards.

5 Q. According to those cards, where did the prints
6 come from?

7 A. Well, there's five latent lift cards that I deemed
8 of no value for comparison.

9 Q. What about the sixth one, the one that you did
10 look at, where did it come from?

11 A. The sixth latent lift card that I deemed of value
12 for comparison was from an item that has a sketch on the
13 back. It's labeled GBBSACO.1918SHTLE bolt-action rifle.

14 Q. Is there a drawing of a gun on that card as well?

15 A. Yes, there is. There's a diagram on the rear side
16 here.

17 Q. Why is there a diagram on there?

18 A. This is to indicate where the -- approximate
19 location where the latent lift came from.

20 Q. You know what, maybe we'll show that to the jury.

21 MR. WILLIAMS: May I approach the jury?

22 THE COURT: You may.

23 MR. WILLIAMS: I'll show that diagram quickly so
24 everybody can see it.

25 BY MR. WILLIAMS:

1 Q. So you said there was one card that had prints on
2 it that you could analyze?

3 A. That's correct. There's one card with latent
4 prints of value.

5 Q. In addition to those six cards, did you also get
6 some fingerprint cards from individuals?

7 A. That's correct. I received three sets of standard
8 fingerprint cards.

9 Q. And who did those cards come from?

10 A. In my report, I indicated there under Exhibit 2,
11 3, and 4, from Cynthia Morton, Robert J. Morton, and David
12 C. Morton.

13 Q. And did you compare each of those against the
14 print you were able to obtain?

15 A. Yes, I did.

16 Q. What were the results of that comparison?

17 A. My finding is that the Exhibit No. 1 was compared
18 against Exhibit No. 3, who is Robert Morton, and I
19 identified the right middle finger of Robert Morton.

20 Q. That was the only analysis that you performed in
21 regards to those cards, right?

22 A. That's correct.

23 MR. WILLIAMS: Nothing further for this witness.

24 THE COURT: You may cross-examine, sir.

25 MR. MOLEZZO: Thank you, Judge.

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CROSS-EXAMINATION

BY MR. MOLEZZO:

Q. May I refer to you as Mr. Byrne?

A. Mr. Byrne, yes, sir.

Q. Thank you, sir. Now, you already have a document in evidence, correct? You have a document -- I'm sorry, that's a report --

A. Under Exhibit No. 29, that's my latent print report.

Q. And that's about a page -- I guess it's just a page; is that correct?

A. That's correct. That's one page.

Q. Thank you, sir.

MR. MOLEZZO: And may I approach, Your Honor?

THE COURT: You may.

MR. MOLEZZO: Thank you, Judge.

BY MR. MOLEZZO:

Q. May I see your exhibit, please? Thank you, sir, very much.

Thank you. For the record, would you read the heading of that document, where it begins "Washoe County Sheriff."

A. Washoe County Sheriff's Office, Michael Haley, Sheriff, Forensic Science Division, 911 Parr Boulevard.

Shall I continue?

1 Q. No, sir, thank you very much. In reference to --
2 and I'm not too familiar with fingerprint stuff. You get
3 impressions or cards, correct?

4 A. That's correct.

5 Q. And in this case it was given to you by law
6 enforcement; isn't that right?

7 A. Well, in this instance I received it from the
8 Washoe County evidence section.

9 Q. So we can infer it was law enforcement that put it
10 there? Are you comfortable with that?

11 MR. WILLIAMS: Objection, Your Honor. Doesn't
12 have personal knowledge of it. He can't testify to it.

13 MR. MOLEZZO: Well, common sense --

14 THE COURT: He can answer the question. He's
15 indicated yes.

16 THE WITNESS: Yes, it is my indication this was
17 taken by a coworker of mine during latent print processing.

18 BY MR. MOLEZZO:

19 Q. Now, you shared with us or you testified that you
20 had print cards on a David Morton, my client, correct?

21 A. Correct.

22 Q. And thank you. And you had print cards from the
23 deceased person, Cynthia Morton; is that right?

24 A. Correct. Cynthia Morton as far as I know.

25 Q. And you also had a print card referencing Robert

1 Morton, correct?

2 A. Correct.

3 Q. Did you have any print cards referencing a Jessica
4 Morton?

5 A. No, I did not.

6 Q. And did you have any print cards referencing an
7 Anastasia Barsness?

8 A. No, I did not.

9 MR. MOLEZZO: Your Honor, Court's indulgence.

10 BY MR. MOLEZZO:

11 Q. Now, you showed us, at least I saw on the screen,
12 a sketch of a rifle; is that correct?

13 A. Yes. This appears to me to be a sketch of a rifle
14 on the back.

15 Q. And please help me. Did you actually -- you took
16 prints off that rifle? You've seen that rifle; is that
17 correct?

18 A. I did not do that myself. These were taken by a
19 coworker of mine.

20 Q. I see. So in relation to that sketch -- may I see
21 that, please?

22 MR. MOLEZZO: May I approach, Your Honor?

23 THE COURT: You may.

24 MR. MOLEZZO: Thank you.

25 BY MR. MOLEZZO:

1 Q. So in relation to that sketch, it's fair to say
2 that looks like a rifle, correct?

3 A. Correct.

4 Q. And stay with me. And that X would denote a
5 fingerprint; is that right?

6 A. That X with the box around it is where I assumed
7 that it's indicated where that print was taken from.

8 Q. Okay. And a fingerprint is the tips of our
9 fingers; is that right?

10 A. Correct. Fingerprint's a reproduction of the
11 impression on the tips of your fingers.

12 MR. MOLEZZO: And, for the record, I'm going
13 towards -- Bailiff, can you hand me that weapon, please --
14 the rifle at issue in this case for demonstrative purposes.
15 And for the record, I'm turning it away from the jury and
16 down to the ground.

17 BY MR. MOLEZZO:

18 Q. Now, in relation to that drawing, what we have is
19 one fingerprint; is that right? Am I making sense?

20 A. There was one fingerprint impression of value for
21 comparison.

22 Q. Do you know if it was an index or thumb?

23 A. It was a right middle finger.

24 Q. I'm sorry?

25 A. It was a right middle finger.

1 Q. So based upon your analysis and what you have,
2 that tells us nothing if the weapon was held or anything; it
3 would just be -- and, for the record, I'm putting my finger
4 -- it would just be something -- it could happen any way,
5 correct?

6 A. Yeah, it would be speculative as to how it was
7 touched and in what manner. But the right middle finger is
8 what came in contact there.

9 Q. And thank you for that. I'm returning this to the
10 bailiff.

11 And in reference to that weapon, with the cards
12 that you had in your possession, specifically the card of my
13 client, David Morton -- that's a long question -- you didn't
14 find any prints of value?

15 A. No. The only fingerprint of value that I compared
16 was identified to Robert Morton. Yes, correct, Robert
17 Morton.

18 Q. Yes, sir, thank you. And in reference to quality
19 control -- my words -- do you know who gave you those latent
20 cards?

21 A. Yes, I do. Specifically, it was -- those cards
22 were turned into Washoe County evidence at some point after
23 processing, and I received them from Washoe County evidence
24 as indicated on the latent print envelope.

25 Q. So you received it from Washoe County evidence,

1 but you're not sure who -- can you tell us who gave them to
2 Washoe County evidence?

3 A. Yes. As indicated on the chain of custody, the
4 latent print cards were -- it says Toni Leal-Olsen, and then
5 those were obtained from Toni Leal-Olsen. Gallagher is the
6 name of the Washoe County evidence technician. And then I
7 received them from Washoe County evidence.

8 Q. And thank you.

9 A. As indicated by Gallagher.

10 Q. Do you know this other person, this Gallagher/Leal
11 person?

12 A. Toni Leal-Olsen?

13 Q. Yes, sir.

14 A. Yes. She's a coworker of mine.

15 Q. And she receives evidence; is that part of her
16 duty?

17 A. As far as --

18 Q. If you have personal knowledge.

19 A. Well, yes, I do know she receives evidence,
20 processes it.

21 Q. Does she have the same status as you, or --

22 A. No, she has a different designation. She's a
23 crime scene investigator.

24 Q. Like "CSI" on TV kind of thing?

25 A. I don't know about on TV. But that's her job

1 title.

2 Q. Crime scene investigator, that's what she does?

3 A. That's her title, yes.

4 Q. Did you receive any other items as -- personal

5 knowledge, did you get any other items from the crime scene,

6 sir?

7 A. No. The items that I received are just what's

8 indicated in the report.

9 Q. Did you receive any shell casings, sir?

10 A. No, I did not.

11 Q. Shells?

12 A. No, I did not.

13 Q. Thank you. Let me ask this: There's various

14 surfaces that are better for fingerprints, you would agree,

15 correct?

16 A. Some surfaces are better than others.

17 Q. Okay. Glass would probably be a good surface, you

18 would agree?

19 A. Depends on if there's anything on the substrate.

20 Any relatively smooth, flat surface tends to be conducive to

21 fingerprints.

22 Q. Conducive. That means that fingerprints are

23 probably easier found on good surfaces?

24 A. That's correct. That would be another way of

25 saying it.

1 Q. And would brass, smooth brass, be a good surface?
2 Again, in your opinion.

3 A. No. Those generally tend to be a difficult
4 surface for fingerprint processing.

5 Q. Well, why would that be so, sir?

6 A. It's the nature of the casings. Smooth brass in
7 relation to the way that we generally receive it, it tends
8 to be in the form of a casing.

9 That tends to be a difficult surface, because it's
10 small, it's rounded. Metal tends to -- latent print residue
11 that's on a metal surface tends to smear very easily.
12 Overall, it tends to be one of the more difficult surfaces.

13 Q. Okay. Isn't it fair to say that if the casing's
14 big enough and it wasn't smeared, it would be a good
15 surface?

16 A. Yes. I found in my experience the bigger the
17 casing, the larger the casing, that's been easier to obtain
18 a print from.

19 Q. And, of course, the smearing thing that you shared
20 with the jury, it could happen anywhere; is that fair to
21 say? On glass or whatever?

22 A. It could happen in any manner, way, shape, or
23 form, yes.

24 Q. In this case, specifically, did you test any
25 shells? I'm sorry if I asked that. Did you test any

1 shells?

2 MR. WILLIAMS: Objection, Your Honor.

3 THE COURT: He asked shell casings; now he's
4 asking if there's any shells --

5 MR. MOLEZZO: Yes. Thank you, Judge.

6 BY MR. MOLEZZO:

7 Q. Did you test any live shells, live rounds?

8 A. No, I did not.

9 Q. Did you test any rifle shells, sir?

10 A. No, I did not.

11 MR. MOLEZZO: I have nothing further for this
12 witness. Thank you.

13 MR. WILLIAMS: Just a couple of clarifiers.

14 REDIRECT EXAMINATION

15 BY MR. WILLIAMS:

16 Q. Mr. Byrne, is it safe to say that what you do is
17 someone lifts a print, then they send them to you, and then
18 you test them? Is that typically your duty?

19 A. Yes. Typically I will receive fingerprints that
20 somebody processed an item. They're given to me and I do
21 the comparisons on them.

22 Q. So you wouldn't actually receive the shells
23 themselves; you would receive any prints that came off the
24 shells if the shell was tested?

25 A. That's correct. That's what would happen here.

1 Q. Same thing with, per se, a gun: Someone would go
2 through like happened here, pull the prints off, and --

3 MR. MOLEZZO: Objection. Leading.

4 THE COURT: Go ahead.

5 MR. MOLEZZO: Thank you.

6 THE COURT: It will get us through faster.

7 BY MR. WILLIAMS:

8 Q. Someone would go to something like a gun, pull the
9 prints off, and then they would send them to you, right?

10 A. That's correct.

11 Q. You said that some surfaces are better than others
12 for fingerprints?

13 A. Yes, I did.

14 Q. What's your experience with gun barrels, if you
15 have any?

16 A. I've processed many, many weapons and firearms. I
17 worked overseas in Iraq as a DOD contractor for the NCIS lab
18 in Fallujah. We received many, many weapons. Typically
19 weapons are similar to shell casings, where they're
20 difficult. There's many scored surfaces on weapons that
21 make it difficult to obtain an identifiable print.

22 Q. If the weapon has wood on it, like the gun you saw
23 here, would it make it easier to find a print?

24 A. That would make it easier. Yeah, typically with a
25 rifle stock, it would be an easier surface than, say, the

1 gun metal, the grip, the barrel, those types of areas.

2 MR. WILLIAMS: No further questions, Your Honor.

3 Thank you.

4 THE COURT: Recross? Recross-examination?

5 RECROSS-EXAMINATION

6 BY MR. MOLEZZO:

7 Q. You're not saying that if it's difficult it
8 shouldn't be tested, correct?

9 A. No, I'm not saying that at all.

10 MR. MOLEZZO: I have nothing further. I'll submit
11 it to the jury, Your Honor.

12 THE COURT: Ladies and gentlemen of the jury, do
13 you have any questions of this witness? It appears there
14 are no questions.

15 Sir, you may be excused to return to your duties.

16 THE WITNESS: Thank you.

17 THE COURT: Let's make sure we leave the exhibit
18 there.

19 Mr. Bailiff, will you get the other part of the
20 exhibit and put it together. I think there's one on the...

21 The State, you may call your next witness, please.

22 MR. SMITH: Kerri Heward, Your Honor, is the
23 State's next witness.

24 THE COURT: Come forward and be sworn by the
25 clerk, please.

1 (Witness sworn.)

2 THE COURT: Please be seated at the witness stand.
3 After you're seated, please pull up the microphone and speak
4 directly into the microphone, please.

5 Would you please state your name for the record.

6 THE WITNESS: My name is Kerri Heward. It's
7 spelled K-e-r-r-i H-e-w-a-r-d.

8 THE COURT: You may proceed on direct examination,
9 sir.

10 MR. SMITH: Thank you, Your Honor.

11 KERRI HEWARD called as a witness on behalf of the
12 Plaintiff, having been first duly sworn, was examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SMITH:

16 Q. Ms. Heward, where are you currently employed?

17 A. I work for the Washoe County Sheriff's Office in
18 the forensic science division.

19 Q. How long have you been employed with the Washoe
20 County Crime Lab?

21 A. Almost three years there.

22 Q. Have you worked in a crime lab prior to working at
23 the Washoe County Crime Lab?

24 A. Yes. Prior to coming to the Washoe County Crime
25 Lab, I worked at the San Bernardino Sheriff's Office crime

1 lab for about 13 years.

2 Q. What were your duties while you were in San the
3 Diego crime lab?

4 A. In San Bernardino, most of the time --

5 Q. Sorry.

6 A. -- that I worked there I spent working in the
7 firearms section doing firearm comparison-type casework.

8 Q. What are your duties at the Washoe County Crime
9 Lab at this time?

10 A. I'm a supervising criminalist at the crime lab,
11 and I supervise firearms, trace, breath alcohol, and the
12 drug section.

13 Currently, however, I am doing firearms cases
14 because our firearms examiner left and we were unable to
15 find a qualified person to come in that could just begin
16 casework.

17 And the training period for a firearms examiner is
18 about two years. So we have hired a trainee; it will be a
19 two-year period before he'll be able to do casework.

20 Q. What education and training have you received to
21 qualify you to do this work with the Washoe County Crime
22 Lab?

23 A. To work as a criminalist in the crime lab I have a
24 Bachelor's degree in biology. I was actually trained in the
25 San Bernardino County firearms section to do firearms

1 analysis. So I went through a training program there.

2 And in addition to the training program there, I
3 also received training through the FBI academy at Quantico
4 through the Department of Justice in California. They have
5 an organization called the California Criminalistics
6 Institute where they teach classes.

7 I've attended training through an organization
8 that I belong to called the Association of Firearm and
9 Toolmark Examiners. And I've taken a couple of armor
10 courses through Glock arms and Sig arms as well.

11 Q. Now, in these years of doing this work, have you
12 ever been qualified as a criminalist to testify as an expert
13 in court?

14 A. Yes. In California, both San Bernardino County
15 and in Los Angeles County also, I've qualified hundreds of
16 times, over 100 times specifically, in firearms. And I've
17 also qualified in federal court in New Mexico as well.

18 Q. How many times have you qualified in the state of
19 Nevada to testify as an expert as a criminalist?

20 A. I've qualified three times in Nevada.

21 Q. Have you performed any tests on any clothing that
22 belonged to Cynthia Morton?

23 A. Yes, I did.

24 Q. And have you performed any tests on a rifle that
25 was involved with the Cynthia Morton case?

1 A. Yes, I did.

2 MR. SMITH: Your Honor, at this time the State
3 would move for this witness to be qualified as an expert to
4 give opinion testimony both as to the weapon and to the
5 clothing.

6 MR. MOLEZZO: May I ask some questions on voir
7 dire, Your Honor?

8 THE COURT: Yes, you may.

9 VOIR DIRE EXAMINATION

10 BY MR. MOLEZZO:

11 Q. Ms. Heward, you haven't been qualified in Sixth
12 Judicial, Humboldt County, correct?

13 A. No. The three times I testified were in the
14 district in Reno, Nevada.

15 Q. Thank you for your honesty. In reference to your
16 prior qualification testimony, was it specific gun-related
17 testimony or other things?

18 A. I have testified hundreds of times in a variety --

19 Q. I'm sorry, in reference to the three times in --

20 A. In Nevada only?

21 Q. Yes, ma'am.

22 A. Yes, they were all three gun-related.

23 MR. MOLEZZO: I'll submit it, Your Honor.

24 THE COURT: The Court recognizes Ms. Heward as an
25 expert to give testimony as a criminalist with regard to

1 firearms examination and other duties relating to a
2 criminalist.

3 And, again, ladies and gentlemen, she's allowed to
4 give testimony in her field of expertise. You'll determine
5 what weight to give to the testimony.

6 You may proceed, counselor.

7 MR. SMITH: Thank you.

8 DIRECT EXAMINATION

9 (Resumed)

10 BY MR. SMITH:

11 Q. Ms. Heward, did you test any pants in regard to
12 the Cynthia Morton case?

13 A. Yes. I received a pair of pajama pants. They
14 were light gray color with a flower pattern on them.

15 Q. Can you please describe the overall condition of
16 those pants.

17 A. The pajama pants were very worn. The fabric was
18 very worn. They were covered with hair. Some that appeared
19 to be human hair; some appeared to be animal hair. There
20 was some blood spots and some blood wipe on the pajama
21 shorts.

22 And both items, the pajama top and bottom, that
23 we'll talk about were covered with what appeared to be some
24 sort of a body fluid. It had a waxy, greasy consistency to
25 it.

1 Q. And were you able to make any determinations that
2 had evidentiary value off of the pants that you examined?

3 A. I examined the pants under a microscope looking
4 for any apparent bullet holes or gunshot residue. And I
5 didn't observe any on the pants. So that was the extent of
6 my examination.

7 I did use an infrared feature on a videocamera,
8 because sometimes it helps to wash out the color of a
9 pattern on material and makes the gunshot residue more
10 visible. It didn't help in this case, however.

11 Q. Now, let me draw your attention to Mrs. Cynthia
12 Morton's top. Did you examine that?

13 A. Yes, I did.

14 Q. Can you again give us an overall description of
15 this top, what it is that we're talking about.

16 A. The top was a matching color and pattern to the
17 shorts. It was a pajama top. It did have what appeared to
18 be a cut up the side of it. But there were several holes in
19 the front. One was a large gaping hole. There were several
20 smaller holes around it.

21 There was a very distinct hole in the back that
22 did look like a bullet hole. On the front, I didn't see
23 anything that looked specifically like a bullet hole. It
24 was covered in what appeared to be blood and tissue or body
25 fluid that was rather oily and waxy. And it also was

1 covered with hair, both appeared to be animal and human.

2 And the material was very worn.

3 Q. What, if any, tests did you perform on this pajama
4 top?

5 A. I began by looking at the pajama top under a
6 microscope to see if I could see any gun residue or bullet
7 holes. As I said, I could see a very distinct hole in the
8 back that looked like a bullet hole. And the front had
9 several holes, and I wasn't able to see a clear bullet hole.

10 I did see some particles on the front of the big
11 gaping hole that appeared to be partially burned gun powder,
12 and I saw one particle on the back that appeared that it
13 could be.

14 They are loosely adhering. So rather than risk
15 losing those particles as evidence by trying to wash the
16 blood out of it, I went straight to the second test, which
17 is a test for partially burned gunpowder, and you do this
18 test by treating photographic paper with some chemicals.

19 And when you actually use an iron and acidic acid,
20 which is vinegar, to transfer those particles, if they're
21 there, onto the photographic page, it turns orange. It has
22 orange dots where there is partially burned gunpowder
23 present.

24 I did see a few orange spots, but I didn't see a
25 pattern. And what I'm looking for is a pattern that would

1 indicate how far away the muzzle of the firearm was from the
2 fabric when it was fired.

3 And the way that I can determine this is when a
4 bullet is fired from a gun and it leaves the barrel, behind
5 it and around it gunpowder that's not burned, partially
6 burned, in the stages of burning, follow it. And it follows
7 it and it leaves in a conical shape.

8 So the further away from the barrel of the gun
9 this powder travels -- and it only travels for a certain
10 distance, depending on the powder and the type of gun -- the
11 pattern is going to get wider --

12 MR. MOLEZZO: Objection. Nonresponsive. The
13 question I think was related specifically to the garment.

14 THE COURT: I think she's explaining that. Go
15 ahead, ma'am.

16 MR. MOLEZZO: Thank you.

17 THE WITNESS: So as that -- as the powder leaves
18 the barrel of the gun, the pattern gets wider and the powder
19 particles get less dense.

20 So what -- my test would be to see if I could find
21 this rather round shaped pattern of particles, and then the
22 next step would be by using the gun and the ammunition in
23 question I would do tests and compare them to see if there
24 was a pattern that was similar in size and density to one I
25 might find on the pajama top.

1 Well, I didn't find a pattern on the pajama top.
2 So I was unable to determine a distance based on that.

3 One other test that I do, it's called a sodium
4 rhodizonate test and it tests for lead. And what happens
5 also as the bullet is leaving the barrel of the firearm and
6 the powder particles are flying with it and after it, kind
7 of a puff of smoke that's kind of a sooty nature will leave
8 the barrel also.

9 And that lead comes from the primer of the
10 cartridge. That's the -- the primer is the area that
11 contains the explosive in the cartridge that when the firing
12 pin hits it, it ignites and burns the gunpowder in the gun
13 and that's what causes it to fire. And also lead residues
14 in the barrel leave at that point as well.

15 This little puff of smoke will only go a short
16 distance. No more than, say, 12 inches, generally. Usually
17 even closer than that. So the second test was looking for
18 lead. So if I had seen indications of lead, then that would
19 have told me that's a close shot.

20 I didn't see any indications of lead. But the top
21 was in such poor condition, I can't be sure that it was or
22 wasn't there, because of all of that apparent blood and
23 fatty tissue-type stuff that I was seeing.

24 BY MR. SMITH:

25 Q. So let me ask you a couple more questions about

1 the gunshot residue test. Now, you explained how it
2 generally works, and you indicated that you didn't find a
3 pattern. Is the gunshot residue test that they do off of
4 people's hands the same gunshot residue test that you're
5 telling us about here?

6 A. No, that's a completely different test. What is
7 being collected off somebody's hands with what is usually
8 referred to as a sticky disk is analyzed by a scanning
9 electron microscope. And it takes a picture of the gunshot
10 particles at a very, very magnified rate. And it actually
11 analyzes the elements contained within it.

12 My test is doing a color test for a particular
13 compound that's in it. There are two different approaches,
14 two different sets of chemical testing.

15 Q. I know that that's not the test that you did, but
16 there was previous testimony about that. So I'm going to
17 ask you a couple other questions about that.

18 What are those tests used for when they're taken
19 off of people's hands?

20 A. That test can identify gunshot particles.

21 Q. Okay. Was that test something that used to be
22 done?

23 A. That test has been done, and I described it to you
24 as the scanning electron microscope type, SEM. Prior to
25 that, there was another type of instrument that they used to

1 analyze gunshot particles before SEM came into being, and it
2 tested for antimony and barium by a different instrument.
3 They were both for testing on hands.

4 We don't have a scanning electron microscope in
5 our laboratory, nor do we have the instrument that the
6 antimony and barium test is done on.

7 Q. And, in fact, does the FBI do that test?

8 A. There are several laboratories that do that test.
9 But we don't offer that at our laboratory.

10 Q. Let's move forward, then. When you indicated the
11 sooting, you indicated you didn't find any sooting, was
12 there other things that you were looking for when you were
13 looking for the sooting also?

14 A. I also looked for what I call bullet wipe. And
15 when a bullet goes through a piece of cloth, it leaves a
16 dark circle around it. Even from a distance it will leave
17 that dark circle. The sooting is specifically something
18 that happens when it's a close shot.

19 So I was looking for that dark ring around any of
20 those holes to try to help me determine which may be an
21 entry hole.

22 Q. Were you able to find any of that?

23 A. I was not.

24 Q. Why not?

25 A. The front of the shirt had multiple holes, and I

1 was unable to tell either by using any of the color tests
2 for lead or for the gunshot residue which one of those might
3 be an entry wound.

4 If I were to consider the large gaping hole,
5 that's more consistent with a contact type of a shot. Yet,
6 there was no sooting. So those results were in conflict
7 with one another.

8 So my overall results for that testing was
9 inconclusive. I couldn't tell if it was up close or if it
10 was further back, because the sets of tests that I did
11 contradicted each other.

12 Q. Now, is there any reason why, in your opinion,
13 based off this garment -- why that might be the case?

14 A. The garment may have had some of those holes in it
15 before any incident ever happened, based on the wear that I
16 observed in it.

17 And the holes didn't have edges that looked like
18 they were cut. They looked as if they were torn or worn in
19 some fashion.

20 I just was unable to tell which one of those might
21 be the entry hole. Although, I was able to see a very
22 distinct hole in the back. I was not able to see that in
23 the front.

24 Q. Thank you.

25 MR. SMITH: Bailiff, could I ask you to please

1 take Exhibit 6, State's Exhibit 6, and show it to the
2 witness at this time.

3 BY MR. SMITH:

4 Q. We are now showing you what's been previously
5 marked as State's Exhibit 6. Do you recognize this?

6 A. That does look like the gun minus the bolt that I
7 did examine. It had very few marks on it, but it did have a
8 serial number that was on the barrel.

9 Can I see that serial number to verify that?

10 THE COURT: Take it over closer.

11 THE WITNESS: Do you see the serial number on
12 that? My eyes don't work so well without my glasses.

13 MR. MOLEZZO: I'm sorry, I can't hear.

14 THE WITNESS: I said my eyes don't work so well
15 without my glasses.

16 I'm referring to the first page of my report, and
17 I did confirm that the serial number that I see on the gun
18 is J18372.

19 BY MR. SMITH:

20 Q. So this is the rifle you performed tests on?

21 A. Yes.

22 Q. Could you walk the Court through what tests you
23 did with this rifle and in the order that you did it.

24 A. I have a worksheet that I go through when I look
25 at firearms. And the first thing that I do is to look at

1 it, record any markings that might be on it. And this did
2 not have a manufacturer or a model number actually written
3 on the gun.

4 It did say BSA for -- I'd have to look it up --
5 British -- I'll refer to the first page of my note --
6 Birmingham Small Arms Company, Limited, and it had the
7 serial number that I read on it.

8 I noted that. I looked for -- when I refer to as
9 trace evidence -- anything that's on there that I would want
10 to collect. And I did find a piece of fibrous material that
11 I removed and put it into a Ziploc bag and stored with the
12 gun. I put a barrel patch down the barrel of the gun to
13 make sure that there wasn't anything blocking it.

14 I then looked to see if there were any safety
15 levers on the gun. It did not have any. This is a
16 bolt-action-type of gun, which means that it doesn't work
17 like a semi-automatic gun. One pull of the trigger will
18 fire one round.

19 And then to extract it, you have to manually lift
20 up on the bolt, pull to the rear to extract it, and then to
21 do the reverse, to chamber another round, assuming there's
22 another one in the magazine.

23 So this one doesn't have a safety device, nor does
24 it have what we call a disconnecter, which is a mechanism in
25 a semi-automatic firearm that doesn't allow more than one

1 shot to be fired with a single pull of the trigger. This
2 doesn't work that way.

3 So that is what I do to term that it's safe for me
4 to fire; that there's nothing in the barrel and everything
5 seems to be working properly.

6 And I measured the trigger pull weight also on
7 this firearm. And I do that simply by pointing the gun
8 straight up and hanging weights from it -- they're called
9 armorer's weights -- from the trigger, and adding weights
10 until it actually pulls that trigger to the rear and the
11 firing mechanism goes forward. I measured that at three and
12 a half pounds.

13 Q. All right. Let me hand you what's been previously
14 marked as State's Exhibit 31.

15 MR. SMITH: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. SMITH: I've already shown this to defense
18 counsel.

19 BY MR. SMITH:

20 Q. Would you take a moment and look at this document.

21 A. This is a copy of the report that I issued.

22 Q. Before you show it to them, let's go through the
23 rest of the steps of entering it into evidence. That's
24 okay.

25 Do you recognize this document?

1 A. Yes.

2 Q. What is this a document of?

3 A. This is the report of my findings that I issued
4 after doing the work.

5 Q. On page 4 of that document, is that your
6 signature?

7 A. Yes, it is.

8 Q. After reviewing this document, does it appear to
9 be altered in any way from the original document that you
10 created?

11 A. No.

12 MR. SMITH: Your Honor, the State would move for
13 State's Exhibit 31 to be admitted into evidence at this
14 time.

15 MR. MOLEZZO: No objection.

16 THE COURT: State's Exhibit 31 will be admitted.
17 (Exhibit 31 admitted.)

18 BY MR. SMITH:

19 Q. I just noticed that you referred to your notes.
20 Now, if you would refer to the note that's actually in the
21 exhibit, that would be appreciated.

22 So I wanted to ask you a couple of questions about
23 trigger pull a little bit more. You explained how you did
24 that.

25 Now, I believe you stated that the bolt was in the

1 rifle; is that true?

2 A. The bolt, when I received it, was out of the
3 rifle. I had to put it in in order to test it.

4 Q. Okay. And why did you put the bolt in when you
5 did the trigger pull test?

6 A. It's part of the mechanism for firing. And that
7 would be needed to be assembled in order to get an accurate
8 trigger pull.

9 Q. So if the bolt was missing and you did a trigger
10 pull test, that would not be an accurate representation?

11 A. That would not. And I've never actually done a
12 trigger pull with a piece of the gun missing, because it
13 just wouldn't occur to me to measure something that wasn't
14 the full assembly.

15 Q. Now, what did you do next after you tested the
16 trigger pull?

17 A. After I determined that the gun was safe to fire,
18 then I test fired it in the water tank that we have at the
19 laboratory. And it's just simply a long, horizontal tank of
20 water that we test fire into because the water stops the
21 bullet and leaves it in a condition that I can then fish out
22 of the tank and look at under the microscope for comparison
23 to evidence from the scene.

24 And the cartridge case would be manually extracted
25 in the way that I explained by pulling the bolt to the rear.

1 And then the cartridge case would extract in that way so I
2 could also compare that under the microscope as well.

3 Q. And then what did you do after you fired this
4 weapon into the water tank to make sure it was safe? What
5 did you do next?

6 A. I obtained the bullets in the cartridge cases that
7 I had for that purpose. And those were going to be used to
8 compare to the fired cartridge cases submitted.

9 I also did additional test firing for the purpose
10 of distance determination. I wanted to see with that gun
11 what I would expect to see as far as a pattern of powder
12 particles and the sooting, how far out I would expect to see
13 that sooting. Even though I didn't see any on the pajama
14 top, I wanted to know what the expectation should be.

15 So I did a series of tests from contact to 10
16 feet, using ammunition that I got at the laboratory. There
17 were four cartridges that were submitted unfired as part of
18 this case. And after having fired those contact of 10 feet
19 with laboratory ammunition, then I chose a few key distances
20 to utilize the cartridges that were like the one that was
21 found with the fire cartridge case at the scene so I could
22 see if they were consistent with that.

23 Q. How many times did you shoot the weapon between
24 contact and 10 feet with the laboratory ammunition?

25 A. I believe 13.

1 Q. And how many times -- I think you already
2 testified to this, but how many times did you shoot the
3 weapon with the ammunition that was sent in that was with
4 the weapon?

5 A. There were four cartridges. I fired three of
6 them. And I took one and disassembled it because I wanted
7 to have a representative of the components of those
8 cartridges. I wanted to see what the powder looked like
9 inside as compared to the powder inside the cartridges from
10 the laboratory ammunition that I used.

11 Q. And was the powder dissimilar?

12 A. It was dissimilar from what I used in the
13 laboratory.

14 Q. Do you believe that the powder that you used would
15 have given you a comparison?

16 A. It was slightly different. But because there were
17 no results on the pajama top, it wasn't different enough to
18 be of any concern.

19 Q. Okay. Now, then, how many times did you fire this
20 weapon while it was in your possession?

21 A. At least 20.

22 Q. Now, in what manner did you fire this weapon?

23 A. I fired it from the shoulder, in the normal
24 expected position.

25 Q. And did you -- you must have, but I'm going to ask

1 it anyway -- so did you activate the bolt-action each time?

2 A. Yes. When I fired each of these, I actually fired
3 one at a time from the chamber. So I would put one into the
4 chamber, put the bolt forward, fire it, pull the bolt to the
5 rear, extract the cartridge case that I just fired, put a
6 new cartridge case in. I didn't load from the magazine.

7 Q. Now, when you were doing this, at any time did you
8 have a problem with the weapon?

9 A. No.

10 Q. Did you have any problem activating the bolt?

11 A. No.

12 Q. Did you have any problem with the trigger?

13 A. No.

14 Q. Did you have any problem in these 20-plus times
15 that you fired the weapon with it misfiring?

16 A. No.

17 Q. Were there any characteristics about this gun
18 while you were doing this that caused you any concern about
19 the operation of the weapon?

20 A. No.

21 Q. Did you do any shell casing comparisons?

22 A. Yes. I received one fired cartridge case from the
23 scene, and I compared that under the microscope to test
24 fired cartridge cases that I had fired.

25 Q. And how did you go about doing that?

1 A. I'd like to first explain to you how the cartridge
2 case gets marked and that would make it easier for me to
3 explain it.

4 Q. Please do.

5 A. So when a gun fires, the way that it works is the
6 firing pin hits the primer of the cartridge. That's the
7 small round area on the back end where usually the
8 manufacturer puts its name around that.

9 The primer contains an explosive material. So
10 when the firing pin hits the primer, it explodes. It
11 ignites the powder contained within the cartridge case. It
12 builds up a tremendous amount of pressure.

13 And that pressure pushes the bullet out the barrel
14 of the firearm, and it also takes the cartridge case and
15 slams it back against the back of the firearm where the
16 firing pin protrudes. That's called the breach.

17 As all these things are moving, the pieces of the
18 firearm have the potential to mark it. So the primer has a
19 softer metal than the rest of the case, and that's usually
20 marked more heavily as it hits the breach face and as the
21 firing pin hits it.

22 But there are other areas that can be marked also.
23 The area of the gun that holds the cartridge while it's
24 being fired is the chamber. It moves a short distance in
25 there. That can mark it.

1 When it's extracted, there are marks that can be
2 made on it at that time as well. So we have all these
3 potentials for marks being made on the cartridge cases. And
4 also on the bullet. But in this case we didn't have a
5 bullet, so we won't talk about that.

6 So what I do is get my test-fired cartridge cases
7 and I put them under what we call a comparison microscope.

8 It has two stages but only one set of eye pieces,
9 so I can see two different things at the same time separated
10 by a line.

11 So the first thing I do is to compare two tests to
12 each other, tests that I fired that I know were fired in the
13 gun in question, and I look for these matching marks on the
14 test so if I see them on two that I know I fired, then I'm
15 more confident in my comparison with the evidence.

16 So after I see those and I make notes, then I put
17 the evidence and a test fire under the comparison microscope
18 and I look for these matching marks. And what they are are
19 microscopic scratches that are placed on the cartridge case.
20 So I'm looking for essentially matching lines.

21 And in this case I did find that and determined
22 that the cartridge case that was submitted to me was fired
23 in the gun that we just saw.

24 Q. So you would refer to that as a positive match; is
25 that correct?

1 A. Yes. I would refer to it as an identification.

2 Q. Okay. Thank you. And in your expert opinion --
3 let me go back.

4 You indicated that you fired this weapon 13 times
5 with laboratory ammunition, plus another three times with
6 ammunition that was sent in with the weapon; is that
7 correct?

8 A. That's correct.

9 Q. So that's 16 times. And when you fired that, what
10 were you firing it at?

11 A. Those that I fired at the range, at the distance
12 between contact and 10 feet, I was firing at white cotton
13 panels that I had attached to cardboard backing and then I
14 attached that to the target. So just to give it some
15 substance so that it wouldn't fall down.

16 So the idea was to test fire at these different
17 distances. And obviously it took a couple of people to
18 carry this experiment out. We just would aim for the center
19 of the target so that we could see what the pattern looked
20 like at the different distances.

21 Q. Now, when this weapon was fired at 10 feet --
22 well, how big was this piece of cotton material that you
23 were firing at?

24 A. It's a 12-inch-by-12-inch square, like a
25 jersey-type fabric.

1 Q. And when it was fired at 12 feet, did that bullet
2 that was expended from the barrel hit that fabric?

3 A. Yes. The longest distance was 10 feet fired at a
4 12-inch-by-12-inch target. And it was essentially in the
5 center. Maybe not dead center. But pretty close to the
6 center.

7 Q. And it was this weapon that was being fired at
8 that distance?

9 A. Yes.

10 Q. Were there any other tests that you performed on
11 this weapon?

12 A. I don't think so.

13 Q. In your expert opinion, did you come to any
14 conclusions at the end of running these tests on this
15 weapon?

16 A. My conclusions after doing all of the testing that
17 I did was the gun fired normally in my use; that the
18 cartridge case was determined to be fired from that gun,
19 based on the comparisons that I did; and that my results for
20 tests for distance and determination on the pajama top were
21 inconclusive. I couldn't tell how far the muzzle was from
22 the fabric when it was fired.

23 MR. SMITH: Thank you. No further questions.

24 THE COURT: Why don't we take a recess and then
25 we'll do cross-examination.

1 Ladies and gentlemen, it is your duty not to
2 discuss among yourselves or with anyone else any matter
3 having to do with this case.

4 It is your further duty not to form or express any
5 opinion regarding the guilt or innocence of the defendant
6 until the case has been finally submitted to you for your
7 decision.

8 You're not to read any newspaper articles or
9 listen to or view any radio or television broadcasts
10 concerning this case.

11 Should any person attempt to discuss the case with
12 you or in any manner attempt to influence you with respect
13 to it, you are to advise the bailiff, who in turn will
14 advise the Court.

15 We'll be in recess until the call of the Court.

16 (Recess taken at 11:07 a.m.)

17 THE COURT: Court will come back to order. Please
18 be seated.

19 Will counsel stipulate to the presence of the jury
20 and the alternates?

21 MR. MOLEZZO: Defense stipulates.

22 MR. SMITH: The State would so stipulate.

23 THE COURT: You may carry out cross-examination,
24 sir.

25 MR. MOLEZZO: Thank you.

CROSS-EXAMINATION

BY MR. MOLEZZO:

Q. Ms. Heward, at the time you were assigned this case, you were short staffed at the -- my words again -- laboratory, correct?

A. Yes. The time I took the case, the case actually came in before the examiner left. But I did work the case after he had left.

Q. Yes, ma'am. Thank you. And your testimony, at the time that you received the case, you didn't have a qualified -- you were the only qualified examiner, firearms; is that right?

A. That's correct.

Q. And during the time that you received this case, you were also doing other cases or redoing other cases; is that correct?

A. That is correct.

Q. And, again, as part of your case file, you had conversations or e-mails with the District Attorney, Mr. Smith, haven't you?

A. Yes.

MR. MOLEZZO: May I approach, Your Honor?

THE COURT: You may.

MR. MOLEZZO: Thank you, Judge. May we mark this as Defense Exhibit E, please.

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1 THE COURT: F, Defendant Exhibit F.

2 MR. SMITH: What is it?

3 THE COURT: F.

4 (Exhibit F marked.)

5 BY MR. MOLEZZO:

6 Q. For the record, this is a letter I received
7 pursuant to discovery. I'm now showing this to the District
8 Attorney.

9 I'm handing you what appears to be a document.
10 Would you please review that and let me know when you're
11 done, please.

12 A. Yes.

13 Q. Would you agree that's a document that you had
14 generated?

15 A. Yes. I generated this at the request of -- I'm
16 not sure who exactly requested it, but it actually was a
17 page of my notes. You see my note.

18 Q. Thank you for publishing it to the jury. It is a
19 document that you utilize in cases to correspond with the
20 District Attorney? It's a normal-type thing you do,
21 correct?

22 A. Yes, correspondence with anybody in the case
23 becomes part of the case file.

24 Q. And thank you. Would you say that's a true and
25 accurate representation of the document you generated or

1 like documents you generate?

2 A. Yes.

3 Q. Thank you. And to be completely fair, you see
4 some highlighted portions there as well, don't you?

5 A. I do.

6 Q. May I have that back?

7 MR. MOLEZZO: For the record, I'd move this into
8 evidence, move this exhibit into evidence, please.

9 MR. SMITH: No objection.

10 THE COURT: It's hereby admitted.

11 (Exhibit F admitted.)

12 BY MR. MOLEZZO:

13 Q. Again, after your review of the document, it tells
14 us you were looking for another qualified individual for
15 firearms?

16 A. Yes.

17 Q. And another fashion that you correspond is through
18 e-mail, correct?

19 A. Yes.

20 Q. In fact, in this case you corresponded by way of
21 e-mail; is that fair to say?

22 A. I have several e-mail contacts listed in my notes,
23 if that's what you're referring to, yes.

24 Q. So you have done that?

25 A. Yes.

1 Q. Now, some of those e-mails were directed to
2 Detective Garrison, correct?

3 A. I believe so, yes.

4 Q. And Detective Garrison, as far as you know, was
5 the lead detective on this case, correct?

6 A. I don't actually know. He was just the person
7 that contacted me.

8 Q. Can we assume for the jury that was your --

9 MR. SMITH: Excuse me, we would ask no
10 assumptions.

11 THE COURT: Apparently she can't assume that. She
12 either knows it or doesn't.

13 BY MR. MOLEZZO:

14 Q. I apologize. That was your contact with law
15 enforcement, Detective Garrison; is that fair?

16 A. That's correct.

17 Q. Again, you testified that you were doing work for
18 a Kevin Lattyak, correct?

19 A. In some of the cases. In this case he didn't do
20 any previous work. But in other cases, yes, I was redoing
21 cases because he was unavailable to testify.

22 Q. You had a full plate, didn't you?

23 A. Yes, I did.

24 Q. And at the time that you became involved in this
25 case, you were doing testifying of firearms?

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A. Correct.

Q. Testing of all kinds of clothing and all kinds of stuff, right?

A. Clothing is not done as often as firearms, but yes.

Q. You're a woman of many parts, you would agree? You do a lot of different testing?

A. Yes.

Q. Do you recall that during the time of this case you were interviewing folks for a firearm position? You recall doing that?

A. I don't remember the exact date, but it was in the spring, yes.

Q. I'm sorry?

A. I don't remember the exact date, but it was in the spring.

Q. Now, in one of the e-mails directed to a Nancy Gural -- did I say that correctly, G-u-r-a-l?

MR. SMITH: Jurad?

MR. MOLEZZO: Again, I'm just referencing the document I am looking at.

THE WITNESS: I did contact her several times via e-mail. And I misspelled her name in one of the e-mails once.

BY MR. MOLEZZO:

1 Q. I'm not trying to embarrass you. That must be
2 what I'm looking at. How do you know Nancy Jurad?

3 A. She contacted me on this case.

4 Q. And isn't it true in one of your correspondence
5 with Ms. Jurad you indicate that you need to have an outside
6 lab review the case before it's released?

7 A. That's correct.

8 Q. Was that accomplished?

9 A. Yes, it was.

10 Q. And what outside lab reviewed the case before it
11 was released, please?

12 A. The Las Vegas Metro Police Department, and the
13 person who reviewed the case is the supervisor of the
14 firearms section, and his name is Randy Stone.

15 Q. And once that is accomplished, do you receive a
16 document or a sign-off or something?

17 A. The report --

18 Q. Yes, ma'am.

19 A. -- and the notes and the evidence were sent to
20 him. Other than the gun -- I sent the test fires rather
21 than the gun -- they all get sent in the mail, certified
22 mail, to him. He signs on -- one of the worksheets has a
23 location for technical review. He signs there, and he also
24 verifies my identification.

25 So on the worksheet for the cartridge case

1 identifications, he has noted that he has also agreed it's
2 an identification and put his initials and the date.

3 Q. So to determine that he has actually looked at the
4 things that you sent him, he just initials the paperwork or
5 something?

6 A. He initials next to the identification and he
7 signs in the appropriate place as a technical reviewer.

8 Q. And that's procedure, correct?

9 A. Yes.

10 Q. And I think I understand. So he doesn't do an
11 independent report, like a couple pages, that he's received
12 X, Y, and Z, and he's reviewed it; he just initials things?

13 A. That's correct.

14 Q. And you shared with us on testimony that he did
15 not have the weapon; he didn't sign off on the weapon?

16 A. No, I didn't want to send the weapon in the mail.
17 I sent the test fires to him so that he could verify that
18 identification.

19 Q. But you kept the weapon?

20 A. I sent it back to the agency. Or, excuse me, I
21 didn't send it back; our evidence section sent it back.

22 Q. As far as you know, the person who, I guess,
23 qualifies your work or signs off on your work never received
24 the weapon, correct?

25 A. He did not.

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1 Q. So you're asking this gentleman -- what's his
2 position, please?

3 A. He's the supervisor of the firearms section at the
4 Las Vegas Metro Police Department lab.

5 Q. So he's your counterpart in Las Vegas?

6 A. Yes.

7 Q. So he's merely reviewing your reports and seeing
8 that all the Ts were crossed and the Is were dotted,
9 something like that; is that fair?

10 A. That's one of his functions. And the other
11 function is to actually look at the items that I compared
12 under the microscope and what we call verify. We need a
13 verification when we have an identification to a gun.

14 And his function was not to redo my work. His
15 function was to review my work.

16 Q. And, again, the individual that reviewed your work
17 is your counterpart in Las Vegas?

18 A. Yes.

19 Q. Now, in reference to this case, you received
20 correspondence from law enforcement, Detective Garrison,
21 correct?

22 A. Yes.

23 Q. You have dialogue with the honorable prosecutor,
24 Mr. Smith, correct?

25 A. I don't believe --

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1 Q. Or his office.

2 A. I did talk to Nancy in his office, but I don't
3 believe I had any conversation with him until just very
4 recently.

5 Q. Do you make any attempt to contact the defense
6 lawyers in this case?

7 A. I would have no knowledge of who they would be.

8 Q. If you had, would you have contacted defense
9 attorneys in this case?

10 A. It's not my practice to contact anybody. But I
11 have been at times contacted by the defense attorneys.

12 Q. And prior to your testing in this case, you were
13 informed that this weapon was involved in a murder case;
14 isn't that true?

15 A. Yes. It came in with that charge attached to it.

16 Q. May I say that in reference to you're -- you're
17 kind of a scientist as well, you would agree?

18 A. Yes.

19 Q. But prior to testing these items, you're aware
20 that it's a murder investigation; that's right, correct?

21 A. That's correct.

22 Q. And you're aware that the reports or the requests
23 are generated by law enforcement, correct?

24 A. The requests for work are generated by the agency
25 submitting it, yes.

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1 Q. Yes, ma'am. So would you define science as the
2 search for the truth?

3 A. I would think it would depend on which area of
4 science you talk about, what would be an appropriate
5 definition of it.

6 Forensic science is that science that's associated
7 with law.

8 Q. The search for the truth; isn't that true? Isn't
9 that your ultimate goal?

10 A. I would define what I do is I test and I speak for
11 the evidence; that's the way I like to describe it.

12 Q. And in reference to the garments tested, I
13 understood, through your testimony, that you can't prove any
14 bullet entrance. Is that correct?

15 A. I can't determine which, if any, of those holes
16 are a bullet entrance hole.

17 Q. Proved and determined, correct?

18 A. Say that again.

19 Q. You don't know of any bullet hole in that garment,
20 ma'am?

21 A. The hole in the back appears to be a typical
22 bullet-type hole. In the front, no, I can't tell.

23 Q. Appears to be, but that doesn't mean -- you're not
24 going to sign off and say that was indeed a bullet hole in
25 the back, correct? I mean, a lot of things appear to be.

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1 Does that make sense?

2 A. I understand what you're saying. I don't have any
3 test results that are going to say that, yes, it's -- in
4 fact it's a bullet hole and couldn't be caused by anything
5 else.

6 Q. Have you ever done hand GSR testing?

7 A. Have I ever --

8 Q. Have you ever done gunshot residue testing of a
9 hand?

10 A. I've neither collected nor tested gunshot residue.
11 I was the supervisor in charge of that when I worked in San
12 Bernardino.

13 Q. You wouldn't testify that in your opinion gunshot
14 residue is a wasted effort, would you?

15 A. I would say it has limited value.

16 Q. But we know one thing, isn't that correct; that
17 GSR testing can show if the person was holding a fired
18 weapon? You would have to agree to that, right?

19 A. Usually what is said about gunshot residue is that
20 the gunshot residue for SEM is identified as gunshot
21 residue. And statements that are made by forensic labs
22 generally are the person could have fired a firearm, could
23 have handled a recently fired firearm, or could have been in
24 a location where a firearm was discharged.

25 Q. Let me try it a different way. Gunshot residue on

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1 the hand can give you an idea where that hand was in
2 relation to where the weapon was when it was fired? Will
3 you admit to that?

4 A. Can you explain what you mean by that? Because
5 I'm not sure if you're talking about a pattern on the hand
6 or just the presence on the hand.

7 Q. Just the presence of gunshot residue on a hand
8 would assist you in determining if that hand occupied that
9 weapon when it was discharged; isn't that true?

10 A. Not necessarily.

11 Q. It wouldn't assist you? Okay. I understand you
12 could be next to a weapon and get gunshot residue, correct?

13 A. That's correct.

14 Q. So it would help you to the degree that -- where
15 you are in relation to the weapon when it was fired. Will
16 you give us that?

17 A. It depends also on other circumstances like how
18 long after the collection was done. It's a multi-faceted
19 question that you're asking me. It's not one thing that
20 matters.

21 Q. Now, you shared with us on testimony regarding
22 what you, I'm sure in good faith, believe to be powder spots
23 on a garment. Did I understand that correctly?

24 A. Can you tell me which garment you're talking
25 about?

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1 Q. I'm sorry, Ms. Heward. I'm assuming the top.

2 A. That I said that there were some parcels that
3 appeared to be gunshot residue?

4 Q. Yes.

5 A. On the front and one on the back? Yes, I did say
6 that.

7 Q. And you found no evidentiary value once you tested
8 those alleged areas, correct?

9 A. I found they reacted with the Griess paper, which
10 is the test for the gunshot residue, but it wasn't in a
11 pattern. So it didn't assist me in determining distance.

12 Q. Well, is that Griess paper a piece of paper-type
13 document thing?

14 A. No. It's the photographic paper that's treated
15 with chemicals that will react and turn orange when it comes
16 in contact with the partially burned gunpowder.

17 Q. Is it a solid object, is my point.

18 A. It looks like a piece of photo paper, yes.

19 Q. I had not found that in this case. Did you turn
20 that to the District Attorney for analysis?

21 A. That probably is part of my notes. I can flip
22 through the copy that I have and see.

23 Q. I apologize, Ms. Heward. The actual photo
24 type-page, what did you do with it?

25 A. The paper is --

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1 Q. Yes, ma'am.

2 A. I believe it is actually under a barcode submitted
3 as evidence, and I believe it's with the test panels that
4 were -- that we shot using the laboratory ammunition and the
5 cartridges that were from the scene.

6 The white panels, those are -- they have been
7 barcoded as evidence and returned to the agency, I believe.
8 I can check in my notes for that information.

9 Q. If I need you to check, I'll ask you. And thank
10 you for that offer.

11 So as far as you know, personal knowledge, you did
12 not send those papers to the District Attorney with your
13 testing reports?

14 A. No.

15 Q. And, again, you testified in reference to your
16 testing procedures you fired simply from the shoulder; is
17 that right?

18 A. Yes.

19 Q. So you didn't fire from the hip, correct?

20 A. No. In the water tank, I can't fire from the hip
21 because I'm too short. I have to fire from the shoulder.

22 Q. So you weren't able to from the hip?

23 A. Right.

24 Q. Did you do any accidental fire testing?

25 A. Accidental fire --

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1 Q. For example, did you take the weapon and back up
2 into any objects to see if that would activate the trigger?

3 A. I did not.

4 Q. And it's your testimony that three and a half
5 pounds is normal, if I have that correct -- normal for this
6 weapon, I guess?

7 A. I just measured the trigger point at three and a
8 half. I made no comment about whether it was normal. I
9 don't have any independent knowledge what is normal for that
10 type of a firearm.

11 Q. And, again, you didn't do any comparison tests;
12 you didn't get another.303 to cross-reference?

13 A. No. We don't have any other firearms like this in
14 our collection. So I didn't have any reference to compare
15 this to, no.

16 Q. And you didn't pursue a comparison test and try to
17 find another.303, correct?

18 A. I did not, no.

19 Q. Isn't it true that three and a half pounds is a
20 hair trigger, per your definition? Would you agree that's a
21 hair trigger?

22 A. I actually don't define three and a half as a hair
23 trigger. But that's just -- that's a colloquialism that is
24 used.

25 I think different people would refer to it as

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1 different amounts of weight. I would refer to probably two
2 and a half or less as a hair trigger.

3 Q. I respect your opinion. And you're saying in your
4 -- your -- your two and a half pounds is for you a hair
5 trigger, right?

6 A. Yes. But it's a term that's defined differently
7 by different people.

8 Q. I understand. But we've heard it throughout our
9 lives. You've heard it throughout your life, correct?

10 A. Yes.

11 Q. It's a common term you hear in everyday American
12 society, correct?

13 A. Yes.

14 Q. Were you able to tell in review of this firearm or
15 this weapon -- were you able to tell how many times a bullet
16 or the shells had been chambered and extracted, how many
17 bullets had been chambered and extracted out of that gun?
18 Kind of vague, but --

19 A. I don't understand what you mean.

20 Q. Do you have a testing procedure that can tell you
21 how many bullets have been chambered into this type of a
22 bolt-action weapon and ejected?

23 A. Based on the gun?

24 Q. I'm just asking. Is there a test --

25 MR. SMITH: Objection. Relevance. I'm going to

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1 object. Relevance.

2 THE COURT: He can ask the question. Do you
3 understand the question, ma'am?

4 THE WITNESS: I don't.

5 THE COURT: So you're asking how many times a
6 bullet has been fired through a gun, whether that can even
7 be done?

8 MR. MOLEZZO: Yeah.

9 THE WITNESS: By looking at a gun, can I tell how
10 many cartridges has been chambered through there? No.

11 BY MR. MOLEZZO:

12 Q. Ma'am, you smiled, but I'm not the expert.

13 A. Did I answer the question that you wanted?

14 Q. You did. Did the question finally make sense?

15 A. It doesn't really make sense, but I answered it.

16 Q. You can't tell how many times that thing's been
17 fired?

18 A. No.

19 Q. In reference to the bullets, I understand from
20 your testimony that you shot or you fired all the bullets
21 you received with that firearm, correct?

22 A. What you're calling bullets I call cartridges,
23 unfired things. Are we talking about the same thing?

24 Q. I just like bullets. We'll go with cartridges.

25 A. I received four cartridges as evidence. I fired

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1 three and disassembled one.

2 Q. And you didn't leave one for possible independent
3 testing for the defense?

4 A. I didn't.

5 Q. Although qualified here as an expert, you wouldn't
6 testify that you're a firearm specialist, would you?

7 A. I think what you would call a firearm specialist I
8 would call an armor, and, no, I'm not an armor.

9 Q. And, in fact, in reference to the firearms, you're
10 better defined as a skilled witness; would you agree?

11 MR. WILLIAMS: Objection, Your Honor. Defined as
12 an expert witness.

13 THE COURT: I'm not sure what that is. Do you
14 know what it is, ma'am?

15 THE WITNESS: I've never heard of that term
16 before. What I'm normally referred to in my field is a
17 firearms examiner. I'm not an armor -- most of the work
18 that I do is of a scientific nature, as you pointed out. I
19 look at things under the microscope and determine if they
20 were fired in a particular firearm. That's most of what I
21 do.

22 BY MR. MOLEZZO:

23 Q. Also in this case you generated correspondence
24 where you indicated you tried to send this firearm to the
25 ATF laboratories; do you recall that?

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1 A. I did. I tried to get them to help me and they
2 said no.

3 Q. I'm sorry, what?

4 A. I tried to get them to help me because my plate
5 being so full, and they said no.

6 Q. Federal government.

7 MR. MOLEZZO: A few more, Your Honor, please.

8 BY MR. MOLEZZO:

9 Q. Would you agree as a firearms expert that
10 trajectory analysis is important?

11 A. It is important in some cases, yes.

12 Q. Ms. Heward, anytime you have a weapon discharged,
13 it's important, correct?

14 A. Not always.

15 Q. If you have a human -- if the projectile is
16 hitting a human, it's important, correct?

17 A. Perhaps we're referring to trajectory as two
18 different things. For me to do an examination of
19 trajectory, a bullet has to pass through two holes so that
20 there is something to compare.

21 When I do a trajectory analysis, I would measure
22 the angle at which something entered. Maybe we're talking
23 about different things.

24 Q. No, we're not. No, we're not. So a trajectory
25 analysis or test would assist you in determining the angle

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1 the bullet entered something, correct?

2 A. I need to have two points, though.

3 Q. Let's say you have two points. Does that assist
4 on the angle of the bullet entering something?

5 A. If I have two angles, it may, yes.

6 Q. And the trajectory testing is -- I've seen it on
7 TV -- it's the rods; is that correct?

8 A. We can utilize rods. We can utilize lasers.
9 Sometimes string. Yes.

10 Q. Would trajectory testing also assist you in
11 determining where the shooter may have been when the shots
12 were fired?

13 A. It may.

14 Q. Isn't the simple definition of trajectory akin to
15 an angle, the angle?

16 A. It encompasses angles and paths and --

17 Q. Thank you. Thank you. It encompasses angles and
18 paths, correct?

19 A. Yes.

20 Q. It wasn't done in this case, was it? To your
21 knowledge.

22 A. I don't know of any trajectory that was done. I
23 wasn't at the scene, and I did not perform any trajectory
24 analysis.

25 Q. Yes, ma'am. So to your knowledge you don't know

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1 if any was done?

2 A. Yes, that's correct.

3 Q. And, again, you shared with us you weren't able to
4 do a comparison test with another .303, correct?

5 A. No, I did not attempt to do that.

6 MR. MOLEZZO: Court's indulgence, Your Honor.

7 BY MR. MOLEZZO:

8 Q. And, again, based upon your testimony, when you --
9 through your testing, you were not able to determine
10 distance? Did I say that correctly?

11 A. That's correct. My results were inconclusive when
12 I attempted to determine the distance of the muzzle from the
13 cloth that I was testing.

14 Q. Thank you. Did you test inside the muzzle? Did
15 you swab inside the muzzle at all?

16 A. I did do a barrel patch, yes.

17 Q. What's a barrel patch, please?

18 A. A barrel patch is a small piece of cotton that I
19 push from the muzzle end to the breach end down the barrel
20 to determine that there's no obstacles blocking it, but it
21 also collects whatever might be loosely adhering in it.

22 Q. You can use different parts to protect yourself,
23 make sure the weapon's operating and pick up whatever,
24 correct?

25 A. Yes.

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1 Q. And isn't it fair to say that a weapon does have a
2 natural blow-back; things can come back in the barrel after
3 the projectile leaves?

4 A. I suppose so. I've always heard blow-back
5 referred to as if something is hit that's bleeding, and the
6 blood coming back is blow-back. That's the term as I've
7 heard it used.

8 Q. Would you adopt the fact that the physics of the
9 shell going out could create blow-back into the muzzle?

10 A. I think what's in the gun is what's left behind as
11 it's going out. It wouldn't make sense that things were
12 being sucked back in.

13 Q. Okay.

14 MR. MOLEZZO: A few more, Your Honor.

15 BY MR. MOLEZZO:

16 Q. This has already been admitted into evidence. I
17 have a photocopy of your report. May I show this to you?

18 A. Sure.

19 MR. MOLEZZO: May I approach?

20 THE COURT: You may.

21 BY MR. MOLEZZO:

22 Q. Again, this is 1 of 4. Please look at 4 of 4 and
23 read that paragraph to yourself.

24 A. Are you interested in the two you have
25 highlighted?

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1 Q. I'll follow up. Just read it to yourself and tell
2 me when you're done.

3 You've had an opportunity to read that?

4 A. Yes.

5 Q. And, again, you were correct, I highlighted a
6 word; do you recall what that word was?

7 A. If I can refer to the Court's Exhibit 31.

8 Q. You may, page 4 of 4.

9 A. What was highlighted was I used the term "target"
10 and "victim" in parentheses.

11 Q. That already defines you already have a bias
12 before you started testing, doesn't it?

13 A. No, that to me just defines what I was testing.

14 Q. Results of the testing to determine distance from
15 the muzzle of the firearm to the target.

16 Target denotes that the firearm was aimed, does it
17 not?

18 A. In my test it was. In my testing.

19 Q. And in reference, you have parentheses "victim,"
20 correct?

21 A. Yes.

22 Q. Did you have an opportunity prior to your testing
23 to review photographs of the crime scene?

24 A. I did receive some photographs on a CD. And I did
25 print out a couple of them and include them in my notes.

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1 Q. In reference to gun expertise, have you ever been
2 published?

3 A. No.

4 Q. Have you ever drafted any article in relation to
5 firearms and stuff like that, firearms stuff?

6 A. No.

7 MR. SMITH: Objection. Relevance.

8 THE COURT: He can ask the question. It goes to
9 her expertise.

10 MR. MOLEZZO: May I continue, Judge?

11 THE COURT: Yes.

12 BY MR. MOLEZZO:

13 Q. Was this a no?

14 A. You asked if I had ever --

15 Q. Been published.

16 A. Or drafted anything. And I said no to both of
17 those.

18 Q. And thank you. And in reference to your alleged
19 firearm expertise, most of it was on the job, correct?

20 A. Yes.

21 Q. And then you've done some collateral classes like
22 seminars and so forth, correct?

23 A. Yes.

24 Q. Workshops, seminars, stuff like that?

25 A. Yes.

1 Q. In your capacity, where you're currently employed,
2 have you ever been contacted by the defense in a criminal
3 case to testify?

4 A. I have been contacted by the defense in at least
5 one case. But I was not -- I did not ever testify. I was
6 not ever asked to testify.

7 Q. And, in fact, in your capacity, in your position,
8 you only testify for law enforcement, correct?

9 A. I testified to whomever gives me a subpoena.

10 Q. And those subpoenas have mostly come from the
11 police, correct?

12 A. Mostly from the District Attorney's Office.

13 Q. Would you allow me to define the District Attorney
14 as law enforcement? May I do that?

15 A. I don't know that it's my right to say whether or
16 not. You can define it however you please.

17 Q. Have you ever taught firearms, any classes -- not
18 on safety, but any firearm mechanical-type classes?

19 A. No, not mechanical. I have taught classes to law
20 enforcement people, but it's more encompassed what I do at
21 the laboratory, what we do as the type of work we do and how
22 that would help them. That's the nature.

23 Q. In this case you received a weapon, you tested it
24 and it shot a bullet, correct? It worked?

25 A. Yes.

1 Q. Under your lab conditions, correct?

2 A. I fired it in the laboratory and at the range, and
3 it worked, yes.

4 MR. MOLEZZO: Nothing further at this time, Your
5 Honor.

6 THE COURT: Any redirect?

7 MR. SMITH: No, Your Honor.

8 THE COURT: All right. May this witness be
9 excused?

10 MR. SMITH: Yes, Your Honor.

11 MR. MOLEZZO: I'm sorry. I apologize. For the
12 Court, Mr. Chad Morton has just walked into the courtroom.
13 He may be recalled. We'd ask he be excused.

14 THE COURT: We're done with testimony, right?

15 MR. MOLEZZO: In reference to the testimony, I
16 have nothing further. The jury may have some questions.

17 THE COURT: Okay. Anyone on the jury have some
18 questions? I'll step outside with counsel. Just be at
19 ease.

20 (Brief recess taken.)

21 THE COURT: Court will come back to order. I have
22 determined that the questions are appropriate that were
23 being asked by one of the jurors.

24 First one: Was the clip loaded with shells and
25 then chambered?

1 THE WITNESS: When I received the firearm, the
2 magazine did not have any cartridges in it at all.

3 THE COURT: The question is: Did you load the
4 clip and with shells and then chamber them through the clip?

5 THE WITNESS: No, I didn't. What you're calling a
6 clip I call a magazine. I loaded them from the top into the
7 chamber directly.

8 THE COURT: The second part of that, I guess,
9 doesn't go, but I'm going to ask it anyway: So were the
10 shells chambered and ejected with ease?

11 THE WITNESS: After I fired each one of those, I
12 had to pull the bolt to the rear to eject them and then
13 manually load another one. And, yes, it was with ease.

14 THE COURT: Do you have knowledge of how many
15 shells the clip is capable of holding?

16 THE WITNESS: It was not marked. And I don't
17 believe that -- I don't recall what it looked like. So I
18 can't answer that question.

19 THE COURT: Follow-up questions?

20 MR. MOLEZZO: No follow-up from defense.

21 MR. SMITH: No, Your Honor.

22 THE COURT: All right. I'm going to give that to
23 the clerk so it becomes part of the record.

24 You are excused. Thank you for coming in.

25 THE WITNESS: Thank you. I will leave your

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1 court's exhibit.

2 THE COURT: Mr. Bailiff, will you take charge of
3 those, give them back to the clerk.

4 Counsel, let's talk about what we're going to be
5 doing, because we've reached Friday. I kind of talked to
6 the jury yesterday about what your plans were for witnesses.

7 Let's figure out so that they can plan their life
8 for the next few days.

9 MR. SMITH: That was the last witness, Your Honor,
10 on the State's case in chief.

11 THE COURT: Do you rest your case, then?

12 MR. SMITH: We do.

13 THE COURT: The State's resting its case. Before
14 we do that, I want you to step with counsel to the clerk's
15 table and check which items have been admitted into
16 evidence, both from the State and from the Defense side, so
17 that everyone agrees what has been admitted into evidence.
18 We're off the record at this point.

19 Do you all agree?

20 MR. SMITH: I do.

21 MR. MOLEZZO: The defense agrees.

22 THE COURT: Let's talk about next week so everyone
23 can plan their life here, gentlemen.

24 MR. MOLEZZO: I can with confidence tell the Court
25 that on Monday I'm going to proffer some evidence. It will

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1 not take a full day, and that's including cross, in my
2 opinion.

3 And on Tuesday I'll have a single witness expert.

4 THE COURT: It's my understanding you've been
5 unable to arrange him to come any earlier than that.

6 MR. MOLEZZO: I'll try. But right now we're still
7 set for 11:00, Your Honor.

8 THE COURT: If you can possibly move that up, I
9 would ask that you do that.

10 MR. MOLEZZO: No problem.

11 THE COURT: And that would be your last witness?

12 MR. MOLEZZO: It would.

13 THE COURT: Then we'll determine if there's any
14 rebuttal witnesses.

15 MR. SMITH: Correct.

16 THE COURT: So by Tuesday all of the evidence
17 should be completed, as I understand it.

18 MR. MOLEZZO: Yes.

19 THE COURT: And we will be working on jury
20 instructions, the attorneys and myself, both today before
21 you leave and into Monday and Tuesday so that we can do that
22 as quickly and as efficiently as possible.

23 And then I would anticipate Wednesday morning that
24 I would instruct the jury, read the instructions, you
25 gentlemen will argue your case, and then they will begin

1 deliberating some time probably around noon on Wednesday.

2 That's the best I project here. Do you all agree?

3 MR. SMITH: Yes.

4 MR. MOLEZZO: Agreed.

5 THE COURT: That's the best I can plan here,
6 ladies and gentlemen. A bunch of this is out of my hands,
7 but I'm trying to give you the information as I learn it.

8 So it's very important. You're going to have the
9 weekend. I know you're going to return back to your life
10 for a couple of days. But it's really important that
11 nothing happen here with you that would contaminate you with
12 regard to doing your job as jurors in this case. So please
13 follow my admonitions very carefully.

14 It is your duty not to discuss among yourselves or
15 with anyone else any matter having to do with this case.
16 It's further your duty not to form or express any opinion
17 regarding the guilt or innocence of the defendant until the
18 case has been finally submitted to you for your decision.

19 You're not to read any newspaper articles or
20 listen to or view any radio or television broadcasts
21 concerning this case. Should any person attempt to discuss
22 the case with you or in any manner attempt to influence you
23 with respect to it, you are to advise the bailiff who in
24 turn will advise the Court.

25 Counsel, with regard to starting time, you have

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1 requested starting time at 10:00 a.m.

2 MR. MOLEZZO: Yes. With all respect, that would
3 be helpful to me.

4 THE COURT: With your traveling. Do you have any
5 objection to that?

6 MR. SMITH: No, Your Honor.

7 THE COURT: Ladies and gentlemen, you get to sleep
8 in an extra hour. And we will start at 10:00 a.m. Monday
9 probably won't be a full day, but it could take a good part
10 of the day. So we'll continue on with our normal schedule,
11 but at 10:00. You don't have to be here at 9:00. Be here
12 at 10:00. Please be here promptly on Monday.

13 All rise, please.

14 (Jury excused.)

15 (Whereupon the following proceedings were held in open
16 court, outside the presence of the jury.)

17 THE COURT: This is in the courtroom of the Sixth
18 Judicial District Court in Winnemucca, Case No. CR09-5709.

19 Normally I would do this in chambers with counsel,
20 but counsel requested that we do this on the record, and so
21 it's easier to do it here in the courtroom. The record
22 should reflect the absence of the defendant.

23 MR. SMITH: I'd like to make the record clear that
24 the State has not requested this.

25 MR. MOLEZZO: This is good practice. This is

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1 defense attorney Richard Molezzo. It's just good practice.

2 THE COURT: I wanted to make a record. Originally
3 I was handed a set of instructions from the State, general
4 instructions. Were those furnished to the defense counsel
5 yet?

6 MR. MOLEZZO: They were, Your Honor.

7 THE COURT: You have those?

8 MR. MOLEZZO: I do.

9 THE COURT: I have received from defense counsel a
10 total of 14 instructions; one of those was a duplicate.

11 You will find your Instruction No. 5 and 14 were
12 exactly the same.

13 MR. MOLEZZO: Thank you.

14 THE COURT: Is that right?

15 MR. MOLEZZO: That is right, Your Honor.

16 THE COURT: So I'm pulling No. 14.

17 MR. MOLEZZO: Thank you.

18 THE COURT: There are some instructions, because I
19 believe we are going to be dealing with lesser included
20 offenses -- it appears that we are going to be needing some
21 instructions, what I call transitional instructions.

22 And I have prepared one of those instructions,
23 which is actually a three-page instruction. My intention is
24 to give that to counsel, along with some other instructions
25 that I have had prepared.

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1 I will give you each copies of those instructions
2 at this time.

3 MR. MOLEZZO: For the record I'm grabbing the
4 prosecution's instructions.

5 THE COURT: Okay. Let's go through those. I'll
6 indicate what I had in mind with regard to these
7 instructions.

8 The first one is a single-page instruction which
9 reads where the original entry is a cause of death, the fact
10 that the immediate cause of death was the medical or
11 surgical treatment administered or that the treatment was a
12 factor contributing to the cause of death will not relieve
13 the person who inflicted the original injury from
14 responsibility. Where, however, the original injury was not
15 a cause of the death and the death was caused by medical or
16 surgical treatment, or some other cause, then the defendant
17 is not guilty of an unlawful homicide.

18 I think this is necessary because it's been my
19 understanding that the defense has at least raised the issue
20 as to cause of death in this case. And I've taken this --
21 it's a CALJIC that I cited to you earlier.

22 If you have any instruction over the weekend as it
23 relates to cause of death, I would be happy to review that.

24 MR. MOLEZZO: The only thing I'm concerned about,
25 and I apologize for interrupting, Your Honor, is the term

1 "homicide." I would denote that "unlawful killing" would be
2 better applied. "Unlawful murder" would be better applied.
3 Because we know homicide can be performed, if you will, and
4 there can still be no criminality. So that just concerns
5 me.

6 MR. SMITH: The State would disagree.

7 THE COURT: The word "homicide," I think we had
8 this discussion in court.

9 MR. MOLEZZO: We did. We did and the Court was
10 gracious and came back and said, well --

11 THE COURT: This is saying an unlawful homicide.
12 Homicide, as I understand the definition, is the killing of
13 one human being by another. Do you agree? That was your
14 side's definition.

15 MR. MOLEZZO: Yes, sir.

16 THE COURT: So this says that if the death here
17 was caused by medical or surgical treatment or some other
18 cause, then your client is not guilty of an unlawful
19 homicide.

20 MR. MOLEZZO: Okay. Yes, sir. I understand.
21 Splitting hairs.

22 THE COURT: We're not here at this point to settle
23 all the instructions, but I'm giving you the opportunity now
24 so that you take the instructions with you and you can do
25 your own research and come back and tell me if there's

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1 something you think needs to be adjusted.

2 The next two pages is a transitional instruction.
3 I've tried to do this in some of the cases I've had, because
4 our Supreme Court over the years has changed generally how
5 juries have to view lesser included offenses.

6 This instruction, I want to go through it with you
7 in some detail, even though it's two pages, because this is
8 a roadmap for the jury to try to consider lesser included
9 offenses.

10 I am a little uncertain at this point what you're
11 going to be requesting. But it's my understanding that this
12 covers first degree murder, second degree murder, and
13 voluntary manslaughter, just so that you know.

14 MR. WILLIAMS: Involuntary manslaughter.

15 THE COURT: Involuntary manslaughter. Let's go
16 through this, and then you folks can tell me, take it with
17 you and come back with your own version or whatever you want
18 with regard to this. But this is how I'd like to handle it.

19 In this case, the defendant, David Craig Morton,
20 has been charged with, quote, open murder, unquote, under
21 Count I of the Information. This charge includes murder of
22 the first degree and murder of the second degree.

23 Murder of the first degree is murder which is
24 perpetrated by means of any kind of willful, deliberate, and
25 premeditation with malice aforethought.

1 The law provides that you are to fully and
2 carefully consider whether the defendant is guilty of first
3 degree murder. In the following instructions, the elements
4 and definitions of first degree murder will be explained to
5 you along with possible defenses.

6 Now, I put that in there because I'm presupposing
7 that the defense may ask for certain defenses.

8 Any verdict of guilt or any crime you find has
9 been proven -- any verdict of guilt for any crime you find
10 has been proven beyond a reasonable doubt must be unanimous.

11 If after first fully and carefully considering the
12 charge of first degree murder you find the defendant not
13 guilty or you are unable to unanimously agree whether to
14 acquit or convict the defendant on the charge of first
15 degree murder, you may find the defendant guilty of second
16 degree murder.

17 Now, the key language there, as I understand our
18 court, used to be that they had to unanimously find them not
19 guilty. Now it says that if they find him not guilty or
20 unable to unanimously agree, then they go to the lesser
21 included. That's the key language.

22 Second degree murder is murder with malice
23 aforethought but without the added mixture of premeditation
24 and deliberation.

25 If you are convinced beyond a reasonable doubt

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1 that the crime of murder has been committed by the defendant
2 but you have a reasonable doubt whether such murder was of
3 the first or second degree, you must give the defendant the
4 benefit of that doubt and return a verdict of murder of the
5 second degree.

6 The following instructions, the elements and
7 definitions of second degree murder, will be explained to
8 you along with the possible defenses.

9 Again, I'm assuming some defenses from the
10 defendant. That may or may not occur.

11 You cannot find the defendant guilty of both first
12 and second degree murder. The law further provides if after
13 considering the charges of second degree murder and you find
14 -- that should be "considering the charge"; that's singular
15 -- of second degree murder and you find either the defendant
16 not guilty of that charge or you're unable to agree
17 unanimously whether to acquit or convict on the charge of
18 second degree murder, you may determine whether or not the
19 defendant is guilty of the lesser included offense of
20 involuntary manslaughter.

21 The definition and elements of involuntary
22 manslaughter will be explained to you in the instructions to
23 follow. You cannot find the defendant guilty of one or more
24 of the offenses which have been described to you in this
25 instruction; however, there's one other separate charge

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1 which you must independently decide, which is charged under
2 Count II of the Information.

3 You are to decide the guilt or innocence of the
4 defendant as to the charge of discharging a firearm from
5 within or from a structure. The elements of that offense
6 and the definitions that go with it are defined further in
7 these instructions.

8 Now, that's what I call a transitional
9 instruction, which lays out for a jury how they proceed in
10 determining a case.

11 MR. MOLEZZO: You mean the form and content is
12 kind of how you want to adopt this kind of content, Your
13 Honor?

14 THE COURT: Yes. We've had those before.

15 MR. MOLEZZO: Yes, sir.

16 THE COURT: And in the past, like I say, our
17 Supreme Court has indicated that there's a way that a jury
18 must proceed in doing these things. And this is just a
19 procedural kind of an instruction.

20 MR. MOLEZZO: And with reference to this Court,
21 second degree murder, I am not aware that the Court has
22 authority to offer a lesser included.

23 I can share with you now: I do not agree with
24 second degree murder at all. I can tell you, clearly, I'm
25 going for involuntary manslaughter. I just want to share

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1 that.

2 THE COURT: Except that this Court -- here's the
3 problem I have with it.

4 MR. MOLEZZO: Please.

5 THE COURT: As I understand the law now, it's not
6 up to the defense counsel to make that determination. If
7 there's any theory for any evidence with regard to any
8 theory, I as a judge am required to give a lesser included
9 instruction, as I understand it, if there's any evidence in
10 a case that could sustain that.

11 And in this case, the issue and the difference, as
12 you can see, about premeditation and deliberation, it's my
13 understanding that some of the evidence that's been produced
14 here goes to that criminal intent and whether or not this
15 was premeditated and a deliberate killing.

16 But there may be evidence that would indicate that
17 there were some of the other elements that a jury could find
18 for second degree murder that it was willful and deliberate.

19 MR. SMITH: In addition to that, Your Honor, the
20 State has charged this as open murder. And in open murder,
21 when you look at the cases and the case law behind that, it
22 indicates that when it's charged as open murder, the jury
23 decides if it's first or second.

24 THE COURT: Exactly right.

25 MR. MOLEZZO: Fair enough, Your Honor. In

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1 reference to the transitional, we need to lay it all out:
2 First, second, voluntary, involuntary. And I don't see
3 voluntary here. So let's give them the full plate to choose
4 from, then. Because they're all lesser includeds. Without
5 question they are.

6 THE COURT: I'm not sure of that.

7 MR. SMITH: You have to -- but we're not to the
8 end of the trial. And evidence has to be put on before you
9 can get that instruction.

10 And I know that there's one missing that you want.
11 But you're not done with your case either.

12 MR. MOLEZZO: True. True.

13 MR. SMITH: So at this point it would be -- what I
14 understand the judge to be saying is it could be included if
15 you put on evidence to support that theory.

16 THE COURT: I agree.

17 MR. MOLEZZO: Okay.

18 THE COURT: There is a flight instruction that you
19 have.

20 MR. MOLEZZO: Yes, sir.

21 THE COURT: There is an instruction that was not
22 included with the State's about admissions and confessions.

23 You have a copy of these with you?

24 MR. MOLEZZO: Yes, sir.

25 THE COURT: And it's up to the jury to determine

1 whether there's an admission or confession. Those have been
2 defined. It's up to the jury to make those findings. And
3 then the constitutional right of a defendant not to testify,
4 that's going to be one way or the other, but if your client
5 does not testify, you must specifically request that
6 instruction. It will not be given sua sponte by the Court.
7 Just so you know.

8 MR. MOLEZZO: This is my first jurisdiction, thank
9 you. It was sua sponte before.

10 MR. WILLIAMS: That's the case law.

11 THE COURT: The law is you must request it.

12 MR. MOLEZZO: Okay. Okay.

13 THE COURT: There's also instructions I'm working
14 on with the elements of first and second degree murder and
15 involuntary manslaughter. And if there is also another
16 manslaughter, voluntary or involuntary, those elements need
17 to be outlined.

18 Generally what I do with those is in order to find
19 the defendant guilty of premeditated first degree murder --
20 I think that also needs to include "with the use of a deadly
21 weapon." Is that correct? That's how it's charged, with a
22 deadly weapon.

23 You must find the State has proven each of the
24 following elements beyond a reasonable doubt. Number one,
25 the defendant on or about August 6, 2009, in Humboldt

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1 County, Nevada.

2 With regard to the death, we have in the past, but
3 we have some language that the defendant shot or inflicted
4 wounds of which she died within a year and a day.

5 Is that your understanding?

6 MR. SMITH: Yes, Your Honor.

7 MR. MOLEZZO: Correct.

8 THE COURT: And that it was done willfully and
9 unlawfully with premeditation and deliberation, and with
10 malice aforethought.

11 And then with the use of a deadly weapon. Those
12 are all the elements I believe needs to go in there. And
13 then other instructions will define the willfulness and
14 deliberation and premeditation and there's already
15 instructions from the State on those.

16 And then the same thing with second degree murder,
17 where the elements are laid out and numbered. Those are the
18 ones that I have been working on. Most of the ones that you
19 provided to me, Counselor, on behalf of the defendant, are
20 pretty much included with the exception that alcohol is the
21 issue that you have an instruction that voluntary
22 intoxication is not less criminal, but when it requires
23 specific intent, it can be considered by the jury in that
24 regard.

25 Is that your understanding?

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1 MR. MOLEZZO: Yes, sir.

2 THE COURT: Okay. I think many of the other
3 instructions you have Are already included in the State's
4 other instructions, but check those to make sure that
5 they're included.

6 MR. MOLEZZO: I will, Your Honor.

7 THE COURT: Now, that's the work I've been doing
8 on the instructions. Anything else that you can see that we
9 need to be working on? What I want to do is rather than
10 take a whole lot of time when we get to the end of the case,
11 spending a day trying to do jury instructions, I want to be
12 pretty much up to speed on the instructions. That's why I'm
13 doing it now.

14 MR. MOLEZZO: I will be prepared. I anticipate
15 some records. For the record, I will absolutely meet the
16 elements for the lesser involuntary, no question. And I
17 would submit -- and I'll research this myself, Judge. If
18 I'm successful in getting the involuntary, I think it
19 negates the deadly weapon, because it -- by its definition
20 it's an accident.

21 So we may have a little tug and pull when we talk
22 about these again.

23 THE COURT: Well, with regard to any defenses, let
24 me ask you specifically -- you don't have to answer me at
25 this point.

1 MR. MOLEZZO: Sure, I don't mind.

2 THE COURT: But I'm trying to find out if you're
3 intending to do a self-defense instruction. At this point
4 there are certain elements that go with that.

5 MR. MOLEZZO: No, I am not.

6 THE COURT: And the other one is the issue with
7 regard to battered spouse syndrome.

8 MR. MOLEZZO: No, I am not.

9 THE COURT: I haven't seen any evidence that would
10 sustain that. Okay. So I'm trying to think what else we
11 haven't covered here, be prepared for that.

12 On behalf of the State, is there anything here
13 that I'm missing that you can see we need to be working on?

14 MR. WILLIAMS: Not right now. But we may come up
15 with something over the weekend.

16 THE COURT: That's why we have weekends.

17 MR. SMITH: I think Rich is right. He's going for
18 one that we haven't included yet. And he has his witnesses
19 to put on. And so we could probably start looking in that
20 direction, too, of another instruction that needs to be
21 included.

22 THE COURT: One of the concerns that I have -- I
23 want to be sure that I cover any theories of the case that
24 you have, because the law now is, however improbable your
25 theory is, I still have to give instructions. That's what

1 the law is.

2 MR. MOLEZZO: Yes, sir.

3 MR. SMITH: As long as there's a thread of
4 evidence to support it.

5 MR. MOLEZZO: That's right. And Russell and Brian
6 have been great. And I think I shared this theory a month
7 ago, pretty much. So I'll meet the elements. I do have a
8 verdict form for involuntary, and I will make sure the
9 record is as complete as I can make it, Judge. I don't want
10 reversal.

11 THE COURT: Okay. All right. Anything else that
12 we can do with regard to instructions?

13 I don't know that I saw your verdict forms. But
14 normally the final instructions, we need to do some work on
15 that. It tells the jury in this case these are the possible
16 -- these are the charges and these are the possible
17 verdicts. Lay them out specifically along with the possible
18 verdict forms.

19 MR. SMITH: Yeah, and our verdict forms right now
20 only contain the theories of the case that the State brought
21 forward.

22 MR. WILLIAMS: Judge, did you want first degree
23 murder, not guilty, second degree murder? Or did you want
24 first, second, voluntary, involuntary, and then not guilty
25 at the end? That was my only question as to how you wanted

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1 it laid out.

2 THE COURT: I'm even concerned about, even if it's
3 a first degree murder charge, there's with a deadly weapon
4 or without a deadly weapon.

5 MR. SMITH: Okay.

6 THE COURT: Right?

7 MR. SMITH: There is.

8 MR. MOLEZZO: Right.

9 MR. SMITH: So for each of the murders there
10 should be two possibilities: First degree murder with the
11 deadly weapon, guilty; first degree murder with the deadly
12 weapon, not guilty. First degree murder, guilty; first
13 degree murder --

14 THE COURT: You mean second degree?

15 MR. SMITH: No, because first they could find them
16 guilty of first degree without a weapon.

17 MR. MOLEZZO: To make it a true lesser included,
18 there has to be a diminishment of punishment. I know the
19 weapon is an enhancement issue. We have to tread lightly.

20 THE COURT: The jury has to make the factual
21 determination whether it's with or without a deadly weapon.
22 Judges can't do that anymore. That's a factual issue for
23 juries to determine.

24 MR. SMITH: For each of them we have four
25 possibilities. That's my understanding.

1 THE COURT: I would suggest, the District
2 Attorney's Office, that's something you need to be working
3 on, those verdict forms.

4 MR. WILLIAMS: We have worked on them some, Your
5 Honor. That's why I had the question. First, deadly
6 weapon. Then do we do a not guilty or go right on to second
7 degree murder, you list these out these are the counts,
8 these are the possible verdicts.

9 THE COURT: What we do not do is say first degree
10 murder, guilty or not guilty on that one; second degree
11 murder, guilty or not guilty.

12 MR. WILLIAMS: Keep going to the end, and then you
13 have not guilty on Count I. That's the way it should read.

14 THE COURT: And the same thing there would be two
15 verdict forms with the Count II.

16 MR. WILLIAMS: Yes, two verdict forms for Count
17 II. Right, because you have the one that lays it all out,
18 and then you have the individual verdict forms. That's what
19 I'm talking about here. That makes sense. I'll get it
20 worked out, Judge.

21 THE COURT: Anything else, Counselor?

22 MR. MOLEZZO: No. Have a great weekend.

23 THE COURT: Enjoy your weekend.

24 (Proceedings adjourned at 12:29 p.m.)
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Case No. CR-09-5709

Department I

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

THE STATE OF NEVADA,)
)
Plaintiff,)
)
v.)
)
DAVID CRAIG MORTON,)
)
Defendant.)
/

JURY TRIAL - VOLUME V

TAMI RAE SPERO
DIST. COURT CLERK
Tami Rae Spero

2010 SEP 21 AM 8:04

FILED

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter
came on for hearing on September 20, 2010, of said
day, before the HONORABLE RICHARD A. WAGNER, District
Judge.

The plaintiff was present in court and
represented by Russell Smith, Humboldt County District
Attorney, and Brian Williams, Deputy District
Attorney.

The defendant was present in court and
represented by Richard Molezzo, Attorney at Law.

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1
2 Winnemucca, Nevada, Monday, September 20, 2010

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

6 (Whereupon, the following proceedings were held in open
7 court, in the presence of the jury.)

8 THE COURT: Court will come to order. Please be
9 seated.

10 Good morning, ladies and gentlemen. Will counsel
11 stipulate to the presence of the jury and the alternates?

12 MR. MOLEZZO: Defense so stipulates.

13 MR. SMITH: The State will so stipulate, Your
14 Honor.

15 THE COURT: Recall at the end of the week the
16 State had rested its case. We've now come to the defense
17 case.

18 You may call your first witness, sir.

19 MR. MOLEZZO: Defense calls Phil Simpson, please.

20 THE COURT: Yes, sir. Sir, would you raise your
21 right hand and face the clerk.

22 (Witness sworn.)

23 THE COURT: You may be seated here in the witness
24 stand. After you're seated, just pull right up to the
25 microphone, sir. Would you please state your name.

1 THE WITNESS: Phillip Simpson.
2 THE COURT: Spell your last name for the court
3 reporter.
4 THE WITNESS: S-i-m-p-s-o-n.
5 THE COURT: You may proceed on direct examination.
6 MR. MOLEZZO: Thank you, Your Honor.
7 PHILLIP SIMPSON,
8 Called as a witness on behalf of the Defendant
9 having been first duly sworn, was examined and testified as
10 follows:
11 DIRECT EXAMINATION
12 (BY MR. MOLEZZO:)
13 Q. Mr. Simpson, what do you do for a living?
14 A. I work for Newmont. I'm a halter driver.
15 Q. How long have you been in that position?
16 A. For about 18 and a half years.
17 Q. Do you live here in the community? Do you live
18 here in Winnemucca?
19 A. Yes, I was born and raised.
20 Q. How many years would that be, sir, if I may?
21 A. 52 years.
22 Q. You know this gentleman to my left?
23 A. Yes, I do.
24 Q. What is his name?
25 A. David Craig Morton.

1 Q. How do you know him?
2 A. I met him in the seventh grade in junior high
3 school.
4 Q. Are you friends?
5 A. Oh, yeah.
6 Q. Good friends?
7 A. Good friends.
8 Q. Best friends?
9 A. Yeah, he's my best friend.
10 Q. Do you know the deceased in this case?
11 A. Yes, I do.
12 Q. How long had you known her?
13 A. I think from either sophomore or junior in high
14 school.
15 Q. Directing your attention to August 5th, 2009, do
16 you recall that day?
17 A. Most of it.
18 Q. What took place on that day at your house?
19 A. Well, Cindy came over early afternoon, I would say
20 around 3:00 or 4:00. I'm not positive on the time. She
21 stated that she was -- that Robert was going to come pick
22 her up.
23 Q. Cindy would be the deceased?
24 A. Yeah, Cindy.
25 Q. Please continue.

1 A. And I don't know if she was looking for Dave or
2 not, because Dave was doing some work for me at times.

3 But, anyway, she was talking about her trip to
4 Salt Lake and stuff like that. And Robert showed up about
5 half an hour later.

6 Q. And what was happening at your house at this time?

7 A. Well, me and Robert started drinking some beers.
8 And then Cindy said she wanted something to drink. So I
9 sent Robert down to the store to get some -- I think she was
10 drinking rum and coke.

11 Q. In reference to Robert, would that be Robert
12 Morton?

13 A. Robert Morton, yeah.

14 Q. Please continue.

15 A. And let's see. Sent him down to the store, and we
16 got her a bottle of rum and some coke, some Hennessy, and
17 some more beer.

18 Q. Did you personally witness the deceased drinking
19 that day?

20 A. Yes, I did.

21 Q. Can you share with the jury what you saw her
22 drinking.

23 A. She was drinking rum and cokes.

24 Q. Did you personally witness Robert Morton drinking
25 that day?

1 A. I remember him pouring a Hennessy, and we were
2 drinking beer, yes.

3 Q. I'm sorry, I don't know what Hennessy is. What is
4 that?

5 A. It's a cognac, I think. Liquor.

6 Q. Is it strong?

7 A. Oh, it's definitely strong.

8 Q. Did you personally witness Robert Morton take in
9 shots?

10 A. All's I can really remember is that he had a glass
11 in his hand. I really can't remember if he was drinking.
12 You know, I'm sure he was, but...

13 Q. Yes, sir. How long, can you share, were those
14 folks at your house, roughly?

15 A. I'm sorry, what's that?

16 Q. Roughly how long were they there, if you can
17 recall?

18 A. I really can't recall when they left. I kind of
19 went out, shall we say.

20 Q. You were drinking as well?

21 A. Oh, yes, I was drinking.

22 Q. Would you say you were buzzed or drunk?

23 A. I was hammered. I was drunk.

24 Q. And did you eventually see David Morton?

25 A. Yeah, I remember seeing him briefly.

1 Q. David Morton would be the gentleman to my left?
2 A. Yes.
3 Q. And was that later on that day you saw Mr. Morton?
4 A. It was that evening, yeah.
5 Q. In your --
6 A. At my house. He was over there briefly.
7 Q. As best you can recall, did you see Mr. Morton
8 consuming alcohol?
9 A. I didn't see Dave drinking at all. I don't know
10 if he was drinking or not.
11 Q. Approximately what time did, if you remember,
12 folks leave your home?
13 A. What time did they leave my house?
14 Q. Please.
15 A. I have no idea. I'm not real sure on that. I
16 know it was dark outside. That's all I can really tell you.
17 Q. I'm sorry, again, this was August 5th?
18 A. Yeah.
19 Q. Now, have you spoken to me before testifying
20 today?
21 A. Yes, I have.
22 Q. And what is the one thing I emphasized to you?
23 A. To tell the truth.
24 Q. Going back just quickly, please, again, sir, if
25 you recall, regarding the deceased, do you know

1 approximately how many drinks she may have consumed?

2 A. I know of two for sure. And after that I really
3 couldn't remember because I wasn't counting.

4 Q. Yes, sir. And in reference to the deceased, do
5 you remember whether she was impaired or intoxicated?

6 MR. SMITH: Objection, Your Honor.

7 THE COURT: You'll have to lay the foundation for
8 it, sir.

9 MR. MOLEZZO: Thank you, Your Honor.

10 (BY MR. MOLEZZO:)

11 Q. In reference to Robert Morton, do you recall how
12 many alcohol beverages he consumed?

13 A. Well, I know that we had at least three or four
14 beers apiece. And after that, like I said, with doing the
15 shots, I really didn't pay attention.

16 Q. And at this time, August 5, 2009, was it your
17 understanding that Robert Morton was 21 years of age?

18 A. Yes.

19 Q. And how long have you known Mr. Morton, if I
20 didn't ask that?

21 A. Dave?

22 Q. I'm sorry, Robert Morton.

23 A. I've known him since he basically was a baby. But
24 I'm not around him all the time. But I've known him since
25 his whole life.

1 MR. MOLEZZO: I have nothing further for this
2 witness. Thank you.

3 THE COURT: Thank you, sir. You may
4 cross-examine.

5 CROSS-EXAMINATION

6 (BY MR. SMITH:)

7 Q. You don't know what time the Mortons -- either
8 Cynthia, Robert, or David -- left your home?

9 A. No, I don't.

10 Q. You don't know how much they were drinking?

11 A. No. Not specifically, no. I know that Cindy was
12 drinking and I know that Robert was drinking. I know that I
13 was drinking.

14 Q. You said you became hammered?

15 A. Yeah, I was drunk.

16 Q. And you were out of it before they left?

17 A. Yeah.

18 MR. SMITH: No further questions, Your Honor.

19 THE COURT: Anything further?

20 MR. MOLEZZO: Nothing further. Defer to the jury.

21 THE COURT: Ladies and gentlemen, do any of you
22 have questions of this witness?

23 If not, you may be excused, sir.

24 MR. MOLEZZO: Thank you.

25 THE COURT: You may call your next witness.

1 MR. MOLEZZO: The defense would call Scott Upshaw,
2 please.

3 THE COURT: Would you come forward and be sworn.
4 Please raise your right hand and face the clerk.

5 (Witness sworn.)

6 THE COURT: Please come and be seated in the
7 witness stand.

8 After you're seated, please pull up to the
9 microphone and speak right into the microphone so everyone
10 can hear you. Would you please state your name for the
11 record.

12 THE WITNESS: Scott Randall Upshaw.

13 THE COURT: Would you spell your names for the
14 court reporter, all of them, please.

15 THE WITNESS: S-c-o-t-t R-a-n-d-a-l-l U-p-s-h-a-w.

16 THE COURT: Thank you. You may proceed on direct
17 examination.

18 MR. MOLEZZO: Thank you, Your Honor.

19 SCOTT RANDALL UPSHAW

20 Called as a witness on behalf of the Defendant,
21 having been first duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 (BY MR. MOLEZZO:)

25 Q. Mr. Upshaw, what is your occupation, please?

1 A. I'm a survey engineer for Newmont.
2 Q. How long have you had that position?
3 A. I was hired on January 11th.
4 Q. Of this year?
5 A. Of this year.
6 Q. Sir, where do you reside? Where do you live?
7 A. 835 Melarkey Street.
8 Q. Would that be here in Winnemucca?
9 A. Yes, sir.
10 Q. How long have you lived in Winnemucca?
11 A. I was born and -- well, since I was two, moved
12 away at 16. So I would say roughly 18 years.
13 Q. How old are you now, please?
14 A. 43.
15 Q. Sir, do you know this gentleman to my left?
16 A. Yes, I do.
17 Q. What is his name?
18 A. David Morton.
19 Q. How do you know Mr. Morton?
20 A. He's my stepbrother.
21 Q. Do you know a gentleman named Robert Morton?
22 A. Yes, I do.
23 Q. How do you know Robert Morton?
24 A. He's my nephew.
25 Q. Directing your attention to August 5th, 2009, do

1 you recall what occurred that day?

2 A. Yes, I do.

3 Q. During that day, did you come into contact with a

4 Robert Morton?

5 A. That evening, yes, I did.

6 Q. As best you recall, approximately what time was

7 that?

8 A. I received a phone call. It was right around

9 11:30, quarter to 12:00. Right around in there. He woke me

10 up out of bed.

11 Q. Did Mr. Morton eventually -- Robert Morton

12 eventually come to your home?

13 A. Yes.

14 Q. How did Robert Morton appear to you when he came

15 to your home? How was he acting?

16 A. Distraught.

17 Q. Okay. Any other -- you say "distraught." Was he

18 crying? Was he just head down? What do you mean?

19 A. Yeah, crying. How do you describe that?

20 Q. Let me help you out here. How long have you known

21 Mr. Morton, Robert Morton, please?

22 A. Pretty much all of his life.

23 Q. Other than being distraught, could you notice

24 anything else about him?

25 A. Yeah. He had pretty red eyes. I mean, could have

1 been from crying. Could have been from --

2 Q. Did you have any -- did you believe he had been

3 smoking marijuana?

4 A. I believe he was, yes.

5 Q. Had you seen him smoke marijuana in the past?

6 A. Yes, I have.

7 MR. SMITH: Objection, Your Honor.

8 THE COURT: Sustained, Counsel.

9 (BY MR. MOLEZZO:)

10 Q. Did you have the impression that he had been

11 drinking alcohol when you saw him on August 5th, 2009?

12 A. I couldn't tell you that.

13 Q. How long did he stay with you?

14 A. He stayed with me for a good three and a half

15 months.

16 MR. MOLEZZO: Nothing further at this time.

17 THE COURT: You may cross-examine.

18 CROSS-EXAMINATION

19 (BY MR. SMITH:)

20 Q. So you testified that Robert was distraught?

21 A. Distraught.

22 Q. And crying?

23 A. Yes.

24 Q. And had red eyes?

25 A. And had red eyes.

1 Q. Had you seen him do any marijuana that evening?
2 A. I had not.
3 MR. SMITH: No further questions, Your Honor.
4 MR. MOLEZZO: No follow-up. Defer to the jury.
5 THE COURT: Ladies and gentlemen, do you have any
6 questions? Now is the time. It appears that there's no
7 questions from the jury.
8 You may be excused, sir.
9 MR. MOLEZZO: May we approach, please?
10 THE COURT: Yes, sir.
11 (Bench conference between Court and counsel.)
12 THE COURT: Counselor, as I understand it, you
13 have an expert witness showing up at 3:00?
14 MR. MOLEZZO: That's correct.
15 THE COURT: Instead of tomorrow, he's been able to
16 move it up at least to 3:00.
17 What we're going to do right now is we're going to
18 take a recess and determine the schedule for the rest of the
19 day here. And the defense is going to determine if they
20 have any other witnesses; they would let us know in this
21 time frame.
22 So I know you haven't been in here very long, but
23 now you get a break.
24 It is your duty not to discuss among yourselves or
25 with anyone else any matter having to do with this case. It

1 is your further duty not to form or express any opinion
2 regarding the guilt or innocence of the defendant until the
3 case has been finally submitted to you for your decision.

4 You are not to read any newspaper articles or
5 listen to or view any radio or television broadcasts
6 concerning this case.

7 Should any person attempt to discuss the case with
8 you or in any manner attempt to influence you with respect
9 to it, you are to advise the bailiff who in turn will advise
10 the Court.

11 We'll be in recess until the call of the Court.

12 (Recess taken at 10:16 a.m.)

13 (Whereupon the following proceedings were held in open
14 court, outside the presence of the jury.)

15 THE COURT: Court will come to order. Please be
16 seated.

17 This is continuation of Case No. CR09-5709, State
18 of Nevada, plaintiff, versus David Craig Morton, defendant.
19 The record should reflect the presence of the defendant
20 together with his attorney, attorney on behalf of the State.
21 The record should reflect the absence of the jury.

22 I have spoken with counsel in chambers with regard
23 to how we're going to proceed. It appears that Mr. Molezzo
24 intends to have his client testify.

25 Mr. Morton -- and these questions are now directed

1 to Mr. David Craig Morton, sir.

2 I need to make sure that you fully understand your
3 constitutional rights. You understand that under the
4 Constitution of the United States that you have the absolute
5 right to remain silent and that the jury would be instructed
6 that if you chose not to testify that they are not to hold
7 that against you in any fashion, that you have an absolute
8 right to remain silent.

9 Do you understand that constitutional right?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: Have you discussed that fully with
12 your attorney, the implications of that right to remain
13 silent and the right that you do have? Have you discussed
14 that with him?

15 THE DEFENDANT: Yes, I have, Your Honor.

16 THE COURT: Do you understand that if you take the
17 witness stand and testify that the District Attorney's
18 Office has the right to ask you questions on
19 cross-examination?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: You fully understand that there are
22 certain risks involved in trial of either testifying or not
23 testifying and that you've had the opportunity to fully
24 discuss that with your attorney and that you're making a
25 tactical decision that it is your intention to testify? Is

1 that your understanding, sir?

2 THE DEFENDANT: Yes, Your Honor, it is.

3 THE COURT: Counsel, anything further we need to
4 go into regarding this matter before we bring the jury?

5 MR. MOLEZZO: No, sir.

6 MR. WILLIAMS: Not from the State.

7 THE COURT: Okay. At this time, if we're ready to
8 proceed, we'll bring the jury in and proceed with regard to
9 calling of this witness.

10 (Whereupon, the following proceedings were held in open
11 court, in the presence of the jury.)

12 THE COURT: Court will come back to order. Please
13 be seated.

14 Will counsel stipulate to the presence of the jury
15 and the alternates?

16 MR. MOLEZZO: The defense so stipulates.

17 MR. WILLIAMS: As does the State, Your Honor.

18 THE COURT: Call your next witness, please.

19 MR. MOLEZZO: The defense will call David Craig
20 Morton.

21 THE COURT: Mr. Morton, please come forward and be
22 sworn.

23 (Witness sworn.)

24 THE COURT: Please be seated in the witness stand.
25 Please speak into the microphone. Please state your name

1 for the record.

2 THE WITNESS: David Craig Morton, D-a-v-i-d
3 C-r-a-i-g M-o-r-t-o-n.

4 THE COURT: You may proceed on direct examination,
5 sir.

6 MR. MOLEZZO: Thank you, Your Honor.

7 DAVID CRAIG MORTON

8 Called as a witness on behalf of the Defendant,
9 having been first duly sworn, was examined and testified as
10 follows:

11 DIRECT EXAMINATION

12 (BY MR. MOLEZZO:)

13 Q. Mr. Morton, how would you like me to refer to the
14 person not here: As deceased or Cindy?

15 A. Cindy, please.

16 Q. How long have you lived -- where do you live, sir?

17 A. Winnemucca, Nevada.

18 Q. Sir, how long have you resided in this community?

19 A. 30 years.

20 Q. And how long have you known Cindy?

21 A. I've known Cindy for 35 years.

22 Q. And when did you meet her?

23 A. I met Cindy in high school. We started going
24 steady in high school.

25 Q. Did you eventually marry?

1 A. Yes, we did.

2 Q. You married your high school sweetheart?

3 A. Yes, I did.

4 Q. Did you have any children with Cindy?

5 A. Yes, we had two children: Chad and Robert.

6 Q. Directing your attention to August 5th, 2009, did

7 you have a confrontation with Cindy?

8 A. Yes, I did.

9 Q. Did you have more than one confrontation with

10 Cindy that day?

11 A. Yes.

12 Q. During August 5th, 2009, would you define the

13 confrontations as verbal?

14 A. Yes.

15 Q. During August 5th, 2009, did you become physical

16 with Cindy?

17 A. No, I did not.

18 Q. On that date, August 5th, 2009, were you drinking

19 alcohol, sir?

20 A. Yes, I was.

21 Q. Did you eventually go to Phil Simpson's home?

22 A. Yes, I did.

23 Q. On that date, when did you come into contact with

24 Cindy?

25 A. I came into contact with Cindy early in the

1 morning when she came home from Salt Lake.

2 Q. I'm sorry, please, sir, where did she come home --

3 A. She came home from Salt Lake on the train.

4 Q. How long had she been gone?

5 A. I don't remember. Five or six days.

6 Q. At any time during that day, were you consuming

7 alcohol with Cindy?

8 A. Yes, I was.

9 Q. And, sir, where was that, please?

10 A. Over at Phil's house.

11 Q. And would that be Phil Simpson?

12 A. Yes, it would.

13 Q. At Phil Simpson's -- at Mr. Simpson's,

14 approximately how much alcohol did you consume, if you can

15 recall?

16 A. It was quite a bit. I don't remember how much.

17 Q. Would you qualify yourself as an alcoholic, sir?

18 A. Yes, I would.

19 Q. Did you witness Cindy consuming alcohol?

20 A. Yes, I did.

21 Q. With your own eyes?

22 A. Yes.

23 Q. Approximately how much alcohol did she consume?

24 A. I don't remember.

25 Q. Did she appear to you on that day to become

1 intoxicated?

2 A. Yes.

3 Q. How long, as best you can recall, were you at Phil
4 Simpson's home?

5 A. Three hours.

6 Q. During the time there, were you able to talk with
7 Cindy?

8 A. Very briefly.

9 Q. Who did you spend most of your time talking to at
10 Phil Simpson's home?

11 A. I was talking to Phil.

12 Q. Did there come a time -- let me back up. While
13 you were there, was there a Robert Morton there as well?

14 A. No, he was not.

15 Q. Did there come a time when you left Mr. Simpson's
16 home?

17 A. Yes.

18 Q. And how did you leave Mr. Simpson's home?

19 A. With Cindy. She gave me a ride home.

20 Q. During -- what happened during the ride home?

21 A. We began to argue.

22 Q. When you arrived home, what did you do?

23 A. The argument continued until I had enough and I
24 went to bed.

25 Q. At the time you were in bed, were you woke -- if

1 that's the right word -- woken up by anybody?

2 A. Yes.

3 Q. And who was that?

4 A. Cindy.

5 Q. And how were you woken up?

6 A. She was hitting me through the covers, yelling at

7 me.

8 Q. Is it your habit to sleep in the nude?

9 A. Yes, it is.

10 Q. As you say she was hitting you, did you get up out

11 of bed?

12 A. Yes, I did.

13 Q. As best you can recall, what time could this have

14 been?

15 A. I don't know what time it was.

16 Q. I'm sorry?

17 A. I don't know what time it was.

18 Q. What did you do when you got up out of bed?

19 A. I went to the front room.

20 Q. Did you put any clothing on?

21 A. No.

22 Q. Were you aware that other folks were in that

23 house?

24 A. No, I was not.

25 Q. When you got up, where did you go?

1 A. I went to the front room and sat in my chair by
2 the front door.

3 Q. Then what happened?

4 A. Cindy continued to yell at me. She went down the
5 hall to the bathroom.

6 Q. Then what happened?

7 A. I picked up the gun and I was going to go outside
8 and shoot myself.

9 Q. Have you seen the weapon here in court, sir?

10 A. Yes.

11 MR. MOLEZZO: For the record, I'm grabbing a rifle
12 already admitted into evidence and pointing it at the
13 ground.

14 (BY MR. MOLEZZO:)

15 Q. Sir, can you look at me, please.

16 A. Yes, sir.

17 Q. Is this the weapon in question?

18 A. Yes, it is.

19 THE COURT: The should record reflect what -- what
20 number of evidence is that?

21 MR. MOLEZZO: I apologize. State's Exhibit No. 6.

22 THE COURT: The record will reflect that you have
23 Exhibit 6 in your hands.

24 (BY MR. MOLEZZO:)

25 Q. When you grabbed the weapon the first time again,

1 what were you doing? Where did you go?

2 A. I was going outside.

3 Q. And as best you can recall, how were you holding

4 the weapon? It would be at your side?

5 A. Yes. In my right hand, pointed down.

6 Q. Did you make it to the front door?

7 A. Yes.

8 Q. Did something cause you to turn around?

9 A. Yes.

10 Q. What was that?

11 A. Cindy was yelling at me from the bathroom that she

12 wasn't going to -- that she wasn't leaving, that I should be

13 the one to leave. That nobody in the house loved me anymore

14 and that I was the one that should leave the house.

15 Q. Did you proceed up to the -- did you turn around?

16 A. Yes, I did.

17 Q. Why did you turn around?

18 A. I was yelling on the way to the bathroom that she

19 wouldn't have to worry about it, that I was going to take

20 that damn gun and go outside and shoot myself.

21 Q. Did you walk through the hallway towards the

22 bathroom?

23 A. Yes, I did.

24 Q. Was the door to the restroom closed or opened?

25 A. It was opened.

1 Q. Did you see Cindy?
2 A. No, I had my head down.
3 Q. As best you can recall, where was the gun at the
4 time you came to the restroom? At your side or on your
5 shoulder?
6 A. It was at my side.
7 Q. Holding it two hands or one hand?
8 A. One.
9 Q. What did you say to Cindy?
10 A. I told her I was going to take this gun, and I
11 brought up to show her and it went off.
12 Q. What were you trying to achieve by showing her the
13 weapon, sir?
14 A. That I was serious about shooting myself. I
15 didn't mean to shoot her. I didn't mean to.
16 Q. Do you need a moment, Mr. Morton? Take your time.
17 Mr. Morton, can I ask a few more questions?
18 A. Yes.
19 Q. When you grabbed that weapon, did you activate the
20 bolt? Did you chamber a round?
21 A. No.
22 Q. So it's your testimony it was an attempt to show
23 her you were serious?
24 A. Yes.
25 Q. Was it an attempt to frighten her, scare her?

1 A. Yes. I was hoping she would stop.

2 Q. When you -- as you say, you pulled up -- you
3 pulled up the weapon? Did I understand that correctly?

4 A. Yes.

5 Q. You pulled up the weapon?

6 A. Yes.

7 Q. What was your intention after you pulled up the
8 weapon? What were you going to do?

9 A. Turning around to go back outside.

10 Q. You heard testimony -- did you hear testimony from
11 law enforcement in this case?

12 A. Yes, I did.

13 Q. Did you hear testimony from Sergeant Garrison in
14 this case?

15 A. Yes.

16 Q. Did you hear where Sergeant Garrison testified
17 that you said, "I should have done it right the first time"?

18 A. Yes.

19 Q. Sir, can you explain to the jury what you meant or
20 if indeed you said that statement?

21 A. I meant that I should have just walked out the
22 door and shot myself. I should never have went towards the
23 bathroom.

24 Q. If you can recall -- let me ask it this way. As
25 you picked up the weapon, why is it you elevated the weapon?

1 I guess that's the question. You testified that you had it
2 at your side. Correct?

3 A. Yes.

4 Q. Again, for the record, I have the weapon in
5 question, 45 degree -- down angle. With your right hand; is
6 this correct?

7 A. Something like that, yeah.

8 Q. And with the bathroom -- was the bathroom door
9 right in front of you?

10 A. Yes.

11 Q. Am I making sense? Was the restroom right in
12 front of you?

13 A. Basically, yes.

14 Q. And is it your testimony -- well, and you drew up
15 the weapon to leave. Do I understand that correctly?

16 A. Yes.

17 Q. And where would the front door be, sir? If I'm in
18 the hallway, where would the front door be? Would it be
19 towards the jury?

20 A. Yes.

21 Q. Let's say you're in the restroom. Would it be
22 towards the jury? You're in the restroom. I'm looking at
23 you.

24 A. Yes.

25 Q. Do you recall if the gun struck any wall or

1 anything like that as you moved?

2 A. I don't remember. I was really drunk.

3 Q. When the weapon discharged, if you remember, what
4 did you do then?

5 A. I couldn't believe it went off. I couldn't
6 believe it fired. I started manipulating the lever.

7 Q. Why would you manipulate the lever, sir?

8 A. I don't know. To make it safe. I don't know. I
9 was shocked. I couldn't believe it went off.

10 Q. Do you remember coming into contact with Robert
11 Morton?

12 A. Yes.

13 Q. What Robert Morton described through testimony, is
14 that what happened? Were you struggling over the weapon?

15 A. Yes.

16 Q. Did you tell -- strike that. Did Robert Morton
17 gain possession of that weapon, sir?

18 A. Yes, he did.

19 Q. What did you do then?

20 A. Told him to call 911.

21 Q. You heard testimony -- well, I'm sorry. Before
22 the weapon struggle -- my words -- did you put clothing on,
23 or was that after?

24 A. That was after.

25 Q. I'm sorry, please?

1 A. That was after.

2 Q. What clothing -- what items of clothing did you

3 put on, sir?

4 A. A pair of pants.

5 Q. During this time, did Robert Morton go downstairs?

6 A. Yes, he did.

7 Q. What did you do then? Did you follow him

8 downstairs?

9 A. I followed him about halfway down the stairs.

10 Q. And then where did you go?

11 A. I heard Cindy in the bathroom. I heard a thump

12 from the bathroom. And I turned around and I headed back to

13 the bathroom.

14 Q. Did you make it to the restroom?

15 A. Yes, I did.

16 Q. What did you see when you -- did you come into

17 contact with Cindy?

18 A. Yes, I did.

19 Q. Did you say anything to Cindy?

20 A. I told her that Robert was calling the ambulance

21 and she'd be okay. That I was sorry.

22 Q. Eventually, did you make your way outside, sir?

23 A. Yes, I did.

24 Q. If you can recall, Mr. Morton, were you running or

25 walking outside?

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A. I was walking.

Q. And if you can recall, why did you walk outside?

A. I went into the bedroom and put on a pair of pants and Robert was in the bathroom with his mom. And she was saying for Robert to stop it, that it hurt. And I just walked outside.

Q. Did Cindy eventually go to the hospital, Mr. Morton?

A. Yes, she did.

Q. Did you want to communicate with her while she was at the hospital?

A. Yes, I did.

Q. Who told you you could not do that?

A. The police.

Q. Didn't I tell you not to do that also?

A. Yes.

MR. WILLIAMS: I object to that, Your Honor.
Cross-examination on a statement between client and attorney.

THE COURT: He's divulged that. He's opening the door.

MR. MOLEZZO: I'm sorry, Judge. I didn't hear you, Your Honor.

THE COURT: He was objecting to attorney-client relationship. But you've opened the door. Go ahead.

1 MR. MOLEZZO: Yeah.

2 (BY MR. MOLEZZO:)

3 Q. Was I able to give you updates as to her

4 condition?

5 A. Yes.

6 Q. Did you ask me for those updates?

7 A. Yes.

8 Q. As the holder of the attorney-client privilege,

9 can we talk about -- would you give up that privilege

10 between you and I?

11 A. Yes.

12 MR. MOLEZZO: Court's indulgence, please, Your

13 Honor.

14 THE COURT: Yes, sir.

15 (BY MR. MOLEZZO:)

16 Q. Did there come a time where you filed divorce

17 papers, or at least gathered divorce papers?

18 A. Yes, I did.

19 Q. How many times did you gather divorce papers?

20 A. Three.

21 Q. Did you share them with Cindy?

22 A. Yes, I did.

23 Q. What did she do with those divorce papers?

24 A. The first two sets she had destroyed.

25 Q. Destroyed?

1 A. She would write obscenities all over them and tear
2 them up.

3 Q. I shared with the jury in opening statement that
4 it was a -- was it a pretty toxic relationship the last few
5 years?

6 A. Yes, it was.

7 Q. Were you responsible for some of that discord?

8 A. Yes.

9 Q. As well as Cindy?

10 A. Yes.

11 MR. MOLEZZO: Nothing further at this time, Your
12 Honor. Thank you.

13 THE COURT: You may cross-examine.

14 MR. WILLIAMS: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 (BY MR. WILLIAMS:)

17 Q. Mr. Morton, I'd like to talk to you a little bit
18 first about your marriage. Isn't it true that about two and
19 a half or three years ago is when you and your wife decided
20 to move back to Winnemucca?

21 A. Yes.

22 Q. And before that you had lived in Salt Lake, right?

23 A. Yes.

24 Q. And when you two moved back here, you were already
25 having problems in your marriage; isn't that true?

1 A. That's true.

2 Q. But you decided to try to give it a go here in
3 Winnemucca, right?

4 A. That's correct.

5 Q. But when you got here, you continued to have
6 problems, didn't you?

7 A. Yes, we did.

8 Q. A lot of those problems related to the fact that
9 you were having money issues; would that be correct?

10 A. Yes.

11 Q. And that you were both aware of these money
12 problems, right, you and your wife?

13 A. Yes.

14 Q. And that was one of the reasons why you two were
15 looking at getting a divorce, right?

16 A. No.

17 Q. At the time of this murder, you weren't working,
18 were you?

19 A. No.

20 Q. Was Cindy working?

21 A. No.

22 Q. And so because of this you two would have
23 arguments, right?

24 A. Yes.

25 Q. And that because you two both consumed alcohol,

1 these arguments would be worsened by the drinking of
2 alcohol, correct?

3 A. No.

4 Q. So drinking alcohol did not make your arguments
5 worse?

6 A. We argued fiercely almost every day, whether
7 alcohol was consumed or not.

8 Q. Would you at least agree with me that alcohol may
9 have been a contributing factor to you arguing so much?

10 A. Yes.

11 Q. So would it be safe to say that on the night of
12 August 5th you were aware of the fact that your marriage
13 with Cindy was in trouble?

14 A. Yes.

15 Q. And on that night, one of the things Cindy kept
16 saying to you is that she wanted the tires on her car fixed
17 so she could leave; isn't that true?

18 A. Yes.

19 Q. And that you kept telling her that you did not
20 want to hear that. Isn't that also true?

21 A. I told her I was not giving her any more money to
22 leave with.

23 Q. Okay. Thank you. Now, you described yourself
24 previously on direct examination as an alcoholic, right?

25 A. That's correct.

1 Q. And as part of your drinking activities, would
2 there be days when you would go and start drinking at 7:00
3 in the morning?
4 A. Yes.
5 Q. Was August 5th one of those days?
6 A. No.
7 Q. So you started drinking that day at your friend
8 Phil's house, correct?
9 A. Yes.
10 Q. And that your wife was there drinking as well?
11 A. Not that I knew of.
12 Q. Had she been at Phil's house with you at some
13 point, though?
14 A. Late that evening.
15 Q. And then you two came home together that night?
16 A. That's correct.
17 Q. Your testimony is that she woke you up that night
18 to start arguing with you, right?
19 A. We had been arguing.
20 Q. So she woke you up to continue the argument, then?
21 A. That's correct.
22 Q. And that she started hitting you, you said?
23 A. Yes.
24 Q. Now, you saw the pictures that were taken of you
25 that night at the detention center, right?

1 A. Yes.

2 Q. There weren't any marks on those pictures, were

3 there?

4 A. No.

5 Q. And you told the officer that night that she had

6 hit you somewhere in the face area. Remember that?

7 A. Pulled up the blanket to protect myself.

8 Q. But there were no marks on your head, were there?

9 A. No.

10 Q. And she stopped this attack to go to the bathroom;

11 is that your testimony?

12 A. Yes. We were yelling back and forth. She went

13 towards the front room. I got out of bed and followed her.

14 And we continued to yell at each other.

15 Q. You followed her to yell at her some more, right?

16 A. Yes. We were yelling at each other.

17 Q. You testified that during this you went to the

18 front room to sit in a chair, you said?

19 A. I was sitting in a chair, yes.

20 Q. At this point you're still naked, right?

21 A. Yes, I am.

22 Q. Then at that point is when you lost it, right?

23 A. Cindy was yelling as she went to the bathroom.

24 And, yes, that's when I lost it.

25 Q. That caused you to -- "lost it" is your term that

1 you gave the police, right?

2 A. Yes.

3 MR. MOLEZZO: Objection. That's the term that
4 counsel asked him on the question.

5 THE COURT: This is cross. Overrule the
6 objection.

7 Go ahead.

8 MR. MOLEZZO: Thank you.

9 (BY MR. WILLIAMS:)

10 Q. Then from there your testimony is you walked to
11 where the gun was located, right?

12 A. Yes.

13 Q. And you knew that gun was behind the door, right?

14 A. Yes.

15 Q. Because that was your gun, right?

16 A. Yes.

17 Q. And you knew that gun was loaded also, didn't you?

18 A. Yes.

19 Q. Because you're the one who loaded it?

20 A. Yes.

21 Q. And you picked that gun up, right?

22 A. That's correct.

23 Q. And then on the way -- and then you testified at
24 that point that you were going to leave and shoot yourself?

25 A. Yes.

1 Q. But you stopped because of something Cindy said to
2 you, right?
3 A. Yes.
4 Q. And you walked back towards the bathroom at that
5 point, right?
6 A. Yes, I did.
7 Q. And on the way there you made sure that there was
8 a bullet in that chamber, didn't you?
9 A. No.
10 Q. You opened that bolt up to make sure that you had
11 a bullet in there, didn't you?
12 A. No.
13 Q. And you continued to walk towards the bathroom at
14 that point, didn't you?
15 A. Yes.
16 Q. And you walked down that hallway, right?
17 A. Yes, I did.
18 Q. And you walked down that hallway with a gun in
19 your hands, right?
20 A. Yes, I did.
21 Q. And you got to the doorway of the bathroom, didn't
22 you?
23 A. Yes.
24 Q. And at that point you raised the gun up, didn't
25 you?

1 A. Yes.

2 Q. And you pointed that gun at your wife, didn't you?

3 A. No, I did not point it at her.

4 Q. You testified you brought the gun up, right?

5 A. I was telling her that I was going to go outside

6 and shoot myself, and I brought the gun around to turn to go

7 back to the front door and the gun went off.

8 Q. As you're walking towards that bathroom, you've

9 already thought about shooting yourself, right?

10 A. Yes.

11 Q. So you had your finger on the trigger, didn't you?

12 A. No.

13 Q. When you pulled the gun up to your shoulder while

14 you're pointing it at her you, had your finger on the

15 trigger?

16 A. I did not pull the gun up to my shoulder.

17 MR. MOLEZZO: Objection. Misstates the testimony.

18 He testified that he didn't put the gun on his shoulder,

19 Your Honor.

20 THE COURT: He can cross-examine.

21 MR. MOLEZZO: Thank you.

22 THE COURT: Ask the questions.

23 (BY MR. WILLIAMS:)

24 Q. Is it your testimony that you never put your

25 finger on the trigger?

1 A. That's correct.

2 Q. So the gun went off completely without you ever

3 putting your finger on the trigger?

4 A. That's correct.

5 Q. And it went off as you were pulling the gun

6 upward?

7 A. No.

8 Q. Pulling the gun away?

9 A. I was turning around to go to the front door.

10 Q. And it went off as you were turning around?

11 A. Yes.

12 Q. But you don't remember hitting anything, do you?

13 A. I don't remember. I was extremely drunk.

14 Q. After that, you testified you actuated the bolt to

15 take the spent cartridge out, didn't you?

16 A. Yes.

17 Q. And you put another bullet in the chamber, didn't

18 you?

19 A. No.

20 Q. You didn't put another bullet in the chamber?

21 A. No.

22 Q. Well, so you have a clip in it, right?

23 A. Yes.

24 Q. And that clip's loaded?

25 A. Yes.

1 Q. So if you actuate that bolt and the clip's working
2 right, it's going to put another bullet in there, isn't it?
3 A. Yes.
4 Q. So you did put another bullet in the chamber,
5 then, didn't you?
6 A. No.
7 Q. All right. You didn't put a bullet in the chamber
8 at that point?
9 A. No. I tried to -- I tried to.
10 Q. You tried to put a bullet in the chamber?
11 A. Yes.
12 Q. At that point, that's when your son Robert came
13 up?
14 A. Yes.
15 Q. He tried to get the gun away from you, didn't he?
16 A. Yes.
17 Q. Because you just shot his mom, right?
18 A. I didn't mean to shoot her.
19 Q. But you had just shot his mother?
20 A. Yes.
21 Q. And he got it away from you?
22 A. Yes.
23 Q. So you followed him to get the gun back, right?
24 Briefly you followed him to get the gun back?
25 A. Briefly.

1 Q. And then he went downstairs, right?

2 A. He went to the phone to call 911, but the phone

3 wasn't working.

4 Q. How do you know the phone wasn't working?

5 A. Because when he put the phone back down I asked

6 him what he was doing. And he said, "The phone isn't

7 working." He said, "I have my phone downstairs."

8 Q. And he went downstairs to get his phone at that

9 point?

10 A. Yes.

11 Q. And you followed him downstairs, right?

12 A. About halfway down the stairs I followed him.

13 Q. Then you went back and put pants on, right?

14 A. I heard Cindy fall in the bathroom. And I went to

15 Cindy.

16 Q. You heard her fall?

17 A. I heard a thump.

18 Q. Did you say you went back to the bathroom at that

19 point?

20 A. Yes, I did.

21 Q. And at some point in there you put on pants,

22 though, right?

23 A. After I talked to Cindy and told her that the

24 ambulance was coming, yes, I got up and went to the bedroom

25 and put on a pair of pants.

1 Q. Then you went back downstairs to talk to your son,
2 right?
3 A. Yes.
4 Q. And you went in the bedroom while he was on the
5 phone with the police, right?
6 A. Yes.
7 Q. And then when you heard he was on the phone with
8 the police, that's when you turned and ran out the door,
9 right? You went back up the stairs, right?
10 A. I did go back up the stairs.
11 Q. Then you went out the front door, didn't you?
12 A. No.
13 Q. And Robert followed you, didn't he?
14 A. Yes, he did.
15 Q. And as you saw him following you, that's when you
16 went out the front door, didn't you?
17 A. He went into the bathroom to talk to his mom.
18 Q. She was in a lot of pain, wasn't she?
19 A. Yes, she was.
20 Q. And you went out the front door, right?
21 A. Yes, I did.
22 Q. And then you tried to go into the neighbor's yard,
23 didn't you?
24 A. I walked that way, yes.
25 Q. And Robert followed you, didn't he?

1 A. Yes.

2 Q. Now, your testimony was that you tried to call 911
3 when Robert was downstairs?

4 A. Robert tried to call 911.

5 Q. But I thought you said you tried to call 911.

6 A. I told Robert to call 911. He went to the phone
7 and picked it up and started to dial it. And then he put
8 the phone back down. I asked him what he was doing. And he
9 said the phone was dead.

10 Q. Now, did you tell him this while you were
11 struggling with him over the gun?

12 A. We weren't struggling over the gun. He had taken
13 it away from me.

14 Q. So after he took the gun away from you, this is
15 when you say you told him to call 911?

16 A. I said "call 911," yes.

17 Q. Why didn't you yourself call 911?

18 A. It happened so damn fast.

19 Q. Is there a phone in your bedroom?

20 A. No.

21 Q. Is there a phone in any of the other bedrooms?

22 A. No.

23 Q. So the only phone upstairs is in the kitchen?

24 A. Yes.

25 Q. When you were fighting with Robert, that's when

1 the police got there, right?

2 A. We weren't fighting.

3 Q. When you were struggling with Robert, that's when
4 the police got there, right?

5 A. We weren't struggling.

6 Q. When he was holding on to you, that's when the
7 police got there, right?

8 A. We were walking toward -- we had been talking in
9 the backyard. I don't remember what was said. We heard the
10 sirens and we both started walking toward the side yard
11 between the two houses.

12 Q. So your testimony is you willingly walked from the
13 backyard to the front yard with Robert?

14 A. Robert had ahold of my arm.

15 Q. You went with him and you weren't trying to fight?

16 A. No.

17 Q. And then once police had taken you, you talked to
18 the police that night, didn't you?

19 A. Yes.

20 Q. And the first thing you said to them was that you
21 couldn't believe you had shot her and that you were going to
22 prison for a long time; isn't that true?

23 A. Yes. I didn't mean to shoot her. I still can't
24 believe it.

25 MR. WILLIAMS: That's all the questions I have of

1 this witness. Thank you.

2 MR. MOLEZZO: I have no further questions. Thank
3 you.

4 THE COURT: The jury have any questions? Now is
5 the time to ask any questions you may have. Raise your hand
6 if you have any questions. Apparently not.

7 You may step down. Do you have any other
8 witnesses to call other than your expert at 3:00, sir?

9 MR. MOLEZZO: No. Thank you, Your Honor.

10 THE COURT: All right. Ladies and gentlemen,
11 what's going to happen is that I'm going to -- you're going
12 to have a long lunch hour. We'll be working -- I've been
13 telling you we've been working on jury instructions and we
14 will continue to do that. But you don't need to be back
15 here until 3:00. The State may or may not have what we call
16 rebuttal witnesses. We will determine that after the last
17 witness testifies on behalf of the defense.

18 So, again, follow my admonition, but you'll be
19 excused until 3:00. Please be back at that time.

20 It is your duty not to discuss among yourselves or
21 with anyone else any matter having to do with this case. It
22 is your further duty not to form or express any opinion
23 regarding the guilt or innocence of the defendant until the
24 case has been finally submitted to you for your decision.

25 You are not to read any newspaper articles or

1 listen to or view any radio or television broadcasts
2 concerning this case. Should any person attempt to discuss
3 the case with you, or in any manner attempt to influence you
4 with respect to it, you are to advise the bailiff, who will
5 in turn advise the Court.

6 We'll be in recess until 3:00.

7 (Recess taken at 11:09 a.m.)

8 THE COURT: Court will come to order. Please be
9 seated.

10 Will counsel stipulate to the presence of the jury
11 and the alternates?

12 MR. MOLEZZO: Defense stipulates.

13 MR. SMITH: The State will so stipulate, Your
14 Honor.

15 THE COURT: You may call your next witness on
16 behalf of the defense.

17 MR. MOLEZZO: Thank you very much, Your Honor.
18 Rich Molezzo defense would call Robert Venkus, Forensics
19 Group Studies.

20 THE COURT: Sir, would you come forward and raise
21 your right hand to be sworn.

22 THE WITNESS: Yes, sir.

23 ROBERT VENKUS,
24 having been first duly sworn to tell the truth, the whole
25 truth, and nothing but the truth, was examined and testified

1 as follows:

2 THE WITNESS: Yes, I do.

3 THE COURT: Please come be seated in the witness
4 stand, sir.

5 MR. SMITH: Your Honor, may we approach?

6 THE COURT: You may.

7 (Whereupon, a sidebar was had.)

8 THE COURT: Sir, would you please state your name
9 for the record?

10 THE WITNESS: Yes, Your Honor. It's Robert, last
11 name Venkus, V, like Victor, e-n-k-u-s.

12 THE COURT: You may proceed on direct examination.

13 MR. MOLEZZO: Thank you very much, Your Honor.

14 DIRECT EXAMINATION

15 (BY MR. MOLEZZO:)

16 Q. Did I pronounce that, Mr. Venkus?

17 A. Venkus.

18 Q. Venkus, correct?

19 A. Yes, sir.

20 Q. And, sir, where do you reside?

21 A. In Sacramento.

22 Q. And how long have you lived in Sacramento?

23 A. Oh, gosh. Since 1948.

24 Q. Can you share with us -- what do you do right now,
25 please?

1 A. I'm the owner/operator of a forensics consulting
2 business called Forensic Studies Group. I provide
3 consultation to primarily attorneys in both civil and
4 criminal matters.

5 Q. When you say "consultation," what are you
6 referencing?

7 A. Uh, helping them with the analysis of reports.
8 Doing, um -- I've done gunshot residue testing. Um,
9 determining trajectories. Firearms identification,
10 examination. Ammunition characteristic, performance, things
11 of that nature.

12 Q. Thank you, sir. And how many years of experience
13 do you have in this field?

14 A. I first qualified as an expert in the mid '80s,
15 but pursued it as more of a career beginning in the mid
16 '90s. So about, um, '95 to -- about 15 years.

17 Q. Yes, sir. And have you taught any type of
18 curriculum in this field?

19 A. Yes. I'm a certified instructor through the
20 National Rifle Association, rifle, pistol, shotgun, and also
21 a course called Home Firearms Responsibility.

22 Q. What are you, an armorer?

23 A. I have a basic police service or armorer, which is
24 a college certification. It's through Yavapai College in
25 Arizona.

1 Q. Can you share with the jury kind of what an
2 armorer is?

3 A. Well, one aspect is kind of a parts replacer. But
4 the bigger, um, responsibility is the administrative one of
5 keeping a log and a record of what firearms have been
6 serviced, um, when they were serviced, what parts have been
7 replaced, and that's primarily for liability issues.

8 MR. MOLEZZO: Your Honor, if I may, I would like
9 to move the Court to recognize this gentleman as an expert
10 witness in the area of firearms.

11 MR. SMITH: Can we voir dire, Your Honor?

12 THE COURT: You may, sir.

13 VOIR DIRE EXAMINATION

14 (BY MR. SMITH:)

15 Q. You indicated that you're an instructor for the
16 NRA; is that correct?

17 A. I'm certified by the NRA as an instructor. I'm
18 not an NRA employee.

19 Q. So you can teach classes on gun safety; is that
20 correct?

21 A. Correct.

22 Q. And you keep logs as part of the armorer of when a
23 weapon's been serviced and what parts have been changed?

24 A. That's what an armorer would do. I do not serve
25 as that function. That's just training I've had. In other

1 words, I'm working as a police armorer.

2 Q. Have you gone to any formal education at college
3 in your life?

4 A. Yes, sir.

5 Q. And what was that in?

6 A. Well, I have a master's degree in psychology,
7 which doesn't directly relate to the firearm issue.
8 However, there was a heavy emphasis in experimental method,
9 scientific method.

10 Q. Okay. And your work experience, can you tell us
11 about your work experience.

12 A. Um --

13 MR. MOLEZZO: Your Honor, these are
14 cross-examination questions, hardly voir dire.

15 THE COURT: No, they are. It has to do with his
16 qualifications, whether he can be qualified to give opinion
17 testimony as an expert.

18 You may proceed, sir.

19 THE WITNESS: I spent -- well, when I first became
20 qualified, I was working for KF Addison & Associates
21 Investigations. We were -- basically, we were taught crime
22 scene work, chain of evidence. Because of my prior interest
23 in firearms and history of firearms, I primarily got the
24 firearms-related cases. Became, um, qualified as an expert.
25 Um, I've since worked on about 168, 169 cases. I've

1 qualified and provided testimony on 27 of those occasions,
2 mainly in -- in the Sacramento area, but also in seven
3 other -- I believe seven other counties in California.

4 (BY MR. SMITH:)

5 Q. Did you have a full work career as a social
6 worker?

7 A. I have not worked as a social worker. I do
8 individual therapy, and I still do that. That accounts for
9 about -- this is one of those professions, the forensic end
10 of it, it's either feast or famine. And right now actually
11 my income is probably 60/40, with 60 percent of it coming
12 from my forensics work.

13 MR. SMITH: Your Honor, at this point we would ask
14 this individual not be qualified as an expert. To be
15 qualified to teach classes for the NRA, you take an exam.
16 It's like teaching hunter safety and range safety. That
17 there's no expertise that would teach any of the areas in
18 which his report goes into, Your Honor.

19 THE COURT: Well, what is it you're trying to
20 qualify him to be as an expert specifically, sir, in which
21 area?

22 MR. MOLEZZO: Specifically in a firearm --
23 firearms and weaponry, Your Honor. I do have his curriculum
24 vitae, as well as the prosecutor.

25 THE COURT: Okay. Then you probably need to go

1 through that to show me that he has the ability to give
2 opinion testimony about the subject that you intend to
3 question him about.

4 MR. MOLEZZO: Okay.

5 DIRECT EXAMINATION

6 (Resumed)

7 (BY MR. MOLEZZO:)

8 Q. Mr. Venkus, have you been qualified as an expert
9 before today?

10 A. Yes, 27 prior times.

11 Q. Were you qualified in -- have you been qualified
12 in Nevada?

13 A. I have not been qualified in Nevada. I have, um,
14 provided services for Nevada, but I have not qualified in
15 this state.

16 Q. Have you been qualified in death penalty cases?

17 A. Yes, I have.

18 Q. Specifically cases relating to weapons or
19 dangerous deadly weapons?

20 A. They've all been related to weapons.

21 THE COURT: Sir, what is it that you have been
22 qualified to give opinions about with regard to firearms?

23 THE WITNESS: In California, Your Honor, I
24 qualified in firearms mechanics on numerous occasions.

25 THE COURT: What background do you have, as far as

1 training, schooling-wise and training, to be able to give
2 testimony, expert testimony about firearm mechanics?

3 THE WITNESS: Well, part of that came from the
4 armor's course. Which was -- again, was a college-level
5 course on how -- it was primarily police revolvers and
6 semiautomatics, how they function.

7 THE COURT: This was a single course?

8 THE WITNESS: It was a single course.

9 THE COURT: And how long did it last?

10 THE WITNESS: It was a 40-hour program. I've done
11 an internship with an organization called Competition
12 Systems, heavy emphasis on design, functioning, and
13 mechanics.

14 Um, I've done coursework at -- when I was working on my
15 associate's degree, I took a semester of, um, aircraft
16 mechanics which taught precision measuring and metallurgy.
17 I've been a member of the American Gunsmithing
18 Association --

19 THE COURT: Go ahead, sir.

20 THE WITNESS: I'm just trying to find the date.
21 -- Since 1997.

22 THE COURT: What I'm trying to do is find out what
23 qualifications he has with regard to the questions you want
24 to ask him.

25 MR. MOLEZZO: Thank you, Your Honor.

1 (BY MR. MOLEZZO:)

2 Q. In reference to -- did you also do work for the
3 American Pistol Institute?

4 A. Right. That was -- that was primarily, uh,
5 internal and external ballistics, tactical. Tactical work.

6 Q. Did that deal with the -- the functionality of
7 weapons as well?

8 A. Oh, definitely. Definitely.

9 Q. And --

10 A. Those were three weeks. That was three separate
11 one-week residential courses. And that was pistol,
12 shotgun -- well, basic, advanced pistol, and shotgun.

13 Q. Did it also deal with firearm theory and
14 performance capabilities?

15 A. Yes.

16 MR. MOLEZZO: Your Honor, I would submit he's --
17 clearly qualifies as an expert to testify in this case in
18 reference to the firearm in question which he's observed and
19 tested.

20 MR. SMITH: I'm still going to object to that,
21 Your Honor. At this point, we have that he's been to a
22 three-week course that specialized in pistols and shotguns.
23 This is neither of which. Precision measuring, which was
24 aircraft, which this is not. Semi-auto weapons, which this
25 is not. Handguns, which this is not.

1 And the general overall armory which he explained
2 was basically keeping logs as to service and what parts were
3 changed on a weapon. I don't see anything that qualifies
4 him to be able to testify as to an expert opinion in the
5 state of Nevada on this weapon.

6 THE COURT: Well, I'm going to allow him to give
7 opinion testimony. But, counsel, you may object
8 specifically to particular questions.

9 It appears with regard to the particular kind of
10 area that he goes into, whether or not he's qualified, you
11 still have the right to object.

12 MR. SMITH: All right. Thank you.

13 THE COURT: But I'm going to allow him to give
14 opinion testimony.

15 Ladies and gentlemen, in making the determination
16 that this man can give opinion testimony, I do not indicate
17 to you what weight you are to give to his testimony. That's
18 entirely up to you based upon what you find his credentials
19 to be and credibility. That's something for the jury to
20 determine.

21 MR. MOLEZZO: Thank you very much, Your Honor.

22 THE COURT: You may proceed.

23 (BY MR. MOLEZZO:)

24 Q. Mr. Venkus, in reference to your education and
25 training, did you -- have you worked with functionality

1 dynamics of various weapons?

2 A. Yes, I have.

3 Q. And also can you educate me what functionality
4 means?

5 A. Basically how the parts of the weapon interact:
6 The fire control mechanism, the safety devices, uh, the
7 extraction and ejection system. How all of those parts come
8 together and allow the firearm to be, um, fired or not fired
9 in a safe fashion.

10 Q. And in reference to your statement to the
11 prosecution, you do -- 60 percent of your income is forensic
12 work?

13 A. Correct.

14 Q. Is that specifically geared towards weaponry? Do
15 I understand that correct?

16 A. Yes. Yes, all of that is weaponry work.

17 Q. Do I understand that correctly, sir?
18 And what is the name of your business, please?

19 A. Forensic Studies Group.

20 Q. And does that deal primarily in firearm
21 identification, research of firearm and ammunition, et
22 cetera?

23 A. Correct.

24 Q. And do lawyers hire you to testify?

25 A. Yes. Well, not so much to testify, but it's to

1 offer opinion.

2 Q. Okay. I'm sorry. To maybe assist them in aspects
3 of their case they may have?

4 A. Correct.

5 Q. Is that what you did in this case?

6 A. Yes, sir.

7 Q. Through our correspondence, was I able to share
8 with you the police reports of this case?

9 A. Um, I was looking through my notes last night. I
10 did not see police reports. I saw some summaries. I saw
11 the reports from the criminalist.

12 Q. And would that be Miss Heward, if you can recall?

13 MR. SMITH: Your Honor, may we ask what he's
14 referring to?

15 THE COURT: Sir, you're looking at certain
16 documents?

17 MR. MOLEZZO: I'm sorry --

18 THE WITNESS: I was looking to see what's in the
19 report and Mr. Molezzo's cover letter.

20 THE COURT: All right.

21 THE WITNESS: And it also includes her bench notes
22 which I reviewed.

23 MR. SMITH: Your Honor, may we have those entered
24 into evidence? The State has not received a copy of any of
25 those, and he's referring to them in court to give

1 testimony.

2 MR. MOLEZZO: I got those through discovery.

3 THE COURT: Just hold on.

4 MR. MOLEZZO: Yes, sir.

5 THE COURT: As I understand it, you are using
6 documents to refresh your recollection. Normally these are
7 not entered into evidence. You do have the right to examine
8 them. So let's, first of all --

9 MR. MOLEZZO: Yes.

10 THE COURT: -- would you please make sure that
11 counsel has the documents this man's referring to to refresh
12 his recollection?

13 MR. MOLEZZO: Thank you for that courtesy, Your
14 Honor. These documents are what counsel gave me.

15 THE COURT: Would you identify them?

16 MR. MOLEZZO: They are specifically from the
17 Washoe County Crime Lab. Thank you, Judge. Miss Heward's
18 written report.

19 THE COURT: Counselor, what I'm going to do is --
20 let's have the bailiff come over. The documents you're
21 referring to, sir, I'm going to ask that bailiff take them
22 to the prosecutor so he can look at them and identify what
23 you're looking at.

24 MR. MOLEZZO: Thank you, Your Honor.

25 THE WITNESS: There's also a cover letter here,

1 which I believe would be work product.

2 MR. SMITH: Your Honor, he indicated that he was
3 referring to the letter from Mr. Molezzo.

4 THE COURT: Yeah, you will need to leave it all
5 there, sir.

6 MR. MOLEZZO: You can leave them all there.
7 For the record, the bailiff is taking over the
8 correspondence I sent to Mr. Venkus in preparation for this
9 case.

10 THE COURT: We will be at ease for a minute and
11 the prosecutor can review the documents that are being used
12 by the witness to refresh his recollection.

13 MR. MOLEZZO: Thank you.

14 (Whereupon, the documents were reviewed.)

15 MR. SMITH: I've examined them, Your Honor. We'd
16 ask that defense counsel retains the copies. And that, when
17 they're going to refresh recollection, that they would
18 inform the Court what they handed to the defendant to
19 refresh recollection so the State might refer to the same
20 documentation.

21 THE COURT: Okay, sir. You're going to have him
22 refer to something to refresh his recollection, sir, and
23 make it known so both counsel have that.

24 MR. MOLEZZO: I will provide that courtesy for the
25 prosecution. Again, for the record, these are reports that

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X E-Flex Delivery System of the Nevada Supreme Court
_____ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

addressed as follows:

MICHAEL McDONALD DISTRICT ATTORNEY
ANTHONY GORDON, DEPUTY DISTRICT ATTORNEY
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 25th day of March, 2022.



KARLA K. BUTKO, ESQ.