IN THE SUPREME COURT OF THE STATE OF NEVADA

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JESSICA DEFALCO, Appellant, vs. THE STATE OF NEVADA, Respondent.	) CASE NO. 89685

APPELLANT'S APPENDIX VOL. VIII – Pages 1290-1517

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff(s), vs. JESSICA DEFALCO, Defendant(s).	Case No. C-23-372006-1 DEPT. VII

BEFORE THE HONORABLE DANIELLE PIEPER,
DISTRICT COURT JUDGE

FRIDAY, SEPTEMBER 13, 2024

TRANSCRIPT OF PROCEEDINGS RE:
JURY TRIAL - DAY 5

(Appearances on page 2.)

RECORDED BY: STACEY RAY, COURT RECORDER

APPEARANCES:

FOR THE STATE:	COREY J. HALLQUIST, ESQ. Deputy District Attorney MICHAEL ALLMON, ESQ. Deputy District Attorney
FOR THE DEFENDANT(S):	ANNA L. STONE, ESQ. Deputy Public Defender ROBERT SCHMIDT, ESQ. Deputy Public Defender

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LAS VEGAS, NEVADA, FRIDAY, SEPTEMBER 13, 2024

[Proceeding commenced at 9:07 a.m.]

[Outside the presence of the jury.]

THE COURT: We're outside the presence of the jury in Case Number C-372006.

State, did you just give something to Ms. Stone?

MR. ALLMON: Yes. We had discussed editing down an audio jail call to exclude the fact that it was a jail call. And then we were going to stipulate to its admission.

THE COURT: Okay.

MR. ALLMON: And I want -- I've edited -- not me personally, but we have edited it down and so now I've got that on Exhibit 6. I want her to listen to it to make sure that she's okay with it.

MS. STONE: Before we play it for the jury.

MR. ALLMON: Before we stipulate. That's --

THE COURT: Okay. And what witness are you going to play that with?

MR. ALLMON: Detective Knickerbocker.

THE COURT: So what I'm going to do is rather than force you to do it five minutes before he walks in, why don't we -- I'm going to -- let's have you -- what I'm trying to figure out is if I should have the jury go get -- use the restroom, maybe get some water, and come back at 9:30. Because if you have objections to it, then I need to deal with that now.

So can you have Helen come in real quick?

MR. ALLMON: Just briefly, I have already played the file edited down to a certain version that I thought was correct and, you know, nothing unfairly prejudicial. And there's --

THE COURT: Mr. Hallquist, I need to hear only Mr. Allmon.

MR. ALLMON: So that is already -- we've already discussed that earlier this week. The only additional cut was the first 30 seconds where they say this is a call from the jail.

THE COURT: Okay. So that is the only thing that has changed since the last --

MR. ALLMON: The only thing that's changed since the last time I played the video for -- or the audio for Ms. Stone.

THE COURT: So what --

MS. STONE: There were --

THE COURT: So --

MS. STONE: We'll see where the place is. There were some other discussions last week. But --

THE COURT: What I'm going to do is, out of an abundance of caution so that we don't feel a bunch of pressure, Helen, just let the jurors know that I'm going to ask them to -- they can use the restroom, they have until 9:30. There are a couple of things that myself and the attorneys need to take care of. I'm going to get off the bench, we're going to go off the record so that you can listen to that.

And then after you listen to it, and if there are other things, because I saw Mr. Hallquist showing things to Ms. Stone, and I don't

think it's fair to her that I'm trying to talk to her about one thing and then somebody else is trying to talk to her about another thing.

So I'm going to ask you to -- I don't know what they showed you and I don't know if you know. So I'm going to ask you to look at that, I mean, listen to the audio, listen to --

MS. STONE: Look at the --

THE COURT: -- look at whatever it is they want you to look at, and then after that's done, if everything's fine, great, we'll get the jury and we will come back at 9:30. If there's an issue, then let me know as soon as possible so I can get back on the bench.

MS. STONE: Yes, Your Honor.

THE COURT: Okay. Thank you.

[Court recessed at 9:10 a.m., until 9:33 a.m.]

[Outside the presence of the jury.]

THE COURT: First listen to the recording.

MS. STONE: I have had an opportunity --

THE COURT: Or, sorry, Ms. Stone and Mr. -- sorry, I keep --

MR. SCHMIDT: It's all right.

THE COURT: Okay.

MS. STONE: We have an opportunity to listen to the recording. There --

THE COURT: Or, wait, are we on the record?

THE COURT RECORDER: Yes.

THE COURT: And we're outside the presence of the jury in Case Number C-372006.

MS. STONE: The thing that gives me some concern about the recording is that there is a lot of discussion of punishment throughout it. It's a jail call recording. She makes some admissions while talking to a family member.

THE COURT: She, meaning your client?

MR. SCHMIDT: Yes.

MS. STONE: Yes.

THE COURT: Okay.

MS. STONE: But those admissions are interspersed through a lot of talk of, like, what do you think's going to happen? What are -- and what am I looking at for something like this? I'll definitely get probation or you think I'm looking at prison time? Or -- so all of that.

I think if Your Honor's inclined to allow the jail call to be played for the jury, I would ask for some leeway to discuss punishment with them in my closing, because they're going to have questions. It's now come up in the trial the question of punishment. And the reality is we've conceded the duty to stop, she's going to prison. So --

THE COURT: Okay. So here, I guess -- okay. So let me back up and ask this.

When was this jail call provided to the defense?

MR. ALLMON: Months ago.

THE COURT: Okay. When you say months, like --

MR. ALLMON: I'm happy to look at the paper.

THE COURT: -- two months ago or, like, six months ago?

MR. ALLMON: Like --

MS. STONE: It's been a while, Judge.

MR. ALLMON: A long time.

THE COURT: Okay. All right. Okay. So --

MR. ALLMON: Before I was on the case, even.

THE COURT: Okay. So how long have you been on the case?

MR. ALLMON: I've been on the case since June. It was provided before then. And then I made sure to provide it again at the 30-day deadline as well.

THE COURT: Okay. So --

MR. ALLMON: It was Victoria Villegas who provided it.

THE COURT: Okay. So this -- I haven't heard the jail call, so I'm a little bit in a vacuum. The jail --

Ms. Stone, did you object before about the -- okay, she's talking about probation or the sentencing portion of it, the punishment?

MS. STONE: That was a concern that my bottom --

THE COURT: You addressed with Mr. Allmon?

MS. STONE: No, that came up today.

THE COURT: Oh, okay.

MS. STONE: We had had prior conversations about the jail call. It also included references to prior bad acts and such, and so those were cut out.

THE COURT: The prior bad acts?

MS. STONE: Yes. But in listening to it in its whole again, I -- particularly given the way that the trial has progressed and our

concessions in opening statement, I --

THE COURT: Because, see, when you ask me to give you leeway, I hesitate on that, because the -- there's a jury instruction that says you are not to discuss punishment in your deliberations.

MS. STONE: Well, and this is what I'm -- I -- this is what -- the reason that I think this is a concern is, normally, we don't talk about punishment --

THE COURT: Correct.

MS. STONE: -- during the trial. So that jury instruction makes sense to the jury. They've not been given any information about that --

THE COURT: Correct.

MS. STONE: -- and they're just being instructed to continue not to think about it. Here, they're going to be given information about it. Whether it's correct or not, there will be evidence relating to potential punishments in this case.

THE COURT: Okay. So are you asking the State to redact all portions that talk about punishment?

MS. STONE: Either that or allow me to comment in my closing that --

THE COURT: I don't think I can allow you to comment. That's the -- that's what I'm seeing. That's the difficulty, right?

MS. STONE: I see.

THE COURT: So -- because we give them instruction that they can't talk about punishment, they can't consider a punishment, all of that kind of stuff. And I don't know what you're going to say, right? And

I'm not asking you to tell me right now what you're going to say, but I think me giving you leeway on that basically violates the jury instruction. Because I don't know what you're going to want to say, and if you say something that they're going to object to, now, you're like, yeah, but, Judge, you said I could say it. And I'm, like, okay, well.

MS. STONE: I mean, on this point, I'm fine with saying what I would like to say, which is something to the effect that we have conceded to a non-probationable charge. She was going to end up going to prison.

THE COURT: Yeah. I -- that's not -- we can't do that.

MS. STONE: Okay.

MR. ALLMON: That's -- we'll cut it down. Let's give -- give us a -- and so that's -- we will -- I'm okay with cutting some portion of it. What I will say, though, is a lot of this does go to her motive and bias in this case, as well, where she's talking about her concern about going to prison. So she --

THE COURT: Well, she's -- the portions where Ms. DeFalco -- I mean, I don't know, right, how long the jail call and I haven't listened to it. And, quite frankly, I don't want to be the redactor. I can listen to it, but I think the portions where Ms. DeFalco is talking about -- just in the vacuum I'm not listening to it in, the portions where Ms. DeFalco is talking about going to prison, that's got to come out.

MR. ALLMON: I'll cut it out, anything of that, anything of bail, anything -- I'll -- we'll go back and I'm going to --

THE COURT: I mean, they know that she was arrested.

That --

MR. ALLMON: Right.

THE COURT: That -- I mean, so --

MS. STONE: It is a pretty lengthy discussion of bail and possible house arrest and other options in addition to also discussion of what she might face as a punishment.

THE COURT: So are you asking to take out the portions about the bail as well? Or just -- because my ruling right now is anything where she's talking about prison, going to prison, anything about prison, that's got to come out. Even though you're conceding the duty to stop at scene of crash involving death or person or -- even though you're conceding that, I'm not going to allow you to get up and talk about, you know, non-probationable or that. So the part about prison's got to come out.

Bail, I don't know. Because I -- I mean, bail is a part of what we do, but I don't know what's happening. So I guess my question is: Are you asking to redact the portions of the bail out? Because, I mean, I don't -- like, I don't know what it is, right? I mean, bail --

MS. STONE: I think if the State's able to, that would be our request, just because there isn't a clear resolution from that conversation about whether she will, in fact, be able to bail out, so I don't want to give the impression that she is still in custody.

THE COURT: In custody?

MS. STONE: Although we know she is, but the jury doesn't know that.

THE COURT: So you're asking for the bail portions, and I'm making the ruling on the prison portion. Okay?

What else?

MS. STONE: Is that prison and probation? Because there's mention of both.

THE COURT: Yeah.

MS. STONE: Okay.

THE COURT: Because any type of punishment can't be in there. Okay.

Anything else?

MS. STONE: That's all, Your Honor.

THE COURT: Okay.

Mr. Allmon, how long is it going to take you to -- and I'm not -- you know, how long is it going to take you to, A, do that? And then, B, be able to have the defense listen to it?

MR. ALLMON: I'm not sure if our tech is working. I'm assuming he is. I just -- I have not verified that he's on today.

THE COURT: Okay.

MR. ALLMON: I will e-mail him right now.

THE COURT: So here's what I'm going to do. I'm going to get up -- why don't you try and contact him. Can Mr. -- so one of you call to see if he's working today.

MR. ALLMON: Yes, we will do that. And I will go back and I will sit down and finish these portions out that -- and go through them with Ms. Stone, make sure we're on the same page.

THE COURT: Because what I'm trying to figure out is what time I should bring the jury into this room.

MR. ALLMON: Another 30 minutes, please.

THE COURT: Okay. So, Helen, what I'm going to ask is you explain to the jury that this is taking a little bit longer than we thought, that the parties apologize. But I'm going to have them come back at 10:30. Okay?

So that -- what that means by 10:30 is the redactions are done, Ms. Stone has listened to it, okay. I also know that there were pictures or it looked like there were pictures.

MS. STONE: I did have a chance to look at those, Judge.

THE COURT: Okay. Are there any objection to them?

MS. STONE: No, Your Honor.

THE COURT: And -- okay. All right.

MS. STONE: Provided the foundation is laid, then we don't, that's fine.

MR. HALLQUIST: And just to be clear with DeSousa, we're not going to into the opinions are any type of crash scene reconstruction. All he's going to be testifying is the photographs taken at the crime scene.

MR. SCHMIDT: And we've had this discussion.

MR. HALLQUIST: Yeah. And I've talked to them prior, so there's no surprise or anything like that.

THE COURT: So thank you.

MS. STONE: Thank you, Your Honor.

[Court recessed at 9:42 a.m., until 10:28 a.m.]

[Outside the presence of the jury.]

THE COURT: Case Number C-372006. We are outside the presence of the jury. What's the update?

MS. STONE: The update is that the State was not able to cut out the portions, but it -- I reviewed their time stamps for what their portions of the call that they're going to play that exclude the portions that Your Honor indicated they could not include.

MR. ALLMON: We're working on it.

MS. STONE: Oh, you are working on actually cutting --

MR. ALLMON: We're -- yeah, we're working on it.

MS. STONE: Okay.

MR. ALLMON: There's a -- sorry, Your Honor.

There -- so last I had mentioned, I said I'm going to send it. We hadn't received a response yet from him. We have received a response from our tech person. And they are working on it. So.

THE COURT: Okay. So is the first witness going to be the witness that this audio is played with?

MR. ALLMON: No, Your Honor.

THE COURT: Okay. Is the second witness going to be the witness that this audio is played with?

MR. SCHMIDT: It depends if he gets here, Your Honor. We've been trying to get in communication with DeSousa.

THE COURT: Okay. I don't know who that is. But --

MR. SCHMIDT: It's the second witness.

THE COURT: Okay. And the third witness for today -- and so, potentially, either the second or third witness of today is the person who this is going to be used with?

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay. How long do we think that it's going to take the first -- I mean, because, basically, your second witness should have been here already, right?

MR. HALLQUIST: He should, yes.

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay. So, is the third --

MR. HALLQUIST: I'll check outside.

THE COURT: Okay. Is your third witness here? I don't know who any of these people are.

MR. ALLMON: So it's a -- the first witness is here, the third witness is here.

THE COURT: Okay.

MR. ALLMON: Our second witness is not.

THE COURT: Okay. All right. I'm assuming the third witness is --

MR. ALLMON: Is our final.

THE COURT: -- who we're going to use the jail call with?

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay. Well, I guess let's -- how long -- whoever's doing the redactions, how long do we think -- or where are they in regard to the redactions?

MR. ALLMON: I sent them to him at 10:08. He knows that it's -- it was coming and told me he was going to work on it as soon as I sent it to him.

THE COURT: Okay. So here's what I think we should do. I think we should start with the first -- State's first witness, see how long that takes us. If the State's second witness comes, then I think we should proceed with the second witness. But if the second witness -- what's the name of the second witness?

THE CLERK: DeSousa.

THE COURT: DeSousa.

MR. ALLMON: DeSousa.

THE COURT: Mr. or Mrs.?

MR. ALLMON: It's Officer.

MR. SCHMIDT: It's Officer DeSousa.

THE COURT: Okay. So Officer DeSousa does not show up, my inclination is to take a long lunch break where we work through the jury instructions. That way it'll give you -- the State time to get the final redactions. And then the defense has an opportunity to listen to that, the final redactions, before we call --

MR. HALLQUIST: Knickerbocker.

THE COURT: Yeah. I think it's better to use names. Knickerbocker. That's my inclination to get through. Because we -- I mean, the jury's been waiting out there for an hour and a half. Okay?

MS. STONE: Yes, Judge.

MR. ALLMON: Yes, Your Honor.

THE COURT: That's my inclination. All right.

So let's bring the jury in.

And then your client's decision to testify, we're going to need to know prior to the instructions.

MS. STONE: Understood, Your Honor.

THE COURT: Prior to working on the instructions. Because I got to know whether I'm pulling an instruction out.

MS. STONE: Yes.

[Jury reconvened at 10:32 a.m.]

THE COURT: We're back on the record in Case Number C-372006. Do the parties stipulate to the presence of the jury panel?

MS. STONE: Yes, Your Honor.

MR. ALLMON: Yes, Your Honor.

THE COURT: So ladies and gentlemen, from time to time there are things that I need to take care of with the lawyers. I want you to know that we all, especially myself, apologize for having you to wait -- having you wait out there. I know that your time is valuable. I know I asked you to be here at 9:00 and it's now almost 10:35, and we are starting jury trial. I'm going to ask that you not hold that against the parties, and that if you're upset or irritated or frustrated, that you hold that against myself. Okay?

State, call your next witness.

MR. ALLMON: State calls Dr. Tibbits.

THE COURT: Tibbits?

/ / /

EMILY TIBBITS,

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

THE CLERK: Please state your full name and spell your first and last name for the record.

THE WITNESS: Emily Tibbits, E-M-I-L-Y, T-I-B-B-I-T-S.

THE COURT: Thank you. You can have a seat.

State?

MR. ALLMON: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. ALLMON:

Q Good morning, Dr. Tibbits.

A Good morning.

Q Dr. Tibbits, will you introduce yourself to the jury.

A Yes. I'm Dr. Emily Tibbits. I am a trauma surgeon.

Q How are you currently employed?

A I'm employed with the United States Air Force.

Q And you have a title or rank there as well?

A Yes, I'm a major.

Q And so you work in the emergency room; is that correct?

A Yes.

Q All right. And what specifically do you do? Are you a trauma doctor?

A I'm a trauma surgeon.

Q Thank you.

And how long have you been a trauma surgeon?

A I completed my training three years ago.

Q Okay. And what kind of schooling did you have to get that job?

A I did four years of undergraduate at the University of Cincinnati for my bachelor's degree, then four years of medical school at Wright State University. After that, I did six years of general surgery training at the University of California at Davis in Sacramento, and then I stayed for an additional two years at University of California, Davis, for some specialty fellowship training in trauma surgery and critical care.

Q What other hospitals have you worked at?

A After I left UCDavis, the Air Force transferred me to Nellis Air Force Base, where I worked at Mike O'Callaghan Military Medical Center, as well as University Medical Center of Southern Nevada for three years under a military-civilian partnership. And then I was just reassigned this summer to Travis Air Force Base, where I now currently practice.

Q And that's in California, right?

A Yes.

Q Now, on April 30th, 2022, were you working here in Las Vegas?

A Yes.

Q And you were working at the UMC here in downtown Las Vegas, right?

A Yes.

Q All right. On that day, did you have -- did you care for the treatment of Bryan Salcedo?

A Yes.

Q Can you tell us the general injuries that he had?

A Yes. He arrived with significant abrasions to his torso, what we call friction burns. He had fractures in his face, teeth -- multiple teeth that were fractured or evulsed, removed, and some complex lacerations, cuts to his face and lips.

Q Okay. And was that an indication of trauma he had received?

A Yes.

Q Okay.

MR. ALLMON: Nothing further.

MS. STONE: Nothing further.

THE COURT: Do the members of the jury have any questions?

[Bench conference transcribed as follows.]

THE COURT: So again, she keeps saying Juror 14.

MR. SCHMIDT: Oh, okay.

THE COURT: It's Badge 14. So I'm going to have my clerk either put it on a piece of paper [indiscernible] and say Badge 14. Because I think that's correct, for the record.. Any objection?

MR. SCHMIDT: No.

[End of bench conference.]

/ / /

/ / /

JUROR QUESTIONS

THE COURT: Were any of Bryan's injuries life threatening?

THE WITNESS: Yes.

THE COURT: Okay. Do any members -- or does the State have any questions based on --

FURTHER DIRECT EXAMINATION

BY MR. ALLMON:

Q Doctor, you indicated yes. What were those injuries, do you recall?

A To give some context, this patient has a history of hemophilia. And so minor injuries can become life-threatening very quickly, because of the tendency to bleed severely. And he had -- when I treated him -- when I saw him initially when he came in, he did not have a -- the CAT scan that we got of his head did not reveal an injury. But based on my review of the medical record that was provided, we did repeat a head CT, a CAT scan of his head, later in his hospitalization because of his hemophilia. And that showed that there was bleeding that had developed in his brain.

Q And that could lead to death?

A Yes.

MR. ALLMON: Nothing further.

THE COURT: Ms. Stone or Mr. Schmidt?

MS. STONE: No, Your Honor.

MR. SCHMIDT: No questions.

THE COURT: Thank you.

Thank you, Doctor.

THE WITNESS: You're welcome.

THE COURT: Thank you for your time.

MR. HALLQUIST: Your Honor, may we approach?

THE COURT: Sure.

[Bench conference transcribed as follows.]

MR. HALLQUIST: He's not here.

THE COURT: Okay.

MR. HALLQUIST: So I've texted him, called multiple times, left a voicemail on has personal number. He's not here.

THE COURT: Okay.

MR. ALLMON: I didn't [indiscernible].

THE COURT: I can't hear it.

MR. HALLQUIST: Detective Knickerbocker -- I didn't hear him.

THE COURT: Me neither.

MS. STONE: I can't hear you.

MR. ALLMON: Sorry. I just -- we're just getting texts right now, so it's, like, Detective Knickerbocker says -- well, he said maybe get a time -- because [indiscernible].

THE COURT: I don't know if I'm having hearing problems or --

MR. ALLMON: What's that? No.

THE COURT: So is he on his way? What's happening?

MR. ALLMON: Let me get some more information.

MR. HALLQUIST: I'm not on the thread with Knickerbocker,

so [indiscernible].

THE COURT: What I'm mostly trying to figure out now is do I let them go for a long lunch now or -- and where are we with the audio?

MR. HALLQUIST: The audio's done. I should receive it back in a little while.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: Your Honor, [indiscernible].

THE COURT: Okay.

MR. HALLQUIST: We may use that for DeSousa.

THE COURT: I don't -- well, I'm -- look, this is what I can do. I can take a long lunch, tell them to come back at 1:00. Okay. And so that gives us time to go over the jury instructions, that gives us -- you guys time to listen to the audio. And then DeSousa can get here and Knickerbocker will already be here. So then at 1:00, we just go.

And then I don't give them copies of the jury instructions while we're sitting here, because every time I've done that, there's a mistake and we have to make 5,000 copies.

MR. HALLQUIST: Yeah.

THE COURT: They get a copy. They get a copy.

MR. SCHMIDT: They each get their own copy once we're all --

THE COURT: Once we're done, they go in the back and there's a copy. But I don't do it prior to -- I don't make copies for everybody while you guys are doing closing arguments.

MR. HALLQUIST: Okay.

THE COURT: But I will make sure that you have the numbers of the jury, like, Juror Number -- I mean, Juror Instruction Number 7 is this. Like, I will give you guys the copy after that [indiscernible].

MR. SCHMIDT: I just want to make sure they have a copy with them when they go back.

THE COURT: Yes.

MR. SCHMIDT: Yeah, that's --

THE COURT: They have a copy when they go back. We have to give them a copy.

MS. STONE: And we'll have copies beforehand, so [indiscernible].

THE COURT: Yes.

MR. SCHMIDT: Okay.

THE COURT: You will have a copy.

MR. SCHMIDT: I assume your witnesses are going to be here, but let's say you give them the long lunch, which I would be all for.

MR. HALLQUIST: Yeah. They're not --

MR. SCHMIDT: If they're not there by then, then --

MR. HALLQUIST: Yeah.

THE COURT: Well, I'm assuming the only issue -- is Knickerbocker here?

MR. ALLMON: Yeah.

THE COURT: Yeah. So I'm assuming the only issue --

MR. SCHMIDT: Okay.

THE COURT: -- is DeSousa.

MR. SCHMIDT: Okay. I didn't know Knickerbocker was there.

MR. ALLMON: Corey just went out to go call him and then see if we can get an update on his time.

THE COURT: Okay. So let's just stand up here. Because I think it's going to look good -- look uncomfortable if we're all just sitting there at our tables in silence.

MR. SCHMIDT: No problem.

THE COURT: All of us looking at each other.

MR. ALLMON: We've already done a long silent [indiscernible].

THE COURT: And I'm just saying, and it's uncomfortable.

MR. ALLMON: Can I ask if you've had a chance to look at some of the jury instructions?

THE COURT: Yeah, I looked at all of them.

MR. ALLMON: Okay.

MR. HALLQUIST: Just update. I walked outside and Detective Knickerbocker is here.

MR. ALLMON: Yeah.

MR. HALLQUIST: Okay. DeSousa may not be here for a while, so I was going to --

MR. ALLMON: I think she's going to break us for lunch now.

THE COURT: So what I'm going to do is probably give them a lunch now, right? Because whether he comes or not, I mean, the issue to me really is the audio. So you haven't had a chance -- the defense

hasn't had a chance to listen to it. So even if we started with Knickerbocker, I don't think it's good to start with a witness if they, the defense, hasn't even had a chance to listen to one of the pieces of evidence.

So I'm going to give them a break till 1:00. Yeah, that should give us enough time to get through everything as well as you guys also eat.

MR. SCHMIDT: Appreciate it.

THE COURT: I don't need people passing out in my courtroom.

MR. SCHMIDT: Thank you.

THE COURT: So I'm going to give them a long lunch till 1:00, and then we should be able to cover all of those things.

MR. SCHMIDT: Okay.

THE COURT: Once your client needs to get lunch too. I don't run the jail, I don't know how that works out.

MR. SCHMIDT: Okay.

THE COURT: Okay? All right.

MR. SCHMIDT: Thank you, Judge.

[End of bench conference.]

THE COURT: Okay. Ladies and gentlemen, so there are a couple of other things that we're going to need to work out. So I apologize, this day has not worked out the way I wanted. But that's okay. This is what trial is.

So what I'm going to do is I'm going to give you an extended

lunch. We are going to come back at 1:00. At 1:00 my expectation is that we will, hopefully, get some witnesses in, hopefully I'll be able to do jury instructions, and we will do closing arguments, and maybe be able to give it to you. That's just my -- don't hold me to that, please. Don't hold me to that.

All right. So during this recess or break, you must not:

1. Discuss or communicate with anyone, including fellow jurors, in any way regarding the case or its merits either by voice, phone, e-mail, text, Internet, or other means of communication or social media. You must not:

2. Read, watch, or listen to any news or media accounts or commentary about the case. You must not:

3. Do any research, such as consulting dictionaries, using the Internet, or using reference materials. You must not:

4. Make any investigation, test a theory of the case, recreate an aspect of the case, or in any way investigate or learn about the case on your own. You must not:

5. Form or express any opinion regarding the case until it is submitted to you.

I will see you at 1:00. Thank you very much. Thank you for your patience.

[Jury recessed at 10:46 a.m.]

THE COURT: We are outside the presence of the jury.

Do you have that recording?

MR. ALLMON: I do, Your Honor. [Indiscernible.]

THE COURT: Okay. So here's what I'm going to first do. I'm going to ask that you, I guess, play it from -- I don't know what format it's in. I'm going to ask that you have -- that you play that for Ms. Stone as well as Mr. Schmidt. And then let me know when you've played that. I'll get back on the bench so we can make a record in regard to that. And then I want to move into jury instructions.

Do you want your client here for that or not?

MS. STONE: Yes.

THE COURT: Okay.

MR. SCHMIDT: For jury instructions?

MS. STONE: Yes.

THE COURT: All right. Okay.

So, Officers, how is it that she can get lunch? Because, let's say, we end up not having Ms. DeFalco -- I don't know if we will, but having Ms. DeFalco go back to her CCDC. Is there a way that we can bring her her lunch here and she can eat it while we're working? I know that's super unconventional, but -- because I don't know when we're going to finish. That's the thing.

THE CORRECTIONS OFFICER: We can arrange.

THE COURT: Okay. All right. And I'm not sure how long that's all going to take. It's just I don't want her not to eat and then everybody else is eating. Okay? All right.

So I'm going to get off the bench, you're going to play the recording. And then if you're -- Ms. Stone, you're okay with the Court, and I don't care, we need to just have it -- now, I understand if you have

to play it from your laptop and then later we get a CD or not -- I mean, I wouldn't put it on --

MR. HALLQUIST: I'll play it directly.

THE COURT: I wouldn't put it on a CD.

MR. HALLQUIST: Yeah, I know.

THE COURT: But put it on some type of thumb drive, I'm okay with that, because I realize we're doing this in the moment. Okay. So just play that, so let me know where we are with that.

MR. HALLQUIST: Okay.

[Court recessed at 10:48 a.m., until 11:13 a.m.]

[Outside the presence of the jury.]

THE COURT: Let's go back on the record in Case Number C-372006. You don't need to stand for me.

MS. STONE: Oh, okay.

THE COURT: All right. So it's my understanding the State had two audios. One?

MR. ALLMON: It's one file that has just been --

THE COURT: It's broken up into two. No?

MR. ALLMON: It's -- no, it's been made down into one now. It's just one final one.

THE COURT: Okay. So it's one file.

Ms. Stone, have you listened to State's Proposed Exhibit Number --

MR. ALLMON: 6, Your Honor.

THE COURT: -- 6?

MS. STONE: Yes, Your Honor.

THE COURT: Okay. Do you have any objections to State's Proposed Exhibit Number 6?

MS. STONE: No, Your Honor.

THE COURT: Okay.

MR. ALLMON: And we're actually stipulating to its admissibility as well in its state.

THE COURT: Oh, okay. So the parties are --

MS. STONE: To avoid having all their portions of the audio played, we're stipulating to the authenticity of the jail call.

THE COURT: To the authenticity or to its admission? Because it sounded like he said admission.

MR. ALLMON: I thought admission.

MS. STONE: The --

THE COURT: And when I say he, I pointed to Mr. Allmon.

MR. SCHMIDT: I mean, if he lays the foundation, he gets it in anyway. I mean --

[Defense counsel confer.]

MS. STONE: To admission, Your Honor.

THE COURT: Okay. So we're stipulate -- so State's Exhibit Number 6 is admitted.

[State's Exhibit Number 6 admitted.]

THE COURT: Okay. All right. Let's move to the jury instructions. So I'm going to have -- I have -- one screen has the State's and the other one has the defense. So I'm going to need some time

when we go back and forth.

MR. SCHMIDT: Okay.

THE COURT: So the defense's instructions are:

It is now my duty to instruct you as to the law that applies in the case.

MS. STONE: I think one --

THE COURT: I'm assuming -- yeah.

MS. STONE: I'm sorry, Your Honor.

THE COURT: No. I'm assuming I didn't go word for word. But I'm looking at the State's that says -- do you have the State's?

MS. STONE: We do, Your Honor.

THE COURT: You know what it looks like, where it has the information? It -- not information, but it looks like it has the State of Nevada versus blah, blah, blah, blah, blah. And it says:

Now it is my duty as judge to instruct you in the law that applies in this case.

This --

MS. STONE: We were -- I was just going to say the first two for both of us --

THE COURT: Are the same.

MS. STONE: -- we went word-by-word, they're the same.

THE COURT: Okay. All right. So if it's the same, then are you going to object to me giving -- so what I tend to -- what I do is, because the State's is on the pleading paper like this, and I don't -- quite frankly, I'm not that good at making the boxes that look -- I'm going to cut

and paste on the State's and delete off the State's. Does that make sense?

MR. SCHMIDT: It's fine.

MS. STONE: Understood, Your Honor.

THE COURT: Because even though what my secretary did, she went back and she reformatted all of yours, because it's -- I'm not always good at the cutting and pasting. That's -- I just work off of one, especially because this one, yours doesn't have the State of Nevada versus Jessica DeFalco. Does that make sense?

MS. STONE: Yes, Your Honor.

MR. SCHMIDT: Yes.

THE COURT: Okay. All right. So the first two are the same, correct?

MS. STONE: Yes.

MR. SCHMIDT: Yes.

THE COURT: Okay. So you don't have any objection to the first two. And we'll -- don't worry, I'll give you numbers to those -- I'm not going to number them yet.

MR. SCHMIDT: Okay.

THE COURT: Okay. All right. So then it says:

An amended information is but a formal method of accusing.

Yours says "indictment." Is this thing --

MR. ALLMON: Did it say "indictment"? I thought --

THE COURT: No.

MS. STONE: Oh, no, that is our mistake. That's our mistake.

THE COURT: The defense's says "indictment," yours says "amended information." Is this an indictment? I thought it was.

MS. STONE: It's an -- no, it's an information.

MR. SCHMIDT: Yeah, it's an amended.

MS. STONE: Yeah.

THE COURT: It's a what?

MS. STONE: It's an amended. I thought -- that's my mistake.

THE COURT: Amended information? Okay.

MS. STONE: Yes.

THE COURT: So when I read over this, it looks like the main difference, besides how it's formatted, okay, because your guys' formatter a little bit different; would you agree with that, Defense?

MS. STONE: Yes.

THE COURT: Okay. It looks like the main difference between yours, and you can correct me if I'm wrong, I'm mostly just looking at, like, the charges. I'm not on the second page --

MR. SCHMIDT: Okay.

THE COURT: -- of the State's, which talks about:

It is the duty of the jury.

I'm not there yet. Okay?

MR. SCHMIDT: Okay.

THE COURT: Is that -- it says "Defendant" as opposed to "Ms. DeFalco." Is there anything else that's different? Just in those first two pages. I'm not yet to the last page. And the way it's formatted, obviously. Does that make sense?

MR. SCHMIDT: Yeah.

MS. STONE: It does make sense, Your Honor.

THE COURT: Okay. So that's what it looks like to me. Just where it says "Defendant," it looks like it says "Ms. DeFalco," besides the formatting.

MS. STONE: We would prefer "Ms. DeFalco."

THE COURT: Okay.

MS. STONE: Use person first language throughout the --

THE COURT: Yeah, I saw that throughout the whole thing.

MS. STONE: Yes.

THE COURT: So you -- we don't need to, like, say that. If you want to make a record of it, that's fine. But to me in these instructions that we are so far, that's the only main difference, the formatting and the fact that we put "Ms. DeFalco."

MS. STONE: I think that's correct.

THE COURT: Okay. And the reason you want to have "Ms. DeFalco," I guess, what's the legal basis for that?

MS. STONE: The legal basis is that it's more accurate. It refers to specifically who she is rather than just a party in the case. And to the extent any other names are used, such as in the information, we used the person's actual name, not just Victim 1 or Victim 2, so I think it is a part of treating her equally and fairly to use her name as well, rather than Defendant.

MR. SCHMIDT: And I would also argue, Your Honor, that using Defendant over and over can be a little bit dehumanizing. It also

kind of infers a sense that maybe she's already sort of guilty. So we would prefer it. I don't think it's a -- I mean, I -- granted, it is throughout the jury instructions, but I don't think it's a huge ask to just to refer to her by her name.

THE COURT: Okay. And, sorry, I forgot to bring this up. Are you on the State's? Because on Count 5, I think there's a highlight.

MR. ALLMON: I think we can delete that highlight, it's just going to say "and," Judge. We're not going to amend it today.

THE COURT: Okay. So hold on. Hold on. Let me highlight it myself. Now I've got to take this off.

And is it -- you're just leaving "and" or is it "or"? I don't have the original.

MR. ALLMON: The original was "and." We're just leaving it "and."

THE COURT: Okay. So I guess there's no objection.

MR. SCHMIDT: No objection.

MS. STONE: No.

THE COURT: So it's brought -- so the jury instruction reads right now, from the State:

Did willful --

Count Number 5: Duty to stop at scene of crash involving death or personal injury did willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access located at In-N-Out Burger, 2760 East Craig Road, North Las Vegas, Clark County, Nevada, and after being in a

crash resulting in substantial bodily injury or death to Bryan Salcedo, and Melissa Garibay, failed to immediately stop at the scene of the crash or as close thereof --

Blah, blah, blah, blah blah. And it doesn't say what I just said, the last of them, but I just -- I didn't know if you wanted me to continue reading the whole instruction.

MR. SCHMIDT: And then, just for the record, just resulted in bodily injury, not substantial bodily injury.

THE COURT: Oh, yes, sorry. Bodily injury or death. All right.

I'm not going to leave -- put Ms. DeFalco's name in it, because I do think that there's no legal basis at this point for it and she is the named defendant in the case. All right.

MR. SCHMIDT: I have citations, if you want that, Your Honor.

THE COURT: Okay.

MR. SCHMIDT: Hold on one second.

So I would cite to Cupp v. Naughten, that's 414 --

THE COURT: Hold on.

MR. SCHMIDT: That's U.S. 141, that's a 1973 case.

THE COURT: Sorry, 414 U.S.?

MR. SCHMIDT: U.S., and it's 141. So 414 U.S. --

THE COURT: Are you trying to confuse me?

MR. SCHMIDT: I was just --

THE COURT: 414 U.S. 141?

MR. SCHMIDT: Yes.

THE COURT: Just want to make sure I got that perfect.

MR. SCHMIDT: And that's a 1973 case indicating instructions have to be carefully formulated to avoid misleading the jury. Also, Boyde v. California.

THE COURT: Wait, wait, wait. Okay. What's the cite there? Is that 141?

MR. SCHMIDT: No. The Boyde v. California is 494 U.S. 370, that's a 1990 case.

THE COURT: Okay.

MR. SCHMIDT: And that -- there, the holding is that the proper standard for reviewing ambiguous jury instructions is whether there's a reasonable likelihood the jury applied the instruction in a way that violates the U.S. Constitution.

And so those are more broadly -- and so I have one more for you, sorry.

THE COURT: That's okay.

MR. SCHMIDT: So I actually have a bunch of --

THE COURT: Is there one that specifically talks about using the defendant's name versus --

MR. SCHMIDT: Yes.

THE COURT: Okay.

MR. SCHMIDT: People v. Cline, Cline with a C.

THE COURT: No, I'm just going to let you give me the cite.

MR. SCHMIDT: Sure. 102 Illinois Appellate 3d. 29 -- 3d., and then 297. That's a 1981 case.

I have others -- states. I don't have a Ninth Circuit case, for

example, or a specific U.S. Supreme Court case. But other states have discussed this issue and found that using the defendant throughout jury instructions is misleading.

MR. ALLMON: What was the Illinois one again, one more time? 102 --

MR. SCHMIDT: Sure. Sure thing. It is --

THE COURT: Is it -- I'm not getting anything.

MR. SCHMIDT: 102 Illinois Appellate 3d., and then 297.

THE COURT: Oh, 297.

MR. SCHMIDT: It's a -- if you want, I can e-mail my cites over, it might make it easier.

MR. ALLMON: Is that -- is it going to be I-l-l. A-P-P?

MR. SCHMIDT: Yes.

MR. ALLMON: Dot after A-P-P or?

MR. SCHMIDT: Yes. And then 3, and then D as in dog.

I have other ones, like, for Minnesota, for example.

THE COURT: Why is mine not coming up?

MR. HALLQUIST: If you have your search filter and if you don't click on Illinois.

MR. SCHMIDT: Yeah, probably.

THE COURT: Oh.

MR. HALLQUIST: That's what happened to me.

THE COURT: So 102 Illinois Appellate 3d 297, correct?

MR. SCHMIDT: Yes. Oh, let me -- what I'll do, if it's all right, is I'll just e-mail the parties my cites, if I can.

MR. ALLMON: I'm still getting City of Chicago versus Scandia Books.

THE COURT: Yeah, me too. I'm getting City of Chicago versus Scandia Books.

MR. SCHMIDT: Let me -- I'll just e-mail the cites to the parties, if that's all right. That way --

MR. HALLQUIST: Is there another cite?

MS. STONE: There are several.

MR. SCHMIDT: We have -- I have several. But usually when I do jury instructions, I have all my cites in the bottom as footnotes. But, obviously, it makes it harder for you guys to edit. So -- but I'll -- like I said, I'll just e-mail my citations to the parties, if that's all right with the Court.

THE COURT: All right. So let's -- can we come back to that or are you --

MR. SCHMIDT: That's fine.

THE COURT: Okay. So on the bottom of the State's, and I got to find out -- figure out where it is on yours, so it says:

It is duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine.

So I'm going to try and find out where that is on yours. Okay.

So you have it, it's basically -- I think it's page 7 of 23 on the defense's.

MS. STONE: I would note it's repeated in the State's instructions. This is the same thing that --

THE COURT: It's repeated in --

MS. STONE: -- is included on the first page of their proposed Instruction Number 3.

THE COURT: Yeah. Okay. So, wait. Maybe I'm lost. I'm on the bottom part of the State's jury -- I'm below their information. "It is the duty."

MS. STONE: I understand, Your Honor. I'm just saying that that same paragraph is contained in that same instruction before each of the charges is listed.

THE COURT: Oh.

It is the duty of the jury to apply.

Okay. I see what you're saying. Okay. Well, I'm going to take out one of them. We can either have it before or after.

MR. ALLMON: I don't have any position.

MS. STONE: I think after probably is clearer.

THE COURT: All right. I'm going to take it out. I'm going to take it out -- I'm going to take it out of before.

MS. STONE: Of before.

THE COURT: So it's going to say:

In this case, it is charged in an amended information that on or about --

Blah, blah, blah, blah, blah. And then it's going to say:

Count 1, Attempt Murder.

All right. Oh, wow, I'm going to have to have my secretary look at this after, because I also have probably just screwed up all of the

things.

I'm also going to move it up so that it's not, like --

MS. STONE: Well, I was going to ask to move it onto a separate page, actually, if Your Honor doesn't mind. I think that would be clearer for the jury. It's already a lot of information with all the charges being listed out. And as Your Honor was going through this, it's easy for things to get lost, as evidenced by the fact that this was duplicated in two different places in the same instruction.

THE COURT: Okay.

MS. STONE: So I think it's clearer for the jury and they'll be better able to understand it if we just put it on a separate page.

THE COURT: Okay. State, I was just going to put it -- because some other State's instructions I'm going to move and put on the same page. Because I'm not having one page with five words on it. I'm not doing that.

MR. ALLMON: That's fine. And I think it's a lead -- or it's a -- you know, they get the charges and then they know that that's right there. I have --

THE COURT: So let's talk about the second -- so you don't have an objection to the language?

MS. STONE: I would object to the last couple words. Specifically, the part which says --

THE COURT: Just the first paragraph:

It is duty of the jury to apply the rules of law contained in the instructions to the facts of the case and determine whether or not the

defendant's guilty of one or more of the offenses charged.

Do you have an objection to that?

MS. STONE: Yes, Your Honor, to the portion which says:

Determine whether or not the defendant is guilty of one or more of the offenses charged.

In addition to the naming convention, with the defendant or Ms. DeFalco, I also don't believe this is an accurate statement of law. It's not their job to determine whether they think factually she is guilty or not guilty of any of the offenses charged, it's their job to determine whether the State has proven beyond a reasonable doubt that she is guilty of one or more of the offenses charged. So I would --

THE COURT: State?

MR. ALLMON: I mean, this -- a trial is a search for the truth. And so we should prove it factually beyond a reasonable doubt. That is exactly what we do.

THE COURT: So I'm inclined to change the language. So it's going to say:

It is duty of the jury to apply the rules of law contained in the instructions to the evidence of --

I was going to put: Of the case.

MS. STONE: To the facts.

THE COURT: And determine whether the State has proved beyond a reasonable doubt.

So I'm just going to cut that. I'm taking out "indictment," because I think that's a mistake.

MS. STONE: Yes, Your Honor.

MR. SCHMIDT: Your Honor, not to -- off subject, can I get your e-mail once more?

MS. STONE: Oh, I got it.

MR. SCHMIDT: Oh, you have it?

MS. STONE: Yeah.

THE COURT: Whether the State has proved beyond a reasonable doubt that the defendant is guilty of --

I'm just going to put:

Is guilty of one or more of the offenses charged.

Then you find --

If you find the State has --

Sorry. Then the --

MS. STONE: Guilty of -- I would ask for guilty of any, Your Honor.

THE COURT: Of any of one?

MS. STONE: Of any of the offenses charged.

MR. ALLMON: Well, guilty of one or more of the offenses charged is an accurate way of saying that. And I'd also say that the theory already is that she is guilty of some charges. That's Defense's theory.

THE COURT: I don't know what they're going to do. So I'm going to change it to:

It is duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether the

State has proved beyond a reasonable doubt that the defendant is guilty of any of the offenses charged.

Okay. Then what the defense has on their jury instruction, page 7, is:

If you find that the State has failed to meet its burden as to any of the charges, you must return a verdict of not guilty as to the charges.

You know where I'm at, everybody?

MR. ALLMON: I do, Your Honor.

THE COURT: It's the last sentence. State?

MR. HALLQUIST: So it would be line 24?

THE COURT: What?

MR. SCHMIDT: Of the Instruction 6, it's line, like, 7?

THE COURT: No, I'm on page 7.

MR. SCHMIDT: Yeah.

THE COURT: So their instruction says it is --

MR. HALLQUIST: Okay.

THE COURT: Are well on the same page?

MR. HALLQUIST: Yeah.

MR. SCHMIDT: Yeah.

MR. ALLMON: Yes, Your Honor.

THE COURT: We're still at -- is it the duty of -- it's the defense's last statement, which is:

If you find that the defendant has failed to meet its --

It's not started --

If you find that the State has failed to meet its burden --

So defense's bottom, last sentence in their --

MR. SCHMIDT: Yes.

MR. ALLMON: I think it's duplicative of other things in the instructions.

MS. STONE: And we would ask for it based on Crawford. We're entitled to the reverse instructions.

THE COURT: Yeah. I'm going to add it, but what I'm trying to figure out is if -- I guess I could read charges.

If you find that the defendant has failed to meet its burden as to any of --

If you find that the State has failed to meet its burden as --

I'm just going to -- I'm going to take out the -- I think there's charges. So I don't think --

MS. STONE: That's fine.

MR. SCHMIDT: That's fine.

THE COURT: Do you see what I'm saying?

MS. STONE: Yes.

MR. SCHMIDT: Yeah, the parentheses?

THE COURT: Yeah.

MR. SCHMIDT: That's fine.

THE COURT: Because there's charges.

MS. STONE: Yes.

MR. ALLMON: Yes.

THE COURT: Okay. Then, at the State's, we go back to the

State's, it says:

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to the other offenses charged.

Let me see if you have that.

MS. STONE: I don't have that, but we're fine with it, Your Honor.

THE COURT: Oh, okay. All right. Okay. I'm going to have to have my secretary redo this. All right. It says:

To constitute the crime charged --

And I think the defense has that. Oh, shoot.

Do you have the: To constitute the crime charged?

MR. HALLQUIST: If you look at Defense jury instruction page 8, we do talk about --

THE COURT: Page 8.

MR. HALLQUIST: -- a union or joint operation --

THE COURT: Yeah. Okay.

MR. HALLQUIST: -- which matches.

THE COURT: So the defense's page 8 says:

In every crime there must exist a union or joint operation of act and intent. The burden is upon the prosecution to prove this union or joint operation of both act and intent beyond a reasonable doubt.

Are we there?

MS. STONE: Yes.

MR. HALLQUIST: Yes.

THE COURT: The State's instruction says:

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do that act. The intent --

All that kind of stuff. So I don't mind adding to the State's instruction:

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an act -- and an intent do that act. The burden is upon the prosecution to prove this union or joint operation of both act and intent beyond a reasonable doubt. The intent which, when an act is done, is shown by the facts and circumstances surrounding.

Do not confuse them with the rest of the instruction.

MR. ALLMON: No objection from the State.

THE COURT: I mean, because to me, like -- I mean, I guess I could reword in every crime. But, I mean, we're talking about the union here.

MS. STONE: The --

THE COURT: See what I'm doing?

MS. STONE: Yes, Your Honor.

The only thing I'm concerned about is lines 4 and 5.

THE COURT: Do you -- are you -- okay. Let -- are you okay with me adding:

The burden is upon the prosecution.

MS. STONE: Yes.

THE COURT: You're objecting to that?

MS. STONE: No.

MR. SCHMIDT: No, no, no, no.

THE COURT: Okay.

MS. STONE: No.

THE COURT: All right. I was, like, they're what? Okay. Sorry. What's your objection?

MS. STONE: To lines 4 and 5, I'm concerned that this is going to confuse the jury and result in them applying an incorrect understanding of intent, given that this is a case where they're going to get subsequent instructions on what intent means and how they can determine what Ms. DeFalco's intent was. Because we have three different levels of intent at issue in this case, basically. The duty of the stop is strict liability, and then the batteries are general, and the attempt murders are specific.

So I think it's an accurate statement as to general intent, but I don't think it's necessarily accurate to the specific intent, so I would object on that reason.

THE COURT: So you're objecting to:

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

MS. STONE: Yes.

THE COURT: Okay. State?

MR. ALLMON: It's an accurate statement of law and it applies

both to general and specific intent.

THE COURT: Okay. I'm going to leave that in, but before that is the part about the prosecution. Okay.

Next, what are we doing about:

The defendant is presumed innocent until the contrary is proved.

Do you guys have that?

MS. STONE: We do, Your Honor.

MR. ALLMON: It's -- I think it's on page 4 for them. It's different. It's that that's the presumption of innocence from them.

THE COURT: Oh.

Ms. DeFalco's presumed innocent of the foregoing charges and you must begin your deliberations by presuming her innocence of the State's allegations. It is your duty to apply the rules of law contained in these instructions to the facts of the case and determine whether the State --

Okay.

MS. STONE: The -- I think -- based on what Your Honor has done with other instructions, probably the last two sentences are duplicative. But we would ask for the first sentence.

THE COURT: That she's presumed innocent of the foregoing charges and you must begin your deliberation by presuming the innocent of the State's allegation, even though we say she is presumed innocent.

It is your duty to apply the rules.

I thought we had that duty to apply the rules.

MS. STONE: We already have the duty to -- yeah.

THE COURT: Okay. Okay. Okay. Okay.

MS. STONE: Yeah, we already have that.

THE COURT: All right.

MS. STONE: At a minimum, in the State's instruction, I think the "until" needs to become "unless." But.

THE COURT: So until and unless.

MS. STONE: In line 2.

THE COURT: This presumption places upon --

Line 2 that I was --

Defendant is presumed innocent until the contrary is proved.

This presumption places upon the State that that's line 3.

MS. STONE: Presumed innocent unless the contrary is proved.

THE COURT: You don't like "unless the contrary is proved"?

MS. STONE: I'm asking for "unless" instead of "until." "Until" presumes that she is going to be found guilty of each of these offenses.

THE COURT: Okay. I'll change it to "unless."

MS. STONE: Okay. Thank you.

And then I had provided a different reasonable doubt instruction, which is on our --

THE COURT: This presumption places the burden of proving beyond a reasonable doubt --

That?

MS. STONE: No. That also goes with the presumption of innocence. Oh, wait, let me see.

THE COURT: It is the duty of the jury to apply law contained with the instructions.

MR. ALLMON: I think that page 9 and 10 was their other reasonable doubt instruction, Your Honor.

THE COURT: Page 9, let's see.

MS. STONE: It's page 10, Your Honor.

THE COURT: Okay.

A reasonable doubt is one --

MS. STONE: Oh, no, it's not.

THE COURT: Okay. Sorry.

Page 9 is:

To convict a person of a crime --

MS. STONE: 11.

THE COURT: -- the State must prove beyond a reasonable doubt that a crime is committed with a criminal intent.

MS. STONE: It's page 11, Your Honor.

THE COURT: Okay.

If the evidence in this case is subject to --

That one?

MS. STONE: 11.

THE COURT: Oh. Sorry.

A reasonable doubt is one based in reason. To find Ms. DeFalco guilty of the offense charged, you must reach a

subjective state of near certainty regarding the fact in issue, wherein the minds of the jurors there's a reasonable doubt as to whether the State has proven each element of the offense that the jurors must return a verdict.

Okay. Where's your legal basis for that? Because I know that the reasonable doubt is one based on reason and all that, you cannot.

MS. STONE: I have a number of objections to the statutory definition, Your Honor, which is why we're asking for this one instead. I believe it's a more accurate instruction on what reasonable doubt means in a criminal case. There was a couple of issues with the -- with the one which the State has provided and which is laid out in NRS 172.211.

THE COURT: So, wait. Are you -- you're taking -- you're objecting to what the statute says?

MS. STONE: Yes.

THE COURT: Okay.

MS. STONE: Well, that's what the State put in their proposed, and that is what the statute says. I think the statute is unconstitutional for a couple of reasons. The phrase:

After the entire comparison and consideration of all the evidence.

We would object to as burden shifting and reducing the State's burden in violation of the Constitution by making it seem like the jurors should be comparing evidence between the two sides, which is not their role.

We would object to the phrase:

Are in such a condition that they can say they feel an abiding conviction of the truth of the charge.

Because this, again, is burden shifting and a violation of the presumption of innocence. The phrase incorrectly tells the jurors that there's not a reasonable doubt and they must convict if they feel a charge is "true," which is not a correct statement of the law under the Constitution.

The presumption of innocence, the burden of proof, and reasonable doubt require jurors not only to believe that a charge is true, but also -- or that something happened, but also that the State proved that it happened beyond a reasonable doubt.

And in cases where the State fails to do that, even if they do think that's what actually happened, they are required to return a verdict of not guilty. That portion of the instruction tells them otherwise and says that they would have to find the defendant guilty under those circumstances.

And then, lastly, we would object to the last sentence:

Doubt to be reasonable must be actual, not mere possibility or speculation.

Because, again, it's burden shifting and a violation of the presumption of innocence.

THE COURT: Thank you. I'm going to give this instruction.

I'll also have your instructions marked as court's exhibits.

MS. STONE: Thank you.

THE COURT: Okay. All right.

MS. STONE: The -- there is one typographical error in the last sentence, it should say "she" instead of "he" on line 11.

MR. ALLMON: I agree.

THE COURT: Thank you. Okay.

You're here to determine the guilt or innocence of the defendant from the evidence.

I'm trying to find it and see if I have one for you guys. Do you guys have a matching one? I don't have that.

MS. STONE: We don't have a matching one.

THE COURT: I usually change the language:

You are here to determine if the defendant is guilty or not guilty.

MR. ALLMON: I would agree with that, actually.

THE COURT: I usually change the innocent part, unless you don't want me to.

MS. STONE: No, I mean, technically, that's also not correct, right? Because they're here to determine whether the State proved their case beyond a reasonable doubt.

THE COURT: Correct.

MS. STONE: But it is definitely better than innocent. So.

THE COURT: Okay. I'm going to change -- and then it says:

You're not called upon to return a verdict as to the guilt or --

You're not called upon to return a verdict as to the guilt -- as -- this used to be as to whether any other person -- as to -- I'm going to put as to -- I'm going to put:

As to whether someone else is guilty or not guilty.

Does that make sense?

MR. SCHMIDT: Sure.

MR. ALLMON: Yes.

THE COURT: Because I think if I just change innocent to not guilty, it looks weird.

MR. SCHMIDT: Yeah.

THE COURT: Okay. So that instruction reads:

You are not --

Sorry.

You are here to determine the guilt -- whether --

Sorry.

You are here to determine whether the defendant is guilty or not guilty --

That's what I'm going to change it to.

-- guilty or not guilty from the evidence in the case. You are not called upon to return a verdict as to whether someone else is guilty or not guilty. So if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendant, you should find so, even though you may not -- even though you may believe one or more persons are also guilty.

The evidence which you are to consider.

Let me see if you guys --

MS. STONE: Do you need me to say on each one that we're objecting to saying "the defendant" or it's noted that --

THE COURT: I'm going to have it noted.

MS. STONE: Okay.

THE COURT: Okay. So I have yours, page 12.

The evidence which you are --

Your instructions state:

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel. Statements, arguments, and opinions of counsel are not evidence in this case. You must not speculate to be true any --

I'm trying to, like, to be honest with you, go back and forth.

You must not speculate to any -- to be true any insinuations suggested by a question asked of the witness, the question is not evidence and may not be construed. You must disregard any evidence to which an objection was sustained, anything you may have seen or heard also [indiscernible].

Okay. So it looks like most of -- some of that is in this -- the State's instruction, but there's additional stuff about direct and circumstantial. Do you guys have a direct and circumstantial?

MS. STONE: No, Your Honor.

THE COURT: Okay. Am I wrong that any things that are not in your instructions are not in the State's? May not be in the same order.

MS. STONE: I didn't understand the question.

THE COURT: I think the State encompasses your instruction with additional things.

MR. SCHMIDT: Yes.

MS. STONE: I think that's correct.

THE COURT: Okay. So do you have an objection to me giving the State's with the additional -- the circumstantial evidence? Do you know what I mean by the two types of evidence?

MR. SCHMIDT: Court's brief indulgence.

THE COURT: Sure.

[Defense counsel confer.]

MS. STONE: It's fine, Your Honor.

THE COURT: Okay. Credibility and believability. Credibility or believability, I'm trying to find that under yours. I don't see those words, so --

MS. STONE: I don't think so, Judge.

THE COURT: Okay. Do you have an objection? Because I'm trying to type in, like, some of the same words. Okay. I don't have anything from the defense regarding credibility or believability of a witness that I can read.

MR. SCHMIDT: Okay.

THE COURT: Am I wrong?

MS. STONE: It does look like it got left out, Your Honor.

THE COURT: You know which instruction I'm on, right?

MS. STONE: Yeah.

MR. SCHMIDT: Yeah.

MS. STONE: We're -- the one that we had intended to submit is quite a bit longer than the State's Number 8. Could we e-mail it to

Your Honor?

THE COURT: I guess.

MS. STONE: That's my fault. I apologize.

THE COURT: Okay. So it looks like your instruction is:

In deciding the facts of the case, you must have to decide which witness to believe and which witness not to believe. You may believe everything a witness says, only part of it, or none of it.

So, wait, I've got to print this out from Mr. Allmon.

MR. SCHMIDT: Sure.

THE COURT: Okay. So I guess my question is: What are you objecting to in the State's instruction?

MS. STONE: Reading the State's instruction, Your Honor, it honestly seems intended to encourage the jury not to believe Dean. Particularly, this last paragraph, which says that:

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Suggesting to the jury that because his testimony does not necessarily match up --

MR. SCHMIDT: That is in ours.

MS. STONE: It is in ours, but it also -- ours also incorporates things about memory and about other --

MR. SCHMIDT: That's right.

MS. STONE: -- circumstances to consider when assessing the credibility of a witness. I think it's a more complete and accurate

description of the things that they can consider in making that credibility determination.

MR. SCHMIDT: And I would just point out for the Court that this is based on the pattern instruction.

MR. ALLMON: Pattern instruction from where?

MR. SCHMIDT: 0.04, the Nevada Criminal Pattern Jury Instructions.

THE COURT: Is this the entire instruction?

MR. SCHMIDT: It is. The word -- I didn't change a single word and it's right in front of them.

THE COURT: So I don't have to put this on pleading paper right now, but I'll have to add it to your packet later.

MR. SCHMIDT: Okay.

MS. STONE: That's fine.

THE COURT: Because I don't have it now.

So their instruction says:

In deciding the facts of this case, you may have to decide whether -- which witnesses to believe and which witnesses not to believe.

Let me just read it to myself.

MR. SCHMIDT: Okay.

MR. ALLMON: Well, one more time, you said on the model ones, you got a --

MR. SCHMIDT: 0.04. It should be word for word. I don't remember changing that one.

MR. ALLMON: Okay.

MR. SCHMIDT: I think I may have merged two paragraphs together so it would fit on one page, but that's it. No changing of actual text.

MR. ALLMON: But are there -- there are two pages, though, right?

THE COURT: I only have one page.

MR. SCHMIDT: No, I just --

MR. ALLMON: Right. On the model one, though.

MR. SCHMIDT: It takes up two pages. I just compressed them. I put two paragraphs together so it would fit on one page. But if you want to split them back up again, I think it's fine. I don't --

MR. ALLMON: Okay. I see it.

MR. SCHMIDT: Yeah. But it should be word for word.

MR. ALLMON: Because on the model one, it's two pages. That's why.

MR. SCHMIDT: Yeah, yeah.

MR. ALLMON: So it's --

THE COURT: I'm inclined to merge some of these instructions.

MR. SCHMIDT: Okay. If you want to merge them, then maybe just run them by us, so we can --

THE COURT: So I'm inclined --

MS. STONE: Do you want to talk about merging when we're done?

THE COURT: I'm inclined to leave the State's as it is, and then put:

The weight or value of evidence does not necessarily.

And that -- those two paragraphs, put it on this instruction.

MS. STONE: The -- which two paragraphs?

THE COURT: The weight or value of evidence.

And:

However, you should bear in mind.

MS. STONE: Oh, I see. Okay. That's fine.

MR. ALLMON: That's fine with the State.

THE COURT: I'll have to -- I don't have it in your packet. I have to figure out how to do that later. Okay? Because I'm -- so it'll be on this instruction. Okay? I've got to figure out how to save all that.

A witness who has special knowledge.

Did you guys do a -- that --

MS. STONE: We did not, Your Honor.

THE COURT: Okay. Are you objecting to the State's?

MR. SCHMIDT: I think we're fine with this instruction, Your Honor.

THE COURT: Okay. Let's go to -- the State has an attempt murder one.

MS. STONE: We also have one.

THE COURT: Yeah. I'm trying to find that on yours. It keeps pulling up just the jury instruction. Okay. Yours is on page 12, right?

Attempt murder is the performance of an act.

That's what it says, which, 10:

But failed to kill a human being when such acts are done.

MR. SCHMIDT: You say on page 12, Your Honor? Or --

THE COURT: 13.

MR. SCHMIDT: Oh, 13.

THE COURT: I have it on 13.

MS. STONE: Yes, that's ours.

THE COURT: Okay. So it looks like the first -- your first two paragraphs are the State's first two paragraphs.

MR. SCHMIDT: That's -- yes.

MS. STONE: Yes.

THE COURT: Okay. I'm trying to figure out if the State -- okay. And then your second two paragraphs is:

It is necessary to prove express malice beyond a reasonable doubt in order to --

What about implied?

MS. STONE: Huh?

THE COURT: What about implied malice?

MS. STONE: There is no implied malice for attempt murder, Your Honor. It's exclusively express malice. And this language is mainly from the Keys case.

THE COURT: State, do you have a malice instruction in here?

MR. ALLMON: It appears I don't, actually.

THE COURT: Okay. Do you want one?

MR. ALLMON: I'm getting one right now. Sorry.

THE COURT: What's the cite on the Keys case?

MS. STONE: It is 107 Nev. 736. And it says in here:

Attempted murder can be committed only when the accused acts are accompanied by express malice, malice in fact. One cannot attempt to kill another with implied malice.

And the court also said, as stated in another case:

The court's instructions must make it clear that to convict for attempted murder, nothing less than a criminal intent to kill must be shown.

MR. HALLQUIST: So, Your Honor, I'm looking at the Nevada Pattern Jury Instructions, Instruction 6, Murder Defined:

Murder is the unlawful killing of a human being with malice aforethought either express or implied. The unlawful killing may be affected by any of the --

And then it goes on. It's adopted by the Supreme Court.

MS. STONE: The issue is with the specific intent. So that's why the Keys court determined that express malice is required, because implied malice is inconsistent with the specific intent required for an attempt.

MR. ALLMON: I generally agree. What's the citation for Keys again? I know you said it already, but let me get that.

MS. STONE: It's 104 Nev. 736.

MR. ALLMON: Well, I would ask the language where it says:

Cannot be inferred.

Where did that come from?

THE COURT: I'm reading the case. Hold on.

Okay. I read Keys. Well, the part that applied to us. Well, I guess I read the whole thing, because there's one more paragraph after that talks about second-degree murder.

So Keys talks about an attempt to kill with express malice. So we're looking at the two instructions. I don't think the defense has an objection to the first two paragraphs of the State's instruction.

MR. SCHMIDT: Because they're the same.

MS. STONE: They're the same as ours.

THE COURT: Because they're the same, right.

MS. STONE: Yeah.

THE COURT: It's the last two paragraphs of -- State, do you have an objection to the last two paragraphs of the defense's attempt murder instruction?

MR. ALLMON: I do.

THE COURT: Okay. And why is that?

MR. ALLMON: Your Honor, I would say the language that I would use would be starting on their third paragraph, I'd leave the first sentence:

It is necessary to prove express malice beyond a reasonable doubt in order to prove attempt murder.

Then I would delete:

Express malice cannot be inferred from the circumstances of the act. Likewise, proof of a wrongful act committed with

abandoning the heart is not sufficient if there is not also proof of an actual specific intent to kill.

And the reason why I would take out:

Express knowledge cannot be inferred from the circumstances of the act.

Is that's incorrect statement of law and that's not cited in Keys anywhere. Likewise, proof of a wrong -- then the second sentence that I'm asking to leave --

Likewise, proof of a wrongful act committed with abandoning the heart.

Is a term of art, we're not using it. It would require further definition as to abandoning the heart. I'm not arguing it. You will not hear an argument from me in closing about it. And so it would confuse the jury.

I would then follow up with a sentence specifically from Keys that says:

Express malice is a deliberate intention to kill.

THE COURT: Okay. So, wait. You're asking for me to take out:

Express malice cannot be inferred from the circumstance of the act.

And then the likewise proof of blah blah -- proof of, and then the rest of that sentence.

MR. ALLMON: Yes, Your Honor.

THE COURT: And you are asking me instead to put in there:

Express malice is the deliberate intention unlawfully to kill a human being.

Or no?

MS. STONE: He said express malice.

THE COURT: Oh, sorry.

MR. ALLMON: I just said express malice is deliberate intention to kill. And that's a direct quote from Keys.

MS. STONE: That's fine.

MR. SCHMIDT: Yeah, that conforms with the other case law I am aware of, Cardova and Leonard. So we're fine with that.

THE COURT: Taking that out and putting -- okay. Let me make sure.

MR. ALLMON: Hold on. I'm sorry.

THE COURT: Express malice -- what -- I'm sorry, what did you say? Is the --

MS. STONE: Deliberate --

MR. ALLMON: I apologize. Here's what I'm -- okay. So I would say:

Express knowledge is deliberate intention, unlawful -- to kill, which is --

THE COURT: Wait:

Express malice is the --

MR. ALLMON: Deliberate intention to kill, which is manifested by external circumstances capable of proof.

THE COURT: -- which is manifested by external

circumstances?

MR. ALLMON: Yes, Your Honor.

Capable of proof.

THE COURT: Capable of proof.

MR. SCHMIDT: And so I have a slightly different -- very similar, but slightly different.

THE COURT: Okay.

MR. SCHMIDT: I would ask for:

Express malice is that deliberate intention to unlawfully take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

That's Pattern Instruction 6.03.

MR. ALLMON: I have no objection to that.

MR. HALLQUIST: We're fine with that.

THE COURT: Okay. So, you're going to have to read that.

MR. SCHMIDT: No problem.

THE COURT: Express -- so do you want me to take out -- so am I taking out:

Express malice is the deliberate intention to kill which is manifested?

MR. ALLMON: Yes, we're going to reword that.

THE COURT: Okay. All right. So am I leaving in express malice?

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay.

Express malice --

MR. ALLMON: -- is that deliberate intention --

THE COURT: Sorry.

Is that --

Hold on.

-- deliberate intention --

MR. SCHMIDT: To unlawfully take --

THE COURT: -- to unlawfully take --

MR. SCHMIDT: -- away the life --

THE COURT: -- away --

Shoot, sorry.

Away the life --

MR. SCHMIDT: -- of a fellow creature.

THE COURT: -- of a fellow creature.

And if you guys want to each lunch and she has her lunch, then you guys can eat lunch. Okay.

Take away the life of a fellow creature --

Period?

MR. SCHMIDT: -- and then which is manifested --

The rest of that's the same:

-- which is manifested by external circumstances capable of proof.

THE COURT: -- which is manifested by external circumstances capable of proof.

MR. SCHMIDT: Yes.

THE COURT: Okay. Now, I think that then -- so then I'm going to jump to:

If the jury finds.

Okay. Now I'm looking at the defense's.

MR. SCHMIDT: Yeah.

THE COURT: If the jury finds that the --

I was going to read it, but I'm assuming -- I would say the State.

-- did not prove beyond a reasonable doubt that Defendant had a specific intent to kill a human being, then the jury must render verdict of not guilty as to the charges of attempt murder.

MR. ALLMON: And I would object to it as redundant.

THE COURT: You want me to read it?

MS. STONE: Yes, please, Your Honor.

THE COURT: Attempt murder is the preferment -- performance of an act or acts which tend, but fail to kill a human being, when such acts are done with express malice, namely with a deliberate intention unlawfully to kill. It is not necessary to prove the elements of premeditation and deliberation in order to prove attempt murder. Express malice is that deliberate intention --

MS. STONE: I thought we kept that first sentence:

It is necessary to prove express malice beyond a reasonable doubt in order to prove attempt murder. Express malice is --

MR. SCHMIDT: Yeah, that's correct.

MS. STONE: I believe the State said they were fine with that.

MR. ALLMON: That's correct.

THE COURT: Okay. Sorry.

MR. ALLMON: And that's why I feel that the last paragraph is redundant too.

THE COURT: It is -- let me just -- okay.

It is necessary to prove express malice beyond a reasonable doubt in order to prove attempt murder. Express malice is that deliberate, intentional -- is that deliberate, intentional --

MR. ALLMON: Just intention.

MR. SCHMIDT: Intention.

THE COURT: Oh, sorry.

-- intention to unlawfully take away the life of a fellow creature which has manifested by external circumstances capable of proof. If the jury finds that the State did not prove beyond a reasonable doubt that Defendant had the specific intent to kill --

Should I keep it human being or creature?

MS. STONE: Creature is fine, Judge.

THE COURT: I kind of think creature's creepy, but whatever.

MR. SCHMIDT: Wow.

MR. ALLMON: I do agree.

MR. SCHMIDT: I'm fine if we use human being instead of creature. That's fine.

THE COURT: I'm just saying.

MR. ALLMON: Yeah. We can replace creature at the end of --

MR. SCHMIDT: I wasn't -- they didn't ask my opinion when they crafted the criminal jury instructions.

THE COURT: Like I said, I was -- I knew about those conversations.

MR. SCHMIDT: Yes.

THE COURT: Clark County prosecution and defense was on the same side. We -- it was a fight against the other side. So:

If the jury finds that the State did not prove beyond a reasonable doubt that Defendant had the specific intent to kill a human being, then the jury must render a verdict of not guilty as to the charges of attempt murder.

And I'm going to make the attempt murder there a capital A and capital M. Okay?

MS. STONE: Understood, Your Honor.

THE COURT: All right. Oh, yikes. The deadly weapon instruction. I didn't think I saw anything in this.

MS. STONE: We didn't put one, Your Honor.

THE COURT: Okay. Do you object to theirs?

MS. STONE: That's the page 15?

THE COURT: It's just the stock.

MS. STONE: Oh, sorry, I'm looking at the wrong thing.

MR. SCHMIDT: What page is it for the State?

THE COURT: 12. It's just the stock.

MR. SCHMIDT: Is that from the statute, I guess?

MS. STONE: It's from the statute.

THE COURT: Yeah, from the statute.

MR. SCHMIDT: Okay.

THE COURT: No objection, right?

MR. SCHMIDT: No objection.

MS. STONE: It's fine.

MR. SCHMIDT: No objection.

THE COURT: Next State's instruction -- and I'm keep -- going back and forth.

MS. STONE: Yes, Your Honor.

THE COURT: So there are things I'm going to remember, okay?

MR. SCHMIDT: Okay.

THE COURT: Next, which we've got to move, next instruction is:

During an attack upon a group, a defendant's intent to kill may not be directed at any one individual, it is the act of -- if intent is -- to kill is directed at a group.

MS. STONE: Does the State have a cite for this?

MR. ALLMON: It's, basically, a language of general intent. I'm sorry, transferred intent. So.

THE COURT: Oh, I thought there was a transferred intent.

MR. ALLMON: That's what I'm saying, it's the language of transferred intent. That's what I'm saying.

THE COURT: Because the next instruction is a transferred intent. It's:

You're instructed that the Doctrine of Transferred Intent provides some moving object --

I'm going to go back to 12, but he said transferred intent, so I'm going to the next one.

-- intent proves that where a person unlawfully attempts to kill a person, and by mistake or inadvertent, during such attempt, commits a battery with use of a deadly weapon against another person, the law nevertheless holds the assailant responsible for his felonious intent in merely transferring his direction from the original object to the person battered.

You guys know where I'm at?

MR. SCHMIDT: I do know where you're at. I'm just unsure where this --

MS. STONE: Does the State have citations for these two? Because I --

MR. ALLMON: We can get them.

THE COURT: The transferred intent instruction I know is a -- hold on.

MS. STONE: I understand transferred intent in the context of general intent crimes. But I'm just asking if they have a cite for it elsewhere --

THE COURT: Well, I think --

MS. STONE: -- applied.

THE COURT: I think what I can add here is to say that battery with use of a deadly weapon is a general intent crime, right? If that's

what they want to use. Because above, in our attempt murder, we're saying that it's a specific intent crime.

MR. SCHMIDT: Yeah.

THE COURT: Or I can put a sentence that the last sentence can say:

Attempt murder with use of a --

Or:

Attempt murder is a specific intent crime.

Up in the attempt murder instruction.

MR. SCHMIDT: Sure.

THE COURT: See what I'm saying?

MS. STONE: And then put one in the battery that says --

THE COURT: Yeah.

MS. STONE: -- it's a general intent crime.

THE COURT: So I can -- on the -- at the end of the instruction, we just put:

Attempt murder is a specific intent crime.

I'm adding that. Okay?

MS. STONE: Okay.

THE COURT: Sorry, I jumped up.

MR. ALLMON: Sorry, which one are we on there?

THE COURT: So on the attempt murder instruction, I'm adding:

Attempt murder is a specific intent crime.

MR. ALLMON: Thank you.

THE COURT: So now let's go back to the -- and then on the back -- on the State's 14, where it says:

You are instructed a Doctrine of Transferred Intent.

I can put another sentence that says:

Battery with use of a deadly weapon is a general intent crime.

MS. STONE: Sorry. Let me just read this again.

THE COURT: I'm going to -- I can tell you I'm going to combine some of the State's battery instructions.

MS. STONE: I -- is there -- I still haven't heard from the State; is there a case they're relying on for Number 13?

THE COURT: Where -- so do you have an objection to:

During an attack upon a group?

That's 12. Or that is 13, sorry. I lied. Because, normally, in the Doctrine of Transferred Intent state, it's just a general statement of the law. Transferred intent is blah, blah, blah, blah, blah.

MR. HALLQUIST: Just a side note. I'm sending everyone an e-mail. It didn't look like we had an attempt instruction, so I'm just pulling it from the Nevada Pattern Jury Instructions. I'm going to e-mail that language. And we'd like to just put that right above the attempt murder instruction.

THE COURT: I'm going to add it in the instruction where I had it.

MS. STONE: I think it's incorporated.

MR. HALLQUIST: And it's 6.22.

MS. STONE: And then we can add it if Your Honor wants to,

but the Keys decision, the first two paragraphs of our attempted -- of the attempted murder instruction that we just went through come from the Keys decision, which was defining, specifically, attempt murder. I think -- I don't think we need to include an additional instruction on attempt, when the -- we already have the definition specifically of attempt murder. If that makes sense.

THE COURT: Well, I'm looking at it, the first sentence of their instruction and the first sentence of this instruction is exactly the same.

An attempt is an act or done with -- is an act or acts done with intent to commit a crime, intending, but failing, to accomplish it.

Maybe not all of that.

The elements of attempt murder are the following: The defendant acted with specific intent to kill; the defendant performs an act or committing the killing, and the defendant failed to consummate the commission of the killing. Mere preparation to commit an act, such as devising --

So let me copy that.

MR. HALLQUIST: I guess the important information that we'd like to add is those last two paragraphs. The paragraphs starting with mere preparation, and then the last one, even though.

THE COURT: All right. So let's go back to the attempt murder instruction.

MR. HALLQUIST: Sorry.

THE COURT: Are you asking me to include the whole instruction? Because, basically, the defendant acted with specific intent

to kill -- that's -- none of that's in here. And I know that that is a complete instruction.

MR. HALLQUIST: I think it would be much clearer to have the complete instruction. I know we've used this in the past. It is in the pattern jury instructions.

THE COURT: Defense, do you have the instruction? I don't know if he got it e-mailed to you.

MS. STONE: I'm just reading through it.

So the State's asking to add the paragraphs that say "mere preparation" and "even though," is that right?

MR. ALLMON: Correct.

MS. STONE: I think we're fine with the paragraph about mere preparation. I would object to the second paragraph, beginning with even though, because there's no issue of impossibility in this case. This is not a case where someone's going to claim that it was impossible to -- for these people to die or impossible for her to kill them or that there was some legal reason that it was an impossibility. I think it's just going to confuse the jury significantly.

THE COURT: State?

MR. ALLMON: I think that there's a lot there that explains. So it would be a direct movement towards consummating the offense here she intends to commit. I think that's important language. And, again, this is from a model instruction there.

MS. STONE: The --

THE COURT: So this comes out of the pattern jury

instructions. I'm going to put the "mere preparation" in and the other paragraph. What I'm going to put it in is I'm going to put it in after:

It is necessary to prove.

So then --

MS. STONE: Oh, between those two paragraphs?

THE COURT: Yeah.

MS. STONE: Okay.

THE COURT: Sorry. I've got to fix it on my thing.

MS. STONE: That's okay.

[Pause in proceedings.]

THE COURT: I'm taking out the "he" and "or." So it should say:

Attempt murder is the performance of an act or acts which tend, but fail, to kill a human being.

Then it says, next paragraph:

It is necessary to prove the elements -- it is not necessary to prove the elements of premeditation and deliberation.

Then:

It is necessary to prove express malice beyond a reasonable doubt, then mere preparation to commit a crime such as --

The rest of that. Then it is:

Even though the actual commission of a crime is impossible.

And then the last paragraph is:

If the jury finds the State did not prove --

And then the last sentence is:

Attempt murder is a specific intent crime.

Okay?

MR. SCHMIDT: Okay.

MS. STONE: Yes, Judge.

THE COURT: All right. Sorry.

Then we go to the deadly weapon, there's no issue with the deadly weapon, correct?

MR. SCHMIDT: No issue, deadly weapon.

MS. STONE: No, Your Honor.

THE COURT: Okay. Then now we're to the --

MR. SCHMIDT: Transferred intent.

THE COURT: -- during an attack. During attack and transferred intent.

MS. STONE: Does the State have a citation for the attack upon a group?

MR. ALLMON: And I would just cite Sharma v. State, which talks about transferred intent.

MS. STONE: What's the cite?

MR. ALLMON: It's 118 Nev. 648.

THE COURT: Well, what -- let me ask you this: Where did you guys get this instruction from?

MR. ALLMON: There's not a citation in our -- for that exact quote.

THE COURT: Is this part of another sentence? Is it from a pattern jury instruction that that's -- I don't -- that's what I'm trying to

figure out.

MR. HALLQUIST: It's in Nevada Pattern Jury Instructions, it's going to be 6.06, Attack Upon a Group. It'll be page 95.

THE COURT: Defense, do you guys have access to that?

MR. SCHMIDT: Uh-huh.

THE COURT: The instructions, I'm talking about?

MR. SCHMIDT: I -- yeah, I have a copy of them.

THE COURT: Okay. All right.

MR. HALLQUIST: And then the citations are on the bottom left page.

THE COURT: Okay. And then what about the one about transferred -- I'm just trying to kill one --

MS. STONE: I'm just trying to look up the case, Your Honor. Just give me one second.

THE COURT: And then what about the Jury Instruction Number 13, which talks about the transferred intent? Oh, I see, it's the next instruction, 6.07.

MS. STONE: It's -- I'm -- each time I read this, I don't understand it. I --

THE COURT: Transferred intent or the instruction?

MR. SCHMIDT: Their instruction or --

MS. STONE: Their instruction.

THE COURT: Which one?

MS. STONE: Number 13, the -- I can't -- transferred intent is one thing. I'm not quite sure what they're trying to get at here with the

two different charges.

THE COURT: So I think -- let me just nip this in the bud. I think on the transferred intent instruction, it should be what is in 6.07:

Where a person unlawfully attempts to kill a certain person, but by mistake or inadvertent kills or injures a different person --

But, I mean, I would take out the part about killing, right? So I think you've got to put attempts to kill.

-- or injures a different person. The crime committed is the same as though the intended victim had been injured --

I guess it would be attempted to be killed or injured. Because it's basically just a general statement of transferred intent, as opposed to specifying the transferred intent.

MS. STONE: That's fine.

THE COURT: Does that make sense? It's --

MS. STONE: That's fine, Judge.

MR. ALLMON: Yeah.

MR. SCHMIDT: That's fine.

THE COURT: So I think:

You are instructed that the Doctrine of Transferred Intent provides that where a person unlawfully attempts to kill a certain person, but by mistake or inadvertent, during such attempt, injures a different person --

Is what I was thinking of putting in. Let me just put it in. Okay. So what I have is:

You're instructed that the Doctrine of Transferred Intent

provides that where a person unlawfully attempts to kill a certain person, but by mistake or inadvertent during such attempt, injures a different person, the crime committed is the same as though the intended --

I guess I could put person.

-- had been attempted to kill or injured.

So I can take out the word "victim" and put "person." Because we have "person" above. Does that make sense?

MR. ALLMON: That's fine.

THE COURT: And take out the whole:

Commits a battery against another person, the law nevertheless holds the assailant responsible.

MR. SCHMIDT: Yeah.

THE COURT: Did you see -- did you hear what I just said?

MR. SCHMIDT: Yes.

THE COURT: I basically copied the jury instruction, but had to change some of it, because it's talking about killing. So it says:

You are instructed that the Doctrine of Transferred Intent provides that where a person unlawfully attempts to kill a certain person, but by mistake or inadvertent, during such attempt injures a different person, the crime committed is the same as though the intended person --

So I took out "victim."

-- had been attempted to be killed or injured.

And the rest of that instruction is out.

MR. SCHMIDT: Okay.

THE COURT: The commits a battery, blah, blah, blah, then that that look -- nevertheless holds. Because I think that the instruction is supposed to be the law and not --

MR. SCHMIDT: Applying the law to --

THE COURT: Correct.

MR. SCHMIDT: Gotcha.

MR. ALLMON: That's fine.

THE COURT: See what I'm saying?

MR. SCHMIDT: Yeah.

MR. ALLMON: I agree.

MS. STONE: That's my intent to do that. Is the defense objecting to that?

MR. SCHMIDT: To your --

MS. STONE: I just -- I still think it's really confusing. And I have concerns about the jury thinking that because they found -- because they find her guilty of a battery, that therefore she's also guilty of the attempted murder.

THE COURT: Well, okay.

MS. STONE: Based on the way the instruction reads.

THE COURT: I mean, that's closing arguments, right?

MS. STONE: Just based on the where the instruction -- the way the instruction reads.

THE COURT: Okay. So how would you change the instruction?

MS. STONE: That's what I'm trying to think of.

THE COURT: I mean, part of that is closing arguments. I think the Doctrine of Transferred Intent applies. Okay.

MS. STONE: What I would ask for, Your Honor, is where someone --

THE COURT: And then you have to have it be -- because this is straight out of Sharma, this --

MR. SCHMIDT: Uh-huh.

THE COURT: Except for where I took the -- we've added the intent, that language is straight out of Sharma.

MS. STONE: I understand, Your Honor.

THE COURT: Okay. I -- we have to move a little bit, because they're coming back. And I've got to give my staff a break. So.

MS. STONE: What I would ask for is:

Where a person attempts to commit a crime against one person, and by mistake or inadvertence, attempts to or --

THE COURT: Why don't you work on that, Mr. Schmidt, and let's move on.

MR. SCHMIDT: Yeah.

THE COURT: All right. So the next instruction that I have for the State, and I'm highlighting yours that I didn't do, is:

Battery means an unlawful and willful use of force.

Okay. But I'm going to combine that with the next instruction. It goes:

Battery means -- the force used by the defendant need not be

violent -- do not cause injury on any side touching the word willful, what that means.

Then I think what I'm going to do is after the end of that instruction, where it says the word "willfully," then my intent is to add:

If that force is accomplished with use of a deadly weapon, the person is guilty of battery with use of a deadly weapon. If that force results in --

So I'm basically moving it up.

MR. SCHMIDT: So you're combining them all kind of into one.

THE COURT: Yeah. Because I think it's all the same. Okay. So --

MS. STONE: I think that's fine, Your Honor. I would ask for clarification on the general intent piece, though.

THE COURT: Is that in this instruction?

MS. STONE: It's not in this instruction.

THE COURT: Okay.

MS. STONE: I -- just because of the issues with the specific intent for the attempt murder, I would ask after the first sentence, to add the statement that battery is a general intent crime.

THE COURT: I think I did the crime of battery.

MS. STONE: Or that one.

THE COURT: Right. Because I can't remember if I did it for -- I might have just said attempt murder.

MR. ALLMON: Okay.

THE COURT: I'm just going to -- I can go back and change it

or --

MS. STONE: That's fine.

THE COURT: -- I just -- I can just put batteries in general intent crime. That's how -- how about we do that?

MS. STONE: And then --

THE COURT: After the first sentence.

MS. STONE: Yes.

THE COURT: Okay.

MS. STONE: And then on line 7 --

THE COURT: That's where the word "willfully"?

MS. STONE: Yes.

THE COURT: Okay.

MS. STONE: Have it say:

The word "willfully," when applied to the general intent --

Just something to denote that the intent that "willfully" is talking about is only for the battery, it's not for other crimes charged.

THE COURT: I'm sorry. The word "willfully," when applied to the general intent?

MS. STONE: Yeah.

THE COURT: Oh, wait. Wait. I don't know if I want to put that in there, because I don't know if that's a correct statement of the law. I think that the fact that we say battery -- because it has to be something -- it has to be an intent with the -- it doesn't -- it does have to be that.

MS. STONE: Right.

THE COURT: But it is a general intent crime.

MS. STONE: Maybe a --

THE COURT: See what I'm saying?

MS. STONE: Maybe a sentence at the end of that paragraph that says this definition applies only to the crime of battery as stated in these instructions, not to other crimes?

MR. HALLQUIST: I think when you're reading the jury instruction talking about battery, it applies to battery. And there's also jury instruction -- I think we have one saying we don't, you know, take what you hear in an attempt murder instruction and mingle it with a battery instruction, right? I'm kind of confused, the last part.

THE COURT: Yeah, I'm not sure that I'm clear on that, either, to be honest with you.

MR. HALLQUIST: I got -- I don't think we have a problem just saying, like, right up front, right, on line --

THE COURT: Battery is a general intent crime.

MR. HALLQUIST: Yeah. Battery is a general intent crime. And then if defense counsel wants to pull up or we can pull up a definition of general intent crime and put it on the bottom, or right after battery, that might make sense.

THE COURT: Okay. All right. Somebody work on that.

MR. SCHMIDT: Well, I was going to say that I would only have -- there's only one other thing. And this might not mean much, but I do think that the lines 5 through 6, any slight touching, that comes from Hobbs, and it's actually any slight unprivileged touching. I know that not

make a big of a difference here, given the allegations.

THE COURT: Unprivileged?

MR. SCHMIDT: Slight unprivileged touching.

THE COURT: All right. I'll put --

MR. SCHMIDT: That's the exact cite from Hobbs.

THE COURT: Any slight unprivileged touching?

MR. SCHMIDT: Yes.

THE COURT: Okay. I put unprivileged, because slight was already in there. All right.

Let's do substantial bodily harm. And I'm assuming we're not objecting to that.

MR. SCHMIDT: Are we not?

THE COURT: I mean, I didn't see one in your guys', unless I'm wrong.

MS. STONE: No, that's fine.

THE COURT: Okay. So no objection to -

MR. SCHMIDT: That's from the statute, right?

THE COURT: Yeah.

MR. SCHMIDT: Then no objection.

THE COURT: Okay. They put in prolong, blah, blah, what it means. I'm going to put prolonged up. Does everybody understand what I'm doing?

MR. SCHMIDT: You mean move it above the bodily injury? Yes.

THE COURT: Yeah.

MR. HALLQUIST: You're just switching points --

THE COURT: I'm just going to add it to --

MR. SCHMIDT: Oh, after the other instruction.

THE COURT: I'm just going to add -- so what it says is:

Prolonged physical pain.

MR. SCHMIDT: Oh, yes.

THE COURT: Prolonged physical pain necessary, encompasses.

MR. SCHMIDT: Gotcha.

THE COURT: Because I don't think we need a --

MR. SCHMIDT: That makes sense.

THE COURT: We're not killing trees here. Okay. All right.

Then it looks like the next instruction we have -- and I highlighted yours that I didn't go over. Sorry, I'm a pointer. The next instruction we have is:

The driver of any vehicle.

See what I'm saying?

MS. STONE: Yes.

THE COURT: Okay.

MR. HALLQUIST: Be on page 19.

THE COURT: Why does bodily injury appear by itself? Okay.

MR. ALLMON: Because bodily -- oh, yeah, it --

THE COURT: Okay. So just you know where the thing that says "bodily injury" by itself, I'm going to move up to two instructions up; does that make sense?

MR. SCHMIDT: Sure.

MR. ALLMON: That's fine.

MR. SCHMIDT: You're talking about moving 19 up to 18, I think.

THE COURT: Yeah. I'm going to just add it to -- follow -- so it says -- it's going to say:

Substantial bodily harm means one bodily injury which --

But then it's going to say:

Bodily injury means any injury to the body, or --

MR. HALLQUIST: That makes sense.

MR. SCHMIDT: Sounds good.

THE COURT: Okay. All right. Sorry. Did we -- did you guys read:

The driver of any vehicle involved in an accident.

You know where I'm at?

MS. STONE: Yes.

THE COURT: Okay. Any objection to that instruction?

MS. STONE: No.

MR. SCHMIDT: No.

THE COURT: Okay. Then the next instruction that I have is:

In order to find that a defendant has committed the crime.

I'm going to change it to -- whether you're objecting or not, I'm going to take out "he/or." Okay?

MS. STONE: Understood.

THE COURT: In order for you to find the defendants --

Did you guys read that instruction?

MS. STONE: We --

MR. SCHMIDT: Which one are we looking at?

MS. STONE: Did --

THE COURT: In order -- it's -- so it's --

MR. SCHMIDT: In order --

THE COURT: It says:

In order to find that a driver committed the crime of leaving the scene of a crash, you must --

Blah, blah, blah.

MR. SCHMIDT: Okay.

MS. STONE: She's charged with --

THE COURT: And I took -- oh, shoot. And I took out "or she" -- "or he." "He/or."

MR. SCHMIDT: Yeah. Yeah.

MS. STONE: She's charged with duty to stop, though, not leaving the scene? Technically.

THE COURT: State?

MR. ALLMON: It's fine, duty to stop.

THE COURT: No, no, no, no, no. They're asking me to take the instruction out, because she's not charged with it, correct? Or am I wrong?

MS. STONE: Unless the State has --

THE COURT: I'm on page 18 --

MS. STONE: -- thinks that this applies to the --

THE COURT: -- which -- sorry. I'm on page 18, which talks about:

In order to find that a driver's committed the crime of leaving the scene of a crash.

Is there something -- I thought it was duty to --

MR. ALLMON: It's -- yeah. We use the two terms. It's -- yeah.

THE COURT: I mean, is there a lesser included? Am I confused?

MR. ALLMON: It's not a lesser included, so it's --

THE COURT: Get rid of that?

MR. ALLMON: Let's change it to what the statute's -- or what the information is.

THE COURT: I thought the one above was what the statute says.

MR. SCHMIDT: Yeah. That's right.

MR. ALLMON: That's good.

MR. HALLQUIST: Yeah, they sometimes change the words up, duty to stop and leaving the scene.

MR. ALLMON: Duty to stop at scene of crash.

MR. HALLQUIST: Same statute, same elements.

MR. ALLMON: Yes.

THE COURT: All right.

MR. ALLMON: So leaving --

THE COURT: So what are we --

MR. ALLMON: So where it says:

In order to find the defendant --

THE COURT: -- has committed the crime of --

MR. ALLMON: Yeah. It says leaving the --

Has committed the crime of duty to stop at scene of crash.

THE COURT: Wait. Hold on. I'm sorry. Duty to stop at scene of crash.

MR. HALLQUIST: And if we want to make it easier --

THE COURT: You must find that the driver knew or should have known that she had been --

MR. ALLMON: Involved in a personal injury, that's right.

THE COURT: -- involved in a collision with a person or the property of another, you need not find that the driver knew that he -- that she had injured someone.

Is that the rest of the instruction?

MR. ALLMON: Yes. And we'll do involving personal injury or death at the end of it too. That is correct, Your Honor.

THE COURT: Okay.

You need not find that the driver knew that she had injured someone or the property of another.

Is that what you said?

MR. ALLMON: Yes.

THE COURT: Okay. So let me read that.

In order to find that a driver's committed the crime of duty to stop at scene of crash, you must find that the driver knew or should

have been known that she had been involved in a collision with a person or property of another. You need not find that the driver knew that she had injured someone or the property of another.

MR. ALLMON: Yeah.

THE COURT: Okay.

MR. ALLMON: We're just going to -- since there's the model instructions here, it's 20.04, we're going to go to that instead of the old one that we've been using here.

MR. SCHMIDT: And I was just looking at that, Your Honor.

THE COURT: Wait, what?

MR. SCHMIDT: There's a pattern instruction for this.

MR. HALLQUIST: It'll make it a lot easier.

THE COURT: That I did not write --

MR. SCHMIDT: Yes.

THE COURT: -- is what you're telling me? Is that what you're telling me? All right. So what number is that? I'm sorry.

MR. HALLQUIST: It's going to be 20.04.

MR. ALLMON: 20.04.

THE COURT: Okay.

MR. SCHMIDT: This is leaving the scene, right?

MR. ALLMON: And --

THE COURT: So do you guys have it?

MS. STONE: We do, Your Honor. The issue, which I can't tell if it's just using a different name for the same crime, but the pattern instruction also says leaving the scene of a crash involving personal

injury or death. And the charge on the indictment reads as duty to stop. If they're the same from the State's perspective on the instructions, then that's fine, but I don't want the jury to be getting two different names for the same thing.

MR. ALLMON: That's fine. We'll keep it duty to stop at scene of crash.

THE COURT: Okay. So my question is: Do I have the instructions wrong?

MR. ALLMON: Yes, we're going to be changing it, Your Honor.

THE COURT: Okay. So the instruction that I just typed out about duty, that one we're changing to 20.04, I need you guys to send that to me.

MR. ALLMON: Send it right now.

THE COURT: Because I don't think that I can -- and you want that whole instruction in there?

MR. ALLMON: Yeah, we're going to copy -- I think it actually is a -- it's actually a decent instruction, because it -- it just compresses --

THE COURT: Never mind.

MR. ALLMON: -- compresses a few different instructions there together.

THE COURT: Hold on. I think I can do it myself.

So the crime of -- what is it? -- duty to stop at the scene of a crash should be -- consist of the following element.

Do you guys know -- Defense, you know where I'm at?

MS. STONE: Yes, Your Honor.

MR. SCHMIDT: Yep.

THE COURT: It's the all -- the entire instruction, correct?

MR. ALLMON: Yes, Your Honor.

THE COURT: And, Defense, are you objecting to that entire instruction?

MS. STONE: No.

MR. SCHMIDT: No.

THE COURT: Let me fix this instruction.

MS. STONE: State, is that going to take care of 18 through 24 from your instructions?

MR. ALLMON: Let me double check, but I -- yes, it's going to take care of them.

THE COURT: So what about the driver of any vehicle involved in a collision; is that out?

MS. STONE: Which number, Your Honor?

THE COURT: It's on page 19. So I -- so what I have is, on page 17, it says:

The driver of any vehicle involved in a crash resulting in substantial bodily harm, shall give her name.

Blah, blah, blah, blah, blah, blah, blah, blah. I have that. Are you guys there?

MR. SCHMIDT: The driver of any vehicle involved in a collision resulting in injury.

THE COURT: Yeah, give his or her name, all that kind of

stuff. That I have and you guys did not object to it.

Then the next instruction is:

The crime of duty to stop.

MS. STONE: Wait.

MR. SCHMIDT: Wait a minute.

MS. STONE: I'm so confused.

THE COURT: That's why I'm --

MS. STONE: My understanding, from what the State was asking for, is that they wanted to replace their Proposed Instruction Number 18 and possibly a few others with the Pattern Instruction 20.04. Did that --

THE COURT: Is that what you're saying, State?

MR. ALLMON: Let me get back to -- I need to compare to make sure what's not missing here.

So let's -- which one are you asking about, Defense, here, saying --

THE COURT: Okay. So let's back up. What I'm asking is on Instruction Number -- on page 17, that says:

The driver of any vehicle involved in an accident resulting in bodily injury to or death of any.

Are you there? And it's going to say:

1. Give his or her name, registration number.

Blah, blah, blah, blah, blah, blah, blah, blah.

MR. ALLMON: Okay. I'm there now.

THE COURT: State, are you there?

MR. ALLMON: I'm there.

THE COURT: Okay. Defense, are you there?

MS. STONE: Yes.

THE COURT: Okay. Are we giving this instruction?

And if so, I'm -- and there's one, two, and three parts. You guys are there, right, Defense?

MR. ALLMON: Yes. So, yes, we can get rid of that one where it says that.

THE COURT: The one I just read?

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay. The driver of any vehicle, so we're taking that out?

MR. ALLMON: Okay. And then I cut and copied the crime of duty to stop at the scene, I copied that instruction, which is --

MR. HALLQUIST: The 20.04.

THE COURT: Correct.

MR. HALLQUIST: Yeah. So --

THE COURT: That whole thing I copied, which includes the name, da, da, da, da, da, da, da, da, da.

MR. SCHMIDT: Yes.

MR. ALLMON: Yes, Your Honor.

MR. HALLQUIST: That instruction should cover leaving the scene. And just to be clear, duty to stop and leaving the scene are the same. It gets confusing because the names switch around a lot, but it is the same charge.

MR. SCHMIDT: You're on that --

MS. STONE: I understand that. I just want it to be --

MR. SCHMIDT: You're on that team, I would assume you know.

MR. HALLQUIST: I get frustrated because some people -- sometimes, it's, like, what's going on?

THE COURT: That's fine. But I just want to make sure that we're on the same page.

MR. SCHMIDT: Uh-huh.

MS. STONE: So which of the other instructions can we take out, State, that are covered by the pattern instruction she just entered?

MR. ALLMON: Give me a second, because it's formatting weird on mine.

MR. HALLQUIST: So I just want to make sure --

THE COURT: Because I'm trying to --

MR. HALLQUIST: -- where we're at right now.

MR. ALLMON: You can take out the --

THE COURT: Hold on. Hold on.

I'm trying to format it so that we can just -- and then my staff have to have lunch, and we're, like, up against the 1:00. Okay. All right. Okay.

So that instruction starts with, after we have substantial bodily harm instruction, it says:

The crime of duty to stop at the scene of a crash consists of the following elements.

1. The defendant was a driver of the vehicle.

2. The vehicle driven by the defendant.

So on and so forth. Okay. It ends with:

A driver should have known that the vehicle he or she was driving was involved in a crash.

You guys see where I'm at?

MR. SCHMIDT: Yep.

MS. STONE: Uh-huh.

MR. HALLQUIST: Yes, exactly.

THE COURT: Okay. Defense, do you have any objection to that?

MR. SCHMIDT: No.

MS. STONE: No.

THE COURT: Okay. Next instruction that I have is:

The driver of any vehicle involved in a crash resulting in an injury to any person shall immediately stop.

MR. HALLQUIST: So that's already covered in the pattern.

THE COURT: Okay.

MR. HALLQUIST: So we don't need that.

THE COURT: So I'm going to take that out, okay?

Then the next instruction I have is:

Stop means stop.

My inclination is to put it --

MR. ALLMON: Into the main one there.

THE COURT: -- into the instruction before, because I think it

looks weird to have an instruction by itself --

MR. SCHMIDT: Yeah, I agree.

THE COURT: -- that says stop.

MR. ALLMON: That's like --

MR. HALLQUIST: And I'm sorry, just go back. Did we pass over the instruction for bodily injury yet?

THE COURT: Yes. We already covered that.

MR. HALLQUIST: Okay.

MR. ALLMON: I think we put it up with substantial bodily harm, right?

THE COURT: Correct.

MR. SCHMIDT: Yeah.

MR. ALLMON: Perfect.

MR. HALLQUIST: All right.

THE COURT: Okay. So I'm going to put -- so it's going to say:

A driver should have known that the vehicle was driving was involved in --

And then it's going to say:

Stop means complete secession from movement.

MR. SCHMIDT: Sure. No, that sounds good.

THE COURT: See what I'm saying?

MR. ALLMON: Yes.

THE COURT: You guys with me?

MR. SCHMIDT: Yep.

THE COURT: Okay. All right. So then the next instruction I have is motor vehicle means any self-propelled -- is the instruction above it talk about a motor vehicle? No, it doesn't, does it? No.

MR. ALLMON: It says vehicle. It says there's apparently the driver of a vehicle.

THE COURT: Okay. Are you going object if I put stop, and then I got motor vehicle?

MR. SCHMIDT: No.

THE COURT: Does everybody know what I'm talking about?

MR. SCHMIDT: Yep.

MS. STONE: Yes, Your Honor.

MR. SCHMIDT: That's fine.

THE COURT: They just look like separate paragraphs.

MS. STONE: Yes.

THE COURT: All right. Okay. The next thing I have is:

Premises to which the public has access.

State, do you know where I'm at?

Defense, do you know where I'm at?

MR. SCHMIDT: Yes.

MS. STONE: Yes, Your Honor.

MR. HALLQUIST: Yes, I do.

MR. SCHMIDT: And we don't have any objection to State's 24.

MR. HALLQUIST: Brief indulgence on that.

THE COURT: Okay. Then I have:

Although you are to consider only the evidence in reaching a verdict, common sense, everyday experience, blah, blah, blah, blah, blah, blah, blah, blah.

Which I think you guys have them, but is it different?

MS. STONE: Ours may be slightly different.

THE COURT: I think you don't have:

Thus, you are not limited solely to what you see and hear as the witnesses testify.

I could be wrong.

MS. STONE: That's correct, Your Honor. I wouldn't object to that, since it's been asked to take it out. I think that's in contravention with other instructions that Your Honor has given, which tell them that the only evidence they can consider in this case is what they've heard in this courtroom, not --

THE COURT: You don't have an -- sorry.

You don't have an objection to the sentence before, correct? Yeah, you don't, because you have it: Did the common sense everyday -- yeah.

MR. SCHMIDT: Yeah, yeah.

MS. STONE: Yes.

THE COURT: State?

MR. ALLMON: Sorry?

THE COURT: It's just:

Thus you are not limited solely to what you see and hear as the witnesses testify.

MR. ALLMON: From my instructions, you're saying, right?

THE COURT: Correct. But they have this -- everything else is the same so that I can tell.

MR. SCHMIDT: I think that's right.

MS. STONE: That's fine.

MR. ALLMON: Yeah, because it's -- everything appears to be the same.

MR. SCHMIDT: Other than that one sentence, right?

THE COURT: Correct. State, in regard to the sentence?

MR. ALLMON: Sorry.

THE COURT: I'm going to take it out over your objection, if you have one.

MR. ALLMON: Could we just -- sorry. Could we just get back to the sentence one more time -- say it one more time. I apologize. I was looking at -- pulling something else up.

THE COURT: It's -- so the instruction says:

Although you are to consider only the evidence in the case in reaching a verdict, you must consider -- you must bring to the consideration of the evvidence your everyday common sense and judgment you have, thus you're not limited solely to what you see and hear as the witnesses testify.

They do not have that. I'm inclined to take that out.

MR. ALLMON: I have no objection.

THE COURT: Okay.

MR. ALLMON: Thank you. Apologize for that. I was --

THE COURT: No, you're fine. All right.

Then we have:

In your deliberations, you may have discussed punishment.

Defense, I think you have that.

MS. STONE: Yes.

THE COURT: Okay.

MS. STONE: But I definitely hope we did not -- yeah.

THE COURT: During the course of the trial, you must not --

And it's the -- my basic thing that I say every day.

MS. STONE: Did we move on from the punishment instruction?

THE COURT: Yeah.

MS. STONE: Ours is different.

MR. SCHMIDT: Yeah.

THE COURT: Okay. What is it?

MS. STONE: Ours says:

In your deliberation, you may not discuss or consider the subject of punishment. Your duty is confined to the determination of whether the State has proven each element of each offense against Ms. DeFalco beyond a reasonable doubt. If the State failed to prove and element, then you must return a verdict of not guilty.

MR. SCHMIDT: Think we're missing a "has" in there.

THE COURT: Yeah, hold on, let me just --

Duty is confined to the determination of the -- of whether --

MR. ALLMON: The defendant is not guilty or not guilty was

the language.

THE COURT: Yeah.

-- of whether the defendant is guilty or not guilty.

Sorry.

MS. STONE: Well, it's whether the State proved each element.

THE COURT: No, it's before that. Because it said innocence.

MS. STONE: I know. But the standard is also not just guilt or --

MR. ALLMON: I just think that it's repetitive, Judge.

THE COURT: I'm not there yet to your part. I'm just changing their thing.

MS. STONE: Okay.

THE COURT: Okay. And then your thing is your duty is confined -- okay. State?

MR. ALLMON: Your Honor, I think again, that's -- they've been instructed of that multiple times. I think it's -- we're adding the reasonable doubt instruction back into every single instruction, and they made instruction on reasonable doubt multiple times.

THE COURT: I'm going to add:

Your duty's going to apply to the determination whether the State proves each element of each offense against Ms. DeFalco beyond a reasonable doubt.

MS. STONE: We would ask for the last sentence in accordance with Crawford.

THE COURT: I put that in other instructions. Haven't I heard that in other instructions?

MS. STONE: I think it may be in one, Your Honor, but pursuant to Crawford, I think each time we say it, we're entitled to the reverse.

THE COURT: Every time what's said?

MS. STONE: So --

THE COURT: I mean, I know what Crawford says, but I didn't think we said something -- I thought I put this in.

MR. ALLMON: It's been in several times.

THE COURT: Yeah, I thought I put it in on multiple times.

MS. STONE: Okay.

THE COURT: Okay. During the course of the -- okay. Communicate. So instruction I read. So I am assuming you don't have an objection to that.

MR. SCHMIDT: No.

THE COURT: When you retire to consider foreperson.

MS. STONE: Are we going to go back to the last paragraph, Your Honor? And ask that Your Honor give our version of that last paragraph.

THE COURT: Which is?

MS. STONE: Which is:

If a unanimous verdict is reached, have it signed and dated by your foreperson and then return to this room. If a unanimous verdict cannot be reached, have a note signed and dated by your

foreperson to be provided to the officer, who will return you to this room.

THE COURT: I'm not adding that whole sentence.

MS. STONE: For the record, we would object on the basis that our proposed version of that last paragraph is legally correct. The -- and the -- lines 8 and 9 in the State's Proposed 28 are legally incorrect. The verdict to the extent that there is one, must be unanimous. But that does not mean that the only outcome which can come out of the jury deliberation room is a unanimous verdict.

THE COURT: Okay. Thank you. Your objection is noted.

What about read-backs? I'm assuming you're not objecting to that. Oh, wait. Hold on. Actually, I've got to take out the one about read-backs, because we only do playbacks.

MS. STONE: So just delete the paragraph altogether?

THE COURT: Yeah. Because we're --

MR. ALLMON: So is it just playbacks?

THE COURT: Because this courtroom doesn't do read-backs.

MR. ALLMON: Got it. Okay.

MR. HALLQUIST: Are we just going to change --

THE COURT: No, I'm just going to move -- you had both of them in. I'm just going to put the playbacks one in here.

MR. SCHMIDT: Okay.

THE COURT: Okay? I'm assuming you're not having an objection to that.

And then your last one that they --

MS. STONE: Oh, so take our 29 -- their 29, and just give 30? Okay.

THE COURT: And then yours -- and then:

Now you will listen.

Okay?

MR. ALLMON: There's two instructions that the State missed, actually. The -- was caught after.

THE COURT: Okay. What's the language?

MR. ALLMON: Malice aforethought. It's going to be from the model one there, the --

MR. HALLQUIST: 6.02.

THE COURT: I've got to find that.

Where's Helen? She's in the back? Because you guys have got to eat, so we're going to have to take a longer break.

What's the pattern jury instruction number?

MR. HALLQUIST: 6.02.

MR. SCHMIDT: I guess we're going to object to that, Your Honor, because it's -- that's used for the definition of murder.

THE COURT: No, but it's an attempt murder, you've got to give a definition of malice.

MS. STONE: We do, Your Honor.

MR. SCHMIDT: There is another definition of malice within pattern jury instructions that's not that.

THE COURT: Okay.

MR. SCHMIDT: It's on the next page after 6.03. And we

would ask for that definition if --

THE COURT: Okay.

MR. HALLQUIST: So we have express malice, but we have to provide a definition, it's in our charges.

THE COURT: We're going to have to tell the jury that they -- because the staff has -- I have to give the staff a break and we haven't had a chance to eat. Well, my hope is we can get this done in the next 10 minutes, but.

So hold on, let me get to the attempt murder instruction.

So let's tell them to come back at 1:30, please.

MS. STONE: Judge, just to be realistically, do you still have to go through the rest of the defense instructions?

THE COURT: Yeah, but I didn't think you guys had that many different from the State, do you?

MR. HALLQUIST: No.

MS. STONE: There's just a couple more.

THE COURT: Right.

MS. STONE: Okay.

THE COURT: I mean, I've already -- I appreciate that, but I don't think there's that -- I mean, I only have, like three or four highlighted.

MR. SCHMIDT: Okay.

THE COURT: All right. Malice aforethought, State?

MR. ALLMON: Your Honor, what we're looking for there is the -- what's the number again here? Pull it up.

THE COURT: 6.02.

MR. ALLMON: 6.02. They're asking for a different one. I don't think that that properly -- that's one part of it. And so there's the express malice, but there's a malice aforethought as well, it's mentioned. I think, an important part thereto is that that encompasses the whole thing and includes the fact that a deadly weapon may be considered by them. And I think that's appropriate in attempt murder as well.

MS. STONE: I -- we were to object, Your Honor. I don't think this is accurate when it comes to express malice specifically. There's a reason that the instruction says:

As used in the definition of murder.

Because murder provides for both express malice and implied malice. And this three-paragraph malice aforethought instruction covers both of those things. I don't see a way to parse those out from the wording. There's a -- also a reason, I think, that on the next page, Instruction 6.03 Malice Defined, it breaks it out into express and implied. And in this case, where she's charged with attempt murder, it is crucial that the jury be instructed only on the express portion of malice and not on the implied portion.

And I think it's clear the discussion of inferences in 6.02 indicates that this is taking into consideration both express and implied. Because both can be considered for a murder charge, but not for an attempt murder charge.

THE COURT: So my inclination is to use the malice aforethought instruction and then aforethought, and then use express

malice. But to put the express malice before the malice aforethought in the same instruction.

MS. STONE: Your inclination is to use the portion from 6.03 that describes express malice and then --

THE COURT: Not the second half, which says malice may be implied.

MS. STONE: So just the part that says:

Express malice, is that deliberate intention to unlawfully take away the life of a fellow creature which has manifested by an external circumstances capable of proof.

THE COURT: We already did that.

MR. ALLMON: We did that in --

MS. STONE: We already did that.

THE COURT: Okay.

MR. SCHMIDT: Yeah.

MR. ALLMON: They express malice part we did.

THE COURT: Okay. I think I have to put in a malice aforethought instruction, to be honest with you, because it's an attempt murder. So you can object to that, but I'm going to put in 6.02.

MR. HALLQUIST: And then we would --

MS. STONE: If Your Honor's going to put in 6.02, then at a minimum, we would ask to put in only that first paragraph. I think that minimizes the damage to the extent that that is possible from giving the jury instructions on malice that incorporates implied malice, which is --

THE COURT: I'm listening to you, I'm just trying to --

MS. STONE: I understand, Your Honor.

THE COURT: -- fix this instruction. Because it's not the same when I cut and paste.

MS. STONE: I mean, this is very clearly incorporating portions of implied malice. It mentions that:

> The condition of mind may arise not only from a specific feeling that the person is feeling, but also from any unjustifiable or unlawful motive which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty.

That lines up with implied malice, which is not an instruction here, it's not a basis on which the jury can find her guilty. So to give this instruction gives the jury a way to find her guilty of attempt murder outside of express malice and specific intent.

THE COURT: I'm sorry, what did you say?

MS. STONE: So the malice aforethought instruction that the State is asking for is -- says in the pattern jury instruction that it's only to be used as in the definition of murder.

THE COURT: Where does it say that?

MS. STONE: Malice aforethought, as used in the definition of murder, it's the very first line.

THE COURT: Okay.

MS. STONE: Paragraph -- the second paragraph, lines 12 to 13, is all about inferring things.

THE COURT: Wait. Hold on a second. Oh, never -- okay. I'm not going to give it. Sorry. I am not giving it.

MS. STONE: Okay.

THE COURT: Because I had to go back and read the malice instruction.

MR. ALLMON: So you're not going to give that instruction generally, you're saying, Your Honor?

THE COURT: No.

MR. ALLMON: There's --

THE COURT: Because we are -- yes?

MR. ALLMON: There is part of it then that I think that, at a minimum, should come in.

THE COURT: Okay.

MR. ALLMON: So -- and I was going to agree, as they -- defense rightfully raised the issue of not along from anger or hatred. However, I would say that -- hold on -- the portion of the deadly weapon, specifically:

Malice aforethought may be inferred from the use of a deadly weapon in a deadly and dangerous manner.

And then:

Aforethought does not imply to --

THE COURT: Am I -- where -- I don't see a deadly weapon. Am I looking at the wrong instruction?

MR. SCHMIDT: It's --

MR. HALLQUIST: It's in brackets.

MR. ALLMON: It's in brackets, Your Honor.

THE COURT: 6.02?

MR. SCHMIDT: Yes.

MR. ALLMON: Yes, Your Honor.

MR. HALLQUIST: It's just a -- yeah.

THE COURT: Oh. Okay.

MR. ALLMON: So I believe that this instruction applies in part, and I agree, some parts do not apply, as they pointed out.

THE COURT: So you're asking me just for the part in the brackets?

MR. ALLMON: Where it says malice -- so --

MR. HALLQUIST: Your Honor, there is a portion, I think, it would be appropriate when we're talking about aforethought, it would be the language, the intentional doing of a wrongful act without legal cause or excuse.

THE COURT: I thought we already had that.

MR. HALLQUIST: Or the law considers --

THE COURT: Attempt murder is a performance and --

MR. SCHMIDT: Yeah.

MS. STONE: We did.

THE COURT: I thought we already had that.

MR. SCHMIDT: That seems redundant.

MR. ALLMON: Well, then, we --

THE COURT: I mean, we can add that.

MR. ALLMON: So at a minimum I would ask that:

Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner.

Aforethought does not imply deliberation and the lapse of a considerable time. It only means a required mental state must proceed rather than follow the act.

MS. STONE: And, Your Honor, we would be object strongly to this. I would --

THE COURT: I'm not giving it.

MS. STONE: Okay.

THE COURT: All right. So we finish with the State's instructions, correct?

MR. SCHMIDT: I think so.

MR. ALLMON: We had a flight instruction request too.

MR. SCHMIDT: Oh.

THE COURT: Did you include it in the pack?

MR. ALLMON: I did not, Your Honor. It's an oversight on my part.

MR. HALLQUIST: I sent an e-mail a little while ago, put that in the [indiscernible]. Couldn't believe it was a flight instruction.

MS. STONE: You sent an e-mail with the attempt murder stuff.

THE COURT: Yeah, I don't think I got a flight instruction.

MR. ALLMON: Here, I'll send the flight.

ME. HALLQUIST: It would be 3.05.

THE COURT: The flight of a person after the commission.

Defense, do you have that?

MS. STONE: I'm looking at it.

THE COURT: I'm not -- I'm looking at the pattern instruction.

MS. STONE: That's --

THE COURT: Is that what you put in there?

MR. ALLMON: Yes, Your Honor.

THE COURT: Is that what your e-mail is?

MR. ALLMON: Let me double check, because there's no change -- was --

THE COURT: Well, I'm looking at the pattern instruction. I think the defense has the pattern instruction or not.

MR. SCHMIDT: We have the pattern here.

MR. ALLMON: I believe mine's the same, but let me double check.

THE COURT: Well, I'm -- if I'm going to use any, I'm going to use the pattern.

MR. SCHMIDT: And we would object --

MR. HALLQUIST: That is the pattern.

MR. SCHMIDT: We would object to that, Your Honor. Here, the flight signifies something more than a mere going away, it embodies the idea of going away with a consciousness of guilt for the purpose of avoiding arrest here. So the Court, obviously, has to look at the record that's been provided here. I'm not sure what the State's basis is for the request, other than the potential -- one of the charges.

MR. ALLMON: Well, no, it goes directly to consciousness of guilt, where she fled the scene, she hid the evidence. And so that goes to her consciousness of guilt at the time.

MR. SCHMIDT: She what? I'm sorry.

THE COURT: She fled the scene.

MR. ALLMON: She fled the scene and hid the evidence.

MR. SCHMIDT: Well, she left the scene. I don't -- my understanding is that is required for someone fleeing from officers. We don't really -- I don't know that there's evidence right now to support the flight instruction.

MR. ALLMON: The flight would include -- it does not specifically require a signal on a police officer. It's flight from the scene, from apprehension, from detection. And so that applies here.

THE COURT: So the evidence that the Court sees is after it happened, she went to Mr. O'Neil's apartment. Mr. O'Neil testified that they actually drove by the scene of the crash and then they continued past it. And then he testified that there was a question asked by the jury in regard to bringing -- how did the defendant get arrested? Or something to that effect. And the testimony that Mr. O'Neil gave was that Mr. O'Neil had to -- that the police called Ms. DeFalco, Ms. DeFalco didn't answer the phone. Mr. O'Neil was then contacted and Mr. O'Neil had to contact Ms. DeFalco's mom in order to get Ms. DeFalco to answer the phone. So the Court is going to give the flight instruction.

MR. SCHMIDT: And just briefly, Your Honor, respond to that.

I think the evidence here suggests that her actions were a mere going away, and not a going away with a consciousness of guilt.

THE COURT: Okay.

MR. SCHMIDT: Were there any other instructions?

MS. STONE: From the State?

MR. ALLMON: We're double checking on our attempt murder here.

[Pause in proceedings; counsel confer.]

THE COURT: State, I'm assuming that's all your instructions.

MR. ALLMON: It is. We're -- so one thing is, is we're looking back at the attempt murder and -- and since we've been doing a lot of the pattern instructions, we're comparing it against the pattern instruction here, which is 6.22.

THE COURT: Okay. Well --

MR. ALLMON: And so -- and --

THE COURT: -- somebody's got to look at that instruction. We've got to move on to the defense. Because I asked the jury to come back, my staff hasn't had a break, they need to have a break.

MR. ALLMON: Okay.

MS. STONE: So --

THE COURT: So --

MS. STONE: -- the next one for ours would be page 15, Instruction Number 14, the voluntary intoxication one.

THE COURT: I have:

When a person is accused of committing a crime.

Do you want to go to the voluntary --

MS. STONE: Oh, no. We can go back. That's fine.

THE COURT: Because I -- that -- what I did is I went back and I kind of highlighted what was different and what we did not address.

MS. STONE: Okay.

MR. SCHMIDT: Okay.

THE COURT: Okay? So I might be wrong, but that's what I was trying to do.

MS. STONE: Understood, Your Honor.

MR. SCHMIDT: Okay.

THE COURT: Okay. So:

When a person is accused of committing a crime and at the same time, at the --

See where I'm at?

MR. HALLQUIST: Which page is that?

THE COURT: It's the defense's page 16:

When a person is accused of committing a particular crime and at the same time and by the same conduct --

MS. STONE: Oh, I think I skipped --

THE COURT: Did we do that?

MS. STONE: I think that is skipping ahead a little bit.

THE COURT: Okay.

MS. STONE: Because the voluntary intoxication is Number 14.

THE COURT: Oh, it is?

MS. STONE: Yeah.

THE COURT: I have that after. I have voluntary intoxication --

MR. SCHMIDT: Page 15, Instruction 14.

THE COURT: I have 14. Okay.

Voluntary intoxication mitigates specific intent, including the specific intent to kill, no act committed.

State, do you see that?

MR. ALLMON: Yes, Your Honor.

THE COURT: Okay. I'm assuming that comes from a pattern jury instruction.

MR. ALLMON: There is not one for it.

MS. STONE: The second paragraph --

MR. HALLQUIST: It's from a statute.

MS. STONE: -- comes from the statute. The first line comes from the case Nevius v. State, 101 Nev. 238. It's a direct quote.

THE COURT: State?

MR. HALLQUIST: And I think it said it may neglect or negate specific intent.

MR. ALLMON: May neglect.

MS. STONE: That's what it says.

MR. ALLMON: Yeah.

MR. SCHMIDT: That's what it says.

MR. HALLQUIST: Yeah. In that -- yeah, in that case.

THE COURT: Am I not reading that?

MR. ALLMON: So you said the first line comes from Nevius?

MS. STONE: Yes.

MR. ALLMON: Okay.

MR. HALLQUIST: This one will be 101 Nev. 238.

MR. ALLMON: I got that. Let me just see it. I had written one as well, in case that was submitted. Let me just look at mine real quick.

THE COURT: Did I get it?

MR. ALLMON: No, no, no. I -- because I did not submit it as an instruction, Your Honor, because I was not requesting it. But I do have one that I wrote out that would --

MR. HALLQUIST: Your Honor, I think that first sentence would be improper. So that case, Nevius, is dealing with a first-degree and --

THE COURT: Murder?

MR. HALLQUIST: Yeah. It was dealing with first-degree murder. The issue was that the defense was, hey, they were intoxicated, so they wanted to try to bring murder down to a manslaughter. That court determined that that's not proper, it could be brought down to second-degree. But they were referencing that statute.

And so I think the language of the statute, which is that second paragraph is proper, but having that very first sentence, I think it's just a little bit confusing.

THE COURT: So I guess my question is, in a first-degree murder charge, it has to be willful, premeditated, and there has to be deliberation. You have to have a specific intent to kill.

So I get where the court is saying that -- I guess my question is how is this not negating specific intent in the attempt murder -- I'm assuming this only applies to the attempt murder.

MS. STONE: It only applies to the attempt murder.

I don't know if I'm understanding Your Honor's question. But from the way that I see it, this is --

THE COURT: The way that I see it, this negates the attempt murder. So I'm trying to figure out why the State is objecting to it.

MS. STONE: Okay.

MR. HALLQUIST: I think it would be appropriate just to have the statutory language.

THE COURT: No act committed by a person --

MR. HALLQUIST: That's the language that they used or that they were talking about in that case, and that's the language that should be used here.

THE COURT: I thought you said this came out of a case.

MS. STONE: The second --

MR. HALLQUIST: The very first sentence.

MS. STONE: If I could finish, Corey.

The second paragraph comes from the statute.

THE COURT: Right.

MS. STONE: The very first sentence up to the comma comes from Nevius v. State, which the court had said:

> It is true that voluntary intoxicating may negate specific intent and an accused is entitled to an instruction to that effect if there is some evidence in support of his defense theory of intoxication.

MR. ALLMON: Okay.

MR. HALLQUIST: And our position is that instruction will be the language of the statute.

THE COURT: So, I guess, my other -- the other questions that I have to note is -- and I didn't really see it in the State's, is your client testifying?

MS. STONE: She is not.

MR. SCHMIDT: No.

MS. STONE: We don't believe she is and we did include that instruction, Your Honor.

THE COURT: Okay.

MR. ALLMON: And I just -- I e-mailed a portion here that I think that should be added to the end of that, of the defense's proposed --

THE COURT: If the defendant shows -- if the evidence shows that a defendant was intoxicated at the time of the alleged crime, you may consider in deciding whether or not the defendant had the requisite specific intent. However, a person may be intoxicated and still find the specific intent. To negate specific intent, intoxication must be to such a level that it impaired her ability to form the attempt, and the defendant must have been suffering from the aforementioned effects at the time of the crimes.

Do you see that?

MS. STONE: I do. It looks like this is unpublished.

MR. ALLMON: It's unpublished, but citable, persuasive from the supreme court.

THE COURT: My intention is to give the instruction with its added in language. Your instruction as a whole --

MS. STONE: With the added language.

THE COURT: -- with the added language, because -- and I'm basing this off of the defense's theory of the case from Mr. O'Neil, who testified.

MS. STONE: Understood, Your Honor.

THE COURT: Right. Because that's your theory of the case.

MS. STONE: Yes.

THE COURT: Correct?

MS. STONE: Yes.

THE COURT: I -- so it reads:

Voluntary intoxication may negate specific intent, including the specific intent to kill. No act committed by a person while in the state --

Blah, blah, blah, the rest of it.

If the evidence shows that a defendant was intoxicated at the time, that represent a taller person who may be intoxicated still from specific intent.

Blah, blah, blah, blah, blah. Okay?

MS. STONE: Yes.

THE COURT: All right. Next? One person is accused of a particular time? Or am I -- I have that as 13.

MS. STONE: Oh, I thought you had said 16 earlier, Your Honor. I apologize.

THE COURT: No. So what about when a person is accused of a particular crime and at the same time about the same conduct.

MS. STONE: We're asking for lessers, so.

THE COURT: State? This is the [indiscernible] of the pattern.

MS. STONE: The -- it's not from the pattern, I don't think, anyway. Actually, it might be.

MR. SCHMIDT: You've got to find it should be.

MR. HALLQUIST: So think it'll be .04 is lesser included offenses. Is that what you're looking for?

THE COURT: State, you're objecting to this instruction?

MR. HALLQUIST: Yes, Your Honor. We've asked for the pattern. I got -- which -- my -- these things too, which charges are we asking for lesser includeds on?

MS. STONE: For the battery with substantial bodily harm with the deadly weapon against Melissa.

MR. HALLQUIST: Did you not concede to the battery, deadly weapon with substantial?

MR. SCHMIDT: No, it was tall specifically in my opening. That way we only conceded the substantial as to Bryan and not to Melissa.

MR. HALLQUIST: Okay.

THE COURT: Okay. What's the pattern?

MS. STONE: 1.04, Your Honor. 1.04 is:

The offense of blame necessarily includes the lesser offense of.

THE COURT: So I'm inclined to give the pattern instruction. You said it's only for the battery, right?

MS. STONE: That is correct. The only thing I'm worried about is there are several lessers as it relates to Melissa. There's battery with a deadly weapon, batty resulting in substantial bodily harm, and battery. So the way the pattern jury instruction is written with enumerating specifically the lesser included, I just don't know if it's going to get overwhelming or confusing to list out each of them each time.

MR. ALLMON: I think it's also -- I mean, a lot of that was covered in the battery with deadly weapon, substantial instruction.

THE COURT: We do say if that force is accomplished deadly weapon, guilty of the -- okay, hang on.

So I'm going to give this instruction. I was going to give it after the -- in the battery instruction, unless you want me to give it on its own.

MS. STONE: I prefer to give it on its own.

THE COURT: You do?

MS. STONE: The lesser-included instruction?

THE COURT: Yeah. I think it reads better if you include it on the battery with deadly weapon, but you don't have to -- I can include it on some -- because then you're kind of explaining the whole --

MS. STONE: I think it makes sense to include it in that, with those instructions. But to include that along with each of the definitions for it, the various batteries I think is a lot.

THE COURT: Okay.

MR. HALLQUIST: And so for Melissa, we're doing battery, battery substantial, battery deadly weapon, battery deadly weapon, substantial.

MS. STONE: Yep.

MR. HALLQUIST: Okay. For Bryan it's --

MS. STONE: Just the one.

MR. SCHMIDT: Just the one.

MR. HALLQUIST: Okay.

THE COURT: All right.

The offense of battery with use of a deadly weapon resulting in substantial bodily harm necessarily includes the lesser offense of battery with use of a deadly weapon and battery with use of a deadly weapon resulting in substantial bodily harm.

MS. STONE: Battery with use of a deadly weapon, battery resulting in substantial bodily harm, and battery.

THE COURT: The defendant may only be convicted of one of these offenses. You should first fully carefully examine the evidence as it applies to battery with use of a deadly weapon resulting in substantial bodily harm.

If you unanimously agree that the defendant is guilty of battery with use of a deadly weapon resulting in substantial bodily harm, then you should sign the appropriate verdict form and request the bailiff to return you to the courtroom.

If you cannot agree that the defendant is guilty of battery with use of a deadly weapon resulting in substantial bodily harm, you should then fully and carefully examine the evidence as it applies to. If you have an -- if you --

Sorry.

If you unanimously agree that the defendant is guilty of --

I think I have to put "ors" in here.

MR. SCHMIDT: Yeah, absolutely.

MS. STONE: Yes.

MR. SCHMIDT: But I think it's better to do that than another sentence for each one.

THE COURT: Or battery --

If you unanimously agree that Defendant's guilty of battery with use of a deadly weapon, or battery resulting in substantial harm, or battery, then you sign --

Hold on.

Then you should sign the appropriate verdict form and ask the bailiff to return you to the court.

The defendant, of course, can be found not guilty of these offenses. I'm just going to put that.

MR. SCHMIDT: Okay.

THE COURT: Okay. Of the offenses enumerated. Okay. All right. What else? Which we're not going to make lunch either.

MS. STONE: Our Number 5, page 6, was the testimony instruction.

THE COURT: I'm sorry, what does it start with?

MS. STONE: It is the constitutional right.

THE COURT: State, did you put that in your packet?

MR. ALLMON: It's typically included in the stock one, so --

MR. HALLQUIST: We have it.

THE COURT: You do?

MR. HALLQUIST: I believe I saw something in there, but. Did you put it in?

MR. ALLMON: It's usually put it in the stock one.

THE COURT: Because I don't remember seeing it.

MR. ALLMON: Yeah, I agree. I'm not finding it right now?

THE COURT: Is this the stock?

MS. STONE: I believe so, Your Honor. That looks like it.

THE COURT: Can somebody check for me?

MR. ALLMON: That's 204, let's see.

MR. HALLQUIST: We're looking at the pattern.

THE COURT: It is the constitutional right of a defendant in criminal charge that she may not be compelled to testify.

Defense, is this your instruction?

MR. SCHMIDT: I think it's a little different, but --

THE COURT: I'm inclined to give the stock instruction.

MS. STONE: That's fine.

MR. SCHMIDT: That's fine, Your Honor.

THE COURT: What else do we have?

MS. STONE: Number 9, page 10.

THE COURT: What is it?

MS. STONE: It's the two reasonable interpretations instruction.

THE COURT: Page 10. Okay.

If the evidence in this case?

MS. STONE: Yes.

THE COURT: The evidence in this case.

Okay?

MR. ALLMON: Trying to get to it.

THE COURT: I'm not inclined to give this instruction, especially after reading Crane versus State and Bells versus State.

MR. HALLQUIST: We would --

THE COURT: In Bells versus State, this instruction was given because it was all circumstantial evidence. Here, the information that we have is we have direct evidence.

MS. STONE: All right. I would note, however, Your Honor, with regard to the specific intent for the attempt murder, it is largely circumstantial evidence. So I do think under these circumstances, not necessarily for the other charges, but for the attempt murder charges, this is an appropriate and accurate instruction and we would ask for it.

THE COURT: I appreciate that. I'm not giving it.

Next?

MS. STONE: I think that's all for us, Your Honor.

THE COURT: Okay. Let's look at the verdict forms.

I'm taking out: We the jury, and the above-entitled action. I'm going to need my JEA to probably fix this. Okay. So hold on.

So for the attempt murder, so I think we have to add and I'm going to have to have to come -- her come in here and add it, because I don't know how to do this. But we have to add for the -- which person are you conceding?

MS. STONE: Bryan.

MR. SCHMIDT: Bryan.

MS. STONE: Melissa is the one.

THE COURT: So I was going to put in parentheses, Bryan, and -- so because that -- because on --

MS. STONE: That's what we did.

THE COURT: Okay. Can you have Lara come in here?

[Pause in proceedings.]

THE COURT: So in regard to -- I need you to add, see how it says Bryan Salcedo and Melissa Garibay under there? I don't know how to add them under here. I know you can't cut and copy it, because I just tried doing that.

[Pause in proceedings; technical issue.]

THE COURT: Are you asking in regard to Melissa for the attempt murder without use of a deadly weapon? That's the only way I know how to say that, even though it's not going to say without use.

MS. STONE: Yeah.

THE COURT: State?

MR. ALLMON: I -- if they're asking for a lesser-included instruction, as -- and only to her?

MS. STONE: Just as to Melissa.

THE COURT: Okay.

MR. ALLMON: Okay. No objection.

THE COURT: What -- and I'm assuming that you're not objecting to the -- on the battery with use of a deadly weapon in regard

to Melissa?

MS. STONE: Uh-huh.

THE COURT: It just say: Battery with use of a deadly weapon and resulting in substantial bodily harm. That or: With use of a deadly weapon, battery with substantial bodily harm, battery.

MS. STONE: So what we had put in ours is -- oh, it did do that. Yeah. Not guilty --

THE COURT: But only as to Melissa.

MS. STONE: Correct.

MR. SCHMIDT: Correct.

MS. STONE: Not guilty; guilty of battery, guilty of battery resulting in substantial bodily harm, guilty of battery with use of a deadly weapon, et cetera.

MR. SCHMIDT: Yes. So that, but the reverse order.

MR. ALLMON: And I would ask for the way that we typically do the verdict forms, which is the guilty on top, not guilty. It also goes in line with the pattern jury instructions where --

THE COURT: Yeah, I'm going to give it the -- I'm just trying to make sure that I know what they're talking about.

[Pause in proceedings; technical issues.]

THE COURT: State, have you looked at the defense's verdict form?

MR. HALLQUIST: We're looking at it right now. But we looked at it in the past, yes.

MR. ALLMON: I have no objection to the way that they

added: As to Melissa Garibay. I think that's fine. As to Bryan Salcedo --

THE COURT: Because what I'm going to --

MR. ALLMON: -- make sure that's the right order, thought. I don't think that that was. I think that --

THE COURT: Because what I'm going to have my JEA do is fix it in the back.

MR. SCHMIDT: Okay.

THE COURT: That's why I'm asking the State.

MS. STONE: Understood.

MR. ALLMON: Yeah. So --

THE COURT: We've got to use the restroom.

MR. ALLMON: So Count --

THE COURT: I don't know if you guys are going to have time to -- because now I've got to push this back.

MR. ALLMON: Oh, it is actually backwards. Yeah, so Count 1 would be to Bryan Salcedo, two and three to Melissa Garibay, 4 to Bryan Salcedo.

THE COURT: Okay. So 1 is to Bryan Salcedo, 2 is to Melissa Garibay, 3 is to Melissa Garibay --

MR. ALLMON: Melissa Garibay.

THE COURT: -- and 4 is to Bryan Salcedo. And then 5 is the last one.

MR. ALLMON: Yes, and then the name of the victim's relevant.

[Pause in proceedings; Court and JEA confer.]

MS. STONE: And, Your Honor, we would -- I don't care how you order the lessers, but as far as putting not guilty on the top or on the bottom, we would strenuously object to putting it on the bottom --

THE COURT: Okay.

MS. STONE: -- given that the default, the first option, the place where they are starting from is not guilty.

THE COURT: Okay.

MS. STONE: And you don't move away from that until they determine that the State has met their burden beyond a reasonable doubt. And so I -- it's burden shifting and a violation of the presumption of innocence to invert those two.

THE COURT: I appreciate that. I'm going to overrule that.

And so do you understand what I'm asking?

THE JEA: Uh-huh.

THE COURT: Okay. So let's get that done if you can.

What I'm going to ask you to do is when you get it all done, and I did it off of these, which were the State's, so hopefully you can pull it up. Then can you make five copies and bring it in to us.

THE JEA: Okay.

THE COURT: Okay? All right. Thank you.

THE JEA: You're welcome.

THE COURT: Because I -- so, I don't know, should I have saved it to the instructions?

[Pause in proceedings; court and clerk confer.]

THE COURT: Do you care if it's on pleading paper?

MS. STONE: No.

THE COURT: Okay. All right. They're the ones you added. Okay.

So you want me to close out of this?

THE CLERK: Yes, please.

THE COURT: Thank you. Okay.

I have to use the restroom. Let's take a five-minute restroom break and then we're going to get the jury in here and we're going to --

[Court recessed at 1:37 p.m., until 1:47 p.m.]

[In the presence of the jury.]

THE COURT: Thank you.

Do the parties stipulate to the presence of the jury?

MS. STONE: Yes, Your Honor.

MR. HALLQUIST: Yes, Your Honor.

THE COURT: We're back on the record in Case Number C-372006. Again, I apologize and I hate to be in the habit of apologizing. Please don't hold that against the parties, but we had to take care of some business.

State, you ready to call your next witness?

MR. HALLQUIST: Yes, Your Honor.

State calls Officer DeSousa.

TREVOR DeSOUSA,

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

THE CLERK: Please state your full name and spell your first and last name for the record.

THE WITNESS: First name is Trevor DeSousa, well, first and last name. First name Trevor, last name DeSousa, D-E-S-O-U-S-A.

THE COURT: Thank you.

MR. HALLQUIST: Good afternoon.

THE COURT: State?

MR. HALLQUIST: Oh, sorry.

DIRECT EXAMINATION

BY MR. HALLQUIST:

Q Good afternoon, Officer DeSousa. Where do you work?

A I am employed with the City of North Las Vegas Police Department.

Q And how long have you worked for the department?

A 17 and a half years.

Q And I want to bring your attention back to April 30th of 2022; were you working for the North Las Vegas Police Department at that time?

A Yes, sir, I was.

Q In what capacity were you working with the department?

A I am part of the North Las Vegas traffic unit, and one of our roles and functions is to investigate collisions and, obviously, traffic enforcement.

Q And I want to bring your attention to an address, a 2675 East Craig Road; were you called out to that location --

A Yes, sir.

Q -- April 30th?

A Yes, sir, we were.

Q And when you arrived at that location, what did you do?

A We were tasked -- I'm part of the major crash investigation unit, and we made contact with Detective Knickerbocker, who was on the scene. And he tasked us with finding vehicle evidence, which would coincide with his crime scene, essentially.

Q And so, basically, quickly just document the scene and take photographs?

A Correct.

Q And is that scene that we're talking about, is that in the parking lot of the In-N-Out?

A Yes, it is.

Q Did you have anyone else with you that was your partner that were assigned to you that day?

A When we get called out, we get called out as a team. The lead investigator or my partner was Officer Ooms at the time, and I was assisting him.

Q And when you were there, did Officer Ooms and yourself take photographs of the area?

A No, sir. All the photographs were taken by CSI.

Q Okay. So what was your position? Were you placing objects on the ground? What were you --

A Correct. Officer Ooms and I were assigned to locate evidence

within the parking lot that coincides with the collision scene. And we located several tire marks, which would be consistent with the video that Officer Ooms had seen all over there.

MR. HALLQUIST: Your Honor, may I approach the witness with State's Proposed Exhibits 36, 35, 34, 46, and 86?

THE COURT: Sure.

MR. HALLQUIST: I've showed these to defense counsel properly.

THE COURT: You're -- sure.

BY MR. HALLQUIST:

Q Quickly look through these and let me know when you're done.

A Yes, sir.

Q And without going into the contents of what I showed you, are you familiar with it?

A Yes, sir, I am.

Q How are you feeling here with the exhibits that I showed you?

A I am familiar with them, yeah.

Q How so?

A Oh. These are orange cones, orange and green cones, as well as orange paint that we had marked on the asphalt parking lot for this particular scene.

Q And those photographs were there a fair and accurate depiction of the actions that you conducted that night?

A Yes, sir.

MR. HALLQUIST: Your Honor, at this time I would ask for the admissions of State's Exhibit -- State's Proposed Exhibit --

MR. SCHMIDT: No objection.

MR. HALLQUIST: They will be Exhibits 34, 36, 35, 46, and 86.

THE COURT: You got it?

THE CLERK: 34, 36, 35, 46, 86.

MR. HALLQUIST: Let me run through it real quick again.

THE COURT: Okay.

MR. HALLQUIST: It'll be 34, 35, 36, 46, and 86.

THE COURT: Yep, they're admitted.

MR. HALLQUIST: Thank you, Your Honor.

[State's Exhibit Numbers 34 through 36, 46, and 86 admitted.]

MR. HALLQUIST: I'm just going to wait until this heats up a little bit.

BY MR. HALLQUIST:

Q So I want to show you a couple of those and just kind of walk through what we're seeing here. State's Exhibit 36 -- well, one second. There we go.

So, again, as I stated, it would be State's Exhibit 36; what are we seeing here in this photograph?

A The orange cones were a depiction of accelerating tire marks into the rear of the --

Q And I -- I kind of want to stop you there and maybe --

A Yeah, sure.

Q -- I should focus in a little more narrowly.

What are the orange cone marks?

A The orange cone marks were -- the orange cones were set up in order for us to trace and track vehicle acceleration marks --

MS. STONE: Objection, Your Honor.

THE WITNESS: -- or tire marks so they --

MS. STONE: Can we approach?

THE COURT: Sure.

[Bench conference transcribed as follows.]

MR. HALLQUIST: So I've talked to him.

MS. STONE: You're not admonishing?

MR. HALLQUIST: Yes, I did. Yeah. Thank you. I --

THE COURT: Sorry, what?

MR. HALLQUIST: You don't have to come at me like that.

THE COURT: What?

MR. HALLQUIST: So I'll just -- I've already talked to him not to talk about accelerating or decelerating marks.

THE COURT: So here's what I'm --

MR. HALLQUIST: So I'm just going to say --

THE COURT: Here's what I am -- I think I'm going to allow them to do, because I can't remember right now what you guys told me about this.

MS. STONE: She's not --

THE COURT: I'm going to ask that you lead him through it.

MR. HALLQUIST: I'm just [indiscernible]. Yeah.

THE COURT: You can object to the leading nature, but I think it's easier if you lead him, if you ask him specific questions.

MS. STONE: Judge, I don't think that's going to be enough. He's already mentioned twice accelerating tire marks after, apparently, having been admonished by Mr. Hallquist not to talk about that on the stand.

THE COURT: Okay.

MR. HALLQUIST: So we'll just strike this one, and I'll lead him through. Here are there orange cones, the suspect --

THE COURT: Okay. But I'm going to let them lead him through it.

MS. STONE: Understood.

THE COURT: Okay.

MS. STONE: All right. I guess I'm objecting to continuing without a further admonishment. He doesn't appear to have listened to the first one.

MR. HALLQUIST: That what I asked for.

THE COURT: I'm going to admonish the jury to disregard --

MR. HALLQUIST: And I'm really --

THE COURT: -- just the last question, right?

MS. STONE: Last two questions..

THE COURT: Last two questions or last two answers?

MS. STONE: Question and answers.

MR. HALLQUIST: That's [indiscernible].

THE COURT: Okay. All right.

[End of bench conference.]

THE COURT: Based on the discussion at the bench, I'm going to ask that the jury disregard the last two answers. Okay?

Mr. Hallquist.

BY MR. HALLQUIST:

Q And so I just -- I'm going to be very pointed: Are the orange cone marks marcating [sic] what you believed the suspect vehicle was at?

A Correct.

Q Okay. And when we're looking at the green cones in the back, do -- does that mark where you believe a vehicle was parked?

A Correct.

Q Okay. And we're talking about a vehicle was parked, are you talking -- are we talking about that black sedan in the back of that photograph?

A Yes, sir.

Q Okay. I want to show State's Exhibit 86. We're talking about these cones; is this a close-up of what we were talking about?

A [No audible response.]

Q All right. Was there another color of cone at the scene that you put down?

A I believe there was a blue color cone also.

Q And would that have indicated another vehicle at the scene?

A I believe we notated that that blue -- the blue cone was the same vehicle, but leaving, or exiting the parking lot.

MS. STONE: Can we approach?

BY MR. HALLQUIST:

Q So, I guess, when we get down to it, what does the V2 -- what does that represent?

A V2 is our notation for the second vehicle and of --

MS. STONE: Judge, can we approach?

THE COURT: Sure.

[Bench conference transcribed as follows.]

THE COURT: Sorry. I'm being attentive, I'm just trying to make sure I put I your jury instructions and the proposed and the law and all that kind of stuff.

MS. STONE: [Indiscernible.]

THE COURT: Same time when I'm looking up, I'm not -- I'm listening.

MS. STONE: The witness is testifying and being asked questions about the -- essentially, reconstructing the accident, reconstructing where a car was before the officer got there, based on marks that he has seen on the ground. This is expert testimony that this witness was not noticed for. The --

THE COURT: Okay. So what are you going there for?

MR. HALLQUIST: So, Your Honor, I think it was pretty clear when he was saying, hey, we put these cones up, because we already reviewed the video and then we just put the cone where we believe the vehicles were, that's what he testified to the green cones.

THE COURT: Okay.

MR. HALLQUIST: And then the orange cones is the suspect vehicle. That's what it is. We're not getting into the opinion of --

THE COURT: No, no. My question is -- sorry, I wasn't clear. What are you calling it for? Is it what he just testified to or is there something else you're calling?

MR. HALLQUIST: It has to be the perspective of the crime scene of where kind of -- where the defense vehicle was at --

THE COURT: Okay.

MR. HALLQUIST: -- in relation to the video. And so the cones kind of give another angle of, hey, this is where the suspect vehicle was, this is where we believe another vehicle was at the time of the collision. But we're not asking about the opinions of what the tires --

THE COURT: So I'm going to sustain your objection.

I'm going to ask you to -- because he's already said the cones thing, right? Because, I heard blue and green --

MR. HALLQUIST: Yeah, he already said the cones.

THE COURT: -- and orange.

MR. HALLQUIST: And I just --

THE COURT: So 'm going to ask you to say, Officer DeSousa, or whatever, we see the purple cones, right? I know that nobody testified to purple cones. We see the purpose cones, right? What do they represent? You see the yellow cones, right? What do they represent? Okay. And, you know, whatever --

MS. STONE: He's getting into expert testimony --

MR. HALLQUIST: This is that --

THE COURT: -- is this the relation-- right.

MS. STONE: -- and answering those questions is the problem.

THE COURT: So you've got to lead him through that, right?

MR. HALLQUIST: Yes.

THE COURT: Right? So you've got to -- because what you --

MR. HALLQUIST: That -- well, that's what his testimony just was -- just when I asked about the green cone, he was, like, yeah, that's where --

THE COURT: I know, but you're going to have to say, sir, this is my question, because, you know, whatever, right? You have to cut him off if he starts going in those areas, right? So, like --

MR. HALLQUIST: When he gets into the opinions, I cut him off?

THE COURT: Well, I think what you -- I think the questions -- I mean, I don't know what his testimony is, because I haven't pretrialed him. [Indiscernible] you can say, Officer DeSousa, do you see the purple cones on the picture, right? And that depict the bird, and you see the yellow cones that -- even though I'm using my own example --

MR. HALLQUIST: Exactly.

THE COURT: -- so I have to pick this pencil. Okay. Which perspective is it on this State's Exhibit Number 12? Is this the purple cone or is this the yellow cone?

MS. STONE: So here's my concern, Your Honor. The traffic -- I suspect what the State is trying to get out and walk the line on

without actually getting into expert testimony, is to have him testify in a way that will let them argue in closing that the -- Ms. DeFalco's car was going so fast that she pushed this other car so far out the way. And so they've called Mr. DeSousa to testify to where the black car was parked before this happened, based on his accident reconstruction, and then where it is now, and the tire marks that he saw on the street. This is in the realm of expert testimony, because there is no way this man saw surveillance -- placed those cones based on surveillance video.

He testified that it was because of what he saw on the ground, that he saw -- that that that's where he put the cones. That is getting into his expert testimony, doing an accident reconstruction. So my -- and -- so there's that.

And then my additional concern is I had to ask Your Honor to either cut the witness off and not allow the State to ask any more questions, or take a break for the State to re-admonish him, because this is now the third time that he, despite admonishment from Mr. Hallquist, and despite Your Honor allowing Mr. Hallquist to lead the witness, that he is getting into things that are stemming from his expertise.

THE COURT: So why don't you --

MR. HALLQUIST: Let's be careful. The last question I simply to ask the markings on the ground, V1. All that means Vehicle 1. V2, Vehicle 2. V3, Vehicle 3. That's not expert. That's just a plain observation of what the markings --

THE COURT: All right. Okay.

MS. STONE: The basis for him knowing --

THE COURT: My question is, is what else do you need from him?

MR. HALLQUIST: It's -- [indiscernible].

MS. STONE: I didn't hear that.

THE COURT: Tire markings.

MR. HALLQUIST: So the cones line up with what he sees as tire markings. But --

THE COURT: Okay. So --

MR. HALLQUIST: -- that's it. That's what we're getting at.

THE COURT: -- can you ask him, see these cones? I'm going to ask him on break.

MR. HALLQUIST: That's --

THE COURT: Do they line up with these -- does this look like tire markings? Do they line up with tire markings?

MR. HALLQUIST: That's what we're --

THE COURT: Yeah, but what else?

MR. HALLQUIST: That's it.

THE COURT: Okay.

MS. STONE: It's the --

MR. HALLQUIST: I'm not getting into his opinions of what it is.

MS. STONE: They're getting into which vehicle that I think is causing him to go into his expertise.

THE COURT: You've got to just lead him, like --

MR. HALLQUIST: That's fine.

THE COURT: -- lead him similar to what I just did.

MR. HALLQUIST: Okay.

THE COURT: I mean, I -- have him look at the cones so I can -- I just put there's orange, green, okay?

MS. STONE: Thank you.

THE COURT: All right.

[End of bench conference.]

BY MR. HALLQUIST:

Q So showing State's 86, we were talking about, we're looking at the green cone; that V2 indicates another possible vehicle?

A Correct.

Q And when we're looking at -- I want to show you State's Exhibit 46, we're going to go back to the orange cones, you indicated later those orange cones demarcate or show another vehicle at the scene, right?

A Yes, sir.

Q And that's the suspect vehicle?

A Yes, sir.

Q And that's why it says V1?

A Correct.

Q Now, when you put these cones down, are you just looking physically on the ground, looking for tire marks and then putting the cones on the tire marks?

A Yes, sir.

Q Okay. And you do that just following the path of the tire marks?

A Yes, sir.

Q Okay. I'm showing you State's Exhibit 35, we were just talking about tire marks or just visibly seeing it. That's what you're talking about, you just visibly see that on the ground and then you just put cones --

A Yes, sir.

Q -- in a line with that?

A Yes, sir.

MR. HALLQUIST: May I approach the witness, Your Honor?

THE COURT: Sure.

BY MR. HALLQUIST:

Q I'm going to show you State's Proposed Exhibit 39; let me know when you're done looking at that.

A Yes, sir.

Q Is this familiar to you?

A Yes, sir, it is.

Q And how's it familiar to you?

A Those are the cones that we put down at the scene, the same --

Q Is it a --

A Same evening, sir.

Q And is it a fair and accurate depiction of the cones that you placed down at the scene?

A Yes, sir.

MR. HALLQUIST: Your Honor, at this time, the State moves to admit State's Proposed Exhibit 39 as evidence.

MS. STONE: No objection.

THE COURT: 39 will be admitted.

[State's Exhibit Number 39 admitted.]

BY MR. HALLQUIST:

Q And, sir, you were just talking a little bit -- while ago about the green cones you've indicated demarced [sic] another vehicle, the orange cones demarced another vehicle. And when we're talking about the blue cones, did you do the same thing that you did with the orange and the green cones?

A Yes, sir.

Q Okay.

MR. HALLQUIST: I'll pass the witness, Your Honor.

MS. STONE: No questions.

THE COURT: Do any members of the jury have any questions? Oh boy, it's not even a whole piece of paper. I can take it.

[Bench conference transcribed as follows.]

THE COURT: While we're at it, I need that least one of you, I saw Mr. Schmidt doing it, looking through the jury instructions, so I need somebody from the State also looking through the jury instructions. Okay?

[Indiscernible; court and counsel discussing juror questions.]

MR. SCHMIDT: We talk about what those tire marks look like

[indiscernible].

MS. STONE: Expert testimony.

THE COURT: I'm sorry, what?

MS. STONE: It's both expert testimony.

THE COURT: Okay. So you're objecting to --

MS. STONE: Yes.

MR. ALLMON: I'll be -- I think on number one, you could talk about when he's putting cones down in these parking lots, so we could see a variety.

THE COURT: How do you determine that the tire tracks [indiscernible] marks are new, fresh, and current? I don't know if he's going to -- I'm assuming he's going to start talking about --

MS. STONE: His experience and his expertise.

THE COURT: The only concern about that is, unless he's going to -- unless he can testify as Mr. DeSousa --

MR. HALLQUIST: Well, he was testifying --

MS. STONE: I don't believe discerning which tire tracks are new and which are not is within the ordinary knowledge of a layperson.

MR. ALLMON: I can't even -- I think we can talk about layperson testimony that, you know, it's --

THE COURT: If you don't have to say it as a layperson.

MS. STONE: He's going to get into expert testimony. This is inadmissible thing. The question calls for expert testimony.

THE COURT: How is the speed of a vehicle determined at a crime scene?

MR. HALLQUIST: I don't think that's an expert.

THE COURT: I'm not going to ask either of these two questions. I'm changing it to badge.

MR. HALLQUIST: Okay.

THE COURT: So many questions.

MR. SCHMIDT: We've got more. We have more.

MS. STONE: Are you able to estimate -- nope, expert testimony.

MR. SCHMIDT: They all say same thing.

THE COURT: Well, as a layperson, you can answer.

MS. STONE: As a layperson. Your Honor -- sorry. Is Your Honor saying as a layperson he can answer that question?

THE COURT: No.

MS. STONE: Okay.

THE COURT: Okay. All right. Thank you.

[End of bench conference.]

THE COURT: Thank you very much, Officer, for coming in and testifying.

THE WITNESS: Thank you, ma'am.

THE COURT: State, call your next witness.

MR. HALLQUIST: State calls Detective Knickerbocker.

ROBERT KNICKERBOCKER,

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

THE CLERK: Please state your full name and spell your first

and last name for the record.

THE WITNESS: Robert, R-O-B-E-R-T, Knickerbocker, K-N-I-C-K-E-R-B-O-C-K-E-R.

THE COURT: Thank you.

MR. ALLMON: Brief indulgence.

THE COURT: Sure.

DIRECT EXAMINATION

BY MR. ALLMON:

Q Good afternoon, Detective.

A Good afternoon.

Q Sir, will you introduce yourself to the jury?

A I'm Robert Knickerbocker. I'm a retired police detective from North Las Vegas, where I served 21 years.

Q Were you working as a detective for North Las Vegas Police Department on April 30th, 2022?

A Yes, I was.

Q Were you assigned to investigate a crime that took place at the In-N-Out at Craig and Berg?

A Yes.

Q And what were the details that you had about the call when you arrived?

A When I arrived, we were briefed that there was a incident that started in the drive-through, a gray Kia Sol driven by Candace Boyd was in line and there was a black Honda Civic behind it. As Boyd moved through the line, the Honda Civic --

MS. STONE: Your Honor, can we approach?

THE COURT: Yes. Sorry.

[Bench conference transcribed as follows.]

THE COURT: Do you need Post-its?

MR. ALLMON: No, I'm good.

MS. STONE: I object to all of this as hearsay. [Indiscernible] witness is the next point, he's he's testifying to what he heard from many other known people who are not present currently. And it's hearsay.

THE COURT: So why don't you ask him how he knows this information?

MR. ALLMON: Yeah, I get that. He jumped the gun a little bit. I'll back up a little bit.

THE COURT: Okay. All right.

[End of bench conference.]

BY MR. ALLMON:

Q So let's back up just a little bit, Detective.

A Okay.

Q You got a call at that In-N-Out on April 30th, 2022; do you remember the time?

A We were notified just after 1:00 a.m. --

Q Okay.

A -- to respond.

Q All right. And so the basic details of the call you had were you were going to investigate what?

A Two subjects struck by a vehicle in the parking lot.

Q Okay. And when you got there, what did you see at the scene?

A Going through the picture, in the west side of the parking lot, there is a travel lane that comes from the drive-through exit heading south towards a shared entrance with the Terribles. On the east side of that parking lane, about five or six parking spaces north of the shared lane -- okay.

THE COURT: What's being shown for the witness?

MR. ALLMON: I'm sorry. Exhibit 85 is up on the ELMO right now, Your Honor.

THE COURT: Thank you.

THE WITNESS: So the -- this is a overview of the In-N-Out at Berg and Craig. Berg Street is the main street that runs north and south, north being where the -- at the top of the picture where the In-N-Out Burger or hamburger notation is.

BY MR. ALLMON:

Q And then --

A That right there is Berg.

Q Where my pen is indicating?

A Yes.

Q Okay.

A Just as you could see, as you travel south on Berg, there's a entrance into the parking lot. The south side is a Chevron Terribles, and to the north is the parking lot to In-N-Out Burger.

Q Okay. And that's generally where this had taken place, right?

A Yes.

Q All right. Did you see any other, like, marked patrol cars there? What -- describe the scene that you're seeing when you get to --

A There was police tape cordoning off a majority of the parking lot, and police vehicles parked blocking entrances into the area.

Q Okay. Ambulance gone at that point?

A Yes.

Q Okay. So you can -- what about the scene; what do you notice of the scene itself?

A At the scene, about -- like I said, about five or six spaces north of this west parking -- north/south parking lane was clothing items and a parking space, and various vehicles in there -- in spaces.

Q What kind of clothing items we talking about?

A A pair or, like, red or maroon pants and a pair of right -- white Crocs.

Q And then when you get there, you know, you're kind of like on an on-call situation, right?

A Yes.

Q All right. So patrol officers started the investigation, fair to say?

A Correct.

Q Do you get briefed by that patrol officer?

A Yes.

Q Okay. And so you met with the patrol officers, I take it, in this case?

A Yes.

Q Just as you do with any case. And then they gave you some information, right?

A Yes.

Q Was there a lead developed on an identity of the defendant?

A Yes, there was.

Q What was that?

A That was from a witness photograph of a license plate and screenshots of the driver of a black Honda Civic. We were able to develop Jessica DeFalco as the driver of the Honda.

Q And you're talking about a cell phone video or a cell phone photo that was provided?

A Yes.

Q Do we see that in Exhibit 83?

A Yes.

Q Then you mentioned a license plate; do you recall what that license plate was?

A Daydream, but no A. So D-A-Y-D-R-E-M.

Q And we see Exhibit 52; do you recognize that?

A Yes.

Q What is that?

A That's a black -- I'm sorry, it's a black Honda Accord.

Q Okay.

A I said Civic earlier.

Q Honda Accord, you said Civic earlier?

A Yes.

Q Okay.

A So black Honda Accord with the Nevada license plate D-A-Y-D-R-E-M.

Q All right. And so this is the suspect vehicle you had identified, you had a license plate, you had a photo of the person driving it at the time.

A Yes.

Q How did you find that vehicle?

A With me on my team, there was four other -- or three other detectives and a detective sergeant. They researched previous for addresses associated with Jessica DeFalco and located the vehicle at a address on Maverick.

Q How did you know the name at that point?

A They conducted a records -- Nevada Department of Motor Vehicles records check of the license plate, which review -- which showed the registered owner being Jessica. Then they were able to retrieve her Nevada drivers license photo and compare it to the driver photo that we saw earlier.

Q Okay. And then to be clear, you're the case agent, right?

A Yes.

Q So kind of all the information comes back to you, right?

A Yes.

Q Okay. And so based on that, you know, you -- do you task other officers or ask them to kind of divvy up the work?

A Yes.

Q All right. What did you do in response to that information?

A The other detectives responded to the Maverick address where they later impounded that vehicle and spoke to one of the residents at the house.

Q Okay. Do you recall who was sent there?

A It was Sergeant Santos, Detective Dave Smith, and Detective Aaron Snyder.

Q Did they also have a patrol officer go with them, do you recall?

A Yes. Yes, they did.

Q And who was that?

A It was -- I can't remember his last name now. It was our lead -- it was the lead officer on our scene.

Q Okay.

A He responded there.

Q So one of the patrol officers went with the detectives as well, right?

A Yes.

Q Okay. And while they're doing that, you're continuing your investigation?

A Yes. I was still at the scene at In-N-Out.

Q Okay. What else are you trying to obtain at that point?

A At that time, we were trying to obtain Ms. DeFalco's location.

Q Okay.

A And while we were still processing all the evidence at

In-N-Out.

Q Okay. So was this the only house that an officer was sent to?

A Metro Air did a, I guess, what's called a flyover of the apartment complex that the vehicle was registered at, and said they could not find it.

Q Okay. So there were a couple of different addresses associated with this, right?

A Yes.

Q All right. And the registered address was not where it was found?

A Correct.

Q Okay. So based on that one location, you found the vehicle, did any of the officers there assist you to find the defendant?

A Yes.

Q Okay. What information did you get from other officers that assisted you to find the defendant?

A We were told that she was driven back to her apartment on East Lake Mead.

Q Okay. Do you recall who that was?

A Who told them?

Q Yes.

A It was Dean, and I can't remember his last name. I want to say Martin, but I know that's not true.

Q Would looking at your report refresh your memory?

A Yes.

Q So on page 2 of your dec for arrest?

A O'Neil.

Q Okay. So looking at your report refresh your memory on that?

A Yes.

Q All right. And so, based on that information, did you obtain different address? A new address to find the defendant?

A No. We -- the Lake Mead, we only knew the Lake Mead address.

Q Okay.

A The apartment address.

Q All right. So that was the same one you guys had been looking for earlier too, right?

A Yes.

Q Okay. But no car was there?

A Correct.

Q And the car was on Maverick?

A Correct.

Q Gotcha. Did -- what did you do in response to that information yourself?

A I responded to the Lake Mead address and kept a visual eye on the apartment to ensure nobody left or entered until the rest of the team arrives.

Q Okay. Do you recall what time you arrived there?

A I think it was right around 5:20 in the morning.

Q So this investigation, fair to say, is within about five hours of

actual incident, you've identified a suspect, you're waiting outside their house?

A Yes.

Q Okay. Did you eventually make contact with your suspect?

A Yes.

Q Approximately when was that?

A Right around 7:00 a.m. in the morning, maybe a little bit after, closer to 7:20.

Q Okay. Did she just come right out?

A No, she did not.

Q Did she turn herself in?

A Eventually.

Q Okay. How long did that take?

A I went through a majority -- a few steps before we were able to have her speak with us.

Q Okay. Tell us about that.

A I -- the team went up to the door, knocked on the apartment door for about three to five minutes and there was no answer. I had -- we had -- the team had obtained her phone number. I attempted to call her multiple times with no answer. We had also obtained a number to her mom, Debbie, who I called and explained to her that I needed to speak with Jessica. And Jessica called me within a few minutes of getting off the phone with her mom.

Q Okay. And then what happened?

A I spoke with Jessica, I explained to her that she was under

arrest and that she needed to exit the apartment. After a few minutes, she finally opened the door.

Q And what happened next?

A When she opened the door, she stepped aside and invited us in. She was worried about her cats. So we allowed her to address her cat situation, give them food and water, while we waited for her.

Q While you're doing that with her and her cats, are you questioning her?

A No, we're not.

Q Does she say anything, though?

A Yes.

Q What does she say?

A She said they deserved it.

Q Okay. So you -- she said that after you had already told her that she was under arrest --

A Correct.

Q -- for the crime? Okay. Specifically what -- the crime at In-N-Out, right?

A Yes.

Q And as she's walking around, she says, they deserved it, to you -- or said they deserved it, out loud?

A Correct.

Q Okay. Showing you State's Proposed Exhibit 72; do you recognize that?

A Yes.

Q What is it?

A This is Jessica DeFalco at the --

MS. STONE: Objection, Your Honor.

THE COURT: Okay.

[Bench conference transcribed as follows.]

MR. ALLMON: [Indiscernible.]

MS. STONE: I'm sorry?

MR. ALLMON: It's just Jessica DeFalco is [indiscernible].

THE COURT: Is what? So did I not need to rule?

MR. ALLMON: No. No ruling.

THE COURT: Okay.

[End of bench conference.]

BY MR. ALLMON:

Q Detective Knickerbocker, who does this photo depict?

A This photo depicts Jessica DeFalco after --

Q Okay. No, that's -- so is this the night after you made contact with her and arrested her?

A Yes.

Q Okay. Fair and accurate depiction of her?

A Yes.

MR. ALLMON: Move to admit 72 into evidence.

MS. STONE: No objection.

THE COURT: 72 will be admitted.

[State's Exhibit Number 72 admitted.]

/ / /

BY MR. ALLMON:

Q Okay. Now, her clothing, is there anything [indiscernible] about that?

A It appears to be the same shirt of the driver that -- when we saw her in the previous cell phone pictures.

Q Okay. So that was, when we compare 72, what we're just talking about right now, with 83, that's what we're talking about, right?

A Yes.

Q So you had found the person you were looking for?

A Correct.

Q Okay. Now, did you find anything on her or in her car or on her -- at the house that you took at that time?

A Yes.

Q What did you find?

A Took a -- her house keys that we used to secure, and on that key ring was a key to a Honda.

Q Okay. Did you later use that key to unlock any vehicle?

A Yes.

Q Okay. Which vehicle did you unlock?

A The black Honda Accord with the license plate D-A-Y-D-R-E-M.

Q Okay. So to be clear, the defendant at her house was away from her car, but that key matched the car that was left on Maverick?

A Yes.

Q Now, I want to show you State's Proposed 87 through 89; do

you recognize these?

A Yes.

Q Okay. Have you go through all three of them.

Do you recognize all those?

A Yes.

Q All right. Starting with 83 -- or 87, what are we looking at? Starting with 87, what are we looking at?

A We're looking at a overview of, basically, the Las Vegas valley. And there are three red pinpoints on the maps.

Q Are those addresses located important in your investigation?

A Yes.

Q All right. And do they fairly and accurately depict those addresses on the map?

A Yes, they do.

MR. ALLMON: Move to admit 87.

MS. STONE: No objection.

THE COURT: 87 will be admitted.

[State's Exhibit Number 87 admitted.]

BY MR. ALLMON:

Q So 88, let's look at that.

A Okay.

Q What are we looking at there?

A We are looking at a Google Maps direction from the In-N-Out Burger on East Craig Road to 6120 Maverick Street in Las Vegas, where the car was located.

Q Is that a fair and accurate depiction of the Google Maps routes and distance estimates?

A Yes.

MR. ALLMON: Move to admit 88.

MS. STONE: I haven't seen it.

MR. ALLMON: And 89.

THE COURT: Well, she -- Ms. Stone wants to see 88.

MR. ALLMON: Sorry. I have no objection.

MS. STONE: Could we approach, Judge?

THE COURT: Sure. I'm assuming you've got to bring that.

[Bench conference transcribed as follows.]

THE COURT: 88 and 89?

MS. STONE: Yes. I'm objecting as to relevance, as to both. I suspect the State wants to introduce them to imply that these are the routes that either Ms. DeFalco took or Mr. O'Neil took or someone unrelated to the case took on the night in question. But there have not been testimony that these are, in fact, the route that they took. The officer has not testified that he personally has driven these routes, and there also have not been testimony from other witnesses that they drove these routes. So I don't believe the maps are relevant, and I don't believe sufficient foundation has been laid to authenticate them or to provide for their authenticity.

THE COURT: State?

MR. ALLMON: As to the relevance, they're clearly relevant. They're the addresses located showing how -- generally, the distance

and the estimate of time to each location.

THE COURT: Are these different [indiscernible]?

MR. ALLMON: Google Maps generate several different routes for you to go. But the point is that, generally, they give a time estimate for each one. And when you look, it's giving you a time estimate from the In-N-Out to the Maverick Street house, In-N-Out to the Lake Mead address.

THE COURT: Did he drive these to do that?

MR. ALLMON: No, but he looked them up.

THE COURT: Okay. I'm going to sustain the objection.

Wait, wait, wait, wait, wait. Don't leave. Wait for one more.

MR. ALLMON: [Indiscernible] drive to Lake Mead.

THE COURT: If he drove part of the route, the route that he drove is relevant.

Have you finished looking at the jury instructions?

MR. SCHMIDT: I'm on the verdict form now.

THE COURT: Okay. The next time you come up, can you bring me -- and have you been reading the jury instructions? The next time when you guys come up, I know this isn't relevant to the objection, can you bring me them so I can start correcting them?

MR. SCHMIDT: Sure. There's one or two we might need to discuss. But they're minor things.

THE COURT: Okay. Could, like, the other stuff, the things I want to try and get them so that my JEA soon after can start --

MR. SCHMIDT: Got it.

THE COURT: -- making copies.

MS. STONE: But to clarify the ruling on the objection, Your Honor, it sounds like Your Honor sustained it as to routes that the officer did not himself drive. But State is indicating that he may have driven part of one of these routes. I would ask Your Honor to still sustain the objection as to the map, which depicts a route that in its entirety he did not drive. And also the maps are from street.

THE COURT: So hold on. I don't have a problem with him saying, you know, from In-N-Out to whatever, West Lake Mead or whatever the address is, it's generally three hours. Which I know it's not. But it's generally three hours, there's different ways that you can take. If you go three hours, you can take a way that takes you two hours and 45 minutes. I don't have a problem with generally.

But, I mean, I have never [indiscernible] -- I don't know what route she took. I don't know how she got there. So that's my ruling.

MS. STONE: Okay. So the maps are out.

THE COURT: The maps like this --

MS. STONE: Okay.

THE COURT: -- goes to the maps.

MS. STONE: That's fine.

THE COURT: Yeah.

MS. STONE: Thank you.

[End of bench conference.]

BY MR. ALLMON:

Q Let's talk about Exhibit 87. Is that clear enough that you can

see that on the screen?

A Yes.

Q Okay. So we have three red pins on here, right?

A Yes.

Q All right. Tell us what the middle pin indicates?

A It's 2765 East Craig Road, which is the address for the In-N-Out Burger.

Q Okay. And up in the upper left, which house was that?

A It's 6120 Maverick Street in Las Vegas, where the car was located.

Q Okay. And 6901 East Lake Mead, is that the third pin there --

A Yes.

Q -- that we're talking about? Okay.

A Yes.

Q All right. And so on the upper -- on the bottom right, that Lake Mead, is that where you found the defendant?

A Yes.

Q Okay. Now, do you know the estimated times between those addresses and In-N-Out?

A Yes. They're both about 20 minutes.

Q Okay. But opposite directions?

A Yes.

Q All right. Now, you're the primary detective, right?

A Yes.

Q Did you come across an audio call, were you able to obtain an

audio call of the defendant?

A Yes.

MR. ALLMON: All right. So Exhibit 6 has been stipulated?

THE COURT: Correct, Defense?

MS. STONE: Yes.

THE COURT: Thank you.

BY MR. ALLMON:

Q This admission has been stipulated.

THE COURT: If you're going to publish it, let me see it.

MR. ALLMON: I am going to publish it, Your Honor.

THE COURT: Okay. Can we not show that while he pulls it up.

MR. ALLMON: Sorry.

THE COURT: It's okay. It's all right.

BY MR. ALLMON:

Q Now, Exhibit 6 -- oh, you said it's an audio call; do you know who it was between?

A It was between Jessica and I believe her father.

[Audio played.]

Q Is that the call that you obtained?

A Yes.

Q Now, do you remember when that call was made?

A I believe it was a day after, on May 2nd. Or two days after.

Q Okay. So two days after?

A Yes.

Q Now, Detective, you're a trained police officer, right?

A Yes.

Q You've done DUI investigations, arrests before you were a detective, as well?

A Yes.

Q You generally know what the general signs of impairment are to look for?

A Yes.

Q Okay. When you arrested her that night, did you see any signs of impairment?

A No, I did not.

Q Did you ever do this as a DUI investigation?

A No, I did not.

Q Okay. And so as you met her, no signs of impairment to you that would warrant a DUI investigation?

A Correct.

Q So, to be clear, things like did you ever smell any alcohol on her breath?

A No, I did not.

MR. ALLMON: Pass the witness.

THE COURT: Ms. Stone.

CROSS-EXAMINATION

BY MS. STONE:

Q Detective, this incident happened a little bit after midnight, correct?

A Yes.

Q And you didn't get to the scene until after 1:00 a.m., right?

A Correct.

Q To the In-N-Out?

A Yes.

Q And by the time you got to the apartment where Ms. DeFalco was, the sun was up, wasn't it?

A Yes.

Q Several hours had passed by the time you were actually able to speak with her, right?

A Yes.

MS. STONE: No further questions.

THE COURT: Do any members of the jury have any questions?

Mr. Schmidt? Mr. Hallquist?

[Bench conference transcribed as follows.]

MR. SCHMIDT: So I wrote where the issues were and I kind of, like, what it is, if that makes sense.

MS. STONE: We'll still need that on the record, though.

THE COURT: Did you mark them or --

MR. HALLQUIST: Did you -- I mean, I have a question at some point. [Indiscernible.]

THE COURT: Let's [indiscernible.]

MR. HALLQUIST: Yeah, okay.

MS. STONE: She cannot answer that.

MR. ALLMON: [Indiscernible] has to stay in, the follow-up is legally obtained.

THE COURT: I'm sorry?

MR. ALLMON: I'd like that to follow-up, it was legally obtained.

THE COURT: I wasn't even going to ask that question.

MR. ALLMON: If you're not going to -- no, I understand. I just --

MS. STONE: She's not going to [indiscernible] ask him a question?

MR. ALLMON: Perhaps it [indiscernible].

[Court and counsel review questions; multiple speakers.]

MS. STONE: I think it's speculative.

THE COURT: I'm sorry?

MS. STONE: Speculative.

THE COURT: [Indiscernible.]

MS. STONE: He can probably answer whether he did, but now that I know [indiscernible].

THE COURT: Yeah. Well, did you see this? Sorry.

MR. SCHMIDT: Well, did they object [indiscernible]?

THE COURT: I -- she's explained to them and [indiscernible]. And we just exceeded the [indiscernible]. Okay. You were made aware that he looked [indiscernible]. All right.

MS. STONE: I'm objecting as to relevance.

THE COURT: This one?

MS. STONE: Yes.

MR. SCHMIDT: Yeah.

MS. STONE: Is there a written transcript?

THE COURT: State?

MS. STONE: No transcript.

MR. ALLMON: I think that's -- do you have some more relevant questions?

MS. STONE: I don't know what fact it makes more or less likely.

THE COURT: Yeah. It's --

MS. STONE: Her state of mind after the fact is not a --

THE COURT: I think her demeanor could be relevant. I don't know if I would ask all these [indiscernible].

MS. STONE: Because demeanor at the time she's arrested doesn't make any of the elements of the charges more or less likely.

MR. ALLMON: Well, was there a consciousness of guilt? And since you've made it an argument that she was [indiscernible] and if she's angry and someone confuses that, that's definitely relevant.

MS. STONE: Say that again?

MR. ALLMON: What's that?

MS. STONE: Say that again?

MR. ALLMON: Since admitted in argument that she's inebriated, if she's showing some behavior, like being angry or something like that, because you confuse if it has.

THE COURT: I'm not going to ask it.

What is this?

MS. STONE: If he knows, he can answer. But there wasn't one.

THE COURT: All right? Thank you.

MR. SCHMIDT: Is there more or is that the only one?

THE COURT: Helen.

[Court and counsel review questions; multiple speakers.]

MR. ALLMON: I think it's a fair question.

THE COURT: Your objecting to this question?

MS. STONE: It opens the door to --

THE COURT: I'm sorry?

MS. STONE: It opens the door to her suppressed statement.

MR. ALLMON: Only says --

MS. STONE: Says [indiscernible] detainment.

MR. ALLMON: Prior to is fine, I think.

MS. STONE: To or.

THE COURT: Prior to or.

MS. STONE: Well, we didn't talk to her prior to detainment. He went in and arrested her.

MR. ALLMON: Yeah, they --

THE COURT: She -- [indiscernible]?

MS. STONE: Prior to being arrested, they didn't have interaction with her.

THE COURT: [Indiscernible.]

MS. STONE: On the phone call?

MR. ALLMON: Yeah, they led her -- he led her around the house to feed her cats.

THE COURT: When they were at the house [indiscernible].

MR. ALLMON: Yes.

MS. STONE: She was. And he told her on the phone that she was under arrest and she allowed them --

MR. SCHMIDT: Yeah.

MS. STONE: That is exactly what he testified to.

THE COURT: But when he got to the house, right, there was interaction. That's where we got the they deserved it comment.

MR. ALLMON: Yes. They had an interaction.

MS. STONE: This question is asking about detainment. She was detained when he said that she was under arrest, and then went into her house with other officers. She was not free to leave at that point.

THE COURT: Right. But did they have any conversation?

MS. STONE: The question asked about detainment.

THE COURT: Did she -- Wait, but the defendant claims she had been drinking at any point prior to arrest? You can ask that.

MS. STONE: Correct.

MR. ALLMON: That's a question that does not touch on anything [indiscernible].

MS. STONE: So Your Honor would ask, did the defendant claim she had been drinking --

THE COURT: At any point prior to arrest.

MS. STONE: Okay. That's fine.

THE COURT: I mean, you want me to write on it?

MS. STONE: Yes, please, Your Honor.

THE COURT: I guess I should have [indiscernible].

So these two, but I'm going to change it.

MS. STONE: The --

MR. ALLMON: Yeah.

MS. STONE: Right.

MR. HALLQUIST: If you know.

MS. STONE: Okay.

THE COURT: Okay.

[End of bench conference.]

THE COURT: The jury can ask out -- ask questions [indiscernible].

JUROR QUESTIONS

THE COURT: When Jessica stated they deserved it, do -- had you made her aware that the victims were dead or alive? Did you tell her?

THE WITNESS: I don't recall if I had told her, but I never mentioned at all during any of the case that anybody had died.

THE COURT: Okay. Did the defendant claim she had been drinking at any point prior to arrest?

THE WITNESS: I have a question about this. Can all of them advance?

THE COURT: Okay. So I'm going to take a break.

MR. ALLMON: Maybe we should excuse the jury?

THE COURT: Let's take a 15-minute break.

During this recess or break, you must not:

1. Discuss or communicate with anyone, including fellow jurors, in any way regarding the case or its merits either by voice, phone, e-mail, text, Internet, or other means of communication or social media. You must not:

2. Read, watch, or listen to any news or media accounts or commentary about the case. You must not:

3. Do any research, such as consulting dictionaries, using the Internet, or using reference materials. You must not:

4. Make any investigation, test a theory of the case, recreate any aspect of the case, or in any way investigate or learn about the case on your own. You must not:

5. Form or express any opinion regarding the case until it is submitted to you.

Let's be back in here at 3:00. Thank you.

[Jury recessed at 2:46 p.m.]

THE COURT: So I'm not sure if I should have him talk to the State, because I'm not sure what they're going to talk about.

MS. STONE: I think since he made a comment in open court with all of us, we should all be entitled to hear what it is.

THE COURT: Okay. So we're outside the presence of the -- everybody can sit down. We're outside the presence of the jury. The question I asked was:

Did the defendant claim she had been drinking at any point prior to arrest?

Which the parties stipulated I could write on and change, which I don't think I'm supposed to do, but that's okay, I want to rewrite it.

MR. ALLMON: So I think the detective has some concerns about I've admonished him not to say anything about any suppressed statement, and I think he's concerned about veering into that, if I --

THE WITNESS: Correct.

MS. STONE: I would like to hear about what -- okay.

What were your concerns, sir?

THE WITNESS: The -- she mentioned it during the suppressed statement that she did.

THE COURT: Okay. Well, that can't come in. So it's just -- while we were at the bench, we were just talking about at the house or the apartment.

MS. STONE: Her question was prior to arrest, right? You notified her that she was under arrest when you called her?

THE WITNESS: I notified her on the phone call.

MS. STONE: On the -- on that first phone call?

THE WITNESS: Yes.

MS. STONE: Which was before her --

THE WITNESS: Yes.

MS. STONE: -- transcribed interview.

THE COURT: Okay.

THE WITNESS: So I was confused, I just don't want to perjure myself and say no. And then the suppressed statement that is brought up.

THE COURT: Okay.

THE WITNESS: So, all right. All right.

THE COURT: Okay.

MR. ALLMON: And so to be clear, I think the detective is not omitting anything, is not an omission in his statement if he says anything that doesn't relate to -- if he leaves out anything related to his suppressed statement. And that's what he's very concerned about.

THE COURT: So the --

MS. STONE: Well, did she -- I'm sorry, Your Honor.

THE COURT: The -- so if she said in her statement, I drank a lot, that can't come -- I drank before, that all is out, right? I mean, that's my understanding of the ruling and we all agreed to that.

MR. SCHMIDT: Correct.

THE COURT: Well, I didn't, but you guys told me about that. Right? So the only thing you can talk about is at the house, is there -- or an apartment. I know I keep saying the word house, it's an apartment, correct?

MR. SCHMIDT: Yeah.

THE COURT: Okay. I'm going to have you wait outside. I'm going to go through some of these -- or that's it, right?

MS. STONE: Well --

MR. ALLMON: That's it from the State, Your Honor.

THE COURT: Yeah. Okay. Thank you.

Can you wait in the side real quick?

THE WITNESS: Yeah.

THE COURT: I want to go through some of these changes here.

So --

MS. STONE: Could he have his page back before we talk about it?

THE COURT: Sure. But I need -- I don't have a copy of this.

MR. SCHMIDT: Just make a copy of it, it's fine.

THE COURT: Don't you have your copy of the instructions?

MS. STONE: He had given you a yellow page.

THE COURT: I know, but I'm going to read it out loud.

MS. STONE: Oh, I see.

MR. SCHMIDT: Yeah. That's fine. I did forget, Mr. Hallquist brought up a good point. I didn't miss it in the verdict form. We -- when we get there, [indiscernible].

THE COURT: Okay. So we're outside the presence of the jury.

Jessica DeFalco is spelled incorrectly, so I've corrected it, D-E-F-A-L-C-O.

MR. ALLMON: I apologize. That's probably a copy from the wrong information.

THE COURT: Instruction Number 6, I don't know how to spell "guilty." Okay, nobody laughed. All right.

MR. SCHMIDT: We know you guys --

THE COURT: Instruction Number 10, it says change -- what Mr. Schmidt wrote is: Change word.

Do you want your instruction portion of it?

MR. SCHMIDT: It's all right. We have the other one with --

THE COURT: Okay.

MR. SCHMIDT: -- Ms. Stone.

THE COURT: Change the word "through" to "if."

MR. SCHMIDT: Yeah. If you read it, it sounds:

Even though the actual commission of a crime is impossible.

That -- is that what we intended?

MS. STONE: That does imply that --

THE COURT: Even though the actual commission -- so it should be even if, is what you're saying?

MR. SCHMIDT: Yes.

THE COURT: Do you know where I am, State?

MR. ALLMON: No, sorry, I don't.

MR. HALLQUIST: 10.

THE COURT: Page 10, line 16.

MR. ALLMON: So line 16:

Do you know the actual commission of a crime is impossible [indiscernible] and, in fact --

THE COURT: It should be even if.

MR. SCHMIDT: Yeah, even if. I think.

MR. ALLMON: Thank you.

Is that the model?

MR. HALLQUIST: I just copied straight from the model.

MR. ALLMON: Is that -- yeah, what's the model say?

THE COURT: Even though the actual commission of a crime is impossible. Even if. I think it's even if.

MR. SCHMIDT: I mean --

MR. HALLQUIST: I don't think it matters.

THE COURT: Okay.

MR. SCHMIDT: Okay.

THE COURT: The other thing is I changed, and then in the rest -- in the line 19, I took out "he/or."

MR. SCHMIDT: Okay.

THE COURT: Okay. Instruction Number 13, "kill" should be changed to "killed."

MR. SCHMIDT: I think. It still reads weird, but --

THE COURT: Your instruction that -- you are instructed that the Doctrine of Transferred Intent provides that:

Where a person unlawfully attempts to kill --

I think it's "kill."

-- a certain person, but by mistake or inadvertent during such attempt, injures a different person, the crime committed is the same as though the intended person had been attempted to be killed or injured.

MR. SCHMIDT: Yes.

THE COURT: The kill -- I think "killed" on the second one.

MR. SCHMIDT: Yes. That's --

THE COURT: Thank you.

Page -- Instruction Number 17, replace "he/she." Where is that? With just "she."

MR. SCHMIDT: I circled the "he/she's" are -- in Instruction 17, there's some "his/hers" too. If you want to leave that there, it's fine. I just wanted to identify it.

THE COURT: That's fine. I want to correct it now, because I want to give this to my -- I want to give it to my JEA so that she can make copies. And if I see it, I'll read it as "she."

MR. SCHMIDT: Okay.

THE COURT: Okay?

Instruction Number 19, we're replacing -- I'm taking out the "he/or." Sounds like Eeyore, but it's not.

Instruction Number 23, add "s" to the end of "member." Oh.

MR. SCHMIDT: Unless, like, one of your member.

THE COURT: Add "s" of your members.

MR. SCHMIDT: Uh-huh.

THE COURT: We should add, "select one of your members." Okay.

Instruction Number 25, add two periods.

MR. SCHMIDT: Yeah. Well --

THE COURT: At the end of "crimes."

MR. SCHMIDT: End of "crimes" and at the end of "motive or intent" above that.

MR. HALLQUIST: Additionally, on line 4, change "his" to "her."

THE COURT: Where is "motive or intent"? What are you talking about?

MS. STONE: Line 7.

MR. SCHMIDT: Line 7. Just a period at the end.

THE COURT: All right. And then what did you say, Mr. Hallquist?

MR. HALLQUIST: Line 4, where it says "reason of his."

MR. SCHMIDT: Yes.

MR. HALLQUIST: Reason of "her."

THE COURT: Where are you?

MR. ALLMON: Line 4, Your Honor.

MR. HALLQUIST: Line 4.

THE COURT: No act committed by a person will, in a state of voluntary -- shall be deemed less criminal by means of --

Oh, her, sorry.

Okay. Anything else?

MR. HALLQUIST: Your Honor, this is one thing I noted and I apologize, there was a lot of moving around and switching things when we were doing these. But looking at Jury Instruction 15, and then I think I -- go back to --

THE COURT: Let's go back to 15 first. Okay.

MR. HALLQUIST: I was going through it and you were talking about substantial bodily harm.

THE COURT: Uh-huh.

MR. HALLQUIST: So the bodily injury portion is just for the leaving the scene. So when we're looking at the leaving the scene instruction, there isn't a definition for bodily injury. And so I'm hoping --

THE COURT: Okay. So you want me to just move that?

MR. HALLQUIST: Yeah, to move that to the "leaving the scene." Because I think it'll be a little bit confusing when they read it.

THE COURT: Where's the leaving the -- what page is the "leaving the scene"?

MR. HALLQUIST: "Leaving the scene" is --

MR. SCHMIDT: It should be 17.

MR. HALLQUIST: -- 17. And we can just put that on the back end of the instruction.

THE COURT: So I'll just -- do you know where it says motor vehicle?

MR. HALLQUIST: Yeah, right below that would be perfect.

MR. SCHMIDT: Sure.

THE COURT: You know what I'm talking about?

MR. SCHMIDT: Yeah.

MR. HALLQUIST: Oh, yeah.

THE COURT: Okay.

MR. HALLQUIST: We're just scratching the bodily injury portion.

THE COURT: All right. Anything else?

MR. SCHMIDT: The verdict form.

THE COURT: I haven't gotten to verdict from yet.

MR. SCHMIDT: Her name is misspelled on the verdict form, but there's also some lesser included probably issues.

THE COURT: Okay. So is there anything else in the main jury instructions?

MR. SCHMIDT: I don't think so.

THE COURT: All right. I'm going now to the --

MR. ALLMON: Hold on. Brief indulgence, Your Honor.

[Pause in proceedings; State confer.]

MR. HALLQUIST: We have no issues, Your Honor.

THE COURT: Okay. So let's move to the verdict form. I changed in the verdict form the State of Nevada versus to Jessica DeFalco.

Can you -- Mr. Schmidt, you can come -- I think that's good.

MR. SCHMIDT: Yes. Thank you.

Sorry if someone [indiscernible].

THE COURT: No, no, no, no, no, no. I'm just trying to --

MR. SCHMIDT: Okay.

THE COURT: All right. So we -- as to Bryan Salcedo:

Guilty of murder with use of deadly weapon, guilty of murder, not guilty.

Is there a problem with that?

MR. HALLQUIST: So because we -- we just get in some clarification? Because I know when we were talking about lessers, I know we wanted -- defense counsel wanted lessers for Melissa, but not

for Bryan.

THE COURT: Okay. So we -- you want to take off a attempted murder? Okay. So it's just going to be:

Guilty of attempt murder with use of a deadly weapon, and not guilty.

Right?

MS. STONE: Actually, Judge --

MR. SCHMIDT: I was just thinking about the lesser includeds for Count 4.

THE COURT: Okay. Well, let's --

MS. STONE: Can we keep both of them for the attempt murders? But for Count 4, we don't need the lessers.

THE COURT: Okay. So Count 1 is guilty of attempt murder with use of a deadly weapon, guilty of attempt murder.

MS. STONE: Yes.

THE COURT: Not guilty.

MS. STONE: Yes.

THE COURT: Count 2 is guilty of attempt murder with use of a deadly weapon, count -- guilty of attempt murder, not guilty; correct?

MS. STONE: Yes.

MR. SCHMIDT: Yes.

MR. HALLQUIST: Yes.

THE COURT: Count 3, Melissa Garibay, what do you want?

MR. SCHMIDT: Those are fine.

THE COURT: Okay.

MR. SCHMIDT: It's Count 4 that --

THE COURT: Okay. Count --

MR. SCHMIDT: -- needs to be changed.

THE COURT: Count 4, which is as to Bryan Salcedo, what --

MR. SCHMIDT: Guilty of battery with use of a deadly weapon resulting in substantial bodily harm, or not guilty.

THE COURT: Okay. So you want me to take out -- you are not asking for the lesser included on Bryan Salcedo of guilty of battery with use of a deadly weapon, guilty of battery resulting in substantial bodily harm, and guilty of battery?

MR. SCHMIDT: Yes.

THE COURT: Okay.

MR. SCHMIDT: And I think that's all the issues.

MR. HALLQUIST: That's -- yeah, that was it.

THE COURT: Okay. Is that it?

MR. SCHMIDT: I think that's it.

MS. STONE: I mean, I haven't had a chance to look at any of this. I am hoping that's correct.

THE COURT: I trust Mr. Schmidt, he's very, very good as an attorney.

MR. SCHMIDT: Thank you. I appreciate that.

THE COURT: So -- all right. So what I'm going to do is give you three minutes for all of us to use the bathroom and whatever else it is. We're going to bring in Detective Knickerbocker. I guess I can re-ask this question. Okay?

MR. SCHMIDT: Yeah.

THE COURT: He's going to answer it and then I'm going to say, anything else based on that? Anything else based on that? Then I'm going to give them a break. And then you guys set you your PowerPoints or whatever, maybe have a bite of something to eat, and then we're going to roll into closings.

MR. SCHMIDT: Sounds good.

MR. ALLMON: Sounds good.

MS. STONE: I --

MR. SCHMIDT: You have something?

MS. STONE: I do want to discuss timing at some point. It is 3:00 right now. I expect we won't go on break for another 15 minutes or so. Once the jury comes back in, we finish with Knickerbocker, they go back out. By the time we start closings, and Your Honor has read all the instructions, I expect it will be 3:45 at the earliest, probably 4:00. By the time we finish with closings, at the earliest it would be 4:30. That -- Your Honor has to read all the instructions --

THE COURT: Yeah.

MS. STONE: -- and it takes a while.

I would request to do closings on Monday. In service of giving Ms. DeFalco a fair trial, I don't believe she can get a fair trial and a fair verdict from the jury that is getting a case on a Friday afternoon at 4:30 in the afternoon knowing that as soon as they just check some boxes, they can leave and not have to deal with this case anymore. I believe that is far too much pressure for them and far too much incentive for

them not to take this seriously, not to read through all the instructions once they get back into the deliberation room.

And it's a structural problem, right? Because we don't have any recourse if they go out and are done in 15 minutes and come back, like, great, we're done, we don't have to do anymore jury duty. It's a structural problem. We don't get to inquire as to whether that made a difference. So I don't see how that could not be something that influences then when they go back.

THE COURT: State?

MR. HALLQUIST: State's ready to close and have them deliberate under the --

THE COURT: Can you ask the jury -- members of the jury if they can stay later than 5:00? And if so, how late. And if they need to make arrangements, the Court will accommodate them.

MS. STONE: The other issue -- we can do it without Helen -- I don't know if Your Honor has had this problem, but I had this problem on another case where Judge Roohani kept the jury until I believe it was 6:00 on a Friday. And then they ended up having to wait another hour, hour and a half for the jail to bring the defendant back.

THE COURT: Yeah, that's okay.

MS. STONE: Okay.

THE COURT: I can make those arrangements with CCDC.

[Pause in proceedings.]

THE MARSHAL: Okay. Your Honor, I have two people that cannot stay.

THE COURT: Past 5:00?

THE MARSHAL: Right. Joshua, Seat Number 1, can only stay to 5:00 p.m.

THE COURT: Okay.

THE MARSHAL: And McKenna in Seat Number 12, I believe -- 11 -- can only stay to 6:00.

THE COURT: Okay. All right. Let's bring the jury back in, let's get Mr. Knickerbocker back on the stand.

[Jury reconvened at 3:02 p.m.]

THE COURT: Thank you.

Let's bring in the witness.

JUROR QUESTIONS (CONT.)

THE COURT: Detective Knickerbocker, I will remind you that you are still under oath. So let me ask you the question.

Did the defendant claim she had been drinking at any point prior to arrest? At any point prior to arrest?

THE WITNESS: No, she did not.

THE COURT: Based on that, State have any questions?

MR. ALLMON: No, Your Honor.

THE COURT: Based on that, does the defense have any other questions?

MS. STONE: No, Your Honor.

THE COURT: Okay. State, do you want to double-check your -- any other -- your exhibits?

MR. ALLMON: Yes.

THE COURT: Because I'm assuming the next thing that's going to come out of your mouth is that you're resting.

MS. STONE: Your Honor, can we approach?

THE COURT: Sure.

[Bench conference transcribed as follows.]

MS. STONE: So, Judge, I apologize for not raising this earlier. I am moving to strike -- to do one of two things. To either strike the officer's last answer to the question or to allow us to ask him, without opening the door to suppressed statements, whether she later said that she had been drinking on the night that this happened. The reason being the statement was suppressed because of unlawful conduct by the State.

THE COURT: Yeah. Oh, and there was a [indiscernible] violation, right?

MS. STONE: Correct.

THE COURT: Okay.

MS. STONE: They are now benefiting from our trying to remedy that violation of her rights by having the officer say, no, she didn't say that, when, in fact, she did. And they're trying to use that against her and putting us in the position of having to choose between -- it's a due process violation meant -- standard Fifth Amendment violation -- for us to be put in a position of having to decide between opening the door to her entire statement versus correcting the misapprehension that the jury now has that she never said anything about drinking, which is not true. She did.

THE COURT: Okay.

MS. STONE: So I'm asking either to strike his last answer from the record and tell the jury to disregard, or to allow me, without opening the door to her suppressed statement, to ask him if she later told him that she had been drinking at the time that this happened.

THE COURT: Okay. State?

MR. HALLQUIST: There's a whole slew of problems. First, it would be hearsay to get into a second statement, and so I could object to that in general.

Then, additionally, she's now put us in a situation where she brings in [indiscernible], but it's suppressed [indiscernible] for that. Then [indiscernible]. I look like I'm entitled [indiscernible]. She made a strategy decision to keep that out.

And so [indiscernible], the State agreed to it. The State agreed to it, now the State look like it's [indiscernible], we need an explanation that that was suppressed. We agree it wasn't [indiscernible].

THE COURT: I'm not going to do either of those things. Okay.

Are all of the jury -- is [indiscernible]?

MR. SCHMIDT: There was some [indiscernible].

THE COURT: I'm sorry?

MR. SCHMIDT: There was a murder on the --

THE COURT: Right. But you guys are about to rest, so I want to make sure that every piece of evidence that you want in is

coming -- has been admitted.

THE CLERK: Yeah, I need 88 and 89 back.

MR. SCHMIDT: Okay. 17 should have got admitted.

THE COURT: Are you saying 17 was [indiscernible] but not admitted? I think that was -- I thought that was [indiscernible].

Is that 88 and 89? All right. I'm keeping that here. So it doesn't get mixed up.

Is that it?

[Court, clerk, and counsel confer re: Exhibits.]

THE COURT: I'm going to give you an opportunity to [indiscernible] really quick.

And then, Defense, your [indiscernible] was in, right? Your two things? Yeah.

MR. HALLQUIST: I looked at them, they're marked.

THE COURT: She told me she had those.

[Court, clerk, and counsel confer re: Exhibits.]

[End of bench conference.]

THE COURT: Sir, are we done with Detective Knickerbocker?

MR. ALLMON: Yes, Your Honor.

THE COURT: Thank you very much for your testimony.

THE WITNESS: Thank you.

MR. ALLMON: Your Honor, the State of Nevada rests.

THE COURT: Defense?

MS. STONE: We also rest.

THE COURT: Thank you.

All right. We're going to take a 10-minute break and then we're going to do closing arguments.

So during this recess or break, you must not:

1. Discuss or communicate with anyone, including fellow jurors, in any way regarding the case or its merits either by voice, phone, e-mail, text, Internet, or other means of communication or social media. You must not:

2. Read, watch, or listen to any news or media accounts or commentary about the case. You must not:

3. Do any research, such as consulting dictionaries, using the Internet, or using reference materials. You must not:

4. Make any investigation, test a theory of the case, recreate an aspect of the case, or in any way investigate or learn about the case on your own. You must not:

5. Form or express any opinion regarding the case until it is submitted to you.

We will be back in the courtroom in 10 minutes and we will go straight into closing arguments, and then you will begin deliberations. Thank you.

[Jury recessed at 3:15 p.m.]

THE COURT: We are outside the presence of the jury.

State, are you familiar with the Court's Proposed Jury Instructions 1 through 27?

MR. ALLMON: Yes, Your Honor.

THE COURT: Does the State object to the giving of any of

those instructions?

MR. ALLMON: No, Your Honor.

THE COURT: Does the State have any additional instructions to compose besides what we went over?

MR. ALLMON: No, Your Honor.

THE COURT: Is the defense familiar with the Court's Proposed Jury Instructions 1 through 27?

MR. SCHMIDT: And -- have you had a chance to look through it?

MS. STONE: I have not had a chance to look through this.

MR. SCHMIDT: She hasn't had a chance to look through the jury instructions. Could we get a brief --

THE COURT: Okay. But you have, correct?

MR. SCHMIDT: Court's brief indulgence.

I'm good with them, but I like her to look through them.

THE COURT: You are -- so --

MR. SCHMIDT: Court's --

THE COURT: Mr. Schmidt, are you familiar with the Court's Proposed Jury Instructions Number 1 through 27?

MR. SCHMIDT: I am, Your Honor.

THE COURT: Does the defense object to the giving of any of those instructions outside of what was put on the record and outside of what was proposed?

MS. STONE: The only thing we did not circle back to, Your Honor, is Your Honor did not make a ruling on the naming issue.

THE COURT: Yeah. I'm not going to put Ms. DeFalco, I'm going to put Defendant.

MS. STONE: Could Your Honor make a record as to why?

THE COURT: Yeah, because I'm not going to do it.

MS. STONE: Okay.

THE COURT: So are you familiar with the Court's Proposed Instruction Number 1 through 27?

MR. SCHMIDT: Yes, Your Honor.

THE COURT: Does the defense object to the giving of any of those instructions outside of what has already been put on the record?

MS. STONE: No, Your Honor.

THE COURT: Do you have any additional proposed instructions outside of what has already been put on the record?

MS. STONE: No, Your Honor.

THE COURT: State, you've looked at the proposed verdict form?

MR. ALLMON: Yes, Your Honor.

THE COURT: Are you okay with it?

MR. ALLMON: Yes, Your Honor.

THE COURT: Defense, you've looked at the proposed verdict form, are you okay with it?

MS. STONE: Outside of the previously noted objections, yes.

THE COURT: Yeah. Okay. Thank you.

I'll let each of you get the dongles and practice.

[Court recessed at 3:17 p.m., until 3:25 p.m.]

[In the presence of the jury.]

THE COURT: Do the parties stipulate to the presence of the jury panel?

MR. ALLMON: Yes, Your Honor.

MS. STONE: Yes, Your Honor.

THE COURT: All right. We are back on the record in State of Nevada versus Jessica DeFalco, Case Number C-372006. I'm now going to read you the jury instructions. You will be handed a copy of these instructions in the back when you deliberate.

[Jury instructions read.]

THE COURT: State?

MR. HALLQUIST: Thank you, Your Honor.

CLOSING ARGUMENT FOR THE STATE

MR. HALLQUIST: This week we've seen this play out. Denying what you can't admit, and admit what you can't deny. That's what happened. You can't deny that the defendant was in the vehicle and drove her vehicle into Melissa and Bryan. You can't deny that she backed out and fled the scene, going to O'Neil's house. You can't deny that she then went to apartment.

What you can deny is the intent. Well, did I really intend to kill those kids? Is that what I was really intending to do? And that's what we have here today.

As I said before, we're going back on April 30th, 2022. Bryan and Melissa are dating, they're in a group of friends. And that Friday, the 29th, they were playing volleyball. They get done, they get tired and

hungry, and they go to In-N-Out. And that spills into the 30th. Well, like every other group, they're going in and they're getting food and it's pretty busy. You saw that on video surveillance; there's a lot of people coming and going.

And they get their food and they sit down. And the video will show they sit down right in that corner, where the windows are. They can see the drive-through and they can see the parking lot.

But as I said, unbeknownst to them, there is an event that is occurring in the drive-through that is going to change Melissa and Bryan's lives. And what is that event? It's very simple: The defendant got into the drive-through and started getting very upset with Candace. This entire trial you've seen that there's benchmarks. And every benchmark we hit, we notice that the defendant -- it's the defendant, it's not Candace, it's not Bryan, it's not Melissa, it's not any other group in the parking lot, it is the defendant who is escalating her behavior and becoming more and more aggressive.

And so what do we start out with? It's a busy night and the defendant is honking and is getting upset and Candace is noticing it. Not only does Candace notice that, but other individuals in the drive-through that we heard testify noticed that the defendant's honking her horn so much so that the defendant doesn't even pick up food from the drive-through window, she just follows Candace out. Where? At the end of the drive-through.

Now, this was one of the spots. I talk about these benchmarks. Remember, Defense counsel admitted a Google Map?

The State presented a map of In-N-Out. Now, when you leave the drive-through, there's two options. You can take an immediate right and you can go down one of the lanes of the parking lot, or you can take a left and then take a right and go down one of those lanes. The defendant could have simply taken a left and we wouldn't be here today.

Did she do that? No, she did not. Instead, what the defendant started to do is she was starting to create a commotion right at the end of that drive-through, so much so that Bryan and Melissa and their group of friends and the individuals outside are taking notes. And this spills into the parking lot. It's another benchmark. The defendant could have pulled off to an empty spot, collected her emotions, collected her [indiscernible], and let Candace drive out of In-N-Out, and the situation would have been over.

Defendant, again, doesn't do that. What does the defendant do? She escalates the situation. And she does so by speeding around Candace, cutting in front of Candace, slamming on her brakes, almost causing a collision at the end of that parking lot.

Now, at this time, while this is going out in the parking lot, Bryan and Melissa and their friends are leaving In-N-Out. And you see them, Bryan's wearing the red pants, Melissa is underneath his arm, and it looks like they're having a good time. And they're walking out towards their vehicle. They get to the area where the commotion is taking place between the defendant and Candace, and they're hearing yelling, they're hearing the defendant scream, Go around, fat bitch. The defendant's words.

But here's the thing you don't see. You don't see Bryan, you don't see Melissa interacting with the defendant. You don't hear these kids screaming at the defendant, insulting the defendant. You don't hear that. There's other people in the parking lot, and Bryan and Melissa aren't associated with anyone else in the parking lot.

So what do we come to? Another benchmark. It's this time where the defendant starts driving away. Remember that? Defendant starts driving away and it looks like she might exit the parking lot. But then the defendant loops around.

[Video played.]

MR. HALLQUIST: Defendant could have left. Defendant didn't leave. Defendant intentionally turned her car back around and aimed her car towards Candace. Candace gets in her vehicle at this time. And so who's left? It's Bryan and Melissa to her immediate right. And what does the defendant do? Well, if you can't get Candace, I'm going to get the people standing right there, and I'm going to get the people standing right there and I'm going to ram my car into that crowd. And not only that, but with such force that I'm going to push the car in front of me, what the State would submit, quite a distance. And not only that, but I'm going to go over Bryan and then I'm going to back out and then I'm going go over him again. And then finally she backs out and she flees the scene.

And you see this. It's a different angle. A different perspective, where the defendant smashes her vehicle into that group of kids with such force that it pushes the adjoining car into that parking stall

a good distance away.

[Video play resumed.]

MR. HALLQUIST: It's an unbiased camera. It doesn't have any prejudice. It's not looking for some ulterior motive. It's simply a camera catching what is happening and that is [indiscernible]. There is no motive behind this machine that's watching over the parking lot. It's simply displaying what happened that night.

Remember Bryan taking the stand. And he said, listen, there was commotion. I can't really remember when the car hit me. I blacked out. We know he's wearing red pants. And he's right there. His girlfriend, Melissa, is right next to him.

Does Defendant stop when she gets to Candace? Does the defendant stop her car and say maybe this isn't a good idea? No. The defendant takes a pike turn, a right turn, and slams her car into them.

And what happened to Bryan after that? He gets pinned underneath the defendant's vehicle. Those are his legs. That is Bryan's legs, and that tire is right on his midsection. And you saw video, his friends are banging on the defendant's car, pleading, and screaming. But what does the defendant do? She goes over him, and then she backs out, and then she goes over him again.

Bryan sustained injuries throughout his body, injuries to his back, injuries to his legs, and injuries to his face. And it's clear, the defendant is the individual in that black Honda. She's behind the wheel. No one else is there. She decided to engage in that conduct. She decided to turn that wheel to the right. She decided to rev her engine up

and she decided to aim her car at some kids that had nothing to do with the argument she had with Candace.

Does the defendant stay? No, Defendant doesn't stay. Right? You saw it on video, she speeds away. And it's caught on camera, her driving away. And she drives in the direction of O'Neil's house. And she parks the car there. Does the defendant ever come back to the scene? No. Does the defendant ever call 911? No. Does the defendant at any point try to get someone to help the individuals she just crashed into? No, she does not. She drops her cars off at O'Neil's house, and then she runs back to her apartment.

State submits that the defendant is guilty on all counts. Count 1 and 2, Count 3 and 4, and Count 5. But how do we get to that point? Right? You're going to have to hold the State accountable to our burden. That burden is beyond a reasonable doubt. That language, that is reasonable doubt. There's nothing outside those four corners that will explain reasonable doubt; that is what reasonable doubt is.

And we're going to read this together:

> Reasonable doubt is one based on reason, it is not mere possible doubt, but it is such a doubt as would govern or control a -- would govern or control a person in the more weighty affairs of life.

If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual. Doubt, to be reasonable, must be actual, not mere possibility or speculation. That

is the State's burden. That is what Michael Allmon and myself are saying that you have to hold us to. That is what we have to prove every single charge here today.

And so let's go into it. I'm going to talk about the batteries first. Defendant is charged with two counts of battery with a deadly weapon resulting in substantial bodily harm. And I'm going to break that down in a couple of pieces. We're going to talk about battery, talk about the deadly weapon portion, and the substantial bodily harm.

So what is battery? It's any willful or unlawful use of force upon the person of another with the use of a deadly weapon, right? An example would be you're walking down the street, and you see one guy punch another guy, and that fist, it's balled up, makes contact. That's a battery. Right? Even a slap, that's a battery. Even if the person walked by, looked at him, and spit, that's a battery. Any harmful or offensive touching.

A deadly weapon? Here it states the deadly weapon is a vehicle. And a deadly weapon can be any weapon device, instrument, material, or substance under which the circumstances in which it is used, is readily capable of causing substantial bodily harm or death.

Four-door sedan, a car used as a battering ram on someone that is just standing out in the open on their own two legs, the State will submit that is a deadly weapon. That car, the defendant used that car as a deadly weapon. You see it on video, we heard testimony about it.

And so what is substantial bodily harm? There's two parts. One, the bodily injury which -- the bodily injury at which creates a

substantial risk of death. Right? Or which causes serious permanent disfigurement or protracted loss of impairment. Think of a classic example of getting [indiscernible] cut off. Right?

The second part is prolonged physical pain. And there, that's the definition. It encompasses some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act.

Here we have Melissa that testified, said:

I got hit by the car. Afterwards, my back started hurting, increasing in pain, eventually having to seek medical help.

Prolonged physical pain.

So let's look at the facts. We play the video a lot. I'm unbashful [sic] about it, because that's what happened. The defendant was in the car, the defendant aimed that car at those group of kids, and struck Melissa and dragged Bryan underneath that vehicle. And, again, that is Bryan. And State submits that's Bryan underneath. Go back, review the video, that's what the State's going to submit. And Melissa? Right over there.

There's definitely a contact, it was definitely an offensive contact. Bryan was pinned underneath the vehicle. The defendant strikes Melissa with the vehicle, she talked about it, how the car hit her, her arm afterwards was hurting, right? Her back afterwards started hurting.

Bryan, we saw him take the stand. He was brave enough to show you his injuries and scars. He even at one point lifted up his shirt and said, this is what happened to me. Both Melissa and Bryan talked

about how they can't do the things that they used to do. Melissa used to play volleyball all the time. She hasn't since the time the defendant smashed her car into her.

Those are the injuries, all over his body. Had doctors take the stand, we had Bryan himself take the stand, and we have photographs. He spent a week in the UMC getting treatment. We had a doctor that said he had a brain bleed. Yeah, they were serious injuries. He could have died. Melissa, again, injuries to her spine. Both are in pain to this day.

So let's talk about who stopped that scene of the crash. That would be Count 5. Pretty much the defendant is the driver of the vehicle. It's pretty well established. And that vehicle was involved in an accident, a crash, a collision. And that driver of the vehicle, the defendant, knew the vehicle was involved in the crash. And that crash resulted in substantial bodily harm or death. It's pretty clear, right? The defendant drover her car into the crowd of kids, hitting Bryan and Melissa and the injuries resulted from that collision.

She didn't stay; she didn't wait; she didn't say, oh, hey, I got to call 911, I can't believe this just happened. She fled. She left and she didn't come back to the scene. And stop, it's pretty straightforward. All right. I'm walking right now, I'm walking, I'm stopping.

And bodily injury, there's two different things. We talked about substantial bodily harm. That's for the battery. Bodily injury, it means just any injury to the body. Here, Melissa had an injured arm. That's any injury to the body. She has an injured back, that's any injury to the

body.

Bryan, it's pretty clear. We have photographs, scarring, bruising, a brain bleed in the hospital, that's definitely any injury to the body.

The defendant is guilty of Count 3 and 4, and Count 5.

But also the defense, on opening, conceded Counts 4 and 5. And so we go into the attempt murder charge, Counts 1 and 2. Attempt murder, it's the definition. The defendant acted with specific intent to kill, unlawfully, another person. The defendant performed some act towards committing that killing. And Defendant failed in killing that individual. When the intent is clearly shown, there need only be slight acts and furtherance of that crime to constitute an attempt.

Have to show express malice, though. And what is express malice? Well:

> Express malice is that deliberate intention unlawful to take away the life of a fellow creature, human being, which is manifested by external circumstances capable of proof.

External circumstances capable of proof. We looked at facts. We looked at what the State presented you this entire week. You don't drive a four-door sedan into someone standing in the parking lot and say, oh, I just want to hurt you. You drive your vehicle into a group of people, you mow them down and you drag one underneath your car because you intended to kill him. It doesn't matter that the defendant failed in that killing, but you don't get in that car and you don't accelerate that vehicle and you don't make that right turn if you're not intending to

kill someone in that group. That's what the defendant intended to do.

That's what the video shows and that's what the defendant's own words indicate. Bryan's stuck underneath that vehicle. And the second part, the tire's physically on top of him.

[Video resumed.]

MR. HALLQUIST: And, again, if you simply wanted to scare someone, to batter someone, why drive your car with such force, with such intentionality as to move that back car a good distance. Why? If you're not intending to kill the person?

Bryan doesn't remember any of this. That's Bryan [indiscernible]. That's after Defendant finally rolled her car off of him and she fled the scene. And that's Melissa kneeling down next to him.

And there? It's a different perspective. See that SUV to the right? That's the SUV we see in the surveillance. You see that sharp right turn? That's where the group of kids were, were just standing. That's where Bryan and Melissa were standing. And the defendant drove that vehicle right into them.

And now we see that we're in the adjoining parking stall. That's Bryan's pants, there's shoes, and the defendant's grill. And that car? That car's pushed quite a bit a ways.

Defendant's conduct demonstrates her intentions.

Look at her car, look at what the defendant did. There was only one way, though, to get inside the mind, right? To really, like, hey, what is the defendant's intentions?

Well, we have that here today. We have her on a call stating

clearly what she did and why she did it.

[Audio played.]

MR. HALLQUIST: Ran them all over. You can't deny, you can't deny -- she can't deny that she's behind that car; she can't deny that she ran that group of kids over; she can't deny it.

What we're here today, she's denying, well, yeah, all that other stuff, okay. But I didn't intend to kill those people. That's not what I intended to do. I did take a sharp right turn. I did accelerate my vehicle. Yes, I did roll over Bryan once, I backed up a little bit, yes. And then I went over him again.

But during this entire time, never had an intention to kill anyone. No intention at all. Just an intention to maybe scare them or to hurt them a little bit. But no killing at all.

State submits that it's clear, the defendant had the intention to kill those kids. And everything that we've presented here today is beyond a reasonable doubt. The defendant is guilty of Count 1 and 2, Count 3 and 4, and Count 5.

Thank you.

THE COURT: Defense.

CLOSING ARGUMENT FOR THE DEFENDANT

MS. STONE: This is a case about the law. This is a case about how the law applies when someone did something horrible, but they did not intend to kill someone.

On April 30th, 2022, Jessica DeFalco hit two people with her car. She ran over one of them and she drove away. And was under the

influence and the police said that she told them that they deserved it.

We said to you from the beginning that Jessica did these things. She committed these batteries and she committed the duty to stop charge. This is what she did.

What she did not do is intend to murder someone. She is not guilty of attempted murder. When you get back to the deliberation room, you're going to get a copy of all the discs, instructions that the judge read to you.

And there are two that I want to highlight for you. The first instruction is Instruction Number 10 on attempted murder. As the judge instructed you:

> Attempted murder is the performance of an ct or acts which tend, but fail, to kill a human being when such acts are done with express malice. Namely, the deliberate intention unlawfully to kill.

You're going to get a chance to read all this when you get back to the deliberation room. But there are two pieces I want to highlight here.

Attempted murder requires an act and an intention.

We have a lot of acts in this case. There's no question about the acts. What we don't have is proof beyond a reasonable doubt of the intention.

For someone to be convicted and found guilty of attempted murder, the prosecutor has to prove to you beyond a reasonable doubt not just that they meant to hurt someone, not just that they did hurt someone, not just that they hurt someone badly, but they specifically

intended to take the life of that person. And, in this case, the State has not proven beyond a reasonable doubt that Jessica intended to take a life.

In addition to the attempted murder instruction, I also want to talk about the intoxication instruction.

Voluntary intoxication can negate specific intent on a crime that requires it. Attempt murder is one of those crimes.

If the evidence shows that a defendant was intoxicated at the time of the crime, then you can consider that fact in determining whether they actually had the specific intent necessary for that crime, in this case, attempted murder.

It's not automatic. As you'll see in the instruction, you have to consider whether Jessica was so intoxicated that she was not able to form specific intent. But in this case, that's the evidence that we have, that Jessica was so intoxicated that not only did she not have the specific intent to kill, but she would not have been able to form that specific intent even if she wanted to.

And there's two ways that we have evidence of intoxication in this case. The first evidence of intoxication came from Candace. She came in here and she testified about the behavior that she observed from Jessica when they were out [indiscernible]. Candace told us that in the drive-through, Jessica drove right past the food window, she did not stop there, despite having waited in line in the drive-through for 20 to 25 minutes.

Candace told us that she thought Jessica was behaving

erratically, that nothing she was doing was making any sense. And that she thought Jessica may have been under the influence.

Now, Candace said she thought Jessica could have been high rather than drunk. But at the end of the day, she thought Jessica could have been under the influence.

The second evidence of intoxication that we got from this case was from Dean. Dean testified that he's known Jessica for quite a long time and that he is familiar with how she acts, how she behaves when she is sober, when she is upset, and when she is drunk. He testified that based on that experience, on the day that this happened, on the day that she came to his house after In-N-Out, she was drunk. He knows what that looks like in her, and that is what he saw that night. That is why he drove her home, because it was not safe for her to be driving.

All of this leads to the conclusion that not only does the State not prove beyond a reasonable doubt that Jessica intended to kill someone, but she was also so intoxicated that she could not have formed that intent even if she wanted to at the time.

The last thing I want to talk about are Jessica's statements. We heard about a lot of her statements in this case. We heard about her statement to Detective Smith when he went to her apartment and she said they deserved it. We heard about the phone call that the State just replayed for you when she was talking to her dad, and she told her dad what she thought had happened. And during that phone call, her dad made a comment about being careful what she said on the phone, and Jessica blew right past it, she continued talking, despite that

reminder from her dad what she already knew, to be careful what she was saying on the phone.

We heard about what Jessica said to Dean when she got to his house, how she described what happened and how she described the state that she was in. And we also heard about all of the things that Jessica said when they were at In-N-Out. She was talking to Candace. She was talking to other people.

Jessica is not someone who has trouble speaking her mind. If she has a thought, you're going to hear about that thought. She's going to tell you that thought. She has no problem speaking up and she will do so even when it might be in her best interest not to; that's what we saw from that phone call with her dad.

The takeaway from all of this is that if Jessica had intended to kill someone, we would have heard about it. It would have been on tape and the State would have come in here and played that tape for you. There is no question that Jessica would have said it. She's not some sly criminal who knows when to say what things to get out of trouble. That's not her. She talks when she has a thought, when she wants to. And for a person like that, if she intended to murder someone, it would have been on tape and we would have heard about it. And the fact that you didn't is proof that she did not intend to kill anyone and the State did not prove that beyond a reasonable doubt.

Jessica is not going to get away with anything on this case. You're going to go back to the deliberation room and you are going to find her guilty of the batteries, and you are going to find her guilty of duty

to stop. There is no question about that; that is what the law requires.

The law also requires you, however, to find her not guilty of attempted murder, because she did not intend to kill anyone.

There is a time and a place for all of our feelings about what happened. But the jury deliberation room is not that time or that place. You all received an instruction that says to set aside sympathy when you are making your decision in this case.

The question I'd ask you to answer when you go back to the deliberation room is this: It's not whether she intended to hurt them, it's not whether she -- it's not whether she intended to hurt them, it's not whether she will be convicted of those offenses, because she will, and things will happen accordingly. The question is whether the State proved that she intended to kill them. The State did not. The answer to that question is no. And I'd ask you to find her not guilty of attempted murder.

Thank you.

THE COURT: Mr. Allmon.

MR. ALLMON: Thank you, Your Honor.

REBUTTAL CLOSING FOR THE STATE

MR. ALLMON: I'm sure many members of the jury have been sitting through this trial wondering to themselves, wait a second. If someone's drunk, does that mean that they get away with the acts that they did? And the answer to that is no. The answer to that is they do not get away with attempted murder. You can still form the intent to kill --

Could I get your chart, defense?

You can still get the intent to kill even if you're drunk. Okay? It's called liquid courage. Let's go with that there. Let's play two theories. Let's play Theory One, defense's theory. Let's give them every benefit of the doubt right here, right? Everything they said, every piece of evidence that they want, you just take it as true. Let's just play that viewpoint.

That viewpoint is guilty. Okay. Because that's just liquid courage. She was -- she had some impairment, she felt tough, she was in a car, she felt tough. That car's her armor, okay. And then she decided to ram those kids. She told -- she said it, she decided to ram that group, right?

Now, we've been talking about voluntary instructions. You'll notice the defense highlights couple portions of it. Okay. I want to point out the other portions of that instruction. I want to read that instruction in whole:

> Voluntary intoxication [indiscernible] specific intent, including the specific intent to kill. But no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of her condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive, or intent. If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you may consider

that fact in deciding whether or not the defendant had the required specific intent.

However, a person may be intoxicated and still form specific intent. To negate specific intent, the intoxication must be to such a level that it impaired her ability to form the intent and the defendant must have been suffering from the aforementioned effects at the time of the crime.

The highlights portions are what the defense wants you to see; the State wants you to see all of it. Those unhighlighted portions, those are the most important. Or read the thing in totality. Okay. It's not a get-out-of-jail-free card. You don't get to be drunk and just be unaccountable for your actions. Okay. It's whether or not you had the ability to form the intent. You have to be at such a state you don't understand what you're doing. Right? You have to be able to not form that intent.

So we're talking about the stupid drunks that are falling over. That's not what she is. So even if you took every piece of it and looked at it in the light most favorable for them every time, you took Dean O'Neil, who was not telling the truth. Dean O'Neil got up here, and I submit to you, he didn't tell the truth at all. You -- let's just pretend that you take that as truth, that right there doesn't matter; she's still guilty of attempted murder. She was not so impaired that she could not form the intent. Because Candace Boyd talked about it. Candace Boyd argued with her.

You, yourselves, were witnesses to what she said. You,

yourselves, were witnesses.

[Video played.]

MR. ALLMON: That sounds like a woman who's in charge of her faculties.

I'll tell you what else shows that she's in charge of her faculties, that she knows what she's doing. Some really good driving. Some really good driving. She cut around Candace Boyd, cut her off, jumped in front of her, blocked her. That's some pretty fast and skilled driving right there.

Then she does the U-turn. She makes that hard right turn. She accelerates in. She hits Bryan -- Bryan's sitting right here, Melissa's sitting right here, she hit them. Two young kids out having a nice Friday night into Saturday morning. She hit them with such force that Bryan got sent under the vehicle. Melissa got hit and Melissa's pain, you can't see it, but it's there. Okay. Make no mistake about it, her pain is substantial. She's in prolonged physical pain.

She hit them with such force, with something that's over a thousand pounds, the deadliest weapon. She hit them with the deadliest weapon. This is deadlier than a bullet. When she comes at them with that vehicle, it's deadlier than a bullet.

What's her intent? She's using a deadly weapon. Why is she using a deadly weapon? To kill. She's using the deadliest weapon to kill them.

And something else to look at, make no mistake about it: She didn't know Bryan, she didn't know Melissa. They were not the ones

yelling at her. But they were in that group. To the defendant's eye, they were in that group. And so the attack on the crowd, the attempted murder on a crowd, it doesn't matter. She doesn't have to know them individually. She tries to kill someone in that crowd, that's enough. They're the named victims. There were other people in that crowd, but they're the named victims. That attempt to kill someone in the crowd is enough. She is guilty of attempted murder for both of them.

Let's talk about if she intended to kill -- well, you would have heard it. Well, no. It's amazing that we have this call, actually. It's amazing that we have this call where she says exactly what she was doing. Right? But, again, you don't need that. You need the facts and circumstances, the facts and circumstances surrounding the crime. Look at what she did here. She's accelerating. She's sending that thousand -- over a thousand-pound object at those kids. She accelerates. You see her go, there's the tire marks on the ground. She pushes that vehicle, the backstop of what Bryan -- think about that, the force that Bryan and Melissa got, they got hit, they got knocked down, knocked under, and she still had enough force to hit that car so hard that it went almost out of an entire parking space, went almost an entire car length and to the side. That's a lot of force when you're not intend to kill. If you're just trying to hit someone to scare them, you don't do it that hard. You don't give it everything you got. She gave it everything she had that night.

We've also been talking a lot about intent, right? So there's been some questions about, all right, I've been saying, look, she can

form the intent. Doesn't matter, she has some alcohol, she can still be forming that intent even if she's a little intoxicated. She has to be so intoxicated she can't form an intent.

What's -- what is that intent? Give you an analogy. You're driving down the street, you see that red light, you see that yellow light about to turn red. You're not sure if you're going to gun it or if you're going to stop. Right? You make that second -- you make that split-second decision and you decide to gun it. You intended to run the red light. All right. We've all done it. All right.

What the defendant intended to do instead, in more than a split second, I submit to you, is she intended to run those kids over. If you have any question about what she actually intended to do, listen to her own words.

[Audio played.]

MR. ALLMON: Ladies and gentlemen, the defendant intended to kill those two young kids. We're going to ask you to find her guilty of all five counts. Thank you.

THE COURT: The clerk will now swear in the officers to take charge of the juror and the alternate juror -- jurors and the alternate juror.

[Officers sworn.]

THE COURT: As you know, a criminal jury is comprised of 12 members. So the alternate is Dawn Shirley.

So, Ms. Shirley, I'm going to ask you to go with my JEA. You are not yet discharged from your jury service. Your service may be

needed. So please do not talk or discuss this with anyone else. Okay? You're going to go with my JEA.

I'm going to ask that everyone please rise.

Helen, can you take charge of the jury, please.

Everybody's going to follow Helen out. And please take your notebooks and your water, whatever else you have.

[Jury recessed for deliberation at 4:34 p.m.]

THE COURT: Attorneys.

MR. ALLMON: I got it.

MS. STONE: Your Honor.

MR. SCHMIDT: Your Honor, can we -- are we outside the presence of the jury right now, for the record?

THE COURT: Yeah, we are outside the presence of the jury. They just walked out.

MS. STONE: Great. For purposes of the record, we just want to renew our objection to sending the case to them at this point, given that it is 4:35 on a Friday, and one of the jurors indicated that he needs to leave in 25 minutes.

THE COURT: Okay. CCDC, can you -- how long can you keep her down there? Because I know there's going to be a shift change come up, and I would like Ms. DeFalco to either sit in the back there, or if you have to take her downstairs, to take her downstairs and leave her there.

THE CORRECTIONS OFFICER: Our policy is, Your Honor, to leave her in transfer release. But at what time, as she still hasn't had

dinner or anything else.

THE COURT: Well, they have to be -- one of the jurors has to leave by 5:00, so --

THE CORRECTIONS OFFICER: So pretty much just going to end it at 5:00?

THE COURT: Yeah.

THE CORRECTIONS OFFICER: We can hold her down there in TR.

THE COURT: Okay.

THE CORRECTIONS OFFICER: And I'll give you my direct number.

THE COURT: Okay. Can you -- okay.

THE CORRECTIONS OFFICER: Yes, Your Honor. And call me directly and we'll get her up here as soon as we can.

THE COURT: Okay. Thank you.

State, we need a clean laptop.

MR. ALLMON: Yes, Your Honor.

[Court recessed at 4:36 p.m., until 5:07 p.m.]

[In the presence of the jury.]

THE COURT: We're back on the record in Case Number C-372006. Do the parties -- the jury is present. Do the parties stipulate to the presence of the jury?

MS. STONE: Yes, Your Honor.

MR. ALLMON: Yes, Your Honor.

THE COURT: Thank you.

Has the jury selected a foreperson?

JUROR NO. 12: Yes, Your Honor.

THE COURT: Okay. Who is that foreperson? Just give me a name.

JUROR NO. 12: Nicole -- sorry, Kayla Nicole Harneck.

THE COURT: Has the jury reached a verdict?

JUROR NO. 12: We have, Your Honor.

THE COURT: Okay. Can you pass the verdict to my marshal, please.

The clerk will now read the verdict out loud.

THE CLERK: District Court Clark County, Nevada, the State of Nevada, Plaintiff versus Jessica DeFalco, Defendant. Case Number C-23-372006-1 in Department 7. The verdict:

Count 1. Attempt murder with use of a deadly weapon as to Bryan Salcedo: Guilty of attempted murder with use of a deadly weapon.

Count 2. Attempt murder with use of a deadly weapon as to Melissa Garibay: Guilty of attempted murder -- of attempt murder with use of a deadly weapon.

Count 3. Battery with use of a deadly weapon resulting in substantial bodily harm as to Melissa Garibay: Guilty of battery with use of a deadly weapon resulting in substantial bodily harm.

Count 4. Battery with use of a deadly weapon resulting in substantial bodily harm as to Bryan Salcedo: Guilty of battery with use of a deadly weapon resulting in substantial bodily harm.

Count 5. Duty to stop at scene of crash involving death or personal injury: Guilty of duty to stop at death -- of crash involving death or personal injury.

Dated this 13th day of February by Foreperson Kayla Harneck.

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

THE JURY: Yes.

THE COURT: Does either side desire to have the jury polled?

MR. ALLMON: No from the State.

MR. SCHMIDT: Yes, just for the record.

THE COURT: Okay.

THE CLERK: Juror Number 1, is this your verdict as read?

JUROR NO. 1: Yes.

THE CLERK: Juror Number 3, is this your verdict as read?

JUROR NO. 3: Yes.

THE CLERK: Juror Number 4, is this your verdict as read?

JUROR NO. 4: Yes.

THE CLERK: Juror Number 6, is this your verdict as read?

JUROR NO. 6: Yes.

THE CLERK: Juror Number 7, is this your verdict as read?

JUROR NO. 7: Yes.

THE CLERK: Juror Number 8, is this your verdict as read?

JUROR NO. 8: Yes.

THE CLERK: Juror Number 9, is this your verdict as read?

JUROR NO. 9: Yes.

THE CLERK: Juror Number 10, is this your verdict as read?

JUROR NO. 10: Yes.

THE CLERK: Juror Number 11, is this your verdict as read?

JUROR NO. 11: Yes.

THE CLERK: Juror Number 12, is this your verdict as read?

JUROR NO. 12: Yes.

THE CLERK: Juror Number 13, is this your verdict as read?

JUROR NO. 13: Yes.

THE COURT: The clerk will now record the verdict in the minutes of the court.

Ladies and gentlemen, as you know, the right to a jury -- the right to trial by jury's one of our most basic fundamental constitutional guarantees. On behalf counsel, the parties, and the Eighth Judicial District Court, I wish to thank you for your careful deliberation which you gave this case.

This process could not happen without your participation and I sincerely thank you for taking part in this process. I hope that it was a rewarding process for you. And I want you to know that we could not do this without people willing to serve. So I want to thank you for your service.

The question may arise now as to whether you can talk to anybody about what happened here and what trial you were in. And I will advise you that you can. So the admonition that I read every single time that we took a break, that you are released from that.

However, if you do not wish to talk about what happened here today and people persist in trying to talk to you or do something to that effect, then I want you to call my chambers and I will take care of that. Okay?

You can now go with the marshal into the back room.

[Jury dismissed at 5:12 p.m.]

THE COURT: Based on the jury verdict, the defendant is remanded to the custody of the sheriff without bail. Let's do presentence investigation report and sentencing for?

THE CLERK: October 23rd at 8:30 a.m.

THE COURT: Thank you.

Thank you, everybody. We'll get your -- can we give your computer back to you later?

MR. ALLMON: Yes, Your Honor. I'll come by on Monday and grab it. Thank you.

[Court recessed at 5:13 p.m.]

/ / /

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

Shawna Ortega, CET*562

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSICA DEFALCO,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	CASE NO. 89685
	)	

APPELLANT'S APPENDIX VOL. VIII – Pages 1290-1517

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of August, 2025. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD SHANA BROUWERS
SHANON CLOWERS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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By: */s/ Gerardo Callotta-Zazueta*
Clark County Public Defender Employee