

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Murray, C.J., Ronayne Krause and Tukel, JJ.)

People of the State of Michigan,

Plaintiff-Appellee,

v.

Supreme Court

No. 162211

Court of Appeals

No. 350391

Circuit Court

No. 2019-175232-AR

Alton Fontenot Jr.,

Defendant-Appellant.

Appendices to Plaintiff-Appellee's Supplemental Brief

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APPENDIX A

STATE OF MICHIGAN

45th JUDICIAL DISTRICT COURT, COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,

v

District No.1700391SP

ALTON FONTENOT, JR.

Defendant(s)

_____ /

EVIDENTIARY HEARING

BEFORE THE HONORABLE MICHELLE FRIEDMAN APPEL, (P32709)
13600 OAK PARK BOULEVARD, OAK PARK, MICHIGAN 48237
On Tuesday, May 15, 2018

APPEARANCES:

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1 Oak Park, Michigan
2 Tuesday, May 15, 2018
3 (At 3:10 p.m., all parties present)

4 - - -
5 THE COURT: Okay, calling 1700391 Alton
6 Fontenot.

7 MR. KUMMER: John Kummer appearing on behalf
8 of the People.

9 MS. SHARON: Alona Sharon on behalf of Mr.
10 Fontenot, who is present in the courtroom seated - -

11 THE COURT: Fontenot.

12 MS. SHARON: Fontenot. Correct.

13 THE DEFENDANT FONTENOT: Fontenot.

14 MS. SHARON: And standing to my right, your
15 Honor.

16 THE COURT: Okay, today's the date and time
17 set for a, um, motion by the defense, um, to suppress
18 and dismiss, correct?

19 MS. SHARON: Yes, your Honor.

20 THE COURT: Okay. One witness?

21 MR. KUMMER: That's correct, your Honor, the
22 People have one witness, it will be Trooper Jon
23 Gjurashaj.

24 THE COURT: Okay.

25 MR. KUMMER: Gjurashaj.

1 THE COURT: You want to come forward, please?
2 Thank you. Raise your right hand.

3 You do solemnly swear, affirm the testimony
4 you're about to give in this matter shall be the truth?

5 THE TROOPER GJURASHAJ: I do.

6 THE COURT: Okay, have a seat. Make yourself
7 comfortable. Um, state your full name for the record,
8 and spell it for the record, please?

9 (Witness takes the stand)

10 THE WITNESS: Jon Gjurashaj. It's G-J-U-R-A-
11 S-H-A-J.

12 THE COURT: Thank you.

13 You may proceed.

14 TROOPER JON GJURASHAJ,
15 Was thereupon called at 3:11 p.m. as a witness herein,
16 having been duly sworn to tell the truth, the whole
17 truth, and nothing but the truth was examined as
18 follows:

19 DIRECT EXAMINAION

20 BY MR. KUMMER:

21 Q Trooper Gjurashaj, what do you do for a living?

22 A I'm a Michigan State Trooper.

23 Q How long have you been a trooper with the Michigan State
24 Police?

25 A Over three (3) years.

1 Q And direct your attention to October 3, 2017, how long
2 had you been a trooper at that time?

3 A Approximately two (2) years, two and a half (2 1/2)
4 years.

5 Q Okay.

6 And what's your educational background?

7 A I have a bachelor's degree in Criminal Justice from
8 Wayne State University.

9 Q And what type of specialized training or education did
10 you receive prior to becoming a trooper with the
11 Michigan State Police?

12 A Um, Standardized SFT training; I am an ARIDE, which is
13 Advanced Roadside Impaired Driving Enforcement.

14 Q Now before I ask you further about those two forms of
15 training, did you attend a Police Academy?

16 A I did.

17 Q Okay.

18 And when was that?

19 A That was March 1, 2015 with the graduation of July 24,
20 2015.

21 Q And was that put on by the state?

22 A Yes, it is.

23 Q Was it during that training that you were initially
24 trained in Standardized Field Sobriety Tests?

25 A It was.

1 Q Now were you only trained in those tests or was that
2 part of a larger drunk driving investigations training?

3 A Um, for the academy?

4 Q Yes, sir.

5 A (No verbal response).

6 Q Were you just trained on how to administer tests or was
7 it part of a broader training for investigating drunk
8 driving cases?

9 A Just like a broader training.

10 Q Okay.

11 And in addition to that training you
12 received specific training on field sobriety tests?

13 A Correct.

14 Q Okay.

15 What test did you learn to administer during
16 that training?

17 A The, um, lack of convergence and the modified Romberg.

18 Q And you learned that at the academy or you learned that
19 during the ARIDE training?

20 A Specialized ARIDE training.

21 Q Okay.

22 And as to the more general standardized
23 field sobriety tests you learned at the academy, which
24 tests did you learn during that time?

25 A The HGN Tests, the walk and turn, and the one-leg stand.

1 Q What is a HGN stand for?

2 A Um, my mind boggled right now.

3 Q Okay, if you're nervous you can just have a second.

4 A Horizontal gaze nystagmus.

5 Q Okay, there you go.

6 A Sorry.

7 Q That's fine. It happens to the best of us.

8 Okay, now as a trooper, doing traffic stops
9 otherwise, have you come into contact with intoxicated
10 persons?

11 A Yes.

12 Q What observations do you look for?

13 A Um, language; um, speech; um, involuntary indicators,
14 such as, like, um, behaviors; um, eyes; odors; driving.

15 Q And when you say eyes, um, what do you mean?

16 A Um, the color of the white of the eyes; for example,
17 bloodshot eyes, looking for droopy eyelids.

18 Q Specifically, what odors do you look for?

19 A Odor of intoxicants.

20 Q Now you testified that certain behaviors that you look
21 for and mannerism, do all intoxicated persons present
22 the same?

23 A For the most part, yes.

24 Q Now if someone's level of intoxication varies does their
25 behavior vary?

1 A Correct.

2 Q And the physical signs vary as well?

3 A Correct.

4 Q Now more specific, going back to October 3, 2017, were
5 you working on that day?

6 A I was.

7 Q Okay.

8 What were your duties?

9 A I was a road trooper on patrol, covering the township of
10 Royal Oak.

11 Q Okay.

12 And at approximately, at around three p.m.
13 that day, were you on stationary patrol or road patrol?

14 A Stationary patrol.

15 Q Okay, where at?

16 A It was within the township, I don't remember the exact
17 streets.

18 Q Okay.

19 When you say the township what township are
20 you referring to?

21 A Royal Oak Township.

22 Q Would reviewing your police report help you refresh your
23 memory with respect to where you were stationed on
24 patrol?

25 A Yes.

1 MR. KUMMER: Your Honor, may the record
2 reflect, I'm showing defense counsel page one of the
3 trooper's narrative report.

4 THE COURT: Yes.

5 BY MR. KUMMER, (continuing):

6 Q Briefly review that, and look up at me when you're done,
7 to yourself.

8 A All right.

9 Q Did reviewing your report refresh your recollection?

10 A Yes.

11 Q Where were you, um, stationed?

12 A Ah, Pasadena and Westview.

13 Q Okay.

14 And around three p.m. or just prior, what
15 did you observe?

16 A I observed a red Jeep coming southbound on Westbrook
17 (sic) - - or was that - - I'm sorry, Woodside.

18 Southbound on Woodside, um, making a left-hand turn onto
19 Pasadena. And I observed the passenger of the vehicle
20 failing to wear a seatbelt.

21 Q Okay.

22 Um, you stated Woodside a moment ago. Are
23 you, - - is that the location Pasadena and Woodside?

24 A No. Um, did I say Woodside?

25 Q I believe so. I may be mistaken.

1 THE COURT: Just now you did, yes. Southbound
2 on Woodside, left onto Pasadena.

3 THE COURT: I'd have to see the report again.
4 I mean, Westview.

5 BY MR. KUMMER, (continuing):

6 Q Okay.

7 So southbound, Westview to Pasadena?

8 A Yes.

9 Q Okay.

10 A Sorry, it's been a longtime.

11 Q I understand.

12 And you testified that it was a red, Jeep,
13 correct?

14 A Correct.

15 Q Okay.

16 And what did you observe about a red, Jeep?

17 A The front seat passenger was not wearing a seatbelt.

18 Q Okay.

19 And did you conduct a traffic stop?

20 A I did.

21 Q Okay.

22 And as you were conducting a traffic stop,
23 what did you observe?

24 A The front seat passenger was slowly reaching for his
25 seatbelt and putting it over his chest.

1 Q Okay.

2 Now did you have an in-car video camera that
3 was functioning that day?

4 A Yes.

5 Q And it was able to record visual of that traffic stop?

6 A Correct.

7 MR. KUMMER: Your Honor, at this time, um, I
8 believe the parties will stipulate to the start time and
9 the end time. For clarifications of the record, the
10 People ask to, um, publish or (inaudible) I, stipulation
11 and publish to the Court the in-car video on this case.

12 THE COURT: Any objection?

13 MS. SHARON: Um, I stipulate it to the
14 relevant portion. So, he can start to play and then I'll
15 agree a stopping point.

16 THE COURT: This is 14:55, is that correct?

17 MS. SHARON: 14:55:46.

18 THE COURT: Was that the - -

19 MS. SHARON: It's the beginning.

20 MR. KUMMER: Your Honor, there's, ah, two
21 video clips. Um, for the first one I will begin with the
22 video clip that ends in the exhibit I-200.

23 THE COURT: Okay.

24 (At 3:19 p.m., video playing)

25 BY MR. KUMMER, (continuing):

1 Q Trooper Gjurashaj, just state for the Court when you see
2 the red, Jeep?

3 A Right now.

4 Q Now was it as that red, Jeep made the turn that you
5 observed the seatbelt on the passenger?

6 A Yes, sir.

7 Q Okay.

8 When I say seatbelt on the passenger, you
9 testified that it was not buckled, correct?

10 A Correct.

11 Q Um, now with respect to the stop sign, um, watching this
12 again now almost a year later, what do you observe?

13 A At the stop sign?

14 (At 3:19 p.m., video paused)

15 MS. SHARON: Objection, that's leading.

16 THE COURT: Sustained.

17 MR. KUMMER: Well - -

18 MS. SHARON: It assumes that he observed
19 something.

20 BY MR. KUMMER, (continuing):

21 Q Okay.

22 What, if any, traffic device, traffic signs,
23 um, are visible on your in-car?

24 A Oh, the stop sign.

25 Q Okay.

1 And where on the in-car video is the stop
2 sign?

3 A To the left of the video.

4 Q Okay.

5 And, on what road, um, or what traffic would
6 have to obey that stop sign?

7 A All traffic, um, driving east or west, I believe on ah,
8 - - or north and south on Westview.

9 Q Is that stop sign facing the subject vehicle, in this
10 case, the red, Jeep?

11 A Yes.

12 Q Viewing the red, Jeep now does it come to a complete
13 stop?

14 A It does not.

15 Q Now, you never test - - you never indicated that in your
16 report, correct?

17 A Correct.

18 Q Okay.

19 And that wasn't the basis for your stop,
20 correct?

21 A Correct.

22 Q Okay.

23 But viewing that now, are you able to say
24 whether or not a civil in fraction occurred there?

25 A That's correct.

1 Q Correct, I asked - -

2 A A civil infraction did occur.

3 Q Okay.

4 Which civil infraction, sir?

5 A Failing to stop at a stop sign.

6 Q Okay.

7 Is it a civil infraction for a passenger to
8 not wear their seatbelt when in the front seat?

9 A It is.

10 Q Okay.

11 So you conducted a traffic stop, correct?

12 A Correct.

13 Q And did you approach the vehicle?

14 A Yes.

15 Q Okay.

16 And did you advise the occupant the reasons
17 for the stop?

18 A Yes.

19 Q Specifically, you only mentioned the seatbelt?

20 A Correct.

21 Q Now what did you notice upon contact with the driver?

22 A Uh, the driver had, um, bloodshot eyes, glassy and
23 droopy eyelids, and the odor of intoxicants was emerging
24 from the driver's mouth and also from the vehicle.

25 Q Okay.

1 Now I can hear the air conditioner pretty
2 loud, I don't know if I'm standing closer to it, but if
3 you could just try to speak up as loud as possible - -

4 A Yes.

5 Q - - you're being recorded.

6 THE COURT: We can turn it down.

7 BY MR. KUMMER, (continuing):

8 Q Okay.

9 So you testified that you noticed the odor
10 of intoxicants coming from both the inside the vehicle
11 cabin, as well as, the driver's mouth?

12 A Correct.

13 Q Did the driver provide identification?

14 A He did.

15 Q Okay.

16 And what was the driver's name?

17 A Um, Alton Fontenot. Fontenot.

18 Q Okay.

19 Do you see him in court today?

20 A Yes.

21 MR. KUMMER: Let the record reflect, the
22 witness' identification of the Defendant.

23 THE COURT: Yes.

24 BY MR. KUMMER, (continuing):

25 Q After noticing the odor, did you ask the Defendant how

1 much alcohol he consumed?

2 A Yes.

3 Q Okay.

4 And what was his response?

5 A Two (2) Tall Boys.

6 Q Did he state how long ago he consumed those two Tall
7 Boys?

8 A Approximately thirty (30) minutes before I conducted the
9 traffic stop.

10 Q Now, besides the driver, who you identified as the
11 Defendant in this case and the passenger, were there any
12 other occupants in the vehicle?

13 A There was not.

14 Q Did you ask the Defendant to step out for further
15 investigation?

16 A Yes.

17 Q Okay.

18 And what happened once he stepped out of the
19 vehicle?

20 A He stepped out of the vehicle and I conducted a verbal
21 consent search.

22 Q With no results?

23 A No results.

24 Q Okay.

25 And what did you do next?

1 A Um, I advised Mr. Fontenot to have a seat on my bumper.
2 And then I believe I administered a PBT on Mr. Fontenot.
3 Q And are you certified to administer preliminary breath
4 test?
5 A Yes.
6 Q And you received that certification when you were in the
7 academy?
8 A Correct.
9 Q And, to your knowledge, was your PBT device, uh, checked
10 for accuracy?
11 A It was.
12 Q Okay.
13 I'm showing you preliminary breath test
14 instrument calibration maintenance log. Is that log
15 concern your PBT instrument?
16 A Yes.
17 Q Okay.
18 And for the month prior, so in September was
19 there a monthly accuracy check conducted?
20 A Yes.
21 Q Okay.
22 And what date was that?
23 A That was September 27th of 2017.
24 Q Okay.
25 And the date of this offense was October 3rd?

1 A Correct.

2 Q So, roughly a week prior?

3 A Correct.

4 Q Okay.

5 And was the PBT instrument certified as
6 accurate on that date?

7 A Yes.

8 Q And then when was the next test?

9 A December 26th of 2017.

10 Q Okay.

11 And was it accurate on that date?

12 A Yes.

13 Q After administering the preliminary breath test, what
14 results did you obtain?

15 A Uh, zero point fourteen (0.14).

16 Q Now how long into the traffic stop was it before you
17 administered the PBT?

18 A Uh, I would say, minutes.

19 Q And if you wish, I could play the in-car if you're not
20 certain of the time?

21 A Um, yeah, sur.

22 Q I don't want you to guess.

23 A Yep.

24 (At 3:25 p.m. video, playing)

25 Q Trooper Gjurashaj, on which side of the vehicle did you

1 make your approach initially?

2 A Driver side.

3 Q Now going back briefly, I'll just ask you to testify as
4 to, um, what observations you made with respect to any
5 hand motions made by, um, the Defendant for the purposes
6 of a complete record?

7 A As I was searching Mr. Fontenot he makes a motion the
8 size of the beer he consumed.

9 Q Describe for the Court what you're doing with your hands
10 and what you observed on the video?

11 A He was making the size of basically a Tall Boy beer - -

12 Q So how - -

13 A - - with his hands, and the length - -

14 Q So the Court can see what you're doing, but if I read
15 this later, specifically what are the hands doing?

16 A Um, showing the length of the beer, of the Tall Boy.

17 Q Okay.

18 How were the hands positioned, his hands?

19 A Ah, one hand up one hand down portraying the length.

20 Q And approximately how much space is between the hands,
21 if you had to estimate?

22 A About a foot.

23 Q Now the traffic stop was around four fifty-five, forty-
24 five was when you first observed the red, Jeep. Um, what
25 time is it now that you administered the PBT?

1 A Almost 1500.

2 Q I meant to say 1455. So you said 1500, so approximately?

3 A Five minutes.

4 Q And when was the last time that the Defendant state he
5 consumed alcohol?

6 A Approximately thirty (30) minutes before I conducted the
7 traffic stop on him.

8 Q Thirty-five (sic) minutes prior to the PBT?

9 A Correct.

10 Q Based upon the results of the PBT did you choose to
11 administer other tests?

12 A Yes.

13 MR. KUMMER: I'm going to pause the video at
14 this time, your Honor. And if counsel will allow, I'll
15 jump to the beginning of the next test, um, one that he
16 administered.

17 (At 3:30 p.m., video paused)

18 THE COURT: (No verbal response).

19 BY MR. KUMMER, (continuing):

20 Q That test did you administer to the Defendant?

21 A The horizontal gaze nystagmus.

22 Q Okay.

23 What instructions did you provide the
24 Defendant?

25 A Uh, to stand still keeping hands to the side. Uh, head

1 still, follow with eyes and eyes only following the
2 stimulus, that's it, that' is - -

3 Q When you say follow with eyes only, what does that mean?

4 A Um, meaning not to follow the stimuli with the head, but
5 keeping the head still and just following strictly with
6 eyes, with eye moment.

7 Q Would you have told the Defendant keep head still or
8 would you have said, follow with your eyes only? How
9 would you describe it?

10 A I would advise him to keep everything still including
11 his head and follow - - along with follow with eyes and
12 eyes only.

13 Q And did you tell, - - ask the Defendant to remove his
14 glasses in this case?

15 A Yes.

16 Q Okay, did he?

17 A Yes.

18 Q What did you use as a stimulus in this case?

19 A I believe it was my finger.

20 Q Um, would reviewing the in-car video first make you
21 certain?

22 A Yes.

23 (At 3:30 p.m., video playing)

24 (At 3:31 p.m., video paused)

25 Q Okay, now Trooper Gjurashaj, what did you just observe

1 there?

2 A Ah, Mr. Fontenot's fly open.

3 Q Okay.

4 And did you tell him?

5 A Yeah, I advised him to - -

6 MS. SHARON: Objection, relevance.

7 THE WITNESS: - - pull up his fly.

8 MR. KUMMER: Your Honor, may I have a little
9 bit leeway?

10 THE COURT: Sure.

11 BY MR. KUMMER, (continuing):

12 Q Okay.

13 Did he appear surprised when you told him?

14 A Yes.

15 Q Okay.

16 MR. KUMMER: Um, your Honor, I would say as
17 far as relevance if someone's fly is down six minutes
18 (inaudible), and it's a surprised to them that goes to a
19 lack of awareness of his person and surroundings I would
20 say. So say as far as showing impairment it's a relevant
21 clue.

22 THE COURT: Okay, you may proceed.

23 (At 3:33 p.m., video playing)

24 BY MR. KUMMER, (continuing):

25 Q Okay, what are you doing at this time?

1 A Uh, removing the passenger from the suspect vehicle.

2 Q Now I jumped ahead to the administration of further
3 field sobriety tests. First, if you could tell the Court
4 what did you observe when you approached the passenger
5 side of the vehicle?

6 A A twenty-four (24) ounce malt beer between the front
7 passenger's feet - -

8 MS. SHARON: Objection, relevance.

9 THE WITNESS: - - along with.

10 MS. SHARON: The passenger was charged with
11 the open intox, so I don't see how it's relevant to Mr.
12 Fontenot.

13 (At 3:34 p.m., video paused)

14 MR. KUMMER: Your Honor, as far as the facts
15 and circumstances in this case, um, there was an odor of
16 alcohol that was observed in the vehicle but he also
17 observed it from the mouth. So I'm providing a full
18 record of the fact there's open alcohol in the vehicle,
19 um, that that alcohol isn't the sole piece that can be
20 contributed to the Defendant, but the fact that it was
21 coming from his mouth as well, is he able to contribute
22 that strong odor to the Defendant as well.

23 THE COURT: I'll allow it.

24 THE WITNESS: As I was saying, I was
25 observing the open beer carbonated cold to the touch

1 odor of beer coming from the can. And it was also
2 spilled on the floor.

3 (At 3:35 p.m., video playing)

4 BY MR. KUMMER, (continuing):

5 Q And was the passenger place in custody?

6 A He was.

7 Q Now what are you doing currently at the car?

8 A Conducting a verbal consent search of the suspect
9 vehicle along with a probable cause exigent circumstance
10 search of the vehicle.

11 Q Now what are you holding in your hand there?

12 A Um, two (2) cans of unopened twenty-five (25) ounce Tall
13 Boy beers.

14 Q Okay.

15 Where were those beers found?

16 A In the rear, rear center seat of the vehicle in a, like,
17 a grocery shopping Kroger bag.

18 Q Now were those beers warm or cold to the touch as well?

19 A They were cold to the touch.

20 Q So it was at 1504 that you were holding beers in your
21 hand?

22 A Yes.

23 Q Are those - - did the Defendant make any statements as
24 far as if those are the beers that he had previously - -
25 not those specific beer but that type of beer?

1 A Yes. He made statements that, that type of beer were the
2 beers that he consumed prior to me stopping him.

3 Q Okay.

4 Did he say what brand of beer or, um, this
5 specific type of beer?

6 A No. I noted from the cans when I observed them.

7 Q And what the type of beer?

8 A I do not recall. I just remember they were twenty-five
9 ounce Tall Boy beer.

10 Q Okay.

11 How many ounces is a standard serving of
12 beer?

13 A For the most part, usually twelve (12) ounces.

14 MS. SHARON: Objection. I'm not sure how he
15 can testify to that.

16 MR. KUMMER: Okay.

17 Um, your Honor, he can, he's trained in
18 drunk driving as far as investigations. And it's also of
19 something of common knowledge. He's not an expert, he
20 can testify to his knowledge if he knows how much a
21 bottle of beer, how many ounces it is. That's relevant
22 to how much alcohol this Defendant consumed and whether
23 or not that was one drink, two drinks, three drinks, or
24 four drinks.

25 (At 3:37 p.m., video paused)

1 THE COURT: Were these cans open?

2 THE WITNESS: They were unopened.

3 THE COURT: Okay.

4 MS. SHARON: Why is it relevant?

5 BY MR. KUMMER, (continuing):

6 Q Trooper Gjurashaj, he indicated that he had two (2) Tall
7 Boys, he stated to you that he drank thirty (30)
8 minutes, were the same exact type of beer that was found
9 in the backseat?

10 A Correct.

11 Q Okay.

12 And how many ounces were those beers in the
13 backseat?

14 A Twenty-five (25) ounces each.

15 Q Okay.

16 Did you - - were you then led to understand
17 that the two (2) Tall Boy beers he admitted to consuming
18 earlier that day were both two(2) twenty-five (25) ounce
19 cans?

20 A Correct.

21 Q Or twenty-four (24) ounce cans?

22 A Twenty-five (25) ounce.

23 Q Okay.

24 So how many total ounces of beer had he
25 consumed thirty (30) minutes prior to the stop?

1 A Fifty (50) ounces of beer.

2 Q Okay.

3 And what is a standard ounce per serving of
4 beer?

5 MS. SHARON: Objection.

6 THE WITNESS: Ah, twelve (12) ounces.

7 MR. KUMMER: Your Honor, the Court - - it's
8 common knowledge, it's relevant that a standard serving
9 of alcohol, whether it's - -

10 MS. SHARON: I guess my question is, what is
11 he looking to extrapolate from that, that a standard
12 serving is twelve ounces, and what?

13 MR. KUMMER: Well, your Honor, it goes to
14 probable cause determination of how intoxicated this
15 person is. If a person admits to taking one shot of
16 Cognac versus three shots of Cognac that's something the
17 trooper is able to consider in determining whether or
18 not this person's intoxicated or not. So the amount of
19 alcohol that's consumed is directly relative to this
20 case.

21 MS. SHARON: Right. But you've already
22 established that, two twenty-five ounces.

23 MR. KUMMER: I, I - -

24 MS. SHARON: I don't understand how he's
25 qualified to testify of what a regular serving of beer

1 is. A regular serving is what you order. I just think
2 it's irrelevant.

3 MR. KUMMER: Your Honor, a regular serving is
4 not what's ordered. And, both the CDC and I'm sure other
5 governmental agencies that the Court can take judicial
6 notice of public guidelines, for each type of alcohol
7 whether it's, um, one point five ounces for a shot of
8 liquor that's, say eighty proof, or twelve ounces for
9 beer there's a different standard for a "serving" of
10 alcohol depending on these type of spirit.

11 THE COURT: I'll allow it.

12 BY MR. KUMMER, (continuing):

13 Q So how many ounces in a standard serving of beer?

14 A Twelve (12) ounces.

15 Q So approximately how many servings of beer had the
16 Defendant admitted to consuming prior to the traffic
17 stop?

18 A Over four (4) servings.

19 (At 3:40 p.m., video playing)

20 Q Now jumping to the HGN test at 16:45 into the video. Um,
21 for consistency 15:12:30 approximately would be the time
22 stamped.

23 (At 3:43 p.m., video paused)

24 Trooper Gjurashaj, when you first begin the
25 test in this case, what did you look for?

1 A Um, on the actual test?

2 Q (No verbal response).

3 A The actually HGN test?

4 Q So prior to beginning the HGN I'm looking for each of
5 the validated clues. What do you check for and what did
6 you check for in this case?

7 A Uh, just balance; um, ability to follow directions.

8 Q Okay.

9 But, and it's - - my question was not
10 eloquently or artfully stated. Um, specific to the HGN
11 test before you check for each of the validated clues,
12 what do you check for first?

13 A Okay.

14 Q And did you check for in this case, not just general?

15 A Ah, resting nystagmus, equal pupil size and equal
16 tracking.

17 Q Okay.

18 And what is the purpose, um, for checking
19 for each of those things?

20 A Uh, medical reasons. To make sure there's no closed-head
21 injury or any kind of eye issues, optic issues.

22 Q And based upon your observations in this case, was the
23 Defendant medically cleared?

24 A He was.

25 Q Okay.

1 And then what is the first part of the test
2 what first clues do you look for?

3 A Lack of smooth pursuit.

4 Q Okay.

5 And with respect to this case, what did you
6 observe?

7 A Um, I observed lack of smooth pursuit in both eyes,
8 which is commonly known as jerking of the eyes.

9 Q Okay.

10 So both the left and the right, so two clues
11 you observed there, correct?

12 A Correct.

13 Q Okay.

14 What did you test for next?

15 A Nystagmus, sustained nystagmus at maximum deviation.

16 Q And what did you observe with respect to this Defendant?

17 A Um, I observed nystagmus at maximum deviation on both of
18 Mr. Fontenot's eyes.

19 Q Now is that the third and fourth clues that you look
20 for?

21 A Correct.

22 Q Okay.

23 Is it sustained nystagmus, is it distinct in
24 the sustained nystagmus - -

25 A Distinct.

1 Q - - what's the main lingo?

2 A Distinct and sustained nystagmus at maximum deviation.

3 Q Okay.

4 I know you sometimes abbreviate things,

5 because you said (sic) which is for the Court.

6 A Right. Correct.

7 Q Want to say everything.

8 And then what happened when looking for the

9 fourth - - I'm sorry the fifth and sixth clues?

10 A Nystagmus prior to forty-five (45) degrees. Um, I was

11 unable to observe, um, that due to Mr. Fontenot losing

12 focus of the stimulus.

13 Q Okay.

14 And I asked you before, when we had you

15 watch the video to refresh your recollection, but what

16 was your stimulus you used in this case?

17 A Ah, pen.

18 Q And how exactly did he lose focus?

19 A Um, eyes kept shifting attention from the stimuli back

20 to me. And then I would hold it to get attention back,

21 hold the stimulus and once you would get attention back

22 I would try to continue the test, and eyes again lost

23 focused and focused attention to my face.

24 Q Now prior to being in a test, did the Defendant indicate

25 whether he understood your instructions?

1 A Yes.

2 Q And did he follow your instructions?

3 A No.

4 Q Did you, at any point in time, remind him of the
5 instructions?

6 A Yes.

7 Q Were you, after that able to finish the test?

8 A Yes.

9 Q Okay.

10 But in finishing it you weren't able to
11 validate the fifth and sixth clues?

12 A Correct.

13 Q Now would the four out of six clues tell you with
14 respect to, um, possible consumption of alcohol?

15 A Intoxication.

16 Q What was the next test you administered?

17 A I believe it was the lack of convergence test.

18 Q And what is that test?

19 A It is a test, um, testing, um, towards marijuana usage
20 usually typically.

21 Q And did you observe any lack of convergence in this
22 case?

23 A I did not.

24 Q And what was the next test you administered?

25 A The walk and turn test.

1 Q Okay.

2 Did you explain that test to the Defendant?

3 A Yes.

4 Q How did you explain that?

5 A Um, ah, verbally and I also demonstrated to him what was
6 expected of him.

7 Q Okay.

8 MR. KUMMER: And I'll play now for the Court
9 the video depicted your demonstration.

10 (At 3:48 p.m., video playing)

11 BY MR. KUMMER, (continuing):

12 Q Now, how are you positioned your feet right now?

13 A Right foot in front of the left.

14 Q And you're demonstrating?

15 A The walk and turn test. And then I am shortening it by
16 simulating three (3) steps, and then advising once you
17 get to nine (9). And then I'm explaining the turn.

18 Q Do you demonstrate and turn as well?

19 A Yes.

20 Q And making that turn, you kept the left foot planted and
21 make small steps?

22 A Correct.

23 Q Now was the portion of the roadway there, ah, flat?

24 A It was.

25 Q You weren't on a hill?

1 A No.

2 Q Okay.

3 What clues do you look for when
4 administering the walk and turn test?

5 A There is a total of eight (8) clues.

6 Q Could you please name those for the Court?

7 (At 3:49 p.m., video paused)

8 A Yes.

9 Ah, step off the line; um, swaying, using
10 arms for balance; stopping; um, walking heel to toe. Um,
11 and I do not - - I'm not recalling the last three.

12 Q Okay.

13 Now, I'll play Defendant's test and I'll ask
14 you what you observed?

15 (At 3:50 p.m., video playing)

16 (At 3:51 p.m., video paused)

17 Having watched again the Defendant performed
18 the walk and turn test, what physical observation did
19 you make of the Defendant's performance?

20 A The Defendant was, um, tightening his arms to his body
21 in a flexing way, using his arms as a balancing
22 technique. The Defendant stepped off the - - stepped off
23 of the line. Um, the Defendant paused in between each
24 step. And the Defendant, um, improperly turned.

25 Q Okay.

1 Now when you say he was bracing his arms for
2 balance, um, how does that work?

3 A Um, arms are supposed to be kept straight to the sides
4 and hang loosely, but, um, close to the body. And what
5 he was doing was, elbows were bent in and flexed towards
6 the front of his thighs area.

7 Q Okay.

8 What, if anything, did you observe about his
9 hands?

10 A His hands were nearing his pockets of his pants, trying
11 to test. I advised him to keep his hands to his side.

12 Q Now would reviewing the NHTSA Manuel refresh your memory
13 as far as the eight (8) steps?

14 A Eight (8) clues?

15 Q Eight (8) clues?

16 A Yes.

17 MR. KUMMER: May I approach the witness?

18 And, may the record reflect, I'm showing
19 counsel the manual.

20 THE COURT: Yes.

21 BY MR. KUMMER, (continuing):

22 Q Take a look at that quietly to yourself.

23 So reviewing that does that refresh your
24 memory as far as any other clues that you're trained to
25 look for?

1 A Yes.

2 Q Okay, and what were they?

3 A Um, losing the additional where losing balance before
4 instructions, um, starting too soon, and improper steps,
5 improper number of steps.

6 Q Okay.

7 And what, I guess how did the Defendant
8 perform as far as standing in the starting position?

9 A Um, in the starting position I believe he was reminded
10 to, um, to stand in the proper position. And then after
11 he was reminded to do so I believe was, it was fine
12 until the test began.

13 Q Okay.

14 Now how many, um, clues would you say you
15 observed when administering the walk and turn test?

16 A Um, I would say three (3), three clues, possibly four
17 (4).

18 Q Okay.

19 And in summation, what were those clues?

20 A Uh, stepped off the line; the heel to toe; um, improper
21 turn; and the stop, stop, the stop in between the walks,
22 the steps. Or I should say the monetary pauses between
23 each stop.

24 Q Okay.

25 Now regarding the next test you

1 administered, which was that?

2 A The one-leg stand.

3 Q Okay.

4 Did you provide the Defendant instructions
5 as far as what his expectations - - what your
6 expectations were of him doing that test?

7 A Yes.

8 Q Okay.

9 Did you demonstrate that test for him?

10 A Yes.

11 Q Okay.

12 And did you look for during the walk, ah,
13 one-leg stand test?

14 A Um, as far as the clues?

15 Q Yes.

16 A Um, hopping, putting foot down, using arms for balance,
17 and swaying, four (4) clues.

18 Q Did you instruct the Defendant to keep his arms by his
19 side during the test?

20 A Correct.

21 Q How did you instruct him to position his foot?

22 A Ah, six (6) inches off of the ground keeping the foot
23 parallel to the ground, with the foot of his own
24 choosing whatever he's more comfortable with. And I
25 specified, um, not pointing the toe or the front of the

1 foot up or down, but to keep it parallel to the ground.

2 Q Now you're making different motions with your arms and
3 your legs, what are you demonstrating when?

4 A Demonstrating how to keep the arms properly positioned
5 and how not to. How to keep both legs properly
6 positioned and not to, which I was advising to keep both
7 legs straight and not canted or bent.

8 Q Now I was asking you a question while he was performing
9 the test (inaudible).

10 (At 3:56 p.m., video playing)

11 (At 3:58 p.m., video stopped)

12 Were you timing the Defendant during that
13 test?

14 A Yes.

15 Q Okay.

16 Did you instruct the Defendant to count
17 during that test?

18 A Yes.

19 Q Okay.

20 What was he to count to?

21 A Um, he was to count until I told him to stop.

22 Q Okay.

23 And what did you observe the Defendant do
24 during that test?

25 A Ah, the Defendant used his arms for balance. He put his

1 - -

2 Q How so?

3 A Um, he was again flexing his arms towards his body,
4 towards his pocket area. Um, at one point, he put his
5 thumb in his pocket and attempted to assist with
6 balance. And I advised him to pull his thumb out of his
7 pocket, which he did. And, um, - -

8 Q What else did you observe?

9 A Him putting his foot down three (3) times.

10 Q With respect to counting how was his performance in the
11 counting?

12 A The counting, he miscounted. Um, after the second time
13 he put his foot onto the ground. I believe he left off
14 and one thousand thirteen. And when continuing for the
15 third time he presumed the count in a backwards way at
16 eight thousand and one, or - -

17 Q Was it eight thousand and one or was it one thousand and
18 eight?

19 A One thousand and eight.

20 Q You need to review your report?

21 A Yes.

22 Q Now when did you author your report?

23 A When did I?

24 Q Did you author your report shortly after?

25 A Yes.

1 Q Okay.

2 Review that portion to yourself. Okay, do
3 you remember verbatim what he said when he resumed
4 counting?

5 A Um, eight one thousand, nine one thousand, ah, ten one
6 thousand and so on and so forth.

7 Q And how are you able to know that, that is what he said
8 at that time a year later?

9 A Ah, I wrote it down.

10 Q Okay.

11 A In the car.

12 Q Now, based upon the Defendant's performance on the one-
13 leg stand what opinions did you draw during your
14 investigation?

15 A That he failed the one-leg stand, using arms for
16 balance. Um, miscounting, putting his foot down multiple
17 times. And, ah, swaying his body in referenced to using
18 his arms for balance.

19 Q Now he's not, you know, swaying dramatically?

20 A Correct.

21 Q Okay.

22 Um, how would you characterize his swaying?

23 A Like a jerk sway.

24 Q Um, what was the next test you administered?

25 A The Modified Romberg.

1 Q Okay.

2 And explain the Modified Romberg to the
3 Court?

4 A Ah, Modified Romberg is, um, have the subject stand
5 there the same as the other tests, um, feet together,
6 hands to the side not moving. Um, they have to count on
7 their own internal clock within their head not out loud
8 two thirty seconds and, um, at the same time their head
9 to be tilted back and then internal clock of thirty
10 seconds. Once they hit thirty seconds in their mind
11 they're to advise me.

12 Q Okay.

13 Now did you explain that test clearly to the
14 Defendant that day like you did just now?

15 A Yes.

16 Q Okay.

17 And did you time the test as it occurred?

18 A Yes.

19 Q What did you use to time the test?

20 A My stopwatch.

21 Q Okay.

22 Um, in addition to obviously, you know, what
23 time key, how much time passes before he tells you to
24 stop, what else are you looking for during this test?

25 A Swing of the body and eyelid shuttering or fluttering.

1 Q Okay.

2 A Movement.

3 Q Um, what did you observe in this case?

4 A A swing of back and forth of about one inch.

5 Q And how much time had passed when the Defendant
6 estimated that thirty seconds had passed?

7 A Sixteen (16) seconds approximately.

8 Q That was sixteen (16) seconds?

9 A Yes. Approximately.

10 (At 4:03 p.m., video playing)

11 (At 4:04 p.m., video paused)

12 BY MR. KUMMER, (continuing):

13 Q So is this test solely tests looking for physical
14 manifestations or also mental, um, capabilities of the
15 subject?

16 A Also mental capabilities I believe.

17 THE COURT: I'm sorry, I didn't hear that.

18 THE WITNESS: Also mental capabilities I
19 believe.

20 THE COURT: Okay.

21 MS. SHARON: Objection. He believes or he
22 knows? If he doesn't know he shouldn't be testifying to
23 it.

24 MR. KUMMER: Okay, that's fair.

25 BY MR. KUMMER, (continuing):

1 Q Um, do you believe or are you more certain in your
2 answer?

3 A More certain.

4 Q Okay.

5 You want to restate your answer for counsel?

6 A Yes. It is a mental and a physical.

7 Q Okay.

8 Now throughout the standardized field
9 sobriety test and the non-standardized that you
10 administered, how would you describe Defendant's overall
11 demeanor?

12 A Ah, could you ask that again, I'm sorry?

13 Q How would you describe Defendant's overall demeanor
14 throughout your investigation?

15 A Um, lethargic, um, uncoordinated movements. Um, you said
16 behavior?

17 Q Yes.

18 A Um, not following directions.

19 Q What did the Defendant's performance on the field
20 sobriety test indicate to you?

21 A He was intoxicated.

22 Q So based upon all of the facts and circumstances known
23 to you following the Modified Romberg test, what did you
24 do?

25 A I placed Mr. Fontenot under arrest for operating under

1 the influence of alcohol.

2 MR. KUMMER: Your Honor, at this time, I have
3 no further questions for the witness.

4 THE COURT: Thank you. Cross-exam.

5 CROSS-EXAMINATION

6 BY MS. SHARON:

7 Q Can you pronounce your last name for me, please?

8 A Yes, Gjurashaj.

9 Q Gjurashaj?

10 A Yes.

11 Q Okay,, I'm going to just call you trooper.

12 A That's fine.

13 Q Okay.

14 Um, Okay, so let's first talk about the
15 video. Can you tell me why there's no sound?

16 A Um, it could - - I believe it was an issue with our
17 portable microphones.

18 Q Do you actually recall, um, turning on the sound?

19 A Yea, turning on the sound - - you mean turning the mic
20 on?

21 Q Yes.

22 A Yes.

23 Q Okay.

24 So you think that you did turn on your mic?

25 A Yes.

1 Q Okay.

2 And that is something that's under your
3 control, correct?

4 A Yes.

5 Q Okay.

6 And during this traffic stop, was there
7 another officer present?

8 A No.

9 Q You were there alone?

10 A Yes.

11 Q Okay.

12 How was it that you remembered turning the
13 microphone on?

14 A I, I turn it on at the beginning of every shift when I
15 turn on the - - or get my patrol car up and running.

16 Q So it's not something that you would turn on at the
17 beginning of the traffic stop?

18 A No.

19 Q You have it running for the entire - -

20 A Entire shift.

21 Q Okay.

22 How long was this problem with the
23 microphones, do you know?

24 A A problem in?

25 Q Well, you said there was a problem with the microphone

1 that's why there's no sound?

2 A I don't recall. It could have died or it could have been
3 a syncing issue, I'm not sure.

4 Q Oh, a sync like syncing with the computer?

5 A They have to sync, yeah. Well they have to sync with the
6 camera system because they're wireless.

7 Q Okay.

8 A And there's usually two recorders in the car, um, this
9 one had one and it's synced. Sometimes they go out of
10 sync when someone else uses the patrol car or they might
11 switch mics.

12 Or, at this point, I was nine (9) hours into
13 my shift, so it could have died.

14 Q Okay.

15 Is there some way for you to become aware
16 that there's a problem with the mic?

17 A No.

18 Q Okay.

19 Um, now when you're conducting the traffic
20 stop, um, and you're administering the various field
21 sobriety tests you're not taking notes there out on the
22 roadway, correct?

23 A I believe at one point I did, but no.

24 Q Okay.

25 Um, you didn't take notes right have

1 conducting the horizontal gaze nystagmus, correct?

2 A Correct.

3 Q Um, you didn't take notes after conducting the walk and
4 turn?

5 A Correct.

6 Q Ah, not after the one-leg stand?

7 A Correct.

8 Q Not after the Modified Romberg?

9 A The Modified Romberg I did.

10 Q You think you did?

11 A Yes.

12 Q Okay.

13 Um, I'm not really going to bother much with
14 the lack of convergence. Can we agree, let's just
15 quickly address the lack of convergence. Can we agree
16 that your results from the lack of convergence did not
17 indicate impairment to you?

18 A Correct.

19 Q Okay.

20 Um, okay. So when did you write your report
21 in this case?

22 A Um, after I finished the paperwork for Mr. Fontenot as
23 he was waiting in the cell, I was typing the report.

24 Q Okay.

25 So you finished your FST's, you place him

1 under arrest, correct?

2 A Correct.

3 Q So does he go in the backseat with the passenger?

4 A No. He goes in the front seat.

5 Q Okay.

6 But you're all in the same vehicle?

7 A Yes.

8 Q Okay.

9 You transport both of them back to where?

10 A No. I released the backseat passenger.

11 Q Okay.

12 A With a citation of open intox.

13 Q Okay.

14 A And I transport just Mr. Fontenot to the Metro North
15 Post.

16 Q Okay.

17 So there is some time spent in the cruiser
18 writing the citation to the passenger, correct?

19 A Correct.

20 Q Okay.

21 And then you release him for the open intox,
22 with the open intox citation?

23 A Correct.

24 Q Okay.

25 And he goes on his merry way. And then you

1 transport Mr. Fontenot to the Post, correct?

2 A Correct.

3 Q Okay.

4 So how long do you think after administering
5 all of the field sobriety tests and then dealing with
6 the passenger and releasing him and getting to the Post?

7 MR. KUMMER: I would object to relevance?

8 MS. SHARON: The accuracy of the report
9 because of how long it takes him to write it, to get to
10 the point of writing it.

11 MR. KUMMER: If that's where counsel is
12 going, that's fine.

13 MS. SHARON: Yes.

14 MR. KUMMER: Withdraw the objection.

15 THE COURT: Okay.

16 BY MS. SHARON, (continuing):

17 Q So just getting to the Post, how long do you think that
18 took?

19 A I would say, after my traffic stop, after he was placed
20 into custody?

21 Q Yes.

22 A Ah, roughly - - well this one was longer because I
23 waited for his mother to come pick up the vehicle.

24 Q Mr. Fontenot's?

25 A Yes.

1 Q Okay.

2 So about how long do you think?

3 A I'd say at least a half an hour.

4 Q Okay.

5 A Maybe forty (40) minutes, I'm not sure exactly.

6 Q So thirty (30) to forty (40) minutes just to get to the

7 Post?

8 A Yes, about.

9 Q Okay.

10 And then when you get to the Post, um,

11 you're the one that administered the data master?

12 A Yes.

13 Q Okay.

14 And so, when you get to the Post, um, you

15 put him in the room with the data master is, correct?

16 A Correct.

17 Q And you have paperwork that you have fill out for the

18 data master, correct?

19 A Correct.

20 Q Okay.

21 Now it's not at that time you're writing

22 your report, it's after you administered the data master

23 that you're going to start writing your report, correct?

24 A Correct.

25 Q Okay.

1 So is it fair, you tell me, that you've got
2 at least another thirty (30) minutes until you're
3 writing your report?

4 A Approximately, yes.

5 Q Okay.

6 So we've got at least a good hour after
7 you've administered these field sobriety tests that
8 you're sitting down to write your report?

9 A Correct.

10 Q Of which you have no notes about any of them, except the
11 Modified Romberg?

12 A I don't recall. I know I jot - -

13 Q Well you just - -

14 A - - I jot notes, but on scene I only jotted Modified
15 Romberg.

16 Q Okay. Um, - -

17 A Before I usually start typing my reports I'll jot down
18 notes for the field sobriety tests just so I have a
19 generalization of like stuff that stuck out.

20 Q Okay.

21 Now, my understanding is, that there's no
22 video of the booking process or the administration of
23 the data master, do you know why that is?

24 A I have no clue.

25 Q Do you have any control over whether or not those

1 activities are videoed?

2 A No, that's all administration.

3 Q Okay.

4 Okay, so at the time of this stop you said
5 that you've been, you've been a trooper for about two
6 years?

7 A To two, two and half, closer to two and a half.

8 Q Okay.

9 And, at that point, do you know how many
10 drunk driving stops you had made?

11 A I do not know.

12 Q Can you estimate?

13 A Ah, quite a bit. Um, over twenty (20) for sure.

14 Q Okay.

15 Can we agree that at this point in time,
16 where were maybe seven (7), eight (8) months after this
17 traffic stop that you don't have a specific recollection
18 about this traffic stop, but that you need the report to
19 refresh your memory, and the video to refresh your
20 memory about this traffic stop?

21 A I still remember the traffic stop.

22 Q Do you remember the specifics about the traffic stop?

23 A Some of them.

24 Q Okay.

25 A But I would need a little bit of refreshing.

1 Q Okay.

2 A It's been a little while.

3 Q Um, can we agree that a subject's performance on field
4 sobriety tests can only be as good as the instruction
5 that he receives?

6 A Yes.

7 Q Okay.

8 And, um, and while you have a routine of
9 instructing on field sobriety tests, we can't know for
10 sure if you instructed in the correct way because we
11 don't have any sound from the traffic stop, correct?

12 A Not necessarily ,no.

13 Q Not necessarily?

14 A No.

15 Q Okay.

16 Um, so are you saying that you are - - that
17 you never make mistakes?

18 A No, I make mistakes.

19 Q Okay.

20 And it is entirely possible that instructing
21 Mr. Fontenot you may have forgotten an instruction, is
22 that fair?

23 A Possibly, but not that I remember.

24 Q Okay.

25 But again, your memory of this traffic stop

1 isn't perfect, correct?

2 A Correct.

3 Q And it isn't complete, fair?

4 A What do you mean by isn't complete?

5 Q In other words, you don't remember every single detail
6 of the traffic stop?

7 A Correct.

8 Q Okay.

9 Now you didn't observe any erratic driving
10 from Mr. Fontenot, correct?

11 A Correct.

12 Q Okay.

13 And you only observed his actual driving for
14 a few seconds before you pulled him over, correct?

15 A Correct.

16 Q Okay.

17 Um, do you know that you're required to wait
18 fifteen (15) minutes before administering a PBT?

19 A No.

20 Q Okay.

21 Do you know that you're required to
22 determine that nothing has been in the subject's mouth
23 for fifteen (15) minutes prior to administering the PBT?

24 A No.

25 Q And you never asked Mr. Fontenot prior to administering

1 the PBT if he had anything to eat or drink within
2 fifteen (15) minutes of administering the PBT, correct?

3 A A drink - -

4 Q Drink?

5 A - - of him advising of the beers thirty (30) minutes
6 prior.

7 Q Right.

8 But you didn't ask him if he had anything
9 else to drink or eat?

10 A No.

11 Q Or if he had vomited within fifteen (15) minutes?

12 A No.

13 Q Okay.

14 I'm going to take some of the field sobriety
15 test out of order.

16 A Okay.

17 Q Okay.

18 The Modified Romberg, okay? Um, this is in
19 your ARIDE manual, correct?

20 A Yes.

21 Q It's not a standard field sobriety test, correct?

22 A Correct.

23 Q Okay.

24 Um, can we agree that there are no validated
25 clues for a Modified Romberg Test?

1 A I believe there was.

2 Q What do you believe are validated clues for the Modified
3 Romberg?

4 A The swaying and the eyelash flutter.

5 Q So you believe that there as scientific, scientifically
6 validated clues for the Modified Romberg?

7 A I don't know, I'm not a scientist it's just what we were
8 told in training.

9 Q Okay.

10 Well when you are trained in horizontal
11 gaze, one-leg stand you have clues that you're supposed
12 to look for, correct?

13 A Correct.

14 Q And those, am I correct, are validated clues because
15 there's science to support those clues?

16 A Correct.

17 Q Okay.

18 Can the same be said for the Modified
19 Romberg?

20 A I don't know.

21 Q Okay.

22 Um, now one of the things that you said
23 you're supposed to record is the actual time that, ah,
24 Mr. Fontenot keeps his head back that he actually
25 estimates, correct?

1 A Correct.

2 Q Okay.

3 And you put in your report that he estimated
4 sixteen (16) seconds?

5 A Correct.

6 Q Okay.

7 Where did you get that from?

8 A (No verbal response).

9 Q Where does sixteen (16) seconds come from?

10 A I count it on my watch when he started.

11 Q Okay.

12 Okay, and when we watched the video did you
13 notice that it was actually twenty-three (23) seconds?

14 A No.

15 Q Okay.

16 Do you dispute the video?

17 A When did you start counting?

18 Q From the minute that he put his hand back and started
19 the test.

20 A I started count - - I'm not sure exactly when you
21 started. I started when he said ready.

22 Q Okay.

23 A So.

24 Q So you think there's a difference between when he said
25 ready?

1 A You could be portraying it differently because I had it
2 on my stop watch.

3 Q Okay.

4 And when did you write down the notice
5 sixteen (16) seconds?

6 A Right when I'm putting my notebook away, as I wrote it
7 right there.

8 Q Okay.

9 Now your training, um, just one second. The
10 training manual doesn't teach you or doesn't indicate
11 what that swaying is a sign of impairment, correct?

12 A The Modified Romberg?

13 Q Correct.

14 A No, it indicates impairment.

15 Q It does?

16 A The swaying of the body.

17 Q Your manual tells you that you should write down if you
18 observe swaying, correct?

19 A I don't know. I haven't reviewed the manual in a
20 longtime.

21 Q Okay.

22 But you believe that if you observe swaying
23 your manual teaches you that that's a sign of
24 impairment?

25 A My training does.

1 Q Does the manual - -what do you mean your training?

2 A I, I don't know.

3 Q What do you mean your training?

4 A My training of ARIDE for the Modified Romberg?

5 Q Yes.

6 A It's a sign of intoxication.

7 Q Okay.

8 So your ARIDE training manual teaches you
9 that swaying is a sign of impairment?

10 A I don't know about the manual, saying what we learned in
11 training.

12 Q Okay.

13 How many inches does a subject have to sway
14 for it to be a sign of impairment?

15 A I don't know.

16 Q The manual doesn't teach you that if a subject is
17 inaccurate in estimating time that that's a sign of
18 impairment, is that correct?

19 A Can you ask that again, please?

20 Q Sure.

21 The manual, your training, ARIDE manual does
22 not teach you that if a subject is in accurate in
23 estimating time that that is sign of impairment?

24 A My training indicates it is a sign of impairment.

25 Q That's contained in the training manual?

1 A I would assume so.

2 Q You would assume so, okay.

3 Do you believe that the manual tells you
4 that body tremors are an indication of impairment?

5 A I don't recall.

6 Q Okay.

7 Isn't the Modified Romberg used to detect
8 drug impairment?

9 A Alcohol and/or drug impairment.

10 Q It's used to detect both?

11 A It can be.

12 Q Okay.

13 How do you know that?

14 A Just training.

15 Q What training?

16 A ARIDE training.

17 Q So you believe that your ARIDE training teaches you that
18 Modified Romberg it's used to detect drugs and alcohol?

19 A Specifically drugs, but it can also detect alcohol.

20 Q And what's your - -

21 A Alcohol causes poor balance, so.

22 Q Okay, so that's your authority for that?

23 A Mm, my - -

24 Q What's your authority that the Modified Romberg is used
25 to detect alcohol, impairment by alcohol?

1 MR. KUMMER: Your Honor, this question's been
2 asked and answered. He's repeatedly said my training.

3 MS. SHARON: No he didn't, he said
4 specifically drugs but also maybe alcohol. So I'd like
5 to know more specifically where he's getting this
6 authority from.

7 THE COURT: That's fine, I'll allow.

8 THE WITNESS: Authority as in?

9 BY MS. SHARON, (continuing):

10 Q What scientific authority that the Modified Romberg is
11 used to detect alcohol impairment?

12 A Umm, again I'm not a scientist it's just what we were
13 told in ARIDE training, so.

14 Q Okay.

15 Is it true, that the Modified Romberg is not
16 listed in your field sobriety training manual?

17 A Correct.

18 Q Okay.

19 When you, um, administered the horizontal
20 gaze nystagmus you had Mr. Fontenot remove his glasses,
21 correct?

22 A Yes.

23 Q Okay.

24 And those remained off for the lack of
25 convergence?

1 A Yes.

2 Q Okay.

3 And they remained off for the walk and turn?

4 A Yes.

5 Q And the one-leg stand?

6 A For every test.

7 Q Okay.

8 Um, now you demonstrate those field sobriety
9 tests so that he can watch you, um, perform them and see
10 how they're supposed to be properly performed, correct?

11 A Correct.

12 Q But you never had him put his glasses back on?

13 A I gave him the option.

14 Q You gave him the option?

15 A Yes.

16 Q Okay.

17 Do you see anywhere in your report where you
18 say that you gave him the options of returning - -

19 A No.

20 Q - - his glasses to his face?

21 A No.

22 Q Okay.

23 As a matter of fact, you indicate that his
24 glasses remained off for all sobriety tests, correct?

25 A Correct.

1 Q Okay.

2 Okay, let's talk about the walk and turn.

3 Um, you testified that a subject's arms are supposed to
4 hang loosely at the side of the body, correct?

5 A Correct.

6 Q Okay.

7 Um, that language is contained nowhere in
8 the Standard Field Sobriety Test Manual, correct?

9 A Correct.

10 Q Okay.

11 The instruction is that the arms have to be
12 at the subject's side, correct?

13 A Correct.

14 Q Okay.

15 You said that you observed a tightening of
16 the arm to the body and that that was an indicator of
17 impairment to you, correct?

18 A And indicator of assisting in balance.

19 Q Okay.

20 But the clue of impairment that you're
21 trained to look for is for the subject to raise his arms
22 away from the body, correct?

23 A Correct.

24 Q Okay.

25 There is no clue for you to look for, for a

1 subject keeping his arms close to the body, correct?

2 A I'm confused.

3 Q Okay.

4 You have eight (8) clues to look for in the
5 walk and turn, correct?

6 A Right. One of that - - that is not one of the clues,
7 your right, yes.

8 Q Okay.

9 There is no violation of the walk and turn
10 test for keeping your arms too close to the body,
11 correct?

12 A Correct.

13 Q You said that you thought Mr. Fontenot was impaired
14 because he paused between each step, correct?

15 A Yes.

16 Q Okay.

17 Doesn't your training warn you not to count
18 as a clue if the subject walks slowly?

19 A He wasn't walking slowly he was pausing in between each
20 step.

21 Q Even, even that, your training warns you not to count
22 that as a clue?

23 A That is a clue because you're stopping between each
24 step.

25 Q You think a clue is if, is if he stops in between the

1 steps?

2 A Yes.

3 Q Okay.

4 A Because you're regaining your balance.

5 Q Okay.

6 But in your report you didn't say that he
7 stopped in between each step, you said that he walked
8 slowly?

9 A I thought I had put momentarily paused, could be wrong.

10 Q Well you wrote, "But walks slowly and lethargically and
11 momentarily paused between each step."

12 A Right.

13 Q So which one is it? Did he walk slowly or did he stop?

14 A All of them, what I put in the report.

15 Q So he did successfully walk heel-to-toe, correct?

16 A Yes.

17 Q Okay.

18 And when you write that, "Fontenot kept his
19 elbows bent and kept his thumbs in his pocket." You
20 didn't instruct him at the beginning that he could put
21 his thumbs in his pocket you just instructed him that
22 his arms had to be at his side, correct?

23 A Correct.

24 Q And they were at his side, correct?

25 A Correct.

1 Q Okay.

2 And when you instructed him to remove them
3 from his pocket, he did so, correct?

4 A Correct.

5 Q Okay.

6 And he took the correct number of steps,
7 correct?

8 A Yes.

9 Q And he counted out loud, correct?

10 A Yes.

11 Q And he counted the correct number of steps, correct?

12 A Yes.

13 Q And he did not start too soon, correct?

14 A Correct.

15 Q Okay.

16 Now you said - - did he step off the line?

17 A Yes.

18 Q Okay.

19 And is that something that we can see on the
20 video?

21 A No, the patrol car blocked it.

22 Q Okay.

23 What does that mean, steps off the line?

24 A Just went off of track of - -

25 Q Does that mean that he's not walking on a straight

1 traductory that he'd be walking like in an angle?

2 A No. Um, when walking heel-to-toe, um, the feet are to be
3 in front of one another. So stepped off the line would
4 be, one foot came out here and then came back and then
5 veered its way back in kind of thing.

6 Q So can you walk off the line but still remain heel-to-
7 toe?

8 A Yes.

9 Q Okay.

10 THE COURT: Before you ask your next
11 question, let's take a five minute break. Sorry.

12 (At 4:27 p.m., recess)

13 (At 4:32 p.m., reconvened)

14 THE OFFICER OF THE COURT: All right.

15 THE COURT: We were on the walk and turn. You
16 were just finished with feet on the line, correct? I
17 think it was the last thing we talked about.

18 MS. SHARON: Yes, your Honor.

19 THE COURT: Okay.

20 BY MS. SHARON, (continuing):

21 Q How was, ah, Mr. Fontenot's turn incorrect?

22 A Um, - -

23 Q On the walk and turn?

24 A It was, um, almost one motion instead of a series of
25 small steps.

1 Q So he didn't lose his balance?

2 A No.

3 Q Um, and he didn't do it in the wrong direction?

4 A Correct.

5 Q Okay.

6 And he, um, you're supposed to keep one leg
7 stationary, correct?

8 A Planted, yes.

9 Q Okay, planted, that was - -

10 A Yes.

11 Q He kept the correct leg planted, yes?

12 A Correct.

13 Q Okay.

14 Um, and he kept his balance during the, um,
15 instructional phase, correct?

16 A Correct.

17 Q Okay.

18 Ah, the one-leg stand, you, on direct
19 examination you made a comment that he put his hand in
20 his pocket again during the one-leg stand, do you
21 remember testifying to that?

22 A Yes.

23 Q Can we agree that that's nowhere in your report?

24 A Uh, I thought it was something with the hands.

25 MS. SHARON: May I approach, your Honor?

1 THE COURT: Yes.

2 BY MS. SHARON, (continuing):

3 Q Is that correct?

4 A Correct.

5 Q Okay.

6 So there's no mentioned in the report on the
7 one-leg stand that he placed his hand in his pocket,
8 correct?

9 A Correct.

10 Q Okay.

11 But his arms were to his side, correct?

12 A Yes.

13 Q And that what's required?

14 A Yes.

15 Q Okay.

16 And that's what you instructed him to do?

17 A Yes.

18 Q In terms of his arms at least?

19 A Yes.

20 Q Okay.

21 Um, the horizontal gaze nystagmus, - - um,
22 let me ask you one other thing. You have no notation
23 here before the walk and turn test, um, that prior to
24 demonstrating the test you asked Mr. Fontenot if he had
25 any physical limitations that would prevent him from

1 performing the test, would you agree?

2 A I asked, um, before conducting the sobriety tests.

3 Q Okay.

4 My question is, would you agree, that in
5 your report there's no indication that prior to
6 conducting the walk and turn you asked him if he had any
7 problems with his back, hip, knee, anything like that?

8 A I asked if he had any, um, physical issues.

9 Q When did you ask that?

10 A Before the HGN.

11 Q Okay.

12 A I'd asked one time and that was it.

13 Q Okay.

14 And how do you phrase the question? Or, let
15 - - on this occasion do you recall exactly how you
16 phrased the question?

17 A Not exactly. But I use a common, um, do you have any
18 medical issues or physical issues that would prevent you
19 from conducting sobriety tests, is how I usually word my
20 question.

21 Q Okay.

22 Let me ask you something, how is the subject
23 supposed to know what physical test they're going to be
24 asked to do?

25 A Watching cops.

1 Q Okay.

2 Well, um, I don't even watch cops.

3 A Me neither.

4 Q Okay.

5 So, again, how is the test subject supposed
6 to know what physical tasks you're going to be asking
7 him or her to do?

8 A I'm unsure.

9 Q Okay.

10 A If he knows or not.

11 Q So from that question, um, there's really no indication
12 to the test subject what type of task you're going to be
13 asking that person to do, is that fair?

14 A Yes.

15 Q Okay.

16 So you don't specifically ask, um, would you
17 have trouble maintaining your balance? Do you have
18 physical limitation that would make it difficult for you
19 to maintain balance or, okay?

20 A (No verbal response).

21 Q No?

22 A No.

23 Q Okay.

24 And you don't specifically ask, um, the test
25 subject if they have any physical elements with their

1 back, or hip, or legs, knee anything like that?

2 A I keep it general, just with the body.

3 Q General?

4 A Yes.

5 Q Okay.

6 Is that what you're training teaches you to
7 do or does your training teaches you to ask more
8 specifically if they have any pain or problems with
9 their back, knee, or hips?

10 A I don't believe so.

11 Q You don't think that's required of your training?

12 A No.

13 Q I'm sorry?

14 A No.

15 Q Okay.

16 Um, you made a notation in your report that
17 I thought was more interesting, I was curious why you
18 put it in there. Um, you made a note that, "Fontenot sat
19 in the front push bumper of my patrol car," why did you
20 put that in there?

21 A Where at in the report is that?

22 THE COURT: Yes.

23 THE WITNESS: Nothing just that he sat on my
24 push bumper.

25 BY MS. SHARON, (continuing):

1 Q Okay.

2 A Yeah, there's nothing, no hidden meaning to that.

3 Q Okay.

4 You didn't out it there to suggest that he
5 had to sit because he couldn't manage to stand or
6 anything like that?

7 A No.

8 Q Okay.

9 Um, you talked earlier about Mr. Fontenot's
10 hand gesture of allegedly showing the size of the beer
11 that he consumed, right?

12 A Correct.

13 Q Okay.

14 Um, did you also notice that there was a
15 time shortly after that when you were walking away and
16 he was talking to you and he held up one finger, did you
17 notice that?

18 A No.

19 Q Okay.

20 Is it possible he told you that he only had
21 one (1) beer?

22 A No, he told me two (2).

23 Q Okay.

24 Do you have any training that tells you that
25 if a man's fly is open that it's a sign of impairment?

1 A No.

2 Q Okay.

3 When were you SFT certified?

4 A While I was in the Michigan State Police Academy.

5 Q What manual were you trained with?

6 A The manual that would've been issued in 2015.

7 Q And ARIDE, same question?

8 A ARIDE I believe was in 2016.

9 Q You said that, um, Mr. Fontenot said he had two (2) Tall
10 Boys thirty (30) minutes prior. Did you ask him over
11 what period of time he consumed those two (2) Tall Boys?

12 A No.

13 MS. SHARON: John can I just change that
14 video for a second?

15 MR. KUMMER: That's fine.

16 (At 4:40 p.m., video playing)

17 BY MS. SHARON, (continuing):

18 Q Okay.

19 So if you could just watch, the time stamp
20 is 15:00:08. Do you see how he just stuck up one finger?

21 A I missed that, I'm sorry.

22 Q I know I didn't give you much warning. Just give me one
23 second.

24 Do you see how he just stuck on one finger?

25 A Yes.

1 Q Do you remember what he was saying to you?

2 A No idea.

3 (At 4:41 p.m., video paused)

4 Q Okay.

5 Um, just one question about the horizontal
6 gaze nystagmus. The nystagmus part of forty-five (45)
7 degrees, um, how does that work?

8 A Um, - -

9 Q How do you estimate, um, forty-five (45) degrees?

10 A Well you just kind of visualize a ninety (90) degree
11 angle and you hit about half of that.

12 Q How does your training teaches you to do that?

13 A I don't recall.

14 Q Okay.

15 But it does teach you a specific way to
16 estimate forty-five (45) degrees, right?

17 A I don't remember.

18 Q Okay.

19 Um, how do you the distinct and distained
20 (sic), sustinct (sic) - -

21 A Sustained, distinctive - -

22 Q Sustained and distinct nystagmus, where do you take the
23 stimulus to for, um, sustained and distinct nystagmus?

24 A Um, to the outside until you can no longer see white in
25 the eye.

1 Q Okay.

2 Um, there's a point there where you take a
3 stimulus all the way past Mr. Fontenot's shoulder and
4 several inches past his shoulder. Do you know what
5 portion of the test you're doing at that point?

6 A (No verbal response).

7 Q Are you doing sustained and distinct or are you doing
8 forty-five degrees?

9 A I would have to see the video.

10 Q Okay.

11 A By the way you're explaining it, I would say, maximum
12 deviation to really get the eye all the way over to not
13 see white.

14 Q Okay.

15 Isn't maximum deviation only supposed to be
16 out to the edge of the shoulder?

17 A No.

18 Q It's not?

19 A Supposed to be until you no longer see white of the eye.

20 Q Okay.

21 MS. SHARON: Your Honor, I think for the most
22 part I'm done, except for the fact that, um, regarding
23 the testimony on the Modified Romberg. Your Honor, um, I
24 would just like to show the witness the ARIDE Manual and
25 ask him to, um, the section on the Modified Romberg and

1 ask him if he could show me portions that support his
2 testimony.

3 THE COURT: Okay. You have that on your
4 laptop?

5 MS. SHARON: Yes.

6 THE COURT: So you want to approach him with
7 your computer?

8 MS. SHARON: Yeah.

9 MR. KUMMER: Your Honor, I have a manual pull
10 up on my, um, device as well. However, I would like to
11 just quickly see what is being shown to verify that
12 we're working off the same - -

13 MS. SHARON: Sure. It's 2017 Instructor
14 Manuel. And it would be page one fifty-one which talks
15 about the test interpretation of the Modified Romberg.

16 THE COURT: Is that the same thing you're
17 looking at?

18 MR. KUMMER: May I see it?

19 Okay, um, your Honor, this is an
20 Instructor's Manual he wouldn't have been given that, he
21 would've been trained and whoever was doing the training
22 would've given him the Instructor's Manuel. Um, I
23 believe it's appropriate for, examination purposes for
24 her to be able to ask questions about his training, what
25 he learned and (inaudible) that she wishes to with the

1 questioning. But as far as showing him an Instructor's
2 Manual that he didn't, he doesn't have, he didn't study,
3 I don't know that it's, um, appropriate.

4 MS. SHARON: Well, actually I think the
5 Instructor's Manual is probably the more reliable
6 because this is what the instructor is working off of
7 and what they're supposed to teach the students.

8 But, if Mr. Kummer has a problem with that,
9 I think we can remedy it by, um, I'm sorry, your Honor.
10 By, um, if you want to just adjourn the matter until
11 next week, I mean I can work off the ARIDE 2017 Student
12 Manual or 2015,'16 manual and just simply submit the
13 Modified Romberg portion to the Court. And, I mean the
14 Court can just, I mean the manual speaks for itself and,
15 it just simply doesn't support anything that the trooper
16 has said regarding the Modified Romberg.

17 MR. KUMMER: I guess it's just - - I'm sorry.

18 MS. SHARON: No, it's okay, just one moment.

19 The, um, I mean it was literally, your
20 Honor, a question and answer, um, section of the manual
21 that asks about validated clues, um, and there's - - the
22 question and answer that says, there are no valid clues
23 for the Modified Romberg.

24 So, um, I do think there's significant
25 portion of the trooper's testimony that is impeached by

1 the manual. Um, and I think that - - first of all, and
2 the big part of our motion, your Honor, was not only
3 suppress the Modified Romberg because it's used to
4 detect drugs and not alcohol, but also for a Daubert
5 Hearing because there is simply no science to support
6 that the Modified Romberg, um, is used to detect alcohol
7 reliably.

8 And finally, your Honor, that even the
9 manual itself doesn't teach students how to interpret
10 the tests. I mean, you look at the walk and turn, the
11 one-leg stand and it gives clues and it tells students
12 well if you observe this number of clues it's the sign
13 of impairment. With Modified Romberg it simply teaches
14 them, look for these signs and write them down and it
15 does not teach them in any way that these signs are
16 signs of impairment.

17 MR. KUMMER: That's correct, your Honor, and
18 I think that's the crux of the misunderstanding between
19 counsel and I.

20 I don't believe that the line of cross-
21 examination she's going down is appropriate he's not a
22 scientific witness. He's testified he's not a
23 scientist, he's not an expert, this is how he was
24 trained.

25 This is a simple divided attention task and

1 he's trained for his observations. Both, we can both
2 agree that there's no pass, fail criteria for this test.
3 But as far as a person's internal clock being able to
4 count to the appropriate amount of time, to see a body
5 swaying those are physical observations manifestation of
6 a person that are non-standardized, and that there's
7 case law People vs. Hannah that a trooper can observe
8 and testify to.

9 And, I think she - - there's a disagreement
10 that, you know, he sees that as a sign of intoxication,
11 counsel doesn't believe that it is and doesn't believe
12 that the NHTSA guidelines stand for that. But we're
13 seeking to introduce his observations and the inferences
14 drawn from those observations. And there's no need for a
15 Daubert Hearing because this is a divided attention
16 task, it's a mental and physical task.

17 MS. SHARON: Your Honor, first of all, this
18 Modified Romberg and lack of convergence are so new on
19 the scene, okay. And second of all, to label it a
20 divided attention and think that that just opens the
21 flood gates to every officer to testify about his
22 observations. There has to be some relevance to his
23 observation, and there's simply isn't.

24 Because, okay, its observations allegedly is
25 that Mr. Fontenot was swaying one inch. Okay, that's his

1 observation. What is the implication of that observation
2 to allow the trooper to testify that of someone sways
3 one inch that that's a sign of impairment. That's taking
4 it one step further and there has to be something to
5 support that and there isn't.

6 The manual certainly does not support it.
7 The manual tells the trooper if he sways right it down,
8 but it doesn't, it doesn't train the trooper and say
9 swaying is a sign of impairment. I mean, it doesn't eve
10 train the trooper to say that the man has to sway two or
11 more inches is a sign of impairment, one inch isn't a
12 sign of impairment. I mean, it's ridicules.

13 And for judges' to just allow this testimony
14 in on Modified Romberg and lack of convergence when
15 there's no science behind it, okay, and just say, "Oh,
16 because he's an officer he can testify to these things."
17 Fine, you want to let him testify that he swayed for one
18 inch, that's fine. How is that relevant if there's
19 nothing more to explain what one inch means.

20 And I'm sorry that I'm getting angry, but
21 these new DRE Tests are just garbage and there's no
22 science behind it.

23 I mean, literally, your Honor, this is a
24 page from the manual that says, there is no - - there
25 are no validated clues. It simply means that we do not

1 have research data to attest that's specific clues on
2 that test are statistically reliable indicators of
3 impairment, and we're going to let our jury hear that.
4 How is that reliable? And, more importantly, how is that
5 relevant?

6 MR. KUMMER: Your Honor - -

7 MS. SHARON: This is directly from the
8 manual.

9 MR. KUMMER: Relevant evidence means evidence
10 having any tendency to make the existence of any fact
11 that is of consequence to the determination more
12 probable than less probable. The fact that - -

13 THE COURT: Unless it is, unless it's
14 prejudicial.

15 MR. KUMMER: Correct, your Honor. And in this
16 case, if counsel wishes to file a motion in limine that
17 he can't say that this swaying is a validated clue of
18 impairment, fine, maybe there's a basis for that. But as
19 far as the motion and its general request to suppress
20 and throw out, this is a Modified Romberg Test, meaning
21 prior to that a Romberg Test existed. This is not as new
22 as counsel would lead you, the Court to believe, it's a
23 physical observation. If a person can't count to thirty
24 (30) seconds in their head, your Honor, it's obvious,
25 there doesn't need to be scientific testimony for the

1 jury to use their common experience that they often
2 count to their head for thirty (30) seconds it's usually
3 close to thirty (30) seconds.

4 THE COURT: Well what's it suggestive of?

5 MS. SHARON: First of all, the test isn't'
6 can he count to thirty, the test is can he estimate
7 thirty (30) seconds and people often are inaccurate in
8 estimating time.

9 But, your Honor, even then, even if I take
10 Mr. Kummer's argument at its face, okay, that if someone
11 can't count to thirty. But even then, the manual - - two
12 things, the manual says that drugs may impair someone's
13 concept of time, it says nothing about alcohol. But even
14 then, your Honor, um, it's not a matter of his ability
15 to count his ability of his time, his ability to
16 estimate time. But there isn't anything in the manual to
17 suggest that alcohol impairment would affect his ability
18 to estimate time. I mean, there's just nothing - -

19 THE COURT: Let me ask this. This officer's
20 testimony is not going to change anything today, the
21 issue is, whether or not I allow it in, is that a fair
22 statement?

23 MS. SHARON: I mean, he's offered his
24 testimony.

25 THE COURT: Correct. I didn't mean it wasn't

1 going to change. I mean, I've heard his testimony - -

2 MS. SHARON: Correct. And I think my issue -

3 -

4 THE COURT: And the prosecution has one
5 position on the relevance of it and the admissibility
6 and you have a different position on the relevance and
7 the admissibility.

8 MS. SHARON: Right. And I think the other
9 sticking point is whether or not it's appropriate to
10 impeach him with this Instructor Manual or whether it's
11 more appropriate to impeach him with the Student Manual.
12 Um, the fact is it's a distinction without a difference
13 if you ask me. I mean, I can impeach him either way. Or
14 I can just give the Court a copy of the relevant portion
15 of the manual and provide it to Mr. Kummer and if he has
16 - -

17 THE COURT: And then argue it.

18 MS. SHARON: And then argue it, correct.

19 MR. KUMMER: And, your Honor, my larger point
20 is I don't believe that counsel and I are disagreeing on
21 what's contained in the manual.

22 THE COURT: Okay.

23 MR. KUMMER: It's the basis for which she
24 wishes to suppress it as opposed to limit any
25 conclusions that are drawn and stated, um.

1 THE COURT: I understand.

2 MR. KUMMER: And I think the Court can make
3 that legal determination on its own.

4 Um, now as far as - -

5 THE COURT: You're arguing it's admissible,
6 its admissibility to the jury.

7 MS. SHARON: Correct.

8 THE COURT: But he's arguing that it's
9 admissible perhaps not to show not as a test, but it's
10 admissible as the officer's observations.

11 MS. SHARON: Well, your Honor - -

12 THE COURT: But the observations could be
13 given greater weight because they have a name or a test
14 is your position.

15 MS. SHARON: Respectfully, your Honor, I
16 think there are a number of facets to my argument. One,
17 it's inadmissible because it's irrelevant; two, it's
18 inadmissible, um, without conducting a Daubert Hearing;
19 three, it's inadmissible - - well - -

20 THE COURT: Who's the expert on these DRE's -
21 - who testified?

22 MS. SHARON: There's so many new - - even
23 though - -

24 THE COURT: There is some people out of Grand
25 Rapids. There are MSP people who are allegedly trained

1 in this. There are DRE experts.

2 MS. SHARON: But even their testimony, your
3 Honor, can't be scientific because then the manual
4 itself admits that these are not scientific tests,
5 that's' the problem.

6 MR. KUMMER: And that's precisely why a
7 Daubert Hearing isn't needed. And the People aren't
8 introducing it as a standardized scientific test with a
9 valid clues like HGN. This test is not on the same
10 footing as HGN, and I'll agree with counsel on that. But
11 - -

12 MS. SHARON: But - - I'm sorry.

13 MR. KUMMER: - - the law provides that non-
14 standardized tests are admissible and divided attention
15 test are such.

16 THE COURT: But if it's designed for drug
17 detection, how is it relevant in a - -

18 MR. KUMMER: The CDC broadly classifies
19 alcohol as a drug.

20 THE COURT: All right, um - -

21 MS. SHARON: Your Honor, what I would ask is,
22 um, first of all I don't know if Mr. Kummer has any
23 redirect, but - -

24 THE COURT: Are you done with the cross at
25 this point?

1 MS. SHARON: I think I am, your Honor.

2 THE COURT: Okay.

3 MS. SHARON: But I would ask that I be
4 allowed to submit a portion of the relevant student
5 manual that deals with the Modified Romberg. And then,
6 at the date and time that is convenient to Mr. Kummer,
7 perhaps we can just come back and argue.

8 THE COURT: I'm fine.

9 MS. SHARON: I don't know if Mr. Kummer has a
10 problem with that. Like I said, I don't know if you have
11 redirect.

12 MR. KUMMER: I have brief redirect, your
13 Honor.

14 THE COURT: That's fine.

15 MR. KUMMER: Of course, you know, I'm at the
16 Court's will as far as coming back and rearguing things.
17 I'd rather have the Court have all the information it
18 requires part of making any ruling.

19 THE COURT: I'm not going to rule today.

20 MR. KUMMER: I would just also add that
21 there's an issue, despite the prejudicial 403 argument
22 that counsel alludes to, um, for the Romberg test, these
23 are still tests that are relevant to a probable cause
24 determination.

25 THE COURT: I understand.

1 MR. KUMMER: And the fact that there's a
2 manual that exist about running these tests, for counsel
3 to flat out say they're irrelevant, I think it's without
4 merit because these wouldn't be tests that are
5 training's are being on, that manuals are being written
6 on if they were wholly irrelevant.

7 MS. SHARON: Just because someone has an
8 interest in locking up people says something is for real
9 doesn't mean that it's for real. I mean, I'm sorry, they
10 have an invested interest in saying, oh, this is
11 something for real.

12 But the fact is, is that, they're own manual
13 doesn't train its officers to interpret the observations
14 that they're supposed to make. And that should be very
15 troubling to this Court, to allow an officer to come in
16 and say, "I observed A, B, and C but my training is
17 completely silent as to what A, B, and C mean that
18 should be very troubling to this Court. And all it's
19 going to do is confuse a jury that, oh, Mr. Fontenot
20 swayed one inch. What does that mean? I don't know
21 because the officer can't tell me because he's not
22 trained in it. So why are we even going to give them
23 that information?

24 It doesn't even pass mustard of relevancy. I
25 think Mr. Kummer cited the rule correctly, it doesn't

1 make a material fact, what it is, more or less likely -
2 -

3 MR. KUMMER: Probable.

4 MS. SHARON: - - probable. It doesn't make a
5 fact more or less probable because they have nothing to
6 tell them of how to, um, take that information, how to
7 process it. But we can argue that another time.

8 THE COURT: I understand your position. Okay,
9 cross-examination (sic).

10 MR. KUMMER: Very briefly, your Honor.

11 REDIRECT EXAMINATION

12 BY MR. KUMMER:

13 Q Trooper Gjurashaj, has a suspect story or recollection
14 of events ever changed throughout your investigation?

15 A (No verbal response).

16 Q Has a suspect ever changed their story while in the mix
17 of an investigation?

18 A In my - -

19 Q In your experience as a trooper?

20 A Yes.

21 Q Yes?

22 A Yes.

23 MR. KUMMER: And, your Honor, I've now opened
24 on the disc that was admitted stipulated exhibit one
25 file ending in I-100. I intend to jump to once Mr.

1 Fontenot is taken into custody. Although this occurred -
2 -

3 MS. SHARON: Objection.

4 MR. KUMMER: - - I am finishing my
5 explanation as my offer of proof. Although this occurred
6 after he was arrested and we're here for probable cause
7 to arrest. As the Court knows, counsel opened the door
8 when they seemed to infer that Mr. Fontenot held up his
9 finger. I believe the inference that defense counsel was
10 trying to create is that he was indicating he had one
11 beer rather than the two testified to, um, the statement
12 that was made by the Defendant when inside the vehicle.

13 MS. SHARON: I simply asked if the officer
14 remembered what Mr. Fontenot said at that moment, that's
15 all I was asking.

16 MR. KUMMER: She also, I believe that, I
17 don't know, my recollection isn't perfect. But, is it
18 possible that he said he had one beer instead of two
19 beers?

20 MS. SHARON: And the officer said no and I
21 accepted it.

22 THE WITNESS: Correct.

23 MR. KUMMER: And at this point, the officer's
24 credibility has been challenged and I would like to play
25 further admissions by the Defendant that occurred

1 voluntarily after he was arrested that are further
2 statements of how much alcohol he may have consumed.

3 MS. SHARON: But that's not relevant to
4 whether or not there was probable cause at the time of
5 the arrest.

6 MR. KUMMER: But it does when you bring into
7 the Court's consideration the credibility of the officer
8 and his recollection.

9 MS. SHARON: I don't think that's bringing
10 into question his credibility, it was simply asking if
11 he remember what Mr. Fontenot said.

12 MR. KUMMER: It also goes further to showing
13 that the Defendant may be changing his story as far as
14 how much alcohol he consumed throughout the
15 investigation. He may have said two initially and then
16 as things got worse and the investigation continued he
17 changed it to one. And then later he said I had one, I
18 had one and a half. The fact that he may have a varying
19 amount of alcohol that he consumed I think shows that
20 the Court needs to take with a grain of salt any
21 possible, you know, finger or indication that he had
22 only consumed the one beer.

23 THE COURT: I think he indicated one beer,
24 it's indicative of drinking.

25 MR. KUMMER: I agree, your Honor. But as far

1 as a probable cause determination if he indicated he had
2 two (2) Tall Boys that's twice as much as one (1) Tall
3 Boy.

4 MS. SHARON: Like, again the trooper didn't
5 have that information until after placing him under
6 arrest, so who cares? It's not relevant to the question
7 of probable cause at the time of the arrest.

8 MR. KUMMER: That's correct, the information
9 that the trooper have is that he had two (2) beers. And
10 if that's the information that Court's operating under,
11 then.

12 THE COURT: That's his testimony.

13 MR. KUMMER: Okay.

14 And the only reason I bring this up is,
15 counsel I know has relied in the past on People v.
16 Cavanaugh for the Court taking and weighing video
17 evidence over that of a testimony of an officer. And
18 rather than relying on the officer's memory looking to
19 the video as direct evidence. And in this case, we have
20 the statement that was made by the Defendant - -

21 THE COURT: That had to do with driving.

22 MR. KUMMER: I understand, your Honor.

23 THE COURT: That had to do with pre-arrest,
24 pre-arrest. The video, visa vie, pre-arrest activity,
25 they were in referenced to a specific time.

1 Um, I don't think it's relevant. I will
2 sustain the objection.

3 BY MR KUMMER, (continuing):

4 Q Trooper Gjurashaj, when did you, ah, well what's one of
5 your proudest moments in life?

6 MS. SHARON: Objection.

7 MR. KUMMER: If the Court will give me a
8 little leeway, it'll be brief.

9 THE COURT: Little leeway.

10 THE WITNESS: One of my proudest moments?

11 BY MR. KUMMER, (continuing):

12 Q Yes.

13 A The day I became a Michigan State Trooper.

14 Q Okay.

15 How long ago was that?

16 A Over three (3) years ago.

17 Q Okay.

18 Do you remember specific parts of that day?

19 A Yes.

20 Q Okay.

21 Are there details and parts you don't
22 remember?

23 A Yes.

24 Q Okay.

25 Now this case is not as important as the day

1 you became a trooper, correct?

2 A Correct.

3 Q But this case happened just seven or eight months ago,
4 correct?

5 A Correct.

6 Q Okay.

7 Are there parts of this case that you
8 distinctly remember?

9 A Yes.

10 Q And there's parts that you rely on your report and the
11 in-car video to recall, correct?

12 A Yes.

13 Q Okay.

14 Ah, is that why you were trained to write a
15 report?

16 A Yes.

17 MR. KUMMER: I have no further questions.

18 THE COURT: Anything further in light of
19 those questions?

20 MS. SHARON: No, your Honor.

21 THE COURT: Thank you, Trooper.

22 THE WITNESS: Thank you.

23 THE COURT: You may be excused.

24 THE WITNESS: Thank you.

25 (At 5:03 p.m. witness excused)

1 THE COURT: Okay, so we need to come back to
2 argue this, because we're certainly not arguing it.

3 MS. SHARON: Your Honor, I would like submit
4 the - -

5 THE COURT: That's fine, you can submit.
6 Although, it's been a pleasure spending my afternoon
7 with both of you. It's now five after five and I think
8 my staff would like to go home.

9 MR. KUMMER: Yes, your Honor.

10 THE COURT: And I think that is reasonable.
11 So with that being said let's look at a calendar.

12 All right, so today is the 15th so a Tuesday
13 would be good, right?

14 MR. KUMMER: Yes, your Honor.

15 THE COURT: There's the 12th or the 19th, both
16 of those are good? You can't tell because I have your
17 calendar.

18 THE COURT REPORTER: Um-um.

19 THE COURT: Either one of those are okay?

20 THE COURT REPORTER: Um-um.

21 THE COURT: 12th or the 19th?

22 MS. SHARON: Um, we're here on the 19th anyway
23 for Robert Wright.

24 MR. KUMMER: Okay.

25 THE COURT: Yeah, we can put it with the

1 Wright case that seems appropriate.

2 MR. KUMMER: I may even cite the Wright case.

3 THE COURT: Again. How often do I get cited
4 to myself?

5 MS. SHARON: We're supposed to be here at one
6 o'clock.

7 THE COURT: So two o'clock, does that work?

8 MR. KUMMER: Probably later.

9 THE COURT: That's right, is Wright
10 testimony?

11 MS. SHARON: Yeah, yes.

12 THE COURT: What's in the morning?

13 THE COURT REPORTER: That's it so far.

14 THE COURT: Do you want to come in the
15 morning? Do you want to come - -

16 THE COURT REPORTER: We could do this at
17 three, it won't be full two hours, it'll be - -

18 THE COURT: I'm not doing this at three.

19 MS. SHARON: How about three, can I do three?
20 Whatever the Court wants.

21 MR. KUMMER: That's fine.

22 MS. SHARON: I enjoy being here.

23 MR. KUMMER: I don't believe that Trooper
24 Gjurashaj will be required back.

25 THE COURT: I agree.

1 MR. KUMMER: And for purposes of the ruling
2 if Ms. Sharon is not calling the Defendant - -

3 MS. SHARON: Right.

4 MR. KUMMER - - then I would refer (sic) him
5 his appearance, waived if required. So if we're both
6 here at one I don't know that it matters what time this
7 case is set for that afternoon.

8 THE COURT: Okay. Just put it down, we'll set
9 it at two and we'll hear it when we hear it, right?

10 MS. SHARON: And I'll, um, I know within the
11 next ten to fourteen days I'll get the manual to the
12 Court and I'll provide a copy to Mr. Kummer.

13 THE COURT: So this is adjourned for
14 decision, for argument of decision

15 MS. SHARON: And, your Honor, so just for the
16 record Mr. Fontenot does not have to come back?

17 THE COURT: It's up to him.

18 MS. SHARON: Okay.

19 THE COURT: So what did I say, June 19th? I'll
20 set it at 2:30.

21 MR. KUMMER: So I guess my question is for
22 purposes of the record, is this something that counsel
23 is asking the Court to take judicial notice of or - -
24 because it won't be facts on the record as far as the
25 manual. I guess I'm not sure where procedurally this

1 report lies in the scope of the hearing.

2 MS. SHARON: Well we could - -

3 THE COURT: Are you stipulating to - -

4 MS. SHARON: Stipulate to make it an exhibit
5 otherwise we'll have to bring him back to take
6 testimony, because that has to be part of the record
7 somehow.

8 MR. KUMMER: I don't know that's qualified to
9 lay the foundation for the instructor - -

10 MS. SHARON: No, I said I'll use the ARIDE's
11 to the manual from when he got certification.

12 MR. KUMMER: So I guess if we could just have
13 Ms. Sharon email it to me I'll review it, there's a
14 stipulation we'll advise the Court, if not - -

15 THE COURT: If not - -

16 MR. KUMMER: - - then we'll proceed as
17 required.

18 MS. SHARON: That's fine.

19 THE COURT: Okay.

20 MS. SHARON: And I'll get it to him in plenty
21 of time.

22 THE COURT: That's fine.

23 MS. SHARON: Thank you, Judge.

24 THE COURT: Thank you.

25 (At 5:08 p.m., Proceedings Concluded)

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STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, Terri Sims, certify that this transcript, consisting of 99 pages, held on Tuesday, May 15, 2018 before the HONORABLE MICHELLE FRIEDMAN APPEL, Chief Judge at 45th District Court, located at 13600 Oak Park Boulevard, Oak Park, Michigan, 48237, and that this is a complete, true, and correct transcript of the electronic recordings.

7/19/19

Date



Terri Sims, CER 6496
45th District Court
13600 Oak Park Blvd.
Oak Park, MI 48237
(248) 691-7423

APPENDIX B

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STATE OF MICHIGAN
IN THE 45th DISTRICT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

V

Case No. 1700391SP

Honorable Michelle Friedman Appel

ALTON FONTENOT,

Defendant.

PROOF OF SERVICE

I, Jack McIntyre, say that a copy of this instrument was served upon the court via facsimile and defense counsel via email.



Jack McIntyre

JESSICA R. COOPER (P23242)
PROSECUTING ATTORNEY
By: JACK McINTYRE (P79905)
ASSISTANT PROSECUTING ATTORNEY

ALONA SHARON (P68782)
ATTORNEY FOR DEFEDANT

PEOPLE'S PRETRIAL MOTION TO DECLARE THAT RESULTS OF 120 DAY TESTS, AS REFLECTED IN DATAMASTER LOGS, ARE NONTESTIMONIAL, AND ADMISSIBLE PURSUANT TO MRE 803(6)

NOW COMES, Jessica R. Cooper, Oakland County Prosecutor, by and through Jack McIntyre, Assistant Prosecuting Attorney, and moves that this Honorable Court declare that results of 120 day tests, as reflected in the Datamaster logs, are nontestimonial for the purposes of the Confrontation Clause. Thus, the People need not call as a witness the person who conducted the 120 day tests in order to admit the portion of the Datamaster logs that reflect the results of those tests. Further, the People move that this Honorable Court declare that the Datamaster logs, including the portions pertaining to the 120 day tests, are admissible pursuant to MRE 803(6).

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STATEMENT OF THE FACTS

On October 30, 2017, defendant was arrested for operating while intoxicated. He was given two Datamaster tests to measure his breath alcohol content. Each test yielded a result of .09 grams of alcohol per 210 liters of breath. The tests were administered using Datamaster instrument 300357, located at the Michigan State Police Metro North Post in Oak Park. In September and December of 2017, a certified class IV Datamaster operator inspected instrument 300357, verified it for accuracy, and certified that it was in proper working order. Information regarding these inspections, verifications, and certifications is reflected in the Datamaster logs. The People intend to admit the complete and unredacted logs at trial, regardless of whether the class IV operator testifies.

I. THE RESULTS OF THE 120 TESTS AS REFLECTED IN THE LOGS ARE NONTTESTIMONIAL

The logs at issue in the instant case are analogous to a certificate from the Michigan Department of State (DOS) certifying that notice was mailed to a defendant that his operator's license was suspended. The Michigan Supreme Court held that the certificate of mailing is nontestimonial. *People v Nunley*, 491 Mich 686, 689; 821 NW2d 642 (2012). Likewise, the Datamaster logs are nontestimonial.

Testimonial statements may not be admitted at trial unless a defendant has an opportunity to cross examine the person making the statements. *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Testimonial statements have been defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. "Affidavits, depositions, prior testimony, and confessions" are generally viewed as testimonial. *Nunley*, 491 Mich at 706, citing *Crawford*, 541 US at 51-52. In general, statements are testimonial when the primary purpose "is to establish or prove past events potentially relevant to

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later criminal prosecution.” *Id.*, citing *Davis v Washington*, 547 US 813, 829; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

The prosecution in *Nunley* sought to admit a certificate from DOS at trial. *Id.* at 691. That certificate stated that on a specific date notice had been mailed to the defendant that his operator’s license was suspended. *Id.* at 690-691. The Michigan Supreme Court ultimately held that the certificate was nontestimonial, and admitting it without accompanying testimony did not violate the confrontation clause. *Id.* at 715. The court reasoned that the certificate from DOS was a “routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities.” *Id.* at 707. It was “created for an administrative business reason and kept in the regular course of the DOS’s operations in a way that is properly within the bureaucratic purview of a governmental agency.” *Id.* The certificate was created before a crime was committed, as “a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose.” *Id.* The court concluded that the certificate “is nontestimonial for the purposes of the Confrontation Clause.” *Id.*

The Datamaster logs are analogous to the certificate at issue in *Nunley*. Like the certificate in *Nunley*, the class IV operator’s certifications in the logs are routine; they happen every 120 days. They are also an “objective cataloging of an unambiguous factual matter”: when the instrument is tested as required by the administrative rules, the tests produce unambiguous, objective, factual results, which are reflected in the logs. The records of a class IV operator’s tests in the logs are analogous to being within “the bureaucratic purview of a governmental agency”: the tests are done by an appropriately certified Datamaster operator

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performing his official duties, in accordance with Administrative Rule 325.2653(3)¹. The records of a class IV operator's tests are created as "a function of the legislatively authorized administrative role" of a class IV operator's employers, pursuant to the administrative rules governing the Datamaster. The 120 day tests as reflected in the logs are created "independent from any investigatory or prosecutorial purpose," in that the tests were in no way affected, caused by, or dependent on the fact that the defendant was charged with a crime, or that he was tested on that instrument. Had the defendant never been arrested, tested, or charged, the 120 day tests reflected in the logs still would have happened, on the same date, in the same way, and would have produced the same results. See also *People v Hagadorn*, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2007 (Docket No. 269825) pp 10-11 (holding that admission of Datamaster logs without the testimony of the class IV operator who performed the 120 day tests was not error and did not violate the defendant's confrontation rights, because the Datamaster logs "did not pertain to defendant, but were maintained merely as a record evidencing the routine testing of the machine.")

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II. THE RESULTS OF THE 120 TESTS AS REFLECTED IN THE LOGS ARE ADMISSIBLE PURSUANT TO MRE 803(6)

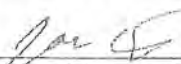
The Datamaster logs are admissible pursuant to MRE 803(6). Trooper Whitcomb will testify that the logs are maintained in the regular course of Michigan State Police business. Entries into the logs regarding each test are made at or near the time the test is conducted. The logs are kept for the purpose of complying with regulations that require the Michigan State Police to keep such logs. See *Id.* at 8-9 (holding Datamaster logs are admissible under MRE 803(6)).

¹ Administrative Rule 325.2653(3) says, in pertinent part: "instruments shall be inspected, verified for accuracy, and certified as to their proper working order by a certified class IV operator within 120 days of the previous inspection."

WHEREFORE, the People respectfully request that this Honorable Court declare that the results of 120 day tests reflected in the Datamaster logs are nontestimonial for the purposes of the Confrontation clause, and are admissible pursuant to MRE 803(6).

Respectfully submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY

By: 

Jack McIntyre (P79905)
Assistant Prosecuting Attorney

Dated: April 12, 2019

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APPENDIX C

STATE OF MICHIGAN
IN THE 45B DISTRICT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

Case No. 1700391SP
Hon. Michelle Friedman Appel

ALTON FONTENOT,
Defendant.

JESSICA COOPER (P23242)
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DEFENDANT’S RESPONSE TO PEOPLE’S PRETRIAL MOTION TO DECLARE THAT RESULTS OF 120 DAY TEST AS REFLECTED IN DATAMASTER LOGS ARE NONTESTIMONIAL, AND ADMISSIBLE PURSUANT TO MRE 803(6)

Alton Fontenot, by and through his attorney, Alona Sharon, responds to the People’s motion as follows:

COUNTER STATEMENT OF FACTS

Mr. Fontenot does not dispute the People’s statement of facts.

LAW AND ARGUMENT

I. THE RESULTS OF THE 120-DAY TEST ARE TESTIMONIAL AND ARE ANALOGOUS TO THE REPORTS GENERATED IN *MELENDEZ-DIAZ* AND *BULLCOMING*.

The prosecution argues that the results of the 120-day test are similar to a certificate of mailing sent by the Secretary of State. The prosecution not only does not cite any case law to support its position but it also ignores United States Supreme Court precedent of *Melendez-Diaz v Massachusetts*, 557 US 305 (2009), and *Bullcoming v New Mexico*, 564 US 647 (2011).

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In *Melendez-Diaz*, the Court addressed the question of whether the affidavits of forensic analysts in a drug prosecution were testimonial and therefore rendering the affiants “witnesses” subject to the defendant’s right to confrontation. *Melendez-Diaz*, 557 US at 307. Under the confrontation clause, “[A] witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.* at 309. The Confrontation Clause applies to a litany of categories including “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 310, citing *Crawford v Washington*, 541 Us 36, 54 (2004). *Melendez-Diaz* found that the certificates of analysis from the lab workers were no different than affidavits because affidavits are defined as “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary 62 (8th ed. 2004). The certificates in *Melendez-Diaz* were “incontrovertibly a solemn declaration of affirmation made for the purpose of establishing or proving some fact.” *Melendez-Diaz*, 557 US at 310 citing *Crawford*, 541 US at 51. The certificates were functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v Washington*, 547 US 813, 830 (2006). It should also be noted that the Court rejected the dissent’s position that unfronted testimony should be admissible as long as it bore indicia of reliability. *Melendez-Diaz*, 557 US at 312.

The *Melendez* Court also noted that “Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst...And, of course, the prospect of the confrontation will deter fraudulent analysis in the

first place." *Melendez-Diaz*, 557 US 318-319. The Court continued, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* The Court continued, "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320.

Perhaps most important the Court summarized the following

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." At the time of trial, petitioner did not know that tests the analysts performed, whether those tests were routine, and whether interpreting their results required exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use 'methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs,' ...At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.

Id. at 320.

Previously Marvin Gier testified before this Honorable Court in the case of *People v Herman Starks*. During that trial Mr. Gier was cross-examined about the series of tests that he conducts during the 120-day test and the samples that are used during the tests. Mr. Gier admitted during cross-examination that in a previous case he improperly used an expired test sample and did not realize his error until confronted at trial. (TT,24-29).¹ He also admitted that he had no documentation with him to confirm that he used unexpired samples in Mr. Starks' case. This is the exact type of cross examination envisioned by *Melendez-Diaz*. Mr. Gier previously made an error in his testing regimen, did not notice his error until he came to testify and acknowledged that he had no proof with him that he did not repeat the same error in Mr.

¹ See Appendix A.

Starks' case. This information would have been entirely unknown to the Starks jury without Gier's appearance. Mr. Gier's stamp on the logs is of the same value as the analyst in *Melendez-Diaz*. In order for the prosecution to admit the BAC of the defendant, it must prove the reliability of the machine. This can only be done by presenting testimony that the 120-day check was conducted properly and completely and that the machine passed each of the ten tests conducted by Mr. Gier. Mr. Gier's stamp provides only the "bare-bones" much like the certificates in *Melendez-Diaz*. Mr. Gier's stamp is testimonial because it establishes necessary information that would otherwise be provided by a live, in-court witness. For that reason, the information is testimonial and failure to produce Marvin Gier would violate Mr. Fontenot's Confrontation Clause rights.

Two years after *Melendez-Diaz* the Court reinforced the critical need of a Defendant to be able to confront the witnesses against him, in *Bullcoming v New Mexico*, *supra*. In *Bullcoming* the Court held that a surrogate lab witness cannot testify in place of the actual analyst who made the certification. *Bullcoming*, 564 US at 652. Historically, and in defense counsel's experience, the Oakland County Prosecutor's office routinely tries to elicit testimony from the keeper of the logs that the stamp from Mr. Gier means that the 120-day check was done correctly and that the machine passed all 10 tests of the check despite the fact that the keeper of the logs is not qualified to administer a 120-day check, is not present when the 120-day check is done and has no personal knowledge of the 120-day check. This is exactly the same type of sham, surrogate testimony that the prosecution tried to get away with in *Bullcoming* and the Supreme Court ruled that it violated the defendant's Confrontation Clause rights.

In *Bullcoming* the Court rejected the New Mexico Supreme Court's ruling that a surrogate witness was adequate under the Sixth Amendment because the analyst "simply transcribed the result generated by the gas chromatograph machine,' presenting no interpretation and exercising no independent judgment." *Id.* at 659. The United States Supreme Court concluded that the analyst's certification "reported more than a machine-generated number." *Id.* at 660. The same can be said for the work conducted by Marvin Gier. He is responsible for mixing solutions, ensuring that the solutions are not expired, running the actual test and then collected the results. He is also responsible for testing the machine for various sources of interference that could compromise the results.

In *People v Fackelman*, 489 Mich 515, 562 (2011), our Supreme Court observed that

[T]he Confrontation Clause of the Sixth Amendment of the United States Constitution reads, '[I]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....' By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy comprise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?

Under *Fackelman*, Marvin Gier is certainly a witness against Mr. Fontenot and failure to provide Mr. Fontenot an opportunity to cross-examine Mr. Gier would violate the Sixth Amendment.

Finally, the *Hagadorn* case, relied on by the prosecution is wholly irrelevant for two reasons. First, it is unpublished and therefore not binding. Second, it is a 2007 case, predating both SCOTUS cases and its holding cannot survive *Melendez-Diaz* and *Bullcoming*.

II. THE RESULTS OF THE 120-DAY TESTS ARE NOT ADMISSIBLE UNDER MRE 803(6).

The prosecution argues that the 120-day test results are admissible under MRE 803(6), however the results are not business records because Marvin Gier is not an employee of the Michigan State Police and therefore is an outside third party making an entry into a business record. This does not fall within the business record exception. See *Merrow v Bofferding*, 458 Mich 617 (1998); See also *Woods v City of Chicago*, 234 F3d 979, 986 (CA 7, 2000) (“[S]tatements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception.” See also *State v Reynolds*, 746 NW2d 837, 842-843 (Iowa, 2008) (“The fact that third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the ‘untrustworthy’ hearsay taint.”))

The prosecution also asserts that Trooper Whitcomb will testify that entries into the logs regarding each test are made at or near the time the test is conducted. Trooper Whitcomb would have no foundation to testify that Mr. Gier made an entry into the log at or near the time the 120-day check was conducted because he is not present for the test. Therefore, this assertion from the prosecution is false. Finally, even if this Court finds that the hearsay exception applies, the Court still must decide the Confrontation Clause issue. Simply because a statement falls within a hearsay exception does not mean that a defendant’s Confrontation rights no longer exist as to that statement.

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WHEREFORE, Alton Fontenot respectfully requests that this Honorable Court deny the prosecution's motion.

Respectfully Submitted,



Alona Sharon (P68782)
Attorney for Defendant
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(248) 545 4755

Dated: May 1, 2019

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45 DISTRICT COURT
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APPENDIX A

45 DISTRICT COURT

19 MAY -2 AM 5:01

STATE OF MICHIGAN

45TH JUDICIAL DISTRICT, COUNTY OF OAKLAND

THE PEOPLE OF THE CITY OF OAK PARK,

V

District No. 1700503SP

HERMAN LEE STARKS,

Defendant.

EXCERPTS OF PROCEEDINGS
TESTIMONY OF MARVIN GIER
JURY TRIAL

BEFORE THE HONORABLE MICHELLE FRIEDMAN APPEL, (P32709)
13600 OAK PARK BOULEVARD, OAK PARK, MICHIGAN 48237
On Monday, January 14, 2019

APPEARANCES:

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WITNESSES: DEFENDANT

None

<u>EXHIBITS:</u>	<u>MARKED</u>	<u>RECEIVED</u>
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Oak Park, Michigan

Monday, January 14, 2019 - 12:53 p.m.

MR. MCINTYRE: The People call Mr. Marvin Gier.

THE COURT: Okay. If you'll come forward, Sir.

MR. GIER: Right here?

THE COURT: Yeah. If you'll stop for a minute.
Raise your right hand. You do solemnly swear or affirm the
testimony you're about to give in this matter shall be the
truth.

MR. GIER: Yes, Your Honor.

THE COURT: Thank you. Have a seat, please. And if
you could state your full name for the record and spell your
name for the record.

THE WITNESS: Um, my full name is Marvin Ray Gier.
Last name spelling, G-I-E-R.

THE COURT: Thank you. You may proceed Mr.
McIntyre.

M A R V I N R A Y G I E R

(At 12:53 p.m., called by Mr. McIntyre and sworn by
the Court, testified as follows:)

DIRECT EXAMINATION

BY MR. MCINTYRE:

Q Um, Mr. Gier, where do you work?

A Ah, currently?

1 Q Yes.

2 A I work at the Grand Traverse Pie Company over in Ann Arbor.

3 Q Really?

4 A Yes.

5 Q Do you work anywhere else?

6 A Ah, no.

7 Q Did you, ah, on December 17th of 2017 did you work somewhere

8 else?

9 A I worked with, ah, National Patent Analytical Systems and the

10 State of Michigan.

11 Q Okay. And what were your responsibilities in that position?

12 A Ah, I was at that time a technician and, ah, I had taken care

13 of the, ah, breath testers on the entire eastern half of the

14 state of Michigan. There were 143 instruments at 141

15 departments and, ah, after 24 years, nine and a half months I

16 decided to retire again.

17 Q When you say retire again, what did you retire from the first

18 time?

19 A The Michigan State Police.

20 Q Okay. How long did you work there?

21 A Twenty-five years and three months.

22 Q Okay. Now because you, ah, conducted testing on the

23 Datamaster instrument, I assume you've had, um, training on

24 how to conduct that testing?

25 A Yes.

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45 DISTRICT COURT

1 Q Please explain the training that you had in how to conduct
2 testing on the Datamaster instrument.

3 A Ah, on the current one it, ah, the training was a, basically a
4 three day training session and, ah, most of the experience
5 that you gain as a technician, you'll gain from actual
6 experience out in the field.

7 Q Okay. And what kind of things did they cover during the
8 training session?

9 A Ah, just, they just made us aware of because they had changed
10 the structure of the interior with the exception of the
11 scientific principals, you know the boards were different,
12 electronic boards were different, ah, the filtering system was
13 different and, ah, so you just had different things to look
14 for and where to look for them when they went bad.

15 Q Okay. Um, and what kind of certification do you have in
16 regard to the Datamaster instrument? Or I should say at the
17 time that you conducted this test, what kind of certification?

18 A Ah, what is my class?

19 Q Yes.

20 A It was a class 4-B.

21 Q And can you explain what that means? What is a class 4-B?

22 A A class 4-B means that, ah, you should be able to take care of
23 anything that's alcohol related, ah, as far as certification
24 or repair and things like that.

25 Q Okay. Um, now at that, um, time in December 17th of 2017, um,

1 please explain your duties in regard to testing the Datamaster
2 instrument.

3 A Ah, explicitly with the, ah, D.M.T. or the breath testing
4 device used at that time, I was responsible for every 120 days
5 or less, to go around and certify them to make sure they're
6 working properly and to take care of any preventative
7 maintenance as I may see and, ah, and then at the same time if
8 any of them broke down in between the 120 day inspections then
9 I was assigned to go and, and fix them and make sure they're
10 working properly and put them back in service.

11 Q Okay. Now what kinds of tests could you potentially conduct
12 on a Datamaster instrument when you do your 120 day test?

13 A Ah, during the 120 day there were a number of things that we
14 looked at. We looked at date and time, make sure the clocks
15 are working and the date's correct and then we also did, ah,
16 what we call dry gas testing. And, and the dry gas is a, ah,
17 tank that's attached to the instrument and it provides
18 automatic testing on Monday morning. And then we would also
19 do wet bath testing. We'd also test, ah, and that would
20 include three different alcohol levels, 0.04, 0.08, 0.20. And
21 then we also tested for acetone and acetone is something that
22 a diabetic can produce so we wanted to make sure that that
23 instrument could sort out the difference between acetone and
24 alcohol.

25 Q Okay. Um, did you, when you conduct a 120 day test, um, did

1 you mark that you completed the test on, on a log form?
2 A I did. Ah, there's a log, a monthly log kept at each police
3 department where they record their results on the Monday
4 morning test and then I would come by on my 120 day
5 inspections or service calls and then I would, ah, stamp it
6 and, ah, indicate that the instrument is working properly when
7 I left.

8 MR. MCINTYRE: I'm holding People's purposed Exhibit
9 3, um, I'm showing it to defense counsel. Ah, permission to
10 approach the witness, Your Honor?

11 THE COURT: Yes.

12 BY MR. MCINTYRE (continuing):

13 Q I'm handing the purposed Exhibit to the witness. So what I
14 handed you has four pages, um, if I could direct your
15 attention to first page one that I handed you, um, do you see
16 one of your stamps on that page?

17 A I do.

18 Q What date, um, did you put that stamp there?

19 A That's, ah, I stamped this on, ah, September the 4th, 2017 and
20 the results were, ah, the target is 0.080 and then the result
21 of my, ah, testing was 0.080.

22 MR. MCINTYRE: Your Honor, if I may use the computer
23 to put this on the screen so the juror can see the, ah,
24 purposed Exhibit.

25 THE COURT: Sure.

1 BY MR. MCINTYRE (continuing):

2 Q Okay. So that would be, um, this, this one on September 4th
3 that you're talking about?

4 A Yes.

5 Q Okay. And what is, what is this here that I'm -- the, the
6 signature, is that your signature?

7 A That is my signature and then the, ah, the printing and --
8 just indicates that I've, ah, serviced the instrument and it's
9 in good working condition.

10 Q Okay. So let's start with this, ah, target number. It says
11 0.080. What does, what does that mean?

12 A Ah, target value is, ah, that is the drunk driving 0.08 limit.
13 Well even at that target value, I can have as much as a plus
14 of, plus or minus 5% of the 0.08. So I could have as low as
15 0.076 or as high as 0.084 and it would still be considered
16 working good.

17 Q All right. Um, and then you have the external standard, and
18 what does that mean?

19 A That is the result of the wet bath, ah, that I perform and I
20 perform that with what they call a simulator and it simulates
21 a person's breath. And then I have a known solution that I've
22 been given that has been certified and, ah, and that's what I
23 run in the simulator to see the result that I would get.

24 Q So, so the known solution, um, that contains a known amount of
25 alcohol? Is that right?

1 A Yes.

2 Q Okay. And, and what is it known to -- what concentration is
3 it known to have?

4 A Well, ah, the actual concentration that they have before they
5 get to me, I never see those results.

6 Q Okay.

7 A But that's done between the company that makes the solution
8 and the state of Michigan. They test them, ah, before they're
9 sent to me in the field.

10 Q And, and based on those tests, what do you understand the
11 concentration to be?

12 A Ah, when the instrument's working properly, then it should
13 come somewhere between that 0.076 at the low end and 0.084 at
14 the high end and anything in between is good.

15 Q All right. But is the known quantity 0.08 exactly, if you
16 know?

17 A I, like I say, I don't know --

18 Q You don't know. Okay.

19 A -- the testing results that they get.

20 Q All right. And if you could explain, when, when you conduct
21 this test, um, so you mentioned you have a sample, how is that
22 sample, how, how do you have the sample when you walk into the
23 police station to conduct this test? Is it in a bottle or
24 what kind of sample is it?

25 A The, the sample itself is in a, ah, simulator and, like I say,

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15 DISTRICT COURT

1 the simulator operates at breath temperature and, ah, you
2 know, and I carry that with me to each department and, ah, and
3 that's what I use for testing.

4 Q Okay. And, and the simulator do you hook it up to the
5 Datamaster instrument somehow?

6 A I do.

7 Q Okay. How, how do you go about doing that?

8 A It's, it's hooked up, ah, with a small tube, hooks to the end
9 of the breath tube and then I equilibrate it to make sure that
10 the water and the air mixture from the head to the water,
11 excuse me, is, is properly, ah, mixed up and then after I do
12 that, then I can do the testing procedure.

13 Q Okay. And, and does the testing procedure involve taking a
14 sample of the contents of that, um, simulator?

15 A Yes.

16 Q Okay. And the sample runs through the Datamaster instrument?

17 A Yes.

18 Q Okay. And when the sample runs through the instrument, then
19 what does the instrument do?

20 A Well the instrument will evaluate that sample and give, give
21 the result which I then register on the log.

22 Q Okay. Ah, does the instrument register that result in the
23 same was as, ah, if a subject was giving a breath test or is
24 it in some way different?

25 A No, it's the same.

1 Q Okay. And then I, so I'll note we see a certification number
2 there, I assume that's your number?

3 A Yes.

4 Q And then over here, finally the last column we have -- what do
5 we see in that column?

6 A In that column there that tells, ah, that's the Deguth, that's
7 the name of the company that makes the solution and then the,
8 the next one tells me that it's a 0.08 solution and then the
9 next one is the lot number, ah, 16-180 every, every batch of
10 solution that's made as its own lot number. And then the, ah,
11 the date there is the date when that solution expires.

12 Q Ah, was that solution expired when you used it?

13 A No.

14 Q Um, was the result of that test that you performed on
15 September 4th of 2017 satisfactory?

16 A Yes.

17 Q Did you have to do any, um, change anything with how the
18 instrument was functioning as a result of that test?

19 A No.

20 Q And I'll now draw your attention to the last page of the
21 document I just handed you, um, which is December of 2017, and
22 we see here, um, direct your attention to, ah, December 30th,
23 ah, is this your signature here in the operation perform
24 column?

25 A Yes.

1 Q Okay. And we have a target of 0.080, is that right?

2 A Yes.

3 Q And what was the result of the test that you ran on that day?

4 A And the results were 0.078, which is, ah, two thousands under
5 the 0.08.

6 Q Is that considered a satisfactory result?

7 A It is.

8 Q Is this test the same kind of, ah, wet bath test that you
9 described earlier?

10 A Yes.

11 Q And certification number, is this your certification number
12 here?

13 A Yes.

14 Q And finally we have a signature and please explain again what
15 we see in the signature column.

16 A Ah, here again it relates to the wet bath solution that I used
17 that day and, ah, it appears as though I left a zero off the,
18 ah, 16-80 and then the expiration date.

19 Q Was the, ah, dry gas expired on that date?

20 A This is wet bath.

21 Q Oh, I'm sorry. Wet bath. Was it, was it expired on that
22 date?

23 A No.

24 MR. MCINTYRE: Okay. At this time the People move
25 to admit People purposed Exhibit 3 into evidence.

1 THE COURT: Any objection?

2 MS. SHARON: I have no objection. Well, may I voire
3 dire?

4 THE COURT: Sure.

5 MS. SHARON: Briefly?

6 VOIRE DIRE

7 BY MS. SHARON:

8 Q Nice to see you, Mr. Gier. I have a question for you.

9 A Uh-huh.

10 Q Mr. McIntyre asked you about this 120 check and this log
11 contains one portion of that test result, correct?

12 A That's correct.

13 Q Okay. In total, how many tests do you conduct as part of the
14 120 day check?

15 A There are ten.

16 Q Ten?

17 A Yeah.

18 Q Okay. Of which we have one test result today, correct?

19 A Yes.

20 Q Okay. And I think when you were testifying earlier, you said
21 that you were -- when you were doing this job, you were, um,
22 responsible for 143 machines? Did I get that right?

23 A Instruments.

24 Q Instruments. Okay. Um, and it's fair to say that you don't
25 have any independent recollection of the test results from

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1 September 4th, 2017 of this machine, is that fair?
2 A That's correct.
3 Q Or from December 30th, 2017 for this machine, correct?
4 A That's correct.
5 Q Okay. So the other tests of the 120 day test are the, the
6 0.04 wet bath, correct?
7 A Yes.
8 Q Okay. We don't have any test results for that test, correct?
9 A No.
10 Q No, I'm not correct or correct?
11 A Yes, you are correct.
12 Q Okay.
13 A No, I have no results.
14 Q Okay. And you run a 0.08 test and those are that, those
15 results?
16 A That's correct.
17 Q Okay. You run a 0.20 test, correct?
18 A Yes.
19 Q And we have no results for that?
20 A No.
21 Q Okay. You run -- are those the only wet bath that you run?
22 A No. We also do the acetone.
23 Q Okay. And you don't have any results for that?
24 A No.
25 Q Okay. Um, what are the other -- so then we still have six

1 results of any of the other, um, tests that were conducted on
2 either September 4th or December 30th.

3 THE COURT: The Court is satisfied that the
4 testimony is that if any of -- and inherent in the
5 certification made by this witness that those other tests were
6 conducted and there were no adverse results. So I will admit
7 that as, admit the, the ticket as well, the Datamaster ticket
8 which is Exhibit 4 or?

9 MR. MCINTYRE: Ah, yes. It will be People's Exhibit
10 4, Your Honor.

11 THE COURT: Okay. So now I've admitted 3 and 4.
12 (At 1:13 p.m., PX#4 admitted)

13 MR. MCINTYRE: Yes.

14 THE COURT: Thank you.

15 BY MR. MCINTYRE (continuing):

16 Q Um, one more question about the December test, ah, the target
17 was 0.08 and the actual standard was 0.078, does that mean it
18 was actually reading lower than the know amount, quantity of
19 alcohol in the sample?

20 A It, it read lower than the 0.08.

21 Q Okay. Um, I'm holding --

22 A The target value.

23 MR. MCINTYRE: Thank you. And I'm holding People's
24 purposed Exhibit 4, I'm showing it to defense counsel,
25 permission to approach the witness, Your Honor?

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11/12 AM 9:01

1 THE COURT: Yes.

2 BY MR. MCINTYRE (continuing):

3 Q I'm handing the Exhibit to the witness, um, do you recognize
4 what I just placed in front of you?

5 A Yes. This is a print out of a subject test.

6 MR. MCINTYRE: Now, ah, again if I may use the
7 computer, Your Honor?

8 THE COURT: Yes.

9 MR. MCINTYRE: There's no PDF viewer on the -- I
10 assume?

11 THE COURT: That's what it says.

12 MR. MCINTYRE: May I download a PDF viewer?

13 THE COURT: If it will allow you to do it. So
14 there's pros and cons to modern technology.

15 MR. MCINTYRE: Sorry for the delay. Hopefully it
16 will not take long.

17 THE COURT: This is an updated version of a watched
18 pot never boils I think. A watched download. There you go.
19 You wanna rotate it?

20 MR. MCINTYRE: Yes. Okay. Here we go. Okay.
21 Somebody knows how to do this better than me?

22 JUROR #5: Right click on the document. On the
23 document.

24 MR. MCINTYRE: Okay.

25 JUROR #5: And then rotate clockwise or

1 counterclockwise? What are your options?

2 MS. SHARON: I could have told you that.

3 THE COURT: There you go.

4 BY MR. MCINTYRE (continuing):

5 Q Okay. Ah, okay. So this is the, a copy of the People's
6 Exhibit 4 that you have in front of you. Um, let's start at
7 the top. You said it's a Datamaster ticket. What is the date
8 on the ticket?

9 A Ah, 12/17/17.

10 Q And we have a time. And what is the name listed as the
11 subject name?

12 A That is, ah, Mr. Starks.

13 Q Herman Starks.

14 A Herman Starks, yes.

15 Q Okay. And the operator, ah, name?

16 A Tasker.

17 Q Tasker. Okay. And we have, ah, a blank test can you, if you
18 know, what is a blank test?

19 A The blank, the blank test is where the instrument takes a look
20 at what's in the sample chamber to see if there's anything
21 there and, ah, it shouldn't be and if there is then the test
22 procedure will stop. Ah, if the blank test comes out clean,
23 then it can proceed.

24 Q So is the expected result what we see here? 0.00?

25 A 0.0 -- oh, yeah. For the blank test, that is correct.

1 Q For the blank test. So what does that mean when it says 0.00?

2 A It means there's nothing in the sample chamber and the, ah,
3 testing result or test can proceed.

4 Q Okay. And then we have an internal standard verified, what
5 does that mean?

6 A That there is, it takes a look at a calibration and exactly
7 what it does there, I don't know. I only know it looks at the
8 calibration, if there's something wrong with it, then the test
9 will stop again.

10 Q Okay. And then we see a subject sample, what does that mean?

11 A That means that that is the result of the subject, ah, who
12 blew into the instrument.

13 Q All right. And what was the subject sample received for test
14 one?

15 A It was a 0.08.

16 Q Okay.

17 A Eight percent.

18 Q And you mentioned that it could be plus or minus 5% from that
19 number?

20 A Yes. That's the, that's the companies accepted error. Plus
21 or minus 5%.

22 Q So do you know how low could that possibly be and how high
23 could that possibly be?

24 A If it read to the third digit on subject testing, which it
25 don't, ah, if there were, it's conceivable it could have been

1 as low as 0.076 or as high as 0.084.

2 Q Okay. And then we have another, another test. So we have a
3 blank test, would that be for -- I'm sorry. Another blank
4 test, would that be for the second test?

5 A Yes.

6 Q Okay.

7 A Here again it's making sure that the, ah, sample chamber is
8 clean and that the test can proceed.

9 Q Now we see another subject sample and what is the result of
10 the next subject sample?

11 A It's, ah, 0.09 or 9%.

12 Q Okay. Um, can you explain, how is it possible that you would
13 get these slightly different results for two tests?

14 A From a scientific --

15 MS. SHARON: Objection.

16 THE WITNESS: -- standpoint I cannot.

17 MS. SHARON: Object --

18 THE COURT: He just said he can't.

19 THE WITNESS: You're beyond my expertise.

20 MS. SHARON: Okay.

21 BY MR. MCINTYRE (continuing):

22 Q Um, and then we have another, ah, well and also if you know,
23 so, would the plus or minus 5%, ah, apply to the, ah, second
24 test as well?

25 A Yes.

1 Q Um, there's another blank test. What, why is there a third
2 blank test?

3 A Ah, in between every test it checks the sample chamber to make
4 sure that it's clean for the next test.

5 Q And finally we see, ah, internal standard listed as verified.
6 What does that mean?

7 A And here again it's looking at the calibration and to make
8 sure there's nothing in there that interferes.

9 Q And when it says verified, does that mean --

10 A That it, it was working properly.

11 MR. MCINTYRE: Just one moment, Your Honor. No
12 further questions at this time, Your Honor.

13 THE COURT: Cross-exam.

14 MS. SHARON: Thank you, Judge.

15 CROSS-EXAMINATION

16 BY MS. SHARON:

17 Q Mr. Gier, we've, we've met before. We've had a trial before a
18 different person, right?

19 A Yes.

20 Q Okay. Um, maybe you remember, um, cause you seem to have a
21 pretty impressive memory. Um, do you remember at that
22 previous trial you had filled out a log and had used an
23 expired, um, tank.

24 MR. MCINTYRE: Objection, Your Honor. Relevance of
25 another test performed for another trial.

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12 AM 9:01
DISTRICT CLERK

1 MS. SHARON: I think it goes to the whether or not
2 how certain he can be of whether or not he used expired
3 samples in this case where we don't have any documentation
4 showing the expiration dates for other sample tanks.

5 MR. MCINTYRE: Actually we do have documentation,
6 it's written right on People's Exhibit 3.

7 MS. SHARON: Not for the 0.04 and not for the 0.20
8 and that's all part of the 120 day check. You have an
9 expiration date for one tenth of the 120 day check.

10 MR. MCINTYRE: Your Honor, it's not relevant what
11 the, the witness --

12 THE COURT: You can ask him why he believes it was
13 appropriate but I don't think you can ask him in reference to
14 a prior case.

15 MS. SHARON: I think that has -- may I respond, Your
16 Honor?

17 THE COURT: Sure.

18 MS. SHARON: I think that has to do with the, I
19 don't want to say carefulness, I'm not sure that's a word but
20 with how careful he is when, when conducting these tests and
21 if we don't have any evidence of the expiration dates on all
22 of these simulator or the testing tanks that he used in this
23 test, I do think that that raises doubt as to how much we can
24 rely on the reliability of this, of this specific instrument.
25 How is that not relevant? How is not previous, um, conduct

1 when executing these tests not relevant?

2 THE COURT: Well first of all, do you remember that
3 case, Mr. Gier?

4 THE WITNESS: Do I, I do remember the case.

5 THE COURT: Okay. And what is your follow up
6 question?

7 MS. SHARON: Whether or not he mistakenly used an
8 expired tank on a 120 day test.

9 THE COURT: In this case or previous?

10 MS. SHARON: No, in that case. Because we have
11 portions, Your Honor. We have 90% of the tests of the 120 day
12 check that we have no documentation for. Okay?

13 THE COURT: I guess that goes to weight and that
14 goes to argument but I don't think --

15 MS. SHARON: But not until I get the testimony from
16 him. I agree with you that it goes to weight but I need to
17 get the testimony from him before I can argue that it goes to
18 weight.

19 THE COURT: I guess you can ask him if he knows
20 whether, how he knows they weren't expired in this case.

21 MS. SHARON: Okay. I'm sorry, Your Honor, may I ask
22 about the previous case or no?

23 THE COURT: Well he says he remembers.

24 MS. SHARON: Okay.

25 MR. MCINTYRE: Well, Your Honor, just so I can

1 clarify. So you are finding that it is relevant what this
2 witness -- a test that this witness performed on another
3 instrument, at another time, on another date, is relevant to
4 this case and is admissible evidence?

5 THE COURT: I'm not -- he remembers. It's a yes or
6 no.

7 MR. MCINTYRE: Okay.

8 THE COURT: He remembers. Okay. Now you can ask --
9 no more questions about, I mean, he remembers that that
10 occurred. Is that your question?

11 MS. SHARON: I'm not sure that I had phrased it that
12 way. I, I would -- can I rephrase it that way and pose it to
13 Mr. Gier?

14 THE COURT: Yes.

15 BY MS. SHARON (continuing):

16 Q Okay. Do you recall in a previous case that, in which you
17 testified and I litigated, that you had used an expired, ah,
18 0.08 tank to conduct the 120 day test?

19 A Yes.

20 Q Okay. Um, and that, that was a mistake that you made,
21 correct?

22 MR. MCINTYRE: Objection, Your Honor. You just said
23 she can ask one question and now she's asking a second
24 question.

25 MS. SHARON: I just --

1 THE COURT: It's a conclusion if someone chooses to
2 draw that. I sustain the objection.

3 BY MS. SHARON (continuing):

4 Q Okay. Um, and in this case, we have no way of knowing whether
5 or not you used expired tanks -- I'm using a wrong word, tank
6 is not the right word, correct? Expired solutions?

7 A Tank is correct --

8 Q Okay.

9 A -- in dry gas but in solutions it's wet bath.

10 Q Okay. So, and -- well let me ask you this, for the dry gas,
11 do those have expirations also?

12 A Yes.

13 Q Okay. So as it relates to the wet bath test which you use for
14 the 0.04 and the 0.20 tests, we have no way of knowing whether
15 or not those tests that you ran were with expired or up to
16 date tanks, correct?

17 A Solutions.

18 Q Solutions. Solutions. Is that right?

19 A Yes. I have -- I do not have, ah, I do not have those
20 expiration dates.

21 Q Okay. And as for the dry gas, ah, test that you ran as part
22 of the 100 day, 120 day check, we also can't be sure that
23 those tanks weren't expired, is that correct?

24 A I do not have that, ah, expiration date either.

25 Q Okay.

1 A On hand.

2 Q And you are required to use solutions and tanks that have not
3 expired, correct?

4 A Yes.

5 Q Okay. Um, because of your, ah, class operator status, I think
6 you can answer this question, if you can't just let me know,
7 um, is it true that you can ask the machine to run an accuracy
8 check test at any time? You can press a button and it'll run
9 an accuracy check test?

10 A You mean can an operator do that?

11 Q Yes. Like if, if you just wanted to ask the machine to run an
12 accuracy check test, similar to a seven day check, it can just
13 do it at any time?

14 A Dry gas.

15 Q Yes.

16 A Yes.

17 Q Okay. You're getting paid to testify today?

18 A Yes.

19 Q And is that by the prosecution?

20 A Yes.

21 Q And you have no independent recollection of the testing that
22 you conducted on, um, this machine, correct?

23 A Other than the paperwork, no.

24 Q Okay. But even that, I mean, you don't have any independent
25 recollection of the test that's reflected in this paperwork,

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1 correct?

2 A I'm not sure I understand.

3 Q Do you remember conducting this test on December 30th, 2017 on
4 this machine?

5 A If it were not for the results on the paper I would not, no.

6 MS. SHARON: Okay. Um, I think that's all, Your
7 Honor.

8 THE COURT: Redirect?

9 MR. MCINTYRE: Yes, Your Honor.

10 **REDIRECT EXAMINATION**

11 BY MR. MCINTYRE:

12 Q Um, now you mentioned that you maintained a, when you worked
13 for, ah, when you did this job, you maintained 143 Datamaster
14 instruments?

15 A Yes.

16 Q And when you visited one of the test sites, did you conduct
17 that test in the same way every time?

18 A Yes.

19 Q All right. Um, was it your habit to check to see if, um,
20 samples, whether it's dry gas or wet bath, did you check to
21 see if those were expired before using them?

22 A Yes.

23 Q If they were expired, what did you do?

24 A I, ah, exchanged them for non-expired, ah, solutions or dry
25 gas.

1 Q So you would not use an expired, um, dry gas or wet bath
2 solution?

3 A I, I tried to never to do that intentionally.

4 Q All right. It's, it's possible it happened but it's something
5 that you checked for?

6 A Yes.

7 MR. MCINTYRE: All right. Ah, no further questions,
8 Your Honor.

9 MS. SHARON: May I enquire?

10 THE COURT: Yeah.

11 **RE-CROSS-EXAMINATION**

12 BY MS. SHARON:

13 Q Okay. Despite what Mr. McIntyre just asked you about, you
14 have made that mistake in the past, correct?

15 A I did on that, in that particular test that you're
16 questioning, yes.

17 MS. SHARON: Okay. Thank you.

18 MR. MCINTYRE: Nothing, Your Honor.

19 THE COURT: Okay. May this witness be excused?

20 MS. SHARON: Yes.

21 MR. MCINTYRE: As far as I'm concerned, yes, Your
22 Honor.

23 THE COURT: Thank you very much. Next time bring
24 pie for everybody.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Gier. You're free to
2 leave.

3 (At 1:31 p.m., witness excused)
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1 STATE OF MICHIGAN)
2 COUNTY OF OAKLAND)

3 I, Kassandra Ginn, certify that this transcript, consisting of
4 33 pages, held on Monday, January 14, 2019, before the HONORABLE
5 MICHELLE FRIEDMAN APPEL, Chief Judge at the 45th District Court,
6 located at 13600 Oak Park Boulevard, Oak Park, Michigan, 48237, is
7 a complete, true, and correct transcript of the electronic
8 recordings.

9
10 3/6/19

Kassandra Ginn

11 Date

Kassandra Ginn, CER 8822
45th District Court
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APPENDIX D

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD MICHAEL LINNARTZ,

Defendant-Appellant.

UNPUBLISHED

October 22, 2020

No. 348297

Shiawassee Circuit Court

LC No. 2018-002914-FH

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant, Todd Michael Linnartz, of manufacturing methamphetamine (meth), MCL 333.7401(2)(b)(i); operating or maintaining a meth laboratory, MCL 333.7401c; tampering with evidence, MCL 750.483a(6)(b); obtaining pseudoephedrine to make meth, MCL 333.17766c(1)(d); assault with a dangerous weapon, MCL 750.82; and assaulting, resisting, or obstructing a police officer (resisting arrest), MCL 750.81d(1). The trial court sentenced defendant to 280 to 480 months' imprisonment for maintaining a meth lab, second or subsequent offense, MCL 333.7413(1), and to a consecutive term of 280 to 480 months' imprisonment for manufacturing meth,¹ second offense, MCL 333.7413(1). The court also sentenced defendant as a third-habitual offender, MCL 769.11, to concurrent sentences of 85 to 240 months' imprisonment for tampering with evidence, 24 to 120 months' imprisonment for obtaining pseudoephedrine to make meth, 24 to 96 months' imprisonment for assault with a dangerous weapon, and 24 to 48 months' imprisonment for resisting arrest. Defendant appeals his convictions by right. We affirm.

I. RELEVANT FACTS

On June 21, 2018, five officers from the Mid-Michigan Area Group Narcotics Enforcement Team (MAGNET), along with other uniformed law enforcement officers, executed a search warrant at defendant's home based on a report that defendant was distributing meth. Officers

¹ The court exercised its discretion to sentence defendant to consecutive sentences pursuant to MCL 333.7401(3).

announced themselves as law enforcement, stated that they had a search warrant, and ordered defendant to exit the house. Defendant refused and demanded to review the search warrant. The MAGNET team breached defendant's front door and saw defendant standing toward the back of the residence holding his 80-pound pit bull dog by the collar. Officers stated that the dog was barking and aggressive, and multiple officers testified that they believed the dog was going to bite them. At one point, defendant told the dog, "You want 'em, go get 'em," and released the dog, which charged toward the officers. Officers retreated outside and lost contact with defendant for approximately 5 to 10 minutes before defendant voluntarily exited the house. The dog followed defendant outside and appeared to be friendly. The officers conducted a search of the home and discovered several items that suggested defendant was producing meth, including suspected one-pot reaction vessels in the kitchen sink that appeared to have been recently washed out. Officers found several household items that are commonly used to produce and smoke meth, as well as two plastic vials that contained residue that tested positive for meth.

II. ANALYSIS

A. NPLEX RECORDS

On appeal, defendant first argues that the trial court erred by admitting into evidence National Precursor Log Exchange (NPLEx) records. NPLEx is a nationwide database that tracks purchases of products containing pseudoephedrine. The database is administered by a private company, and the information is obtained by pharmacies at the time of purchase. Defendant contends that the trial court erred in admitting the records because they constituted hearsay without exception and their admission violated his rights under the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20. We disagree.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Grant*, 329 Mich App 626, 634; 944 NW2d 172 (2019) (quotation marks and citation omitted). Defendant did not object to admission of the records on constitutional grounds in the trial court; therefore, this issue is unpreserved, and our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant bears the burden to demonstrate that an error occurred, that the error was clear or obvious, and that the error affected his or her substantial rights. *Id.* In order to establish the last element, the defendant must show that the error "affected the outcome of the lower court proceedings." *Id.*

1. CONFRONTATION CLAUSE

The basis of defendant's claim of constitutional error is his assertion that the NPLEx records were inadmissible because they were testimonial statements. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). "A statement is testimonial if the declarant should reasonably have expected that [the] statement would be used in a prosecutorial manner and an objective witness would believe that the statement would be available for use at a later trial." *People v Clark*, _____

Mich App ___; ___ NW2d ___ (2019) (Docket No. 343607); slip op at 19. In other words, a statement is testimonial and subject to the Confrontation Clause if it was “prepared specifically for use at . . . trial.” *Melendez-Diaz v Massachusetts*, 557 US 305, 324; 129 S Ct 2527; 174 L Ed 2d 314 (2009), and had “the primary purpose of accusing a targeted individual of engaging in criminal conduct.” *Williams v Illinois*, 567 US 50, 84; 132 S Ct 2221; 183 L Ed 2d 89 (2012). Defendant argues in his appellate brief that the NPLEx records “are testimonial because the pharmacists or any reasonable person could assume that the records would be used at a later trial should there be a violation of the allowed amount of purchases.”

That NPLEx records *could* be used *should* a violation occur is insufficient to show that the records are “prepared specifically for use at . . . trial, *Melendez-Diaz*, 557 US at 324; 129 S Ct 2527, 2540, and with “the primary purpose” of targeting one accused of criminal conduct, *Williams*, 567 US at 84, 132 S Ct 2221, 2243. Detective Trooper Ryan Dunlap testified that Michigan law requires pharmacies to scan the ID of anyone who purchases pseudoephedrine, and that the log is created to show identifying information, including how many grams were purchased, where, when, and by whom. The police have the ability to retrieve the logs but cannot manipulate them in any way.

As support for his argument, defendant relies on three cases where courts have determined that a document prepared by a nontestifying expert violated the Confrontation Clause. In *Bullcoming v New Mexico*, 564 US 647, 663-664; 131 S Ct 2705, 180 L Ed 2d 610 (2011), the United States Supreme Court determined that the admission of a blood-alcohol analysis report violated the Confrontation Clause because it was generated after police sent the defendant’s blood sample to a state laboratory to assist in the police investigation. Similarly, in *Melendez-Diaz*, 557 US at 308, the Court held that a forensic lab report regarding seized plastic bags that were analyzed on police request was a testimonial document that violated the Confrontation Clause. Finally, in *People v Fackelman*, 489 Mich 515, 532-533; 802 NW2d 552 (2011), cert den 565 US 1059 (2011), the Michigan Supreme Court determined that a forensic psychiatric report was testimonial evidence because, among other things, it focused on the defendant’s alleged crime and pending charges and the defendant’s admittance to the hospital was arranged by lawyers.

Defendant’s reliance on these cases is misplaced. The reports at issue in *Bullcoming*, *Melendez-Diaz*, and *Fackelman* were each generated after a defendant was charged with a crime and pursuant to a police investigation or a request by lawyers. By contrast, the data compilation and reporting procedures Detective Trooper Dunlap described are required for every purchase of pseudoephedrine products within the state and regardless of whether the log is ever used for litigation. Unlike the reports at issue in *Bullcoming*, *Melendez-Diaz*, and *Fackelman*, the NPLEx purchase logs responded to state mandates, were being kept before defendant was suspected and accused of the instant crimes, and recorded any purchase of pseudoephedrine, not just those made by defendant. The possibility that the NPLEx records could be used as evidence against a defendant in criminal prosecution does not mean that they were specifically or primarily prepared for such use. Accordingly, the NPLEx records were not testimonial and their admission did not violate the Confrontation Clause. Defendant has not established a plain error. See *Carines*, 640 Mich at 763.

2. BUSINESS-RECORDS EXCEPTION

Defendant next contends that that the NPLEx records are hearsay, and the trial court erred in admitting them under the business-records exception, MRE 803(6), because the exception was inapplicable, given “the motivation for the data collection,” and because the witness through whose testimony the prosecution introduced the records, Detective Trooper Dunlap, neither created the records nor was he their custodian. Defendant’s arguments are unpersuasive.

Out-of-court statements offered to prove the truth of the matter asserted is hearsay, MRE 801(c), and hearsay is inadmissible unless it falls under one of the exceptions provided by the Michigan rules of evidence, MRE 802. The business-records exception, MRE 803(6), excludes the following from operation of the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian *or other qualified witness*, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [Emphasis added.]

As pertains to the case at bar, MRE 803(6) allows admission of a record or data compilation of transactions, made at or near the time by a person with knowledge, if the record or data collection is kept in the “course of a regularly conducted business activity,” and if the business regularly kept such record or data collection. The foundation for admitting such documents may be provided by the custodian or other qualified witness, or by a certificate that complies with the court rule.

In contending that the “motivation for the data collection” makes the business-records exception inapplicable, defendant is essentially reasserting his argument that the NPLEx log is testimonial because it was created, as defendant insists, “in anticipation of potential criminal litigation.” We have already rejected this argument and need not address it further.

As to who may properly lay the foundation for admission of evidence under the business-records exception, MRE 803(6) allows qualifying records to be introduced through the testimony of “the custodian or other qualified witness.” Addressing FRE 803(6),² the federal counterpart to MRE 803(6), the Sixth Circuit Court of Appeals has explained that “[another] qualified witness should be given the broadest interpretation,” and that “[t]he foundation for admitting evidence under Rule 803(6) may be laid, in whole or in part, by the testimony of a government agent or

² FRE 803(6) is not identical to that of MRE 803(6), but the differences in language are not relevant to the instant analysis.

other person outside the organization whose records are sought to be admitted. The only requirement is that the witness be familiar with the record keeping system.” *United States v Collins*, 799 F3d 554, 584 (CA 6, 2015); see also *People v VanderVliet*, 444 Mich 52, 60 n 7; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994) (indicating that, because Michigan’s rules of evidence are based on the federal rules of evidence, courts may find case law referring to a parallel federal rule helpful and persuasive).

Here, Detective Trooper Dunlap testified that he had personal knowledge and expertise regarding how and why the logs were created and maintained and had been trained in how to use them. Based on the trooper’s testimony, the trial court made a factual finding that he was an “other qualified witness” for purposes of MRE 803(6). Defendant does not challenge that finding. To the extent defendant argues that Detective Trooper Dunlap was not a proper witness to introduce the records because he did not create them, MRE 803(6) does not require the witness introducing the records to have created them, only that the records themselves were made by, or with information from, a person with knowledge. Defendant does not argue that the records were not made by a person with knowledge or with information conveyed by such a person. The trial court having found Detective Trooper Dunlap a “qualified witness” for purposes of MRE 803(6), a finding that defendant does not challenge, and absent any requirement that the “qualified witness” created the records or is their custodian, we conclude that the trial court’s admission of the NPLeX records into evidence was not an abuse of discretion. See *Lukity*, 460 Mich at 488.

B. SUFFICIENT EVIDENCE

Defendant next argues that the prosecutor did not present sufficient evidence for a reasonable jury to have found that the elements of assault with a dangerous weapon were proven beyond a reasonable doubt. Specifically, defendant argues that the officers could not have “reasonably” feared his dog because the dog “never made physical contact with anyone present”; acted “confused” during the ordeal, according to one witness; was friendly and easy to put on a leash five to ten minutes later; and was never close enough to harm the officers. We disagree.

We review de novo challenges to the sufficiency of evidence. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). We “view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of assault with a dangerous weapon are “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Bosca*, 310 Mich App 1, 20; 871 NW2d 307 (2015) (quotation marks and citation omitted). “Assault” is defined as “either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Meissner*, 294 Mich App 438, 454; 812 NW2d 37 (2011) (quotation marks and citation omitted).

The prosecution presented ample evidence to establish that the officers were “in reasonable apprehension of receiving an immediate battery.” Detective Matthew Fray testified that when officers initially breached the house, defendant’s dog was barking and “appeared to be trying to get away from [defendant] to come toward the door.” He testified that his “gut feeling was that

the dog was trying to come and attack us as to defend the home.” Lieutenant Michelle Taylor also testified that the dog was barking and “aggressive,” and it would only advance a few feet before returning to defendant. Defendant admitted that he commanded his dog to attack the officers. Detective Fray testified that the dog was released and advanced toward the officers, who were “stacked up” at the front door, and Detective Trooper Dunlap expressly testified that he was afraid the dog was going to try and bite them. Detective Fray testified that he believed the dog could have injured them and that defendant intended for the dog to do so. That the dog did not make physical contact is legally irrelevant. See e.g., *People v Carlson*, 160 Mich 426, 429; 125 NW 361 (1910) (“That an assault may be committed without actually touching the person of the one assaulted is not disputed, and no authorities are required in support of the proposition.”). Viewing this evidence in the light most favorable to the prosecutor, *Wolfe*, 440 Mich at 515, we conclude that the evidence was sufficient for a reasonable jury to find that the element of “reasonable apprehension” had been met. That the dog was friendly and easy to put on a leash after the incident does not negate the reasonableness of the officer’s fear during the incident. And, to the extent that an officer’s testimony that the dog appeared “confused” contradicts testimony about its aggressiveness, we resolve conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008) (indicating that, when reviewing a claim of insufficient evidence, “[a]ll conflicts in the evidence must be resolved in favor of the prosecution”).

C. EXTRANEOUS INFLUENCE

Defendant next argues that he is entitled to a new trial because the jury was exposed to an extraneous influence in the form of knowledge that he was incarcerated, and that his trial counsel rendered ineffective assistance by failing to move for a mistrial. Once again, we disagree.

Defendant concedes that he did not preserve for appellate review the issue of the jury’s exposure to an extraneous influence. We review unpreserved errors for plain error affecting substantial rights. *Carines*, 60 Mich at 763. Defendant preserved his claim of ineffective assistance of counsel by filing in this Court a motion for remand for a *Ginther* hearing.³ Because this Court denied defendant’s motion to remand for a *Ginther* hearing,⁴ our review is limited to mistakes apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

A criminal defendant is entitled to be tried by a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). “Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.” *Id.* The Michigan Supreme Court has laid out a two-part test to determine whether a jury was exposed to extrinsic influences that requires reversal:

- First, the defendant must prove that the jury was exposed to extraneous influences.
- Second, the defendant must establish that these extraneous influences created a real

³ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

⁴ *People v Linnartz*, unpublished order of the Court of Appeals, issued October 21, 2019 (Docket No. 348297).

and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. [*Id.* at 88-89 (citations omitted).]

During his testimony, defendant explained his purchases of pseudoephedrine by asserting that he used it to control his allergies. At the close of his testimony, one juror submitted the question, "What is being used to control [defendant]'s allergies in jail?" A second juror submitted the question, "What are you currently using to manage your allergies since June 21, 2018?" Addressing these questions outside the presence of the jury, the trial court said to counsel:

And I think the record should reflect that this Court and Security has done everything in its power to prevent the jury from knowing the status of [defendant] and his incarceration pending trial.

He's been brought in well before seven o'clock in the morning, taken out well after five o'clock. He is in the courtroom, and has been in the courtroom in civilian, appropriate attire. He was given a haircut. He was given a shave. He is not in shackles, and he's not restrained in any way in the courtroom.

I think this Court, and its staff has gone above and beyond the call of duty not to give the impression that [defendant] is incarcerated.

The prosecutor agreed that there was nothing the court could have done differently because incarceration had never been brought up during the course of trial and posited that the juror likely was assuming that criminal defendants are routinely lodged in jail while awaiting, and during, trial. Defense counsel also stated that he had not "seen anything the Court has done or could have done differently that would have prevented anyone from knowing that [defendant] is incarcerated." The trial court decided that it would not read either question because their prejudicial effect would outweigh the probative value, and noted that "the jury knowing that the defendant is incarcerated is not necessarily going to be an automatic mistrial."

Assuming that defendant's incarceration is an "extraneous influence," defendant has proved neither prong of the *Budzyn* test. The record gives us no reason to believe that the jurors based their questions on actual external information. We agree with the prosecutor that the questions appear to assume that defendants are housed in jail from their arrest through their trial. In addition, there is no indication that any of the other jurors were exposed to this information because the court refused to read the question to the jury. Thus, defendant has not "prove[d] that the jury was exposed to extraneous influences." *Budzyn*, 456 Mich at 88.

Even if we assume for the sake of argument that defendant has established the first prong of the *Budzyn* test, he has not established that the alleged extraneous influence "created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 89. Defendant argues that the evidence of his guilt was not overwhelming and that, but for the jury's improper exposure

to the knowledge of his incarceration, the jury may have acquitted him. However, our review of the record compels us to conclude that the prosecution presented ample evidence that, if believed by the jury, established defendant's guilt. Multiple officers testified that, when they searched defendant's property according to the search warrant, they found nearly all of the ingredients needed to cook meth, paraphernalia needed to cook meth, and capsules that tested positive for meth. Officers also testified that defendant appeared to be trying to dispose of incriminating evidence, and multiple witnesses testified to defendant's conduct that constituted assault and resisting and obstructing a police officer. Although defendant's credibility was at issue during his testimony, this case did not turn entirely on which witnesses the jury found more credible; the prosecution presented ample physical evidence of defendant's guilt. Thus, even if the jury was exposed to extraneous information regarding defendant's incarceration, there was no real and substantial possibility that it affected the jury's verdict.

Defendant contends that his trial counsel rendered constitutionally ineffective assistance by failing to move for a mistrial based on the questions of the jurors. Ineffective-assistance claims are mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail on a claim of ineffective assistance, a defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). On the record before us, there is no evidence that counsel performed below an objective standard of reasonableness when he failed to move for a mistrial when there was no basis for such motion. Counsel does not render ineffective assistance for failing to advance a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Having failed to establish the first of two prongs required to prevail on a claim of ineffective assistance, defendant's claim necessarily fails.

D. JURY INSTRUCTION

Defendant next contends that the trial court invaded the factfinding province of the jury, negated the presumption of innocence, and shifted the prosecution's burden of proof, when it instructed the jury that witnesses, including police officers, cannot lie while testifying, and that defense counsel was ineffective for failing to object to the comment. Both arguments fail.

Defendant failed to object to the comment he now challenges on appeal, so the issue is unpreserved, and our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763. Defendant's preserved ineffective-assistance claim is, again, reviewed de novo, *LeBlanc*, 465 Mich at 579, based on mistakes apparent from the record, see *Horn*, 279 Mich App at 38.

A criminal defendant has a right to a properly instructed jury. *People v Lambert*, 395 Mich 296, 304; 235 NW2d 338 (1975). We consider jury instructions as a whole to determine whether the court misinformed the jury or otherwise committed an error, *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011), and will affirm a conviction when the instructions fairly presented the issues to be tried and adequately protected the defendant's rights, see *People v Kowalksi*, 489 Mich 488, 502; 803 NW2d 300 (2011).

During voir dire, defense counsel asked prospective jurors hypothetical questions regarding a citizen's obligation when presented with a warrant and whether police have an obligation to be truthful when doing their job. One juror indicated that he thought police officers have an obligation to be truthful at all times. The court called a bench conference, after which the juror asked for clarification. After a second bench conference, the court explained that undercover police officers "can use some subterfuge when doing their jobs, but they can't when recounting what happened. Right -- or stating the nature of what's happened, facts." When the juror continued to express confusion regarding whether an officer could lie about having a warrant and not be held accountable for the lie, the court again attempted to clarify:

The Court: -- you're going to have to listen to all the testimony, and, then, you're going to have to decide what happened.

Juror: Okay.

The Court: Do you understand? You'll have to hear the testimony and listen to the instructions, and, then, decide what happened. That's your job as a juror is to decide the facts, and there will be law to instruct you on that.

Juror: So, I would take the officer at his word. Do you know what I mean? And expect that he's held under a different set of guidelines that say what he's supposed to be saying.

The Court: Well, no -- I mean, an officer's testimony is to be judged the same as anybody else's testimony as to whether or not they're credible and telling the truth. Do you understand that?

The juror explained that he was asking whether someone must take an officer at his word if the officer shows up at his house and claims to have a warrant. After holding another bench conference, the court explained that officers are not required to show a warrant right away, but must provide the warrant to the person to be searched at some point later. A second juror then requested further clarification:

Second Juror: I just want to clarify something.

You said that if an undercover officer is going to purchase drugs and the guy said it was [sic], asked him if he was a cop, you said it's okay for him to say no.

The Court: That is okay.

Second Juror: Okay. But, he—but, when he goes to court, he has to then say he said it was [sic], said no?

The Court: Yeah.

Second Juror: Okay.

The Court: And, well, an officer, or any witness, can't put their right hand up and tell a lie. They can't do that—I mean, they've got to tell the truth.

Second Juror: But, the police can lie, at that point, on the street.

The Court: On the street to, in the course of police work, you know, as long as their misrepresentation doesn't violate the constitution.

Second Juror: Okay.

The Court: All right. [Emphasis added.]

Defendant challenges the comment italicized above, contending that the court's statement was effectively an instruction to the jury that police officers and witnesses cannot lie while testifying in court. Viewed in context, however, the court was not instructing the jury that it should presume that all witnesses tell the truth on the stand. Rather, the comment occurred in the larger context of a discussion about the rights and responsibilities of a citizen for whose property police claim to have a search warrant. More specifically, it occurred during a tangential exchange regarding whether and when an officer may use trickery. That witnesses are expected to tell the truth when testifying should come as no surprise; before each witness took the stand, including defendant, the court asked whether the witness would "tell the truth, the whole truth, and nothing but the truth, so help you God."⁵ That witnesses may not tell the truth was reiterated by the trial court's repeated instructions to the jury that one of its roles was to determine the credibility of witnesses.

Even in the immediate context of the challenged statement, the court stressed that it was the jury's obligation to listen to and weigh witnesses' testimony and determine whom to believe. Further, before and after the presentation of proofs, the court properly instructed the jury that defendant's innocence was presumed, that the prosecutor had to prove each element of each charge beyond a reasonable doubt, and that the jury's role was to decide the facts, which included determining what testimony to believe and what to reject. The court also instructed the jury that it could only consider evidence that had been properly admitted, that the court's "comments, rulings, questions, and instructions" were not evidence, and that the jury was the judge of the facts and "should decide the case from the evidence." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

In light of the foregoing, we find no plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763. Viewed as a whole, *Hartuniewicz*, 294 Mich App at 242, the court's instructions fairly presented the issues to be tried and adequately protected defendant's rights, *Kowalksi*, 489 Mich at 502. Because the trial court's statement was not erroneous and did not

⁵ The only exception was the first witness, whom the court asked, "Do you promise that you will tell [sic] testify truthfully, so help you, God?"

interfere with the jury's ability to impartially judge each witness's credibility, defense counsel was not ineffective for failing to raise a futile motion for a mistrial. *Ericksen*, 288 Mich App at 201.

We conclude that the trial court did not abuse its discretion or violate defendant's rights under the Confrontation Clause by admitting the NPLEX records into evidence, and that the prosecution presented sufficient evidence from which rational jurors could conclude beyond a reasonable doubt that the behavior of defendant's dog put officers in reasonable apprehension of an immediate battery. We further conclude that there is no evidence that the jury was actually exposed to any information regarding defendant's incarceration, and that the trial court did not misinform the jury, and its instructions to the jury adequately protected defendant's rights.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering

APPENDIX E

OAKLAND COUNTY

18-164475-AR



JUDGE MICHAEL WARREN
TROY CITY v ASSI, STEVEN

STATE OF MICHIGAN

IN THE FIFTY-SECOND JUDICIAL DISTRICT - F

(COUNTY OF OAKLAND)

THE CITY OF TROY,

Plaintiff,

v.

STEVEN ASSI,

Defendant.

17-006229

JURY TRIAL - VOLUME I OF II

BEFORE THE HONORABLE KIRSTEN NIELSEN HARTIG, DISTRICT JUDGE

Troy, Michigan - Monday, March 5, 2018

APPEARANCES:

For the People:

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1 Troy, Michigan

2 Monday, March 5, 2018 - 8:49 a.m.

3 THE COURT: Calling People v. Assi. 17-6229.

4 MR. MOTZNY: Good morning, your Honor. Allan Motzny
5 on behalf of the City of Troy.

6 MR. NUSHAJ: Good morning, your Honor. Renis
7 Nushaj appearing with and on behalf of Mr. Assi to my left.

8 THE COURT: Sir, your full name?

9 MR. ASSI: Steven Assi.

10 THE COURT: And I assume you're still on East Twelve
11 Mile Road?

12 MR. ASSI: Yes.

13 THE COURT: All right. Jury instructions,
14 gentlemen. I hear that there's a disagreement.

15 All right. Tell me about which one or ones.

16 MR. NUSHAJ: Your Honor, this is my disagreement
17 with Mr. Motzny's jury instructions, so I guess I'll start.

18 Judge, I received the instructions on Friday. We
19 both filed them on Friday. Mr. Motzny made a small
20 modification and sent them out on Saturday, as well.

21 On 15.3 --

22 THE COURT: Oh. Well, then I may not have -- do I
23 have the most recent one?

24 MS. KORKES: Yes, your Honor.

25 THE COURT: Okay.

1 MR. NUSHAJ: Okay. Under 15.3, Mr. Motzny has
2 listed that the marijuana -- you know, use of marijuana is a
3 controlled substance.

4 THE COURT: I'm sorry, 15.3 or 15.4? I feel like
5 that was the one -- 15.4 is the one that says that marijuana
6 is controlled --

7 MR. NUSHAJ: A controlled substance, I apologize.

8 THE COURT: All right.

9 MR. NUSHAJ: I think maybe on the Friday ones, it
10 was on 15.3. Regardless.

11 THE COURT: Okay.

12 MR. NUSHAJ: Thank you.

13 Judge, obviously, the use of marijuana is not a
14 charged offense here, it's not one of the charged offenses.
15 I'm objecting to that particular portion being included with
16 the instructions here. It's not a charged offense, Judge.

17 I did some research, Judge. In People v. Koon,
18 which is 494 Mich 1 (sic), it's a 2013 case, Judge.

19 The Michigan Supreme Court held that the Michigan
20 Vehicle Code has a zero-tolerance provision for any amount of
21 controlled substance in the driver's system is inconsistent
22 with the Michigan Medical Marihuana (sic) Act, Judge, and does
23 not apply, you know, to the medical use of marijuana.

24 THE COURT: All right. Let me ask you, does your
25 client have a card?

1 MR. NUSHAJ: Yes, your Honor.

2 THE COURT: Okay. And was it valid on the date of
3 arrest?

4 MR. NUSHAJ: I believe so; yes, your Honor.

5 THE COURT: Well, I would need to know the answer to
6 that.

7 MR. NUSHAJ: I don't have the card in front of me,
8 obviously, but I'll find out in just a second. May I finish
9 this and then I'll find out?

10 THE COURT: Well, I think it makes a big difference
11 if you're claiming some protection of the Act whether or not
12 he had a valid card on the day of the arrest.

13 MR. NUSHAJ: Sure. And I'll double-check, but --
14 you can sit down, Steve.

15 Obviously, the protections of the Act pursuant to
16 the Medical Marihuana Act Section 4 and Section 8 are still
17 available even if the card may not be valid on the date in
18 question.

19 THE COURT: Well, still, I want to know if it was.

20 MR. NUSHAJ: Oh, sure, sure. Absolutely.

21 THE COURT: So, take the time to look.

22 MR. NUSHAJ: Thank you.

23 THE COURT: Okay.

24 All right. So, Mr. Motzny, while Mr. Nushaj is
25 looking, it does appear that the matter of 15.4 you have added

1 language beyond what the standard jury instruction has.

2 MR. MOTZNY: Yes, your Honor. Generally, that
3 instruction is given in conjunction with the instruction for
4 Operating While Intoxicated. And the standard instructions
5 for Operating While Intoxicated have a provision that says
6 such-and-such is a controlled substance, that's 15.3. So,
7 normally, you wouldn't give it twice because you've already
8 told the Jury that it's a controlled substance.

9 THE COURT: All right. So, just to be clear, you
10 did add Paren 1 (sic) and you're saying that you added Paren
11 because you believe that the law contemplates that Paren 1
12 would have already or I rather, I think, I can't tell which
13 one it is, would already state that. And where does 15.3
14 state that?

15 MR. MOTZNY: It's right -- it's one of the drop-
16 downs and I have --

17 THE COURT: Is it A or just 13?

18 MR. MOTZNY: It's 15.3 -- yeah, it's 15.3(1)(e),
19 Roman numeral I (sic). I have a copy, if the Court would like
20 to see it.

21 THE COURT: No, I'm looking at it. So, (e), "was
22 under the influence of a combination of alcohol/ a controlled
23 substance/ an intoxicating substance while operating the
24 vehicle choose from the following, under the influence of
25 alcohol, under the influence of a controlled substance."

1 And then it says, "name substance." Is there -- the
2 bracket of materials, is that what you're --

3 MR. MOTZNY: Yes, named substance is a controlled
4 substance, that's what I'm referring to, your Honor.

5 THE COURT: So, just to be clear, you are arguing
6 Paren 3, the bracketed material says "named substance."

7 MR. MOTZNY: Correct.

8 THE COURT: All right. Just one second.

9 All right. So, the answer to my question is, did he
10 have a valid card on that day?

11 MR. NUSHAJ: I'm afraid I don't have that, Judge. I
12 was looking at my file, I don't have it, but he does have a
13 valid card in his possession today, but I don't know whether
14 on the date of the arrest he had one. I know that I've seen
15 his previous cards, but --

16 THE COURT: Okay. I just can't honestly believe
17 we're at this moment and you don't have the answer to that.

18 MR. NUSHAJ: I understand, Judge, but I don't know
19 the answer. I don't have his prior cards at this time. I
20 know that they were included in the police report. I believe
21 they were included in the police reports, whatever they
22 destroyed --

23 THE COURT: Officer, could you look through the
24 police report and tell us --

25 OFFICER MINTON: (inaudible) statement, there's a

1 copy of a seized Medical Marijuana Card is attached to this
2 report and I did locate a copy or I did locate the card itself
3 at the time of the incident.

4 THE COURT: And do you believe it was valid?

5 OFFICER MINTON: I do.

6 THE COURT: All right. Thank you.

7 MR. NUSHAJ: Thank you, your Honor. Sorry, Judge.

8 THE COURT: All right. So, just for the record,
9 what's your name?

10 OFFICER MINTON: Officer Minton.

11 THE COURT: All right. Thank you.

12 All right. So, the Defendant had a valid Medical
13 Marijuana Card, which means that he could drive with some of
14 -- yeah, so I'm not sure that -- okay.

15 MR. NUSHAJ: And I do have some more, you know -- if
16 your Honor is obviously agreeing with me, I won't belabor it,
17 but your Honor --

18 THE COURT: No --

19 MR. NUSHAJ: There's more case law, if it'll help
20 you Honor, that I was able to find.

21 THE COURT: All right. Well, let me just -- I'm
22 trying to get my mind around this.

23 So, 15.4 states essentially that a person can be
24 impaired both by the drinking of alcohol and/or the
25 consumption of a controlled substance.

1 For purposes of this discussion, marijuana, I
2 believe, is a controlled substance and I believe the law would
3 allow the Defendant to be guilty if he was impaired by the
4 combination of those substances or in theory, even marijuana
5 by itself.

6 MR. NUSHAJ: Your Honor -- sorry, I didn't mean to
7 interrupt.

8 Okay. In People v. Feezel, which is 486 Mich 184,
9 it's a 2010 case.

10 THE COURT: Well, tell me your premise. So, are you
11 basically saying that if you have a medical marijuana card,
12 you can be impaired by the use of marijuana and the Jury can't
13 consider that? I really don't think that's the law.

14 MR. NUSHAJ: No, but this case, Judge, stands (sic)
15 for proposition that marijuana -- you know, the marijuana
16 metabolite, 11-carboxy-THC (sic), is not a controlled
17 substance under safe law and its mere presence is not
18 sufficient to state a conviction for operating with a
19 controlled substance.

20 THE COURT: Okay. Was there any lab report in this
21 case for blood?

22 MR. NUSHAJ: No, your Honor.

23 THE COURT: Okay. So, you'd be going, your theory
24 would be, simply his admission of having consumed --

25 MR. MOTZNY: Yes, there's no lab report, but the

1 argument is the credibility. Yeah, they don't have a lab
2 report. I'm sure he's going to make the argument it's a
3 credibility argument, but not an admissibility argument.

4 MR. NUSHAJ: Well, we talk about operating while
5 implicit drugs (sic). That's per se (sic), Judge, obviously,
6 a (inaudible), which operating while impaired --

7 THE COURT: Not under marijuana there's no per se.
8 I'm not exactly understanding what your argument is.

9 MR. NUSHAJ: My argument, my basic argument
10 obviously is that this instruction shouldn't be included for
11 it.

12 THE COURT: That, I get, but I don't know why.

13 MR. NUSHAJ: Well, case law says that you can't.
14 People v. Koon says that the Supreme Court held that the zero-
15 tolerance provision on any amount of a controlled substance in
16 a driver' system is inconsistent with Michigan Medical
17 Marihuana Act.

18 THE COURT: Okay. So, I think I agree with what
19 you're saying, as well, and perhaps it sounds like maybe a
20 special instruction will be not be crafted that states that
21 the Defendant has a medical marijuana card and is legally
22 allowed to consume marijuana, and to consider the marijuana
23 use for purposes of whether or not he was impaired, the Jury
24 would have to find that his marijuana consumption caused him
25 in whole or in part to be impaired by that marijuana usage, as

1 opposed to just not letting the Prosecutor discuss it at all.

2 MR. MOTZNY: I'd be acceptable to that, your Honor.

3 MR. NUSHAJ: Of course, you would.

4 And I understand, Judge, I would object; however, I
5 certainly understand and if your Honor is overruling my
6 objection, I will agree that it --

7 THE COURT: Well, I just don't see any basis, in
8 fact, for your argument because under the Medical Marihuana
9 Act, he can't drive while intoxicated or impaired by
10 marijuana, it specifically excludes that. So, I think doing
11 something different would be giving carte blanche to medical
12 marijuana drivers that they can drive impaired and the statute
13 doesn't allow that. It allows them to use marijuana, but not
14 to drive while impaired by marijuana.

15 So, I guess then that means that in the next -- I
16 think what I propose to do is do the special instructions
17 during the final and to remove Paren I because it really isn't
18 a controlled substance for purpose of someone with a medical
19 marijuana and I could include the special instruction at the
20 end.

21 Does that meet with both of your approval?

22 MR. NUSHAJ: It's also -- you know, Mr. Motzny has
23 also included it in the preliminary instructions. Is your
24 Honor going to strike it from the --

25 THE COURT: I'm looking at the preliminary right

1 now.

2 MR. NUSHAJ: Oh, okay.

3 THE COURT: So, my thought is to strike Paren I
4 because it already talks about the use or consumption of a
5 controlled substance or we could take the time now to craft
6 the special instruction, which is never my, you know,
7 preference because we're now wasting the time of the Jury.

8 But I'll defer to you both if you think it's
9 imperative to have this special instruction crafted now, I'll
10 do so.

11 MR. MOTZNY: Well, your Honor, I would object to
12 striking that at all because marijuana is a controlled
13 substance.

14 THE COURT: Not when you have a medical marijuana -

15 MR. MOTZNY: No, it --

16 THE COURT: I'm not -- I'm not going to do that.

17 MR. MOTZNY: Okay.

18 THE COURT: They're going to have sort of the Full
19 Monty of exactly the nuances of somebody consuming marijuana
20 when they have a valid card. And to state it just so -- to
21 me, this is actually disingenuous, marijuana is a controlled
22 substance. Saying that is disingenuous when the person going
23 to trial actually has a valid card. So, I'm not going to
24 state it so starkly because I don't think it's accurate.

25 So, what do you both want to do? Do it now or cover

1 it in the end? Probably the safer thing is to do it now.

2 MR. NUSHAJ: Judge, your sense was -- I was fine
3 with your articulation of the limiting (sic).

4 THE COURT: The Defendant is a valid medical
5 marijuana user.

6 All right. I have, "Defendant is a valid medical
7 marijuana user."

8 All right. I have, "At the time of the alleged
9 offense, Defendant was a valid medical marijuana user,
10 licensed by the State of Michigan pursuant to the Michigan
11 Medical Marihuana Act statute."

12 Maybe that's redundant.

13 "A driver in Michigan is guilty of operating while
14 impaired if the marijuana ingested or the alcohol and
15 marijuana ingested by the Defendant impaired his ability to
16 drive."

17 MR. MOTZNY: Satisfied, your Honor.

18 MR. NUSHAJ: I understand you objected to my
19 original, but I'm satisfied with that as a limited
20 instruction, your Honor.

21 THE COURT: All right. So, I'm going to take out
22 5 (sic) Paren I and then I'm going to -- I'm not going to
23 label it special instruction, I'm simply going to put it at
24 the bottom of 4 on the same page.

25 MR. NUSHAJ: Thank you, your Honor.

1 I do have one other matter, Judge.

2 THE COURT: Okay. I'm going to get Ms. Korke
3 working on this.

4 MR. NUSHAJ: Thank you.

5 My other matter, Judge, deals with respect to the
6 transcript from the Evidentiary Hearing that we had early last
7 week. I don't anticipate that this will become an issue.
8 Obviously, the Officer is going to testify. I called your
9 staff to request a transcript. I was told -- and you know,
10 Ms. Kliever will correct me if I'm wrong.

11 I was told that -- we had a series of conversations
12 back-and-forth, Ms. Kliever and I, and she indicated to me
13 that -- obviously, the timing was very tight with respect to
14 the Evidentiary Hearing to today. I wanted it for no other
15 reason than in case I needed to refresh the Officer's
16 recollection and impeach testimony, to use it for those
17 purposes.

18 The initial conversation that the two of us had, I
19 was told that the cost because of the time limitation was
20 exorbitantly high. It was about 3600 dollars. After another
21 conversation, Ms. Kliever called me and left me a message and
22 indicated that actually the deposit was going to be 400, the
23 cost may vary. She wasn't sure at this time and it was all
24 because of -- the high cost was because of the, again, time
25 limitation.

1 Obviously, this was -- my client couldn't afford
2 that, Judge, and as such, I was not able to request it. I'm
3 respectfully requesting that if the need arises and only if
4 the need arises, for me to be able to impeach testimony that
5 we may play portions of that particular hearing.

6 THE COURT: I'll see at the time.

7 MR. NUSHAJ: Thank you, your Honor.

8 THE COURT: Anything else?

9 MR. NUSHAJ: No, your Honor.

10 THE COURT: All right. So, I'm changing that and
11 then we will make copies. So, the next time I come in, I'll
12 be with the Jury unless there's any other preliminary matters.

13 MR. MOTZNY: Your Honor, we agreed to stop the video
14 at a certain time, 12:25:43, so that doesn't show anything
15 that the Jury shouldn't see.

16 MR. NUSHAJ: That is correct, your Honor.

17 MR. MOTZNY: I will watch it and stop it when it
18 gets to that point.

19 THE COURT: All right. And I'm sure you both want a
20 Mutual Sequestration Order.

21 MR. NUSHAJ: Yes, your Honor.

22 MR. MOTZNY: Yes, your Honor.

23 THE COURT: Anything else?

24 MR. NUSHAJ: No, your Honor.

25 THE COURT: All right. I'll return with the Jury.

1 MR. NUSHAJ: Thank you, Judge.

2 MR. MOTZNY: I could have Officer Minton as the
3 Officer-in-Charge?

4 THE COURT: Yes.

5 MR. MOTZNY: Okay.

6 (At 9:06 a.m., off the record.)

7 (At 9:25 a.m., on the record.)

8 THE COURT: Recalling People v. Assi. 17-6229.

9 MR. MOTZNY: Good morning, again, your Honor. Allan
10 Motzny on behalf of the City of Troy.

11 MR. NUSHAJ: Good morning, again, your Honor.
12 Renis Nushaj appearing on behalf of Mr. Assi.

13 THE COURT: And just to be clear, I believe both of
14 you saw the typed version of special jury instruction and
15 other than your objection to it existing at all, you don't
16 object to form or substance.

17 Is that true, Mr. Nushaj?

18 MR. NUSHAJ: That's correct.

19 MR. MOTZNY: Correct, your Honor.

20 THE COURT: All right. Please bring in the Jury.

21 MS. KORKES: All rise for the Jury.

22 (At 9:26 a.m., the Jury enters the courtroom.)

23 THE COURT: Good morning.

24 THE JURY: Good morning.

25 THE COURT: Please be seated.

1 The record should reflect the Jury is present in
2 court with Mr. Assi, his Counsel, and the City Attorney.

3 Ladies and gentlemen, I'm now going to read you the
4 preliminary jury instructions. You may follow along with me,
5 they're in your binders, or you may listen. The choice is
6 completely yours.

7 At this time, ladies and gentlemen, I'm going to
8 ask you to stand, raise your right hand, and swear your oath.

9 Ladies and gentlemen of the Jury, you have been
10 chosen to decide a criminal charge made by the City of Troy
11 against one of your fellow citizens. I will now ask you to
12 stand and swear to perform your duty to try the case justly
13 and to reach a true verdict. If your religious beliefs do not
14 permit you to take an oath, you may instead affirm to try the
15 case justly and reach a true verdict.

16 Each of you solemnly swear or affirm that in this
17 action now before the Court, you will justly decide the
18 questions submitted to you, that unless you are discharged by
19 the Court from further deliberation, you'll render a true
20 verdict and that you will render the verdict only on the
21 evidence introduced and in accordance with the instructions of
22 the Court so help you God. If so, please say I will.

23 THE JURY: (In unison.) I will.

24 THE COURT: Keeping your hands up, is there anyone
25 who was unable or unwilling to say, "I will"?

1 (No response.)

2 THE COURT: Hearing none, please have a seat.

3 Now, I will explain some of the legal principles you
4 will need to know and the procedure we will follow in this
5 trial.

6 A trial follows this procedure. First, the
7 Prosecutor makes an opening statement where he gives his
8 theories about the case. The Defendant's lawyer does not have
9 to make an opening statement, but he may make an opening
10 statement after the Prosecutor makes his or he may wait until
11 later. These statements are not evidence. They are only
12 meant to help you understand how each side views the case.

13 The Defendant is charged with operating a motor
14 vehicle while visibly impaired.

15 To prove the charge, the Prosecutor must prove the
16 following elements beyond a reasonable doubt. First, that the
17 Defendant was operating a motor vehicle on or about December
18 2nd, 2017. Operating means driving or having actual physical
19 control of the vehicle. Second, that the Defendant was
20 operating a vehicle on a highway, or other place open to the
21 public, or generally accessible to motor vehicles. Third,
22 that the Defendant was operating the vehicle in the City of
23 Troy, County of Oakland.

24 At the time of the alleged offense, the Defendant
25 was a valid medical marijuana user licensed by the State of

1 Michigan. Pursuant to the Michigan Medical Marihuana Act, a
2 driver in Michigan is guilty of operating while impaired if
3 the marijuana ingested or the alcohol and marijuana ingested
4 by the Defendant impaired his ability to drive.

5 After opening statements, the Prosecutor presents
6 his evidence. The Prosecutor may call witnesses to testify
7 and may show you exhibits like documents or objects. The
8 Defendant's lawyer has the right to cross examine the
9 Prosecutor's witnesses. After the Prosecutor has presented
10 all his evidence, the Defense Attorney may also offer
11 evidence, but he does not have to.

12 By law, the Defendant does not have to prove his
13 innocence or produce any evidence. If the Defense does call
14 any witnesses, the Prosecutor has the right to cross examine
15 them. The Prosecutor may also call witnesses to contradict
16 the testimony of the Defense witnesses.

17 After all the evidence has been presented, the
18 Prosecutor and the Defendant's lawyer will make their closing
19 arguments. Like the opening statements, these are not
20 evidence. They are only meant to help you understand the
21 evidence and the way each side sees the case. You must base
22 your verdict only on the evidence.

23 You have been given a written copy of the
24 instructions I have just read to you. You may refer to them
25 during the trial. Since no one can predict the course of the

1 trial, these instructions may change at the end of the trial.

2 At the close of the trial, I will provide you with a
3 copy of my final instructions for your use during
4 deliberations.

5 My responsibilities as the Judge in this trial are
6 to make sure that the trial is run fairly and efficiently, to
7 make decisions about evidence, and to introduce you -- pardon
8 me, instruct you about the law that applies to this case. You
9 must take the law as I give it to you. Nothing I say is meant
10 to reflect my own opinions about the facts of the case.

11 As jurors, you are the ones who will decide this
12 case. Your responsibility as jurors is to decide what the
13 facts of the case are. This is your job and no one else's.
14 You must think about all the evidence, and all the testimony,
15 and then decide what each piece of evidence means and how
16 important you think it is. This includes how much you believe
17 what each of the witnesses said. What you decide about any
18 fact in this case is final.

19 When it is time for you to decide the case, you are
20 only allowed to consider the evidence that was admitted in the
21 case. Evidence includes only the sworn testimony of
22 witnesses, the exhibits admitted into evidence, and anything
23 else I tell you to consider as evidence.

24 It is your job to decide what the facts of the case
25 are. You must decide which witnesses you believe and how

1 important you think their testimony is. You do not have to
2 accept or reject everything a witness says. You are free to
3 believe all, none, or part of any person's testimony.

4 In deciding which testimony you believe, you should
5 rely on your own common sense and everyday experience.

6 However, in deciding whether you believe a witness' testimony,
7 you must set aside any bias or prejudice you have based on the
8 race, gender, or national origin of the witness. There is no
9 fixed set of rules for judging whether you believe a witness,
10 but it may help you to think about these questions.

11 Was the witness able to see or hear clearly? How
12 long was the witness watching or listening? Was there
13 anything else going on that might have distracted the witness?
14 Does the witness seem to have a good memory? How does the
15 witness look and act while testifying? Does the witness seem
16 to be making an honest effort to tell the truth, or does the
17 witness seem to evade the questions, or argue with the
18 lawyers? Does the witness' age or maturity affect how you
19 judge his or her testimony?

20 Does the witness have any bias, or prejudice, or any
21 personal interest in how this case is decided? Have there
22 been any promises, threats, suggestions, or other influences
23 that affect how the witness testifies? In general, does the
24 witness seem to have any special reason to tell the truth or
25 any special reason to lie? All in all, how reasonable does

1 the witness' testimony seem when you think about all the other
2 evidence in the case?

3 The questions the lawyers ask the witnesses are not
4 evidence. Only the answers are evidence. You should not
5 think that something is true just because one of the lawyers
6 asked questions that assume or suggest that it is.

7 I may ask some of the witnesses questions myself.
8 These questions are not meant to reflect my opinion about the
9 evidence. If I ask questions, my only reason would be to ask
10 about things that may not have been fully explored.

11 During the trial, the lawyers may object to certain
12 questions or statements made by the other lawyers or
13 witnesses. I will rule on these objections according to the
14 law. My rulings for or against one side or the other are not
15 meant to reflect my opinions about the facts of the case.

16 Sometimes the lawyers and I will have discussions
17 out of your hearing. Also, while you are in the jury room, I
18 may have to take care of other matters that have nothing to do
19 with this case. Pay no attention to these interruptions.

20 You must not discuss the case with anyone including
21 your family and friends. You must not even discuss it with
22 the other jurors until the time comes for you to decide the
23 case. When it is time for you to decide the case, I will send
24 you to the jury room for that purpose. Then you should
25 discuss the case among yourselves, but only in the jury room

1 and only when all jurors are there.

2 When the trial is over, you may, if you wish,
3 discuss the case with anyone. If I call for a recess during
4 trial, I will either send you back to the jury room or allow
5 you to leave the courtroom on your own and go about your
6 business. But you must not discuss the case with anyone or
7 let anyone discuss it with you or in your presence. If
8 someone tries to do that, tell him or her to stop and explain
9 that as a juror, you are not allowed to discuss the case. If
10 he or she continues, leave and report the incident to me as
11 soon as you return to court.

12 You must not talk to the Defendant, the lawyers, or
13 the witnesses about anything at all, even if it has nothing to
14 do with the case. It is very important that you only get
15 information about the case in court when you're acting as the
16 jury and when the Defendant, the lawyers, and I are all here.

17 The only information that you will receive about
18 this case will come to you in this courtroom. You must not
19 consider any information that comes from anywhere else. Until
20 your jury service has concluded, you are not to discuss the
21 case with others, including other jurors except as otherwise
22 authorized by the Court. You are not to read or listen to any
23 news reports about the case. You may also not use a computer,
24 cellular phone, or other electronic device with communication
25 capabilities while in attendance at trial or during

1 deliberations. These devices may be used in morning breaks or
2 recesses, but are not to be used at any time to disclose or
3 obtain the following, information about a party, witness,
4 attorney, or court officer, or news accounts of the case, or
5 information collected through juror research on any topics
6 raised or testimony offered by any witness or by any exhibit.

7 You must not do any investigations on your own or
8 conduct any experiments of any kind. This includes using the
9 internet for any purpose regarding this case. If you discover
10 a juror has violated my instructions, you should report it to
11 me.

12 You may take notes during the trial if you wish, but
13 of course, you don't have to. If you do take notes, you
14 should be careful that it does not distract you from paying
15 attention to all the evidence. When you go to the jury room
16 to decide your verdict, you may use your notes to help you
17 remember what happened in the courtroom. If you take notes,
18 do not let anyone except the other jurors see them during
19 deliberations. Your notes will not be examined by anyone and
20 when your jury service concludes, your notes will be collected
21 and destroyed.

22 You can see that we have chosen a jury of seven.
23 After you have heard all the evidence and my instructions, we
24 will draw lots to decide which one of you will be dismissed in
25 order to form a jury of six.

1 Possible penalties should not influence your
2 decision. It is the duty of the Judge to fix the penalty
3 within the limits provided by law.

4 I may give you more instructions during the trial
5 and at the end of the trial, I will give you detailed
6 instructions about the law in this case. You should consider
7 all my instructions as a connected series. Taken all
8 together, they are the law that you must follow.

9 After all the evidence has been presented and the
10 lawyers have given their arguments, I will give you detailed
11 instructions about the rules of law that apply to this case,
12 then you will go to the jury room to decide on your verdict.
13 A verdict must be unanimous. That means that every juror must
14 agree on it and it must reflect the individual decision of
15 each juror.

16 It is important for you to keep an open mind and not
17 make a decision about anything in the case until you go to the
18 jury room to decide the case.

19 A person accused of a crime is presumed to be
20 innocent. This means that you must start with the presumption
21 that the Defendant is innocent. This presumption continues
22 throughout the trial and entitles the Defendant to a verdict
23 of not guilty unless you are satisfied beyond a reasonable
24 doubt that he is guilty.

25 Every crime is made up of parts called elements.

1 The Prosecutor must prove each element of the crime beyond a
2 reasonable doubt. The Defendant is not required to prove his
3 innocence or to do anything. If you find that the Prosecutor
4 has not proven every element beyond a reasonable doubt, then
5 you must find the Defendant not guilty. A reasonable doubt is
6 a fair, honest doubt growing out of the evidence or lack of
7 evidence. It is not merely an imaginary or possible doubt,
8 but a doubt based on reason and common sense.

9 A reasonable doubt is just that, a doubt that is
10 reasonable after a careful and considered examination of the
11 facts and circumstances in this case.

12 Counsel, any objection to the jury instructions as
13 written?

14 MR. MOTZNY: No objection, your Honor.

15 MR. NUSHAJ: None, your Honor, other than my prior
16 objection.

17 THE COURT: All right. I'll give you both
18 15 minutes for opening.

19 Mr. Motzny, would you like a two-minute warning?

20 MR. MOTZNY: Yes, your Honor.

21 THE COURT: Mr. Nushaj?

22 MR. NUSHAJ: Yes, your Honor.

23 THE COURT: All right. Go ahead, Mr. Motzny.

24 MR. MOTZNY: Good morning, again.

25 The Defendant, Steven Assi, this gentleman here is

1 charged with Operating a Motor Vehicle While Visibly Impaired
2 This is a lesser charge than the charge of, you've often heard
3 of Operating While Intoxicated. It's a lesser charge.

4 As the Judge indicated when she read the jury
5 instructions, a person can be guilty of Operating While
6 Impaired if, as a result of consuming alcohol or consuming
7 alcohol combined with marijuana their ability to operate is
8 impaired. And the key word is ability.

9 The evidence in this case will show beyond a
10 reasonable doubt that on December 2nd of 2017, the Defendant,
11 as a result of consuming alcohol or consuming marijuana in
12 conjunction with that alcohol was so affected by those drugs
13 and the alcohol that his ability to operate a vehicle in an
14 ordinary and careful manner was impaired.

15 We're going to prove our case with three witnesses,
16 Officer Pete Minton, who's sitting in the courtroom at this
17 time; Officer Melinda Weingart, who was a backup officer;
18 Police Service Aide Peter Guest, who is a certified breath
19 test operator in Michigan.

20 We will show you a video taken from the car. We'll
21 have a few exhibits for you to look at, mostly relating to a
22 breath test that was taken in this case.

23 But what the evidence will show is on
24 December 2nd, 2017, as I already indicated, at approximately
25 12:11 a.m., shortly after midnight, Officer Minton was on duty

1 and he was monitoring the eastbound traffic on Maple Road,
2 which is a public road in the City of Troy. He saw a vehicle
3 a GMC Sierra, that appeared to be going at a high rate of
4 speed because the vehicle was pulling away from other vehicles
5 on Maple Road at the time.

6 The Officer's radar unit indicated the vehicle was
7 traveling 62 miles per hour in a 40 mile per hour zone. The
8 vehicle was speeding, so Officer Minton had to turn his
9 vehicle around and catch up to this vehicle. He activated his
10 overhead lights and the vehicle pulled over. It pulled over
11 on Maple Road near John R.

12 Officer Minton approached the driver of the vehicle,
13 who was the Defendant, Steven Assi. He was the only person in
14 the vehicle. When Officer Minton first observed the
15 Defendant, one of the things that stuck out to him was he
16 smelled of alcohol as though he had been drinking. In fact,
17 the Officer asked, "Have you been drinking," and Mr. Assi
18 admitted he drank or said he drank two beers and he claimed
19 that he drank those beers before going to the gym and he was
20 coming from the gym.

21 Another thing that Officer Minton noticed was what
22 he describes as a fruity tobacco smell and he will testify
23 based on his experience, he's aware of a tobacco product that
24 sometimes is used in conjunction with the use of marijuana.
25 And based on that observation, he said, "Do you have any

1 marijuana in the car." And Mr. Assi's response was he's a
2 medical marijuana cardholder and he smoked marijuana at
3 approximately five p.m. that day.

4 As he was talking to Mr. Assi, he noticed a few
5 other peculiar things. For instance, he asked for his
6 driver's license and Mr. Assi, instead of handing him a
7 driver's license, handed the Officer a credit card. Sensing
8 that there was something not right about Mr. Assi's demeanor
9 and the things he was saying, Officer Minton asked Mr. Assi to
10 exit the vehicle so, he could perform what's known as field
11 sobriety tests.

12 And I should note at this time that Officer
13 Weingart, who's also going to testify, was also at the scene
14 as a backup officer.

15 The Officers will tell you that these field sobriety
16 tests, they're evaluations that officers use to determine
17 whether or not somebody's ability to operate a vehicle is
18 impaired by drugs and/or alcohol. Essentially, they involve
19 asking someone to perform simple tasks that someone who's not
20 impaired could normally perform. Most of the tests are known
21 as divided attention tests; in other words, they require you
22 to perform mental and physical tasks at the same time. And
23 the reason they do that is because when you drive a vehicle,
24 you have to think about what you're seeing, like signs, or
25 things in the road, but you also have to perform physical

1 tasks. For instance, if something runs out in front of your
2 car, you would remove your foot from the accelerator to the
3 brake. Seems simple and it is for most people who are driving
4 in an ordinary careful manner that aren't impaired. But if
5 someone's impaired, they have difficulty performing those
6 simple tasks.

7 So, these Officers use these field sobriety tests to
8 determine whether someone's ability to operate is impaired.

9 The first test -- well, I should note that before
10 the Officer actually did the test, he did a pat-down search
11 and that's for officer protection, to make sure someone
12 doesn't have weapons.

13 But he asked Mr. Assi, "Do you have anything in your
14 pockets", and his response was, "I have my marijuana things in
15 my pocket." And sure enough, the Officer found marijuana
16 pipes in Mr. Assi's pocket.

17 But the actual first field sobriety was asking
18 Mr. Assi to perform the alphabet after ascertaining that
19 Mr. Assi could cite the English alphabet. He asked him to
20 state the alphabet, but one of the problems is that he kept
21 trying to state the alphabet before the Officer told him to
22 start. Now, that may not seem like a big deal, but one of the
23 things that the Officers are looking for to determine if
24 someone's impaired is if somebody could follow instructions.
25 Mr. Assi kept trying to start the test before the Officer

1 said, you know, "Start."

2 He did say the alphabet and he didn't miss any
3 letters, but his cadence was such indicating he was having
4 some difficulty.

5 The next field sobriety test was to ask Mr. Assi to
6 count backwards. Mr. Assi, again, started before he was told
7 to start. And when he started counting backwards, he missed a
8 number and had to go back. Again, this is just two tests, but
9 the Officer decided to do some more tests.

10 The next test that the Officer did is what's known
11 as the heel-to-toe test or walk-and-turn. It has different
12 names, but it's essentially a test where someone's asked to
13 count and take nine steps forward and nine steps back. But
14 when you do that, you have to put your foot right in front of
15 the other foot. Similar to having to move your foot from the
16 accelerator to the brake. Again, it doesn't seem like a big
17 deal that someone who's impaired might have difficulty doing
18 this.

19 He asked Mr. Assi, "Do you have any physical
20 problems that would stop you from doing this." And Mr. Assi
21 said, "I have a sprained ankle," a left ankle, "but I
22 shouldn't have any problems. I'm a hundred percent sure I
23 could do this."

24 Well, when the Officer had him try to do the test,
25 he actually couldn't do it. He couldn't keep his balance, he

1 couldn't put one foot in front of the other, and he couldn't
2 complete the test.

3 The next test, again, one of these divided attention
4 tests was called the one-leg lift. Again, there's different
5 names for it, but it essentially involves asking someone to
6 lift one leg and count, again, using your mental and physical
7 abilities at the same time.

8 Mr. Assi was told, "Well, if you have a sore left
9 foot, why don't you lift your left foot, so you'd be standing
10 on your strong foot." When he tried to do this test, he
11 couldn't do it. He lost his balance, he kept falling back on
12 the car, he couldn't complete the test, again, indicating
13 there was something affecting his brain and his physical
14 coordination to the affect that his ability to operate in a
15 careful and normal manner was impaired.

16 The third test that the Officer did is known as the
17 horizontal gaze nystagmus test. He will explain what that
18 test is, but it's a test essentially where the Officer looks
19 into someone's eyes using a fixed object and Officer Minton
20 will explain it much better than I can explain it. But what
21 you're looking for is something called nystagmus. It's the
22 involuntary jerking of your eyes. If you have that nystagmus,
23 it's an indication that you might be intoxicated. Again,
24 we're not charging the Defendant with intoxicated, but if you
25 have nystagmus, it's an indication of that.

1 Officer Minton performed the test on Mr. Assi and
2 nystagmus was present. He had the involuntary jerking.

3 So, at this point, the two Officers, Weingart and
4 Minton, seeing that Defendant had issues. He smelled of -- he
5 admitted smoking marijuana, he admitted drinking, he smelled
6 of alcohol, he couldn't perform many simple tests that a
7 person who's able to drive in the normal manner could perform,
8 so they decided to take him into custody.

9 When they took Mr. Assi to the police department,
10 there was one more evaluation. They had him submit to a
11 breath test. The breath test operator in this case, as I
12 indicated, was Police Service Aide Peter Guest. And using an
13 instrument called the DataMaster DMT, the Defendant was asked
14 to submit two breath samples and following proper procedure on
15 the instrument that the City of Troy uses, which is the same
16 instrument that's used throughout the State of Michigan, it
17 indicated his bodily alcohol content was .07 grams of alcohol
18 per 210 liters of breath.

19 Now, as I indicated, the Defendant's not charged
20 with Operating While Intoxicated because you may have heard
21 the legal limit is .08, above an .07, he's charged with an
22 impaired. So, what we have in this case is someone who drank
23 to the extent that their bodily alcohol content was .07,
24 coupled with his admission that he smoked marijuana, coupled
25 with the Officers' observations that the Defendant couldn't

1 follow simple instructions. He did things like hand a credit
2 card to the Officers instead of a driver's license. He
3 couldn't do simple tasks that someone who's not affected by
4 alcohol or drugs could do. All of these observations as
5 observed by the two Officers indicated that Mr. Assi's ability
6 to operate a vehicle in an ordinary and careful manner was
7 impaired.

8 Because the evidence will show beyond a reasonable
9 doubt that that is what occurred on December 2nd of 2017, we
10 will ask you at the end of this trial to return a verdict of
11 guilty.

12 Thank you.

13 THE COURT: Mr. Nushaj.

14 MR. NUSHAJ: Thank you, your Honor.

15 Good morning. Thank you again for being here, for
16 your service.

17 I, obviously, disagree with Mr. Motzny with respect
18 to what the evidence will show with respect to what the
19 testimony will show and that's why we're here today, for you
20 to be able to decide upon, after having reviewed all the
21 evidence, after having heard all the testimony as to what the
22 correct results should be in the end, whether he should be
23 found not guilty or guilty of these charges.

24 As I indicated to you early on, he didn't call from
25 clear blue sky and land on that chair next to me today.

1 Something happened, there was a police stop.

2 The testimony and the evidence will show that
3 Mr. Assi was driving as Mr. Motzny indicated. He was driving
4 going eastbound on 15 Mile Road and he was speeding.
5 Mr. Motzny glossed over this, but you won't hear any other
6 issues with his driving. There will be no testimony. There
7 will be no evidence of any sort that will provide to you any
8 sort of understanding that he had made any other errors other
9 than speeding with respect to his driving.

10 There was no accident. There was no calls from
11 anybody saying -- there will be no testimony for calls for
12 anybody saying, "There's a drunk driver on the road. He's
13 driving erratically." The Officer, himself, will testify that
14 he wasn't driving erratically. You won't hear of any
15 swerving, of him crossing over the lane. You will hear him
16 taking the correct steps as the Officer initiates the traffic
17 stop.

18 He will give the proper signal, he will move, will
19 turn over and move aside as we all would when our ability to
20 drive is not impaired. And that's the key word here. It is
21 ability, but the driving ability -- whether the driving
22 ability was impaired or not is the issue here.

23 And the driving here, which you will see, was
24 impeccable. Yeah, he was speeding. Absolutely but we all
25 speed. You don't have to be impaired, that doesn't show that

1 your ability to drive impaired, that in and of itself.

2 And there won't be any testimony, there won't be any
3 evidence, there won't be anything to lead you to that
4 conclusion when you observe his driving.

5 The Officer pulled Mister (sic) -- the evidence will
6 show that the testimony -- the Officer pulled Mr. Assi over
7 for speeding, they got to the side, and asked a series of
8 questions, a few quick questions with respect to where he was
9 coming from which Mr. Assi indicated that he was coming from
10 the gym. "Did you have anything to drink," apparently after
11 the Officer determined that he could smell some alcohol. He
12 asked whether there was anything to drink and Mr. Assi
13 truthfully responded, "Yes, I had two beers."

14 You'll hear that in the video. The video, by the
15 way, which you will see -- it's not state-of-the-art or
16 anything like that, but you will see what happened on the date
17 in question. What you will be able -- you know, it's a little
18 difficult to hear. It's on the side of the road, if you can
19 imagine, so not the entire conversation is recorded or at
20 least it's recorded, but you won't be able to comprehend the
21 entire conversation. I certainly couldn't when I watched the
22 video.

23 Nonetheless, it's a good starting point that then
24 upon the rest of the testimony will be further elucidated, I
25 think.

1 The Officer followed his protocols. These are
2 protocols that exist all throughout the State of Michigan.
3 After the Officer makes some determination that there may be
4 some alcohol consumption, he will have to follow those
5 protocols for all sorts of issues, safety of the public,
6 liability, whatever it may be. And the Officer did follow and
7 issued a series of tests, as you heard Mr. Motzny explain.

8 When I viewed the tests -- when you view the tests,
9 I don't believe you'll see what Mr. Motzny sees in these
10 tests. And I hope that when you review everything, the
11 testimony, the evidence, the video, that you will reach a
12 different conclusion and I hope that you will hold
13 Mr. Motzny's promises to you to account. And if he does not
14 prove this case, much like we talked about early on the last
15 time we met, you would hold him to account and you will render
16 a verdict according to what you witnessed, to what you viewed
17 and what you believe.

18 Mr. Motzny glossed over it, but when you look at
19 those two tests, the first test, the ability to recite the
20 alphabet, the ability to count backwards. Alphabet is easy,
21 obviously. But counting backwards, you know, he did them
22 perfectly.

23 So, when Mr. Motzny says that there's something
24 affecting his brain, I will submit to you that the testimony
25 and the evidence will not show that.

1 There's three more tests, the other -- two of them
2 are the balancing-type tests. They're not -- what you'll see
3 is that he doesn't have the greatest balance. What you'll see
4 is that he doesn't have the body structure of a male
5 ballerina, okay. He is overweight. It does affect his
6 ability.

7 If you ask me to perform some of those tests at
8 40, 50 pounds over my ideal weight, I, too, will be affected.
9 I will be affected even more so at one a.m. after being to the
10 gym, after a long day. We all would.

11 I believe the testimony and the evidence will
12 determine such and you will see such in the video.

13 The final test is the nystagmus test, the HGN that
14 Mr. Motzny mentioned briefly. You won't be able to see
15 obviously. You'll need to trust the Officer's word with
16 respect to that. You won't be able to see how his eyes react.
17 The camera angle is such that the distance is too far, you
18 would never be able to determine as to how he faired on that
19 particular test.

20 Fortunately for all of us, I think we do have an
21 expert coming in to testify, to try to help us understand both
22 how these tests were performed on the night in question, how
23 Mr. Assi's responses to these tests were on the night in
24 question, and what those tests mean. How were they designed
25 and what extrapolations you should make as you go back to the

1 jury room to deliberate on this case. And I believe that when
2 you've heard everything, you will not be returning a verdict
3 of guilty, you will be returning a verdict of not guilty.

4 If you hold Mr. Motzny to his promise, to his
5 burden, and that burden is entirely his. He has to prove to
6 you beyond a reasonable doubt that all of the elements in this
7 case are met. That his driving was impaired. That's the key
8 word.

9 I believe you will not be able to agree with him
10 that he has proven his case. And I thank you for your time
11 and I thank you for your attention.

12 THE COURT: Mr. Motzny, please call your first
13 witness.

14 MR. MOTZNY: Yes, Officer Pete Minton.

15 THE COURT: Please raise your right hand.

16 Do you solemnly swear to tell the truth, the whole
17 truth, and nothing but the truth so help you God?

18 OFFICE MINTON: I do.

19 OFFICER PETER MINTON

20 At 9:58 a.m., sworn by the Court, testifies as follows:

21 DIRECT EXAMINATION

22 BY MR. MOTZNY:

23 Q. Please state your name and spell your name.

24 A. Officer Peter Minton. P-e-t-e-r. M-i-n-t-o-n.

25 Q. And how are you employed?

- 1 A. I'm a Police Officer with the City of Troy Police Department.
- 2 Q. And how long have you been so employed?
- 3 A. Just shy of 14 years.
- 4 Q. And what are your duties and responsibilities?
- 5 A. I currently work road patrol where I respond to dispatched
6 calls. I take traffic accidents and patrol, do traffic.
- 7 Q. Okay. In your 14 years experience as a police officer with
8 the City of Troy, have you had occasion to come in contact
9 with people who have been affected by drugs and alcohol?
- 10 A. Yes.
- 11 Q. And typically, when do you have those contacts?
- 12 A. Any number of calls, domestic situations, fights, drunk
13 driving situations, a number of different times we come across
14 people.
- 15 Q. And have you had training in detecting people who may be under
16 the influence of drugs and alcohol?
- 17 A. Yes.
- 18 Q. And based on your experience and training, do you have the
19 ability to make a determination as to whether someone has been
20 impaired by the use of drugs and alcohol?
- 21 A. Yes.
- 22 Q. Directing your attention to December 2nd of 2017, were you on
23 duty?
- 24 A. Yes.
- 25 Q. And where were you at approximately 12:11 a.m., shortly after

1 midnight?

2 A. I was traveling westbound on Maple Road in the left lane,
3 running moving radar on eastbound traffic.

4 Q. Okay. And Maple Road in that location is in the City of Troy
5 correct?

6 A. Correct.

7 Q. And Maple Road is a public road?

8 A. Correct.

9 Q. You said you were using moving radar. Was is that?

10 A. It's a radar unit located on the dashboard of the patrol
11 vehicle. There's -- you can have stationary radar where
12 you're sitting in place and you have the radar running. It's
13 different modes, that way it records the vehicles coming
14 towards you and has you as a stationary object. Or moving
15 radar is where you're actually moving it. It's a different
16 mode on the radar system, so you can actually be moving and
17 vehicles be moving towards you, and it will record the speed
18 of the vehicles going towards you.

19 Q. Okay. And are you certified to operate that radar unit?

20 A. Yes.

21 Q. And the radar unit in your vehicle was it working properly
22 that night?

23 A. Yes. It was testing at the beginning and end of the shift,
24 and tested properly.

25 Q. Okay. And approximately 12:11 a.m., as I've indicated, did

1 you observe a vehicle on eastbound Maple Road?

2 A. Yes.

3 Q. What was that vehicle doing?

4 A. I was -- as I was traveling westbound with moving radar. The
5 vehicle was traveling eastbound in the left lane at a high
6 rate of speed. I observed the vehicle, which is a GMC Sierra,
7 pulling away from the other vehicles that were behind it. At
8 that time, the radar unit gave a reading, as well as an audio
9 tone. And the reading was 62 miles per hour.

10 In tracking the vehicle, I was watching it as it
11 goes by. The 62 miles an hour reading was on the radar unit.
12 After the vehicle passes by, the reading on the radar then
13 lowered and was then catching the speeds of the vehicles that
14 were behind it, which were lower speeds. At that time, I
15 waited for the other people to pass. I turned around and then
16 began to pursue or go after the -- catch up to the vehicle
17 that had passed with the 62 mile an hour reading.

18 Q. Okay. So, it was clear to you the vehicle that was traveling
19 62 miles per hour was the GMC Sierra?

20 A. Correct.

21 Q. And what is the speed limit in that area of Maple Road?

22 A. 40 miles per hour.

23 Q. So, you took some action to stop that vehicle correct?

24 A. Correct.

25 Q. What did you do?

1 A. I then turned around and began to try to catch up to the
2 vehicle as I approached -- as I was now eastbound to follow
3 the vehicle approaching Stephenson Highway, the signal for
4 Stephenson Highway cycled to a red light. I slowed down for
5 the red light. I activated my lights to go through the
6 intersection after checking to make sure that there was no
7 vehicles going north or south on Stephenson Highway.

8 I proceeded through that intersection and continued
9 eastbound with my lights activated to catch up to the GMC
10 Sierra and I was able to get behind the vehicle just west of
11 John R Road.

12 Q. Okay. And did the vehicle pull over?

13 A. Yes.

14 Q. All right. Now, you heard Mr. Nushaj indicate that there was
15 no swerving or bad driving. Why didn't you follow the vehicle
16 a little longer to see if the vehicle would swerve or --

17 A. Well, I had to activate my lights at Maple and Stephenson to
18 go through the signal there. And at that point, the vehicle
19 was further ahead in the distance. I was traveling at a high
20 rate of speed, but there was minimal vehicles on the roadway
21 there. I was traveling at a high rate of speed to catch up to
22 the vehicle and by the time I'd gotten behind the vehicle, my
23 lights were still activated, and the vehicle pulled over. I
24 didn't -- at no point did I catch up to the vehicle and turn
25 my lights off to follow the vehicle to then again turn my

1 lights back on to pull it over. I had -- there was a speeding
2 violation and this was a stop. Yeah, I didn't follow the
3 vehicle further to observe further driving on it.

4 Q. Now, sometimes as an officer, you might see a vehicle that's
5 swerving or moving around; is that correct?

6 A. Correct.

7 Q. And on those occasions, would you typically pull the vehicle
8 over right away?

9 A. I would observe some of the driving and that way I'd able to
10 indicate in a report the reason for the stop if they're not
11 able to maintain their lane or something along those lines,
12 yes.

13 Q. Okay. But in this occasion, you have a speeding vehicle and
14 you needed to stop it, correct?

15 A. Correct.

16 Q. And you stopped it?

17 A. Correct.

18 Q. And did you then approach the driver of the vehicle?

19 A. Yes.

20 Q. Is that driver in court at this time?

21 A. Yes.

22 Q. Can you describe the driver?

23 A. The driver is sitting at the Defendant's table there, wearing
24 the dark-colored suit with the pocket square.

25 MR. MOTZNY: Your Honor, may the record reflect the

1 Defendant was identified?

2 THE COURT: Any objection?

3 MR. NUSHAJ: No, your Honor.

4 THE COURT: It will.

5 BY MR. MOTZNY:

6 Q. And was the Defendant the only person in the vehicle?

7 A. Yes.

8 Q. Okay. And what happened when you first approached the
9 Defendant?

10 A. I approached the vehicle. When I first approached, the driver
11 advised that he had urinated himself and he was on his way to
12 go use the restroom. I asked the driver for his license,
13 registration, and a proof of insurance.

14 At that time, I noticed that the driver was sweating
15 profusely. I could see that his eyes were watery. I could
16 smell the odor of mari- (sic) -- or I'm sorry, I could smell
17 the odor of alcohol emitting from the vehicle and there was an
18 odor of what I would -- what my experience would be a fruity
19 tobacco inside the vehicle.

20 Q. Okay. Going back to the information you asked for, did he
21 provide a driver's license to you?

22 A. He provided me with his credit card and I advised him that it
23 was his credit card and not his license, and then he
24 eventually handed me his driver's license.

25 Q. And that identified him as Steven Assi, correct?

1 A. That's correct.

2 Q. Okay. And you smelled alcohol you said?

3 A. Yes.

4 Q. This fruity tobacco smell, what's that about?

5 A. There's different products called Swisher Sweets, or
6 Cigarillos, or flavored tobacco cigarettes that have a
7 different type of wrapping on them. Almost kind of like a
8 cigar wrapping, a dark paper wrapping that in my experience
9 people will often purchase to hollow out the tobacco and then
10 use the paper to make marijuana cigarettes or make a blunt
11 essentially is what it's called when you use that particular
12 paper. It's a different paper than a rolling paper.

13 So, I smelled the -- from what my experience would
14 be tobacco inside one of those flavored tobacco cigarettes.

15 Q. Based on your experience, that was an indication there may
16 have been marijuana used by the driver, by the Defendant?

17 A. Correct.

18 Q. And did you ask him about marijuana?

19 A. Yes, I asked him. At one point I asked him if there's any
20 marijuana in the vehicle. He advised that there was not, but
21 he advised that he had smoked marijuana at about five p.m.
22 that evening.

23 Q. Did he indicate whether he had a medical marijuana card, was
24 medical --

25 A. He did advise that he did have a medical marijuana card, yes.

- 1 Q. And I may have already asked you this, but did you ask him if
2 he had been drinking?
- 3 A. I did ask him if he had anything to drink. He advised that he
4 had two beers. I asked him where he was coming from and he
5 advised he was coming from the gym. I asked him if he was
6 drinking those beers at the gym and he advised that he drank
7 the beers prior to going to the gym.
- 8 Q. At some point, you asked the Defendant to exit his vehicle,
9 correct?
- 10 A. Correct.
- 11 Q. And let me backtrack a little bit. Did another officer arrive
12 at the scene to back you up?
- 13 A. Yes. Officer Weingart arrived as a backup officer.
- 14 Q. Okay. And you asked the Defendant to exit the vehicle. Why
15 did you ask him to do that?
- 16 A. To perform some field dexterity evaluations.
- 17 Q. All right. Why did you want to do that?
- 18 A. To make sure that the driver would have been okay to leave the
19 scene and drive away from the scene.
- 20 Q. Okay. And you're looking for whether or not he's affected by
21 drugs or alcohol?
- 22 A. Correct.
- 23 Q. All right. And can you tell us, what is a field sobriety
24 evaluation?
- 25 A. There's different field dexterity evaluations that I asked the

1 driver to perform. It's -- as was explained in the opening
2 argument it's attention -- divides your attention to perform
3 mental and physical activities, to -- some of the different
4 ones are the reciting of the alphabet or counting backwards,
5 walk-and-turn, one-leg stand.

6 As I'm performing mental evaluations, as well as
7 physical evaluations to be able to determine if they're able
8 to perform both and perform multiple activities and have a
9 divided focus, which is what's required to drive, so
10 oftentimes if someone is impaired or whatnot, they might be
11 able to focus on one thing, but when they have to divide their
12 attention, it could be -- it's a way to identify whether their
13 attention is impaired or their ability is impaired.

14 Q. Okay. Before you did the field sobriety tests, did you do a
15 pat-down search?

16 A. Yes, I asked the driver if he had anything. I asked the
17 driver for consent to search his person, if he had anything on
18 him that he wasn't supposed to have, and the driver advised
19 that he had his marijuana things in his pocket.

20 Q. Okay. And a pat-down is for officer safety --

21 A. So, then, yes, I asked for consent for -- to the search his
22 person and he consented. I searched his person and in the
23 process, located two wax marijuana pipes in his pocket.

24 Q. Okay. And you recognized them as objects used to ingest
25 marijuana, correct?

1 A. Correct.

2 Q. And describe what was the first field sobriety test you had
3 Mr. Assi perform?

4 A. The alphabet, reciting the English alphabet, A through Z.

5 Q. Okay. And did you instruct him how you wanted him to perform

6 A. Yeah, I was giving the instructions of how to perform the
7 evaluation. I asked him if he understood the English
8 alphabet, A through Z, which was essentially a yes or no
9 question. The Defendant then began to recite the alphabet. I
10 stopped him. I asked him if he was able to recite the
11 alphabet. He advised he was. I asked him what his last level
12 of education was. He advised he graduated high school.

13 I was then explaining the process of the evaluation
14 and I said, "I'm going to have you recite the English alphabet
15 A through Z," and before finishing my sentence, the Defendant
16 began to recite the alphabet again. I finished explaining the
17 instructions and then the Defendant recited the alphabet.

18 Q. Okay. Is following instructions one of the things an officer
19 looks for in determining whether someone's impaired?

20 A. Yes.

21 Q. And how did he do on the alphabet?

22 A. He was able to recite the alphabet. He -- when he started to
23 get towards the middle/end of the alphabet, the letters kind
24 of -- I don't want to say jumbled together, they were kind of
25 were rapidly recited, so sort of blended together, but you

1 were able to decipher each letter and he was able to recite it
2 properly.

3 Q. Okay. And what was the next field sobriety test you had him
4 perform?

5 A. To count backwards. The numbers I use are 91 to 76. So, I
6 have the Defendant -- I asked the Defendant if he knew his
7 numbers 1 through 100. He advised that he did. I'd asked him
8 if he'd be able to recite forward and backward. He advised he
9 could. And I said, "Can you start with the number -- can you
10 recite the numbers 91 through 76 backwards? Start with number
11 91 and go to 76."

12 The Defendant started to recite the numbers, but
13 again, as I was giving the instructions, I was mid-sentence
14 when he started. So, I stopped him. Again, I went through
15 the whole -- I finished my sentence, essentially advising that
16 I'd have him start with 91, end at 76. I asked him if he'd be
17 able to perform that, he advised that he would.

18 He began the evaluation. He started.

19 Q. Let me stop you there.

20 A. Sorry.

21 Q. So, again, he started before you asked him to start, correct?

22 A. Correct.

23 Q. Okay. All right. Did he ultimately perform after you told
24 him to start?

25 A. Yes, he started with 91. He said, "91, 90, 89, 87," then went

1 back to 88 and completed the evaluation. Towards the end of
2 the evaluation, his cadence was slower, more hesitant, but he
3 was able to stop at 76 as requested.

4 Q. Okay. And did you perform any more field sobriety tests?

5 A. At that point, I had asked him -- yes. The next one was the
6 walk-and-turn.

7 Q. Okay. What is the walk-and-turn?

8 A. A walk-and-turn evaluation is have the Defendant stand with
9 his hands at his side. Puts his right foot in front of his
10 left foot, so his heel is touching his toe. I advised him to
11 stay in that position while I explained the remainder of the
12 instructions. At that point, I advised him to take nine steps
13 forward in a heel-to-toe manner. So, every step he takes, his
14 heel touches his toe. After he takes his ninth step, I
15 explained for him to take -- to pivot on his left foot, and to
16 make several kind of turns to his left to pivot on his left
17 foot and then at that point to take nine steps back in the
18 direction from which he came, again in a heel-to-toe manner,
19 counting his steps aloud, and keeping his hands to his side,
20 not using his hands to balance.

21 Q. Okay. Did you ask him if he had any physical difficulties
22 that would prevent him from doing that task?

23 A. Yes, he advised that he had a sprained ankle and indicated
24 that the sprained ankle was his left ankle.

25 Q. Okay. Did he indicate that that would stop him from doing

1 this test?

2 A. No, I asked him if that would prevent him from being able to
3 complete the test, he said he'd be able to do it 100 percent.

4 Q. Okay. Now, with regard to that sprained ankle, did you -- at
5 some point, you saw him get out of that vehicle, correct?

6 A. Yes.

7 Q. Did it indicate -- was he limping or walking funny when he
8 walked out of the vehicle?

9 A. No, I didn't notice any issues with him walking when he got
10 out of the vehicle to walking to the back of his vehicle, no.

11 Q. Okay. So, you saw no sign of injury, correct?

12 A. Correct.

13 Q. Okay. And let me ask you though, if someone's impaired by
14 alcohol, wouldn't they have trouble just walking usually or --

15 A. It's a possibly; not necessarily, but a possibility.

16 Q. But just because someone could walk normal doesn't mean
17 they're not impaired?

18 A. Correct.

19 Q. That's why you did the other evaluation.

20 A. Exactly. Again, with the divided attention, and being able to
21 focus and perform the mental and physical, and whatnot.

22 Q. Okay. And so, describe how Mr. Assi did the heel-to-toe test.

23 A. So, as I explained, initially I had him stand with his hands
24 at his sides, right foot in front of his left foot so his heel
25 is touching his toe. I advised him to stay in that position

1 until I finished the instructions. At that point, the
2 Defendant advised that his ankle was hurting him, he didn't
3 know if he'd -- or his ankle was hurting him. I asked him if
4 he would be able to attempt the evaluation and he advised he'd
5 be able to attempt it.

6 He wasn't standing with his feet together. At that
7 point, he kind of separated his feet. He then -- I finished
8 explaining the instructions, as far as taking the nine steps
9 forward and turning around, whatnot. He was attempting to do
10 the evaluation. He took -- each step he took, I don't know if
11 he even had a step that he wasn't doing kind of several steps
12 in order to put one foot in front of the other as opposed to
13 doing one step, it took him -- he was stepping off the
14 imaginary straight line to go forward.

15 After taking nine steps forward, he stopped. He
16 didn't complete the rest of the evaluation as far as turning
17 around and going back in the direction from which he came.

18 Q. Okay. So, he didn't complete the evaluation?

19 A. Correct.

20 Q. And what was the next evaluation that you did?

21 A. The next evaluation was the one-leg stand.

22 Q. And describe how you advised Mr. Assi to perform that test.

23 A. The one-leg stand is have your hands at your sides, your feet
24 together. I told him to stand in that position and then I
25 would explain the remainder of the instructions.

1 The remainder of the instructions I told him to lift
2 one leg, leg of his choosing, either the right or his left. I
3 suggested he might want to lift his left leg being that that
4 was the leg that he advised was sprained, that way he could
5 stand on his strong leg, but I also advised him that it was
6 his choice. He could choose whatever leg he wanted to lift,
7 to lift that leg about six inches above the ground, point his
8 toe outward, look down at this foot, and count out loud one-
9 thousand-one, one-thousand-two, one-thousand-three, and so on
10 until I advised him to stop.

11 And then I asked him if he'd be able to perform the
12 evaluation, he advised that he would be able to. I asked him
13 what leg he was going to choose, he said that he was going to
14 lift his leg because that's the one I suggested. I, again,
15 advised him that, "You can lift whatever leg you choose."
16 That was just a suggestion, but he can lift whatever leg he'd
17 want to choose. He choose (sic) to lift his left leg. He
18 started the evaluation and with his leg up, he started
19 counting. And at that point, myself and Officer Weingart
20 observed that he was leaning back on the tailgate, back bumper
21 of his vehicle essentially resting his back on the vehicle to
22 maintain his balance.

23 When I saw that he was doing that, I advised him to
24 stop and to take a step forward. He took a step forward and
25 then attempted the evaluation again, and I don't know if he

1 made it -- he attempted several times to lift his foot up, but
2 I don't know if he lasted a second before having to put his
3 foot back down, he wasn't able to maintain his balance.

4 Q. So, he couldn't do the evaluation?

5 A. Correct.

6 Q. And did you perform another evaluation after that test?

7 A. Yes. After that was the horizontal gaze nystagmus test.

8 Q. What is that?

9 A. Nystagmus is an involuntary jerking of the eyes that would be
10 an indication of being under the influence of alcohol and/or
11 narcotics.

12 Q. Okay. And have you been trained in that procedure?

13 A. Correct. Yes.

14 Q. Okay. And did you follow the procedure as you were trained to
15 do?

16 A. Yes.

17 Q. Okay. Describe how you perform that procedure with the
18 Defendant.

19 A. So, you have a fixed object in which case I used the tip of my
20 pen. I held the tip of my pen out approximately a foot or so
21 from his face. At that point, initially you start with kind
22 of a sweeping from side-to-side and you check for smooth
23 pursuit of the eyes, making sure they can follow the object as
24 it goes back and forth. And often most people are able to
25 just smoothly follow back-and-forth.

1 If someone is under the influence, you have like
2 almost what a windshield wiper on a dry windshield, where it's
3 just kind of moving, like jerking across. So, you check
4 initially for a smooth pursuit and then you put the object out
5 at maximum, what's maximum deviation. So, you set it out
6 there, so that way the eyes are having to focus to the side.
7 And then you look for involuntary jerking in the eyes when
8 it's at maximum deviation.

9 And then after that, you start and you move out, and
10 you gradually go out to 45 degrees, which is roughly the
11 extension of the shoulder is at and then you see if there's an
12 onset of the nystagmus or the voluntary jerking of the eyes
13 prior to you get to that 45 or the shoulder essentially, the
14 45 degree point.

15 Q. Okay. And what happened when you performed that evaluation on
16 the Defendant?

17 A. I performed that evaluation. Initially, the lack of smooth --
18 the smooth pursuit, there was not smooth pursuit, it wasn't
19 going fluidly back-and-forth. It was kind of jolting as it
20 was following the fixed object. There was nystagmus -- excuse
21 me. There was nystagmus at maximum deviation and then there
22 was also nystagmus present prior to reaching the shoulder or
23 the 45-degrees.

24 Q. Okay. At this point, did you and Officer Weingart make some
25 sort of determination as to whether or not Mr. Assi was

1 impaired as a result of drinking or using drugs?

2 MR. NUSHAJ: Objection, your Honor. This calls for
3 speculation as to what Officer Weingart thinks. I think the
4 question should be rephrased to ask what this Officer thought

5 MR. MOTZNY: I'll rephrase, your Honor. That's
6 fine.

7 THE COURT: Sustained.

8 BY MR. MOTZNY:

9 Q. Did you make a determination at that point as to whether or
10 not the Defendant may have been impaired in his ability to
11 drive?

12 A. Yes, due to the totality of the circumstances from the high
13 speed, and the initial encounter, the odor of alcohol, the
14 admission of having consumed alcohol, the admission of having
15 smoked marijuana earlier in the evening, the watery eyes, he
16 advised he had urinated himself, the evaluation performance.
17 All the things came into effect and I was under the impression
18 that his ability to drive was impaired, yes.

19 Q. Okay. And you heard Mr. Nushaj during his opening that --
20 well, you know, he was driving fine other than going 22 miles
21 per hour over the speed limit. He wasn't swerving and running
22 into things. How can you make that determination when the
23 only thing that you could actually see him do is speeding?
24 How can you determine his ability to drive was impaired?

25 A. Well, just that with, like I said, the evaluation, the

1 totality of the -- I didn't follow the vehicle longer to see
2 if it was swerving or any other indications. I just had the
3 speed, like I said, and then my encounter with the Defendant
4 and the evaluation, his performance on those evaluations is
5 how I was able to base the determination on his ability to
6 drive.

7 Q. So, it's his ability to drive that matters, correct?

8 A. Correct.

9 Q. You took the Defendant into custody at that point, correct?

10 A. Correct.

11 Q. And was there another test performed at the Troy Police
12 Department?

13 A. Yes. He was read his chemical test rights and a breath test
14 was taken.

15 Q. Okay. And you read the chemical test rights to Mr. Assi?

16 A. Correct.

17 Q. And he agreed to take a breath test, correct?

18 A. Correct.

19 Q. And did you perform that test or did someone else?

20 A. Police Service Aide Peter Guest performed the test. I was
21 present while it was given, but he performed it.

22 Q. Okay. All right. Your vehicle has the capability of
23 recording things that occurs in front of the police vehicle,
24 correct?

25 A. Correct.

1 Q. And that recording can be turned into a video, correct?

2 A. Correct.

3 Q. And there's a video in this case, correct?

4 A. Yes.

5 Q. And have you watched that video?

6 A. Yes.

7 Q. And does it accurately represent what could be seen in front
8 of your vehicle?

9 A. Yes.

10 Q. Okay. And there's audio, of course, and you can hear things,
11 correct?

12 A. Yes.

13 Q. Can you hear everything the Defendant and you say during the
14 video?

15 A. No, it's outside, there's ambient noise, there's other cars
16 passing, so I carry a microphone transmitter that records
17 interactions with people. So, the transmitter's on my person,
18 but there's other ambient noise and whatnot that records, as
19 well, that interferes with some of it.

20 Q. So, you agree, as Mr. Nushaj said, it's not like an
21 Oscar-quality film?

22 A. Correct.

23 MR. MOTZNY: Your Honor, I would move to play a
24 portion of the video. We stipulated on a certain spot to stop
25 the video. I would also move that it be admitted into

1 evidence.

2 (At 10:23 a.m., People's Exhibit No. 1 is offered.)

3 MR. NUSHAJ: No objection, your Honor.

4 THE COURT: So ordered.

5 (At 10:23 a.m., People's Exhibit No. 1 is admitted.)

6 THE COURT: Ladies and gentleman, I think this is a
7 good time for a morning break. We'll take about 10 minutes.

8 Please rise for the Jury.

9 (At 10:23 a.m., the Jury exits the courtroom.)

10 THE COURT: Counsel, if you could be back at in
11 25 to (sic).

12 MR. MOTZNY: Thank you, your Honor.

13 MR. NUSHAJ: Thank you, your Honor.

14 (At 10:23 a.m., off the record.)

15 (At 10:38 a.m., on the record.)

16 MS. KORKES: All rise for the Jury.

17 (At 10:38 a.m., the Jury enters the courtroom.)

18 THE COURT: Please be seated.

19 The record will reflect that the Defendant,
20 Attorneys, and the Jury are all present in court.

21 MR. MOTZNY: Thank you, your Honor.

22 Did the Court admit People's Exhibit 1?

23 THE COURT: I don't know if I did, but I will now.

24 MR. MOTZNY: Okay. Thank you.

25 I would ask permission to play the video. We agreed

1 that I will stop it as close to 12:25:43 as possible. I
2 believe if we're a few seconds off, there won't be a problem.

3 MR. NUSHAJ: That's correct, your Honor. Thank you,
4 your Honor.

5 THE COURT: All right. And we will lower one of the
6 lights and if at any point you believe there's more volume
7 that we can provide you, let me know.

8 MR. MOTZNY: Judge, can you see the video or do you
9 need --

10 THE COURT: I can't and I don't think I need to.

11 MR. MOTZNY: Okay.

12 MR. NUSHAJ: Your Honor, perhaps with your
13 permission, may I at least step down by Mr. Motzny?

14 THE COURT: You and your client may do so.

15 MR. NUSHAJ: Thank you.

16 MR. MOTZNY: And again, there will be no talking
17 during the video.

18 THE COURT: No talking of any kind.

19 (From 10:39 a.m. to 10:54 a.m., People's Exhibit
20 No. 1 played.)

21 MR. MOTZNY: Just for the record, your Honor, the
22 video shows it was stopped at 12:25:47, which is fairly close
23 to the time we tried to stop it.

24 BY MR. MOTZNY:

25 Q. Officer Minton, that was the video from your car, correct?

1 A. Correct.

2 Q. The other officer we see, is that Officer Weingart?

3 A.. That's correct.

4 Q. All right. In the video, the Defendant made a comment when
5 you were telling him how to do the heel-to-toe test. What was
6 that comment?

7 A. He said that he wouldn't be able to do that when he's --
8 something along the lines of "I wouldn't be able to do that if
9 I were sober".

10 Q. Okay. Did he then try to explain that comment afterwards?

11 A. I then said, "Are you implying that you're not sober now," and
12 he said -- he tried to explain that, no, he was sober, he was
13 just saying he couldn't do it, but if he were sober -- when
14 he's sober.

15 Q. Okay.

16 A. Along those lines.

17 Q. When you did the horizontal gaze nystagmus test, you had
18 Officer Weingart do something. What did you have her do?

19 A. She went back to the patrol vehicle and turned off the front
20 overhead lights of the patrol vehicle. There's different
21 settings on our patrol vehicles lights. You could have it so
22 it just activates, it activates the front and back or we can
23 have it where it just activates the back lights that way cars
24 don't run into the back of us. But at the same time, the
25 front lights, the driver's already stopped, so we don't

1 necessarily need the front flashing lights on to affect his
2 eyes while performing the test.

3 Q. Okay. So, that was so that the lights wouldn't affect the
4 test, right?

5 A. Correct. Correct.

6 Q. You admit you can't hear everything the Defendant's saying
7 when he's sitting in the vehicle, correct?

8 A. Correct.

9 Q. For instance, you testified that he indicated that he smoked
10 marijuana earlier in the evening, correct?

11 A. Correct.

12 MR. NUSHAJ: Objection. Asked and answered, your
13 Honor.

14 MR. MOTZNY: Well, I'm just -- you can't hear that
15 on the video, correct?

16 THE WITNESS: Correct.

17 MR. MOTZNY: But that --

18 MR. NUSHAJ: Objection. Asked and answered.

19 BY MR. MOTZNY:

20 Q. What was your testimony as to what he told you in the video?

21 THE COURT: It is asked and answered.

22 MR. MOTZNY: Very well, your Honor.

23 Your Honor, I have no further questions at this
24 time.

25 MR. NUSHAJ: May I, your Honor?

1 THE COURT: You may.

2 CROSS EXAMINATION

3 BY MR. NUSHAJ:

4 Q. Good morning.

5 A. Good morning.

6 Q. I have a few questions, as well, if I may.

7 A. Yes.

8 Q. I shouldn't preface a few; I have some questions.

9 How long did you follow him? We see that your car
10 travels for some time. Earlier you testified that you didn't
11 have time to follow him, but it looks like you travel for some
12 distance to catch up to him; is that correct?

13 A. That's correct.

14 Q. You've been a police officer for 14 years, close to, you
15 indicated?

16 A. Close to. Yes.

17 Q. And you've been through the Police Academy?

18 A. Correct.

19 Q. Okay. You're trained to obviously investigate an incident
20 such as this?

21 A. Correct.

22 Q. Okay. And obviously at the end of your investigation, you put
23 down all your thoughts, whatever happened that night, on paper
24 on the report; is that correct?

25 A. Correct.

- 1 Q. And you've been trained to be observant when conducting the
2 investigation; is that correct?
- 3 A. Yes.
- 4 Q. And when preparing your report, you do so in a complete and
5 thorough fashion, correct?
- 6 A. Yes.
- 7 Q. And you were thorough during your investigation here, correct?
- 8 A. Correct.
- 9 Q. You left nothing out, correct?
- 10 A. I'm sure there's details that took place that you can see in
11 the video that's not specified in the report, but I feel that
12 I put pertinent information in the report.
- 13 Q. But I'm asking you -- thank you. I'm asking you about what
14 happened on the night of the investigation. You didn't leave
15 anything out as far as your investigation. You're satisfied
16 with your investigation, correct?
- 17 A. At the time, yes.
- 18 Q. The report that you drafted, you wrote shortly after the
19 events, correct?
- 20 A. Correct.
- 21 Q. And obviously your testimony here today and Mr. Motzny asked
22 you a form of this question, reflects basically what happened
23 here that we just witnessed, correct?
- 24 A. Correct.
- 25 Q. This was on December 2nd, correct?

1 A. correct.

2 Q. And it's about, you know, after midnight, correct?

3 A. Correct.

4 Q. And you indicated that you were running -- pardon me, you were
5 traveling the opposite, you know, way from where Mr. Assi was
6 coming, correct?

7 A. Correct.

8 Q. Okay. Which direction was that? You were westbound?

9 A. I was traveling westbound on Maple Road.

10 Q. And Mr. Assi was traveling eastbound.

11 A. Correct.

12 Q. There were more than -- you know, I presume your radar machine
13 gave a beeping sound that you told us about during your direct
14 testimony at the time when -- just a second before you made
15 the turnaround; is that correct?

16 A. Yes.

17 Q. Okay. So, you heard the beeping sound and you indicate you
18 testified earlier that you saw -- the radar machine gave you a
19 reading of some sort, correct?

20 A. Yes.

21 Q. Okay. And that reading, you said, was something like 60 miles
22 an hour, correct?

23 A. 62, yes.

24 Q. 62, pardon me.

25 And there's obviously quite a few cars traveling

- 1 opposite of you at the same time; is that correct, we see in
2 the video, correct?
- 3 A. There's several, I would say.
- 4 Q. Several cars.
- 5 A. Five to seven, yes.
- 6 Q. Okay. When your radar machine gives you that beeping sound,
7 do you know which car -- does it tell you which car it is that
8 is speeding?
- 9 A. No.
- 10 Q. Okay. So, when you hear the sound, the beeping sound and when
11 you see the reading, you can't tell which vehicle it is,
12 correct?
- 13 A. No, it also doesn't specify (sic) --
- 14 Q. Is that correct?
- 15 A. Yes, I don't know exactly. It doesn't -- the radar itself
16 doesn't specify what vehicle is causing that tone.
- 17 Q. Okay. So, you made the turnaround?
- 18 A. Yes.
- 19 Q. Okay. And now you were going in the same direction, once you
20 make the turnaround, as Mr. Assi's vehicle and the rest of the
21 vehicles, correct?
- 22 A. Correct.
- 23 Q. Okay. Could you tell at this particular moment which one was
24 the vehicle that was speeding?
- 25 A. Meaning?

- 1 Q. When you turned around and you're going in the same direction
2 as the rest of the vehicles, could you tell which one -- you
3 know, did you know at that point which vehicle you were going
4 after?
- 5 A. Yes.
- 6 Q. Okay. So, you could tell Mr. Assi's vehicle, correct?
- 7 A. Yes.
- 8 Q. You could see it?
- 9 A. In the distance, yes.
- 10 Q. In the distance, okay. Well, let me ask you with respect to
11 your radar. Your radar -- are you trained with respect to use
12 of the radar?
- 13 A. Yes.
- 14 Q. Okay. And your radar, do you test it in the morning? Was it
15 properly this radar?
- 16 A. I tested it prior and -- prior to the shift and at the end of
17 the shift, yes.
- 18 Q. Okay. This is your radar, this is --
- 19 A. This is radar that's mounted in the vehicle.
- 20 Q. Okay.
- 21 A. So, it's not per se. It's mounted in the vehicle and anyone
22 who takes that particular vehicle has this radar in that
23 vehicle.
- 24 Q. Was this the vehicle that you typically use?
- 25 A. On an everyday occasion?

1 Q. Correct.

2 A. No.

3 Q. Was there a problem with the vehicle that you typically use on
4 an everyday occasion?

5 A. I typically work days shift, this happened at nighttime. I
6 was working an additional shift as opposed to my regular shift
7 on days shift. So, on days shift, I take one particular
8 vehicle, but then that also vehicle (sic) for days shift is
9 used by officers on midnight shift. So, this is the time of
10 midnight shift, another officer was driving my usual vehicle
11 and I was driving this vehicle because this is an additional
12 vehicle that was not being used at this time.

13 Q. But it is your testimony here today that this particular radar
14 was properly functioning and the result that you witnessed on
15 that day is reliable, correct?

16 A. Correct.

17 Q. Okay. You testified at an earlier hearing that there was a
18 problem with the other radar on the other machine that you
19 used that day?

20 A. No.

21 Q. You did not?

22 A. No, I testified about the -- are you talking about as far as
23 the -- oh, the other vehicle. It wasn't --

24 Q. Was there a problem with a prior radar on the day in question,
25 the car you were going to originally use?

1 A. No, I believe it was the computer system wasn't logging on.

2 Q. Okay. And so, you had to use this other car, this other
3 computer system, correct?

4 A. Correct.

5 Q. Thank you. Now, as you get behind him, you testified that now
6 you could see him, you could see his vehicle, you maintained
7 eye contact with him upon your turnaround, correct?

8 A. Yes.

9 Q. Did he get away from your field of vision at any point in
10 time?

11 A. Was I able to see the -- was I able to decipher which --

12 Q. Were you able to see the vehicle at all times?

13 A. Yes, I was able to see his taillights in the distance, yes.

14 Q. Okay. And you maintained visual contact with him at all
15 times?

16 A. Yes, yes. Correct.

17 Q. With the vehicle, correct?

18 A. Yes, it's dark out. It was a fair distance away from me, but
19 I was able to see the illuminated taillights and so, yes, I
20 was able to -- so, in order to answer your question, yes, I
21 was able to decipher that vehicle, yes.

22 Q. Okay. As you see him -- obviously, you keep in contact and
23 you're following all along -- strike that, let me ask another
24 question.

25 Do you know what NHTSA is? What it stands for? Do

- 1 you know that NHTSA stands for? N-H-T-S-A.
- 2 A. National Highway Traffic Safety --
- 3 Q. Administration, Association.
- 4 A. Yeah.
- 5 Q. Are you NHTSA certified?
- 6 A. If I am, I'm not aware.
- 7 Q. Have you ever read one of their -- no, okay.
- 8 Have you ever read one of their manuals?
- 9 A. If I have, I'm not aware.
- 10 Q. Okay. Do you know that there's certain cues that you're to
- 11 observe with respect to somebody's driving when you suspect
- 12 them of impaired driving? Are you aware of those cues?
- 13 A. Yes.
- 14 Q. Okay. Do you know how many cues there are?
- 15 A. Exactly how many, I couldn't say.
- 16 Q. Okay. But if I were to mention them, you would be able to
- 17 recognize them, correct?
- 18 A. Presumably, yes.
- 19 Q. Okay. I start mentioning them and ask you some questions, if
- 20 that's okay with you.
- 21 You didn't notice -- from the moment that you made
- 22 the turnaround and start following this vehicle, did you
- 23 notice any weaving?
- 24 A. No.
- 25 Q. Okay. Did you notice any weaving across lane lines?

- 1 A. No.
- 2 Q. Did you notice Mr. Assi's vehicle straddling a lane line?
- 3 A. No.
- 4 Q. Okay. These are some of these cues, correct? You're
5 recognizing them?
- 6 A. Yes.
- 7 Q. Okay. Let me know if you don't recognize one of them --
- 8 A. Okay.
- 9 Q. -- so that I know I'm not asking you something outside the
10 bounds.
- 11 A. Mm-hmm.
- 12 Q. Did you notice any swerving at all of his vehicle?
- 13 A. No.
- 14 Q. At one point, you obviously came behind him with your lights
15 turned on in order for you to cross whatever intersection.
16 There were two red lights, so in order to cross, you indicated
17 earlier, for safety you turn on the vehicles (sic) and then
18 you left the lights on, correct?
- 19 A. Correct.
- 20 Q. As soon as you got behind him, he made the turn, he turned on
21 the blinker, correct?
- 22 A. Correct.
- 23 Q. Which he was supposed to do, correct?
- 24 A. To change lanes in the right lane, correct.
- 25 Q. And then he stopped right away, correct?

- 1 A. Yes.
- 2 Q. Did you notice him making a wide turn or like a turn on a wide
3 radius, at all?
- 4 A. Not that I observed.
- 5 Q. Okay. That is one of those cues, right? We're still talking
6 about the cues. You recognize that cue, correct?
- 7 A. Yes, but I think that's more so for making a 90-degree
8 righthand turn as opposed to a lane change, but yes.
- 9 Q. Fair enough. Did you notice any drifting of his vehicle?
- 10 A. No.
- 11 Q. Was there an accident on this night in question?
- 12 A. No.
- 13 Q. Okay. To the best of your knowledge, do you know whether
14 anybody had called in to the City of Troy through Dispatch to
15 indicate that there was some sort of an impaired driver out
16 there on the road, driving erratically?
- 17 A. Not to my knowledge, no.
- 18 Q. Did he almost strike some other vehicle from where you started
19 observing him?
- 20 A. Not that I observed, no.
- 21 Q. So, you're testifying that he was driving straight as an arrow
22 (sic), correct?
- 23 A. That's not my exact testimony either. I'm not saying that he
24 wasn't either. I'm saying -- my testimony is --
- 25 Q. Okay. Well, let's parse it out.

1 A. Okay.

2 Q. Let me ask you some questions with respect to that.

3 Did you notice any stopping problems with respect to
4 his vehicle, meaning --

5 A. No.

6 Q. -- he was going too far, too short, too jerky. Anything like
7 that?

8 A. No.

9 Q. Okay. That's another one of those cues, correct?

10 A. Yes.

11 Q. Okay. Did you notice any accelerating or decelerating for no
12 apparent reason?

13 A. No. Other than speed initial (sic), but no
14 accelerating/decelerating.

15 Q. There was some speed (sic) -- I'm glad you brought that up.

16 You indicated that, obviously, there was speed (sic)
17 -- by my calculation, and I went to law school because I can't
18 (sic) make calculations, but it's 22 miles over, correct?

19 A. Correct.

20 Q. So, he's going over the speed limit. Was there any slow speed
21 at all at any point in time? Was he going slower than the
22 speed limit?

23 A. Not that I can recall or not that I've observed. Maybe after
24 the --

25 Q. Well, you didn't observe, correct?

- 1 A. Yes.
- 2 Q. Okay. We see everything that you observed on the video,
3 correct?
- 4 A. Absolutely, yes.
- 5 Q. Okay. Good. And you didn't notice any slow speeding at all,
6 correct?
- 7 A. Slow speeding, no.
- 8 Q. He didn't slow down.
- 9 A. Yes.
- 10 Q. And that's another one of those cues, correct?
- 11 A. Sure, yes.
- 12 Q. Did he, at any point in time, and I know I'm beating a dead
13 horse to death, but these are the cues.
- 14 A. Mm-hmm. Yeah.
- 15 Q. I'm not creating these. Did he drive in an opposing lane or
16 anything like that?
- 17 A. No, not that I observed, no.
- 18 Q. Did he, you know -- I wonder if you noticed, did he slow down
19 in response to the traffic signal to the red light? His, I
20 presume, was a green light, correct?
- 21 A. When he went through -- at Stephenson when I activated the
22 light?
- 23 Q. Correct.
- 24 A. Yes, you could see in the --
- 25 Q. It was a green light.

1 A. You can see as I'm turning around and approaching the
2 intersection as it cycles up to red. And it was -- yes, it
3 was green for when he went through, yes.

4 Q. But his light was green. He respected the green light,
5 correct?

6 A. Yeah. Yes.

7 Q. Did he stop in his lane for no apparent reason or any apparent
8 reason at any point other than when you turn on the lights
9 behind him?

10 A. No.

11 Q. And obviously, you testified earlier that, you know, the
12 moment you got behind him, he gave the blinker and parked,
13 correct?

14 A. Correct.

15 Q. As he was supposed to do.

16 Okay. This was a safe park then?

17 A. Relatively speaking. It's a main roadway. And there was a
18 side street not too much further, but at the same time, it's
19 late at night and there's not much traffic, and he pulled over
20 to the right, as he's instructed to do so.

21 Q. Thank you. That's fair.

22 A. So, I said relatively -- relatively, yes.

23 Q. You would have to know there's some street further down the
24 road.

25 A. Correct.

- 1 Q. But you've got lights behind you.
- 2 A. Yep. Yes.
- 3 Q. He's supposed to stop, right?
- 4 A. Correct. Relatively, (inaudible), yes.
- 5 Q. Now, you know, obviously, and we've seen the video that once,
- 6 you know, you made the stop, you get out of your vehicle and
- 7 approach the driver's side window, correct?
- 8 A. Correct.
- 9 Q. Okay. And you have a conversation with him, you start your
- 10 conversation with him, correct?
- 11 A. Correct.
- 12 Q. You ask him for your (sic) license and registration -- pardon
- 13 me. You ask him for his license, correct?
- 14 A. Correct.
- 15 Q. And you indicated earlier that he did not give you his license
- 16 right away, he gave you a credit card, correct?
- 17 A. Correct.
- 18 Q. And then he gave you his license, correct?
- 19 A. Correct.
- 20 Q. Correct me if I'm wrong, it must have been a matter of seconds
- 21 because right then and there, you asked him, "Have you had
- 22 anything to drink tonight," correct?
- 23 A. Correct.
- 24 Q. You noticed that he was sweating, correct?
- 25 A. Correct.

- 1 Q. Okay. Now, is he sweating profusely or was glistening, kind
2 of like he is today?
- 3 A. Sweating profusely through his -- sweat beaded up -- I'm
4 sorry.
- 5 Q. And he indicated -- pardon me.
6 He indicated to you that he had been to the gym, correct?
- 7 A. Yeah, after further questioning, yes.
- 8 Q. When he gave you the license and the credit card, did he
9 fumble with those as he's handing them to you?
- 10 A. I -- I'd have to --
- 11 Q. Would you have noted it in the report had he fumbled?
- 12 A. I -- yeah, that's what I was just -- I don't recall per se,
13 but I did -- it wasn't noted on the report or anything, so I
14 can't say yes to that, so I would indicate no then. Not that
15 I recall, but there's nothing to indicate yes.
- 16 Q. That's fair. Fumbling with a driver's license would be one of
17 the cues, correct?
- 18 A. Correct.
- 19 Q. You recognize that as one of the cues?
- 20 A. Yes. Yes.
- 21 Q. It is not the cue gives you the wrong credit card or the
22 credit card is in lieu of a driver's license, it's fumbling,
23 correct?
- 24 A. Fumbling is one of the cues, giving the wrong --
- 25 Q. And that's what I'm asking you. That is the cue, fumbling.

- 1 A. But you're also specifying or indicating that giving the wrong
2 form of what was requested is not a cue. I'm not going to --
3 I don't know per se that that's not a cue, but I will agree
4 that fumbling is a cue, yes.
- 5 Q. Okay. Let me separate it. Do you agree with me that fumbling
6 is a cue?
- 7 A. Yes.
- 8 Q. You don't know whether giving you the credit card in lieu of
9 -- yeah.
- 10 A. Well, if I asked for a driver's license and I get a credit
11 card is that --
- 12 Q. Is that one of the cues from NHTSA, certified cues from NHTSA?
- 13 A. Mm-hmm. I --
- 14 Q. No. You don't know?
- 15 A. (Shrugs.)
- 16 Q. Is that a no? We're recording, so we have to --
- 17 A. I don't know if that's one of the cues from NHTSA.
- 18 Q. Good. You continued on your conversation with him. You
19 indicated he told you -- I don't hear this in the video, but
20 you indicated that he told you that he, you know, he was
21 speeding because he had to urinate, correct?
- 22 A. No, he stated that -- actually, it was the first thing he said
23 when I approached the vehicle is he advised that he had --
- 24 Q. So, that's not correct?
- 25 A. Not because --

1 Q. Excuse me.

2 MR. MOTZNY: Your Honor, objection. He asked, let
3 him at least answer the question.

4 MR. NUSHAJ: Well, Judge, I'm letting him answer the
5 question, but he's not -- you know, I indicated to him -- my
6 answer (sic) was correct or not correct. Now, he's going
7 above and beyond my question. I think I'm --

8 THE COURT: It's Cross Examination. If the question
9 can be answered, yes or no, you are instructed to do so.

10 MR. NUSHAJ: Thank you, your Honor.

11 BY MR. NUSHAJ:

12 Q. Did he indicate to you that he was -- he had to urinate, you
13 know, after the gym. That's why he's speeding; is that
14 correct?

15 MR. MOTZNY: Objection, your Honor. That's a
16 compound question. There's actually two questions there that
17 can't be answered yes or no.

18 THE COURT: I would agree.

19 MR. NUSHAJ: Thank you, your Honor.

20 BY MR. NUSHAJ:

21 Q. Did he -- strike that.

22 He indicated to you that he had to urinate, correct?

23 A. Correct.

24 Q. He indicated to you that that's why he was speeding, correct?

25 A. Correct.

- 1 Q. Did you ask him how much he weighs?
- 2 A. No.
- 3 Q. Did you ask him any questions, plural, with respect to any
4 health conditions he may have?
- 5 A. I asked him if he was on any medications.
- 6 Q. Okay. That's different than health conditions.
- 7 A. Oh.
- 8 Q. With respect to health conditions, did you ask him if he had
9 diabetes?
- 10 A. No.
- 11 Q. Did you ask him whether he has a weak bladder or anything like
12 that?
- 13 A. No.
- 14 Q. Okay. Did you ask him whether he had consumed too much water
15 while working out at the gym?
- 16 A. No.
- 17 Q. Did you ask him any questions with respect to why he needed to
18 urinate, why he needed to speed?
- 19 A. No.
- 20 Q. You indicated that upon approaching the vehicle as soon as,
21 you know, I presume -- let me ask you this, was the driver's
22 side window open by the time you got to him?
- 23 A. I believe so.
- 24 Q. So, he was parked and waiting for you to approach; is that
25 fair?

1 A. That's fair.

2 Q. Okay. And that's what he was supposed to do, correct?

3 A. Yes.

4 Q. You indicated that upon approaching you could smell two
5 scents. One was the smell of alcohol and the other one was
6 the smell of flavored tobacco; is that correct?

7 A. Yes.

8 Q. Okay. You were able to distinguish therefore both smells,
9 correct?

10 A. Correct.

11 Q. As separate and distinct, correct?

12 A. Correct.

13 Q. You asked him whether he had any marijuana on him or whether
14 he consumed marijuana, correct?

15 A. No.

16 Q. Okay. Did you ask him whether he had any marijuana on him?

17 A. Or in the vehicle. Yes.

18 Q. Okay. Did you ask him whether he consumed any marijuana?

19 A. No, he offered that information after I asked him the first
20 question.

21 Q. He didn't lie to you, did he?

22 A. I don't know.

23 MR. MOTZNY: Well, your Honor, how would he know
24 that? There's no way he can know whether or not the Defendant
25 lied to him.

1 MR. NUSHAJ: Fair enough, I supposed. I don't know
2 why anybody would say they smoked marijuana if they didn't,
3 but sure, I'll continue.

4 THE COURT: All right.

5 BY MR. NUSHAJ:

6 Q. Did you find any marijuana on him?

7 A. On him, no.

8 Q. Isn't it true that if marijuana is present in the vehicle,
9 that the vehicle would reek of the marijuana; is that correct?

10 A. Not necessarily.

11 Q. There's marijuana that doesn't smell?

12 A. Correct.

13 Q. Is that your testimony?

14 A. There's marijuana that does not smell, yes, or the way in
15 which it might be packaged it can make it so it doesn't smell.

16 Q. Officer Weingart came and assisted you at the scene; is that
17 correct?

18 A. Yes.

19 Q. She is a part of the K-9 Unit; is that correct?

20 A. Correct.

21 Q. Okay. The K-9 Unit is -- so that I understand it is, the K-9
22 is about to detect drugs in the vehicle; is that correct?

23 A. Correct.

24 Q. Did the car smell of the odor of freshly burnt marijuana?

25 A. No.

- 1 Q. Okay. Would you agree with me that you'd be able to smell the
2 odor of freshly burned marijuana?
- 3 A. Yes.
- 4 Q. Okay. The odor would linger in the car, would you agree with
5 me?
- 6 A. That's a fair statement depending on how long prior to it was
7 smoked, yes.
- 8 Q. Would you agree with me that if it was smoked that day, it
9 would linger on, correct?
- 10 A. Again, I'd have to go back to depending on the timeframe.
- 11 Q. I'm giving you the timeframe.
- 12 A. Well, that day -- well, I can't -- if it was 10 a.m. --
- 13 Q. Okay. You can't --
- 14 A. 10 a.m. the previous day -- I don't know. I mean, but --
- 15 Q. Okay. Right. But I'm not asking you about the previous day,
16 am I?
- 17 A. Well, then we're talking about 25 minutes or we're talking
18 about 11 minutes then.
- 19 Q. I'm not asking you about the previous day, am I? I'm not
20 asking about if the marijuana was smoked the day before or the
21 day --
- 22 A. No, you said the same day, but if we're talking about 12:11 in
23 the morning, then the same day would be an 11-minute
24 timeframe.
- 25 Q. You would be able to smell freshly burnt marijuana.

- 1 A. Freshly burned marijuana, yes.
- 2 Q. Was the dog sent out to smell around with respect to
3 marijuana?
- 4 A. At any point during the --
- 5 Q. During this particular investigation.
- 6 A. No.
- 7 Q. So, at this particular point, you pulled him out of the
8 vehicle; is that correct?
- 9 A. Yes.
- 10 Q. Okay. And you brought him behind his vehicle, between your
11 vehicle and his vehicle, correct?
- 12 A. Correct.
- 13 Q. Okay. And your lights are shining upon the three of you, you,
14 the other officer, and my client, correct?
- 15 A. Correct.
- 16 Q. Okay. And you're on the side of the road, this is on 15 Mile,
17 correct?
- 18 A. Maple Road, yes.
- 19 Q. Okay. And we see and we hear vehicles passing throughout the
20 entire time of the investigation, correct?
- 21 A. Correct.
- 22 Q. Okay. And it is loud in there, correct?
- 23 A. Correct.
- 24 Q. And that's why Mr. Motzny pointed out earlier that, you know,
25 a lot of the conversation going on, at least some of his

1 answers were not audible to you, correct, or, I mean, they're
2 not audible on the video, correct?

3 A. On the video. Correct.

4 Q. At this point, once you stepped out -- you know, you had him
5 step out of the vehicle, you initiated those tests, correct?

6 A. Evaluation, yes.

7 Q. The field sobriety evaluations, correct?

8 A. Correct.

9 Q. And on my count -- correct me if I'm wrong, on my count, you
10 conducted five tests, correct?

11 A. Correct.

12 Q. Okay. And you indicated during Direct Examination, during
13 Mr. Motzny's questions that, you know, my client failed all
14 five of them, correct?

15 A. Didn't say --

16 Q. Is that correct or not?

17 A. Incorrect; that's not correct.

18 Q. That's not correct. So, he did not fail all five tests,
19 correct?

20 A. They're not pass/fail. It's taken in totality of the
21 circumstances.

22 Q. That's great. Okay. Let's take them one-by-one.

23 You had him first perform the alphabet, correct?

24 A. Correct.

25 Q. And we heard how he performed the alphabet, correct?

- 1 A. Correct.
- 2 Q. You indicated that, you know, he tried to answer your
3 questions or your question here with respect to the alphabet,
4 he tried to answer right away and started telling you the
5 alphabet before you instructed him to begin reciting the
6 alphabet, correct?
- 7 A. While I was in the process of giving --
- 8 Q. Is that correct?
- 9 A. Sorry, sorry.
- 10 Q. That's okay. You just testified, correct?
- 11 A. I did just testify, yes.
- 12 Q. Okay. And you told us that he started trying to recite the
13 alphabet prior to you giving the go-ahead, correct?
- 14 A. Yes.
- 15 Q. Okay. That's all I was asking.
- 16 A. Okay.
- 17 Q. He basically did sort of what we're doing here right now,
18 correct, meaning I ask you a question, I don't tell you when
19 to start answering the question; is that correct?
- 20 A. That is correct.
- 21 Q. Okay. You don't wait for a cue from me to start answering the
22 question, correct?
- 23 A. I do, I wait for you to finish the sentence --
- 24 Q. Right.
- 25 A. -- and then I respond.

1 Q. But again, my question is, you don't wait for me to tell you,
2 "Go ahead and answer my question, sir", correct?

3 MR. MOTZNY: Well, objection, your Honor, he's asked
4 it a couple times now and I think it's been asked and
5 answered.

6 MR. NUSHAJ: I don't -- I think this is different, a
7 nuance (sic) is a question as to my prior question, but I'll
8 move it along just for the sake of expediency.

9 BY MR. NUSHAJ:

10 Q. So, what he's doing in your question/answer or, you know, you
11 giving him commands is he's responding to the command; is that
12 fair?

13 A. That's fair.

14 Q. Okay. And he starts reciting the alphabet as we heard; is
15 that correct?

16 A. Correct.

17 Q. And he does -- when you give him the go-ahead, he does recite
18 the alphabet, correct?

19 A. Correct.

20 Q. He does so correctly.

21 A. Correct.

22 Q. So, after passing this test, then you move on to counting
23 backwards, correct

24 A. Well, you just said, "After passing this test, you move on."

25 So, that's adding the previous part and I advised it wasn't a

- 1 pass/fail situation. You kind of added -- in order for me to
2 say correct, that would be me agreeing that he passed the
3 previous test.
- 4 Q. You're not agreeing that he recited the test correctly, I
5 mean, the alphabet correctly?
- 6 A. That's not what you said. You said when he passed the test.
- 7 Q. Okay. And I don't mean for you and I to be bogged down --
- 8 A. I'm not trying -- I'm not trying --
- 9 Q. You're fine. Let me ask you the questions.
- 10 A. -- to be difficult either. I'm just --
- 11 Q. I understand.
- 12 A. I don't want to have you ask me a question and me testify to
13 something I don't necessarily agree with.
- 14 Q. I'm not trying to fight you, I'm just trying to get an answer.
- 15 A. I agree.
- 16 Q. I'm not.
- 17 A. I'm not trying to either.
- 18 Q. I know. I know. That's fair.
- 19 He recited the alphabet correctly and you moved on
20 to the next test.
- 21 A. Correct.
- 22 Q. The next test was counting backwards, correct?
- 23 A. Correct.
- 24 Q. He was counting backwards, and correct me if I'm wrong, it was
25 91 to 76?

- 1 A. Correct.
- 2 Q. Okay. You had asked him prior to that whether he knew the
3 numbers from 1 to 100 and he indicated to you, yes, correct?
- 4 A. Correct.
- 5 Q. And you gave him the go-ahead and he started reciting the
6 numbers backwards, counting backwards, correct?
- 7 A. Yes.
- 8 Q. Okay. And in your testimony that at one point he skipped a
9 number, but right then and there he went back, stated the
10 number and continued on with his counting; is that correct?
- 11 A. That's correct.
- 12 Q. Okay. And he stopped at the correct number, correct?
- 13 A. Correct.
- 14 Q. He started at the correct number; is that right?
- 15 A. Correct.
- 16 Q. Okay. That is one of those cues that you look for; is that
17 right?
- 18 A. That's correct.
- 19 Q. Okay. Meaning that when you want to see for signs of
20 impairment, that would be one of the things that you would
21 notice, whether he started at the correct number and whether
22 he finished at the correct number, is that fair?
- 23 A. That's fair.
- 24 Q. Okay. And you didn't see that here because he did start at
25 the correct number and he finished at the correct number; is

1 that correct?

2 A. That is correct.

3 Q. You moved on from these two tests and you did nine steps
4 back-and-forth; is that correct?

5 A. The heel-to-toe evaluation.

6 Q. The heel-to-toe, yeah, whatever it (inaudible).

7 Prior to having him perform this test, you started
8 to explain the test to him, correct?

9 A. Correct.

10 Q. You told him exactly what you wanted him to do, correct?

11 A. Correct.

12 Q. You indicated -- this is from me looking at the video, you
13 indicated to him that, "I want you to walk in an imaginary
14 straight line"; is that correct?

15 A. I don't know if I used those exact words, but that's the
16 concept, yes.

17 Q. Okay. Did you have some sort of a tape measure that you
18 rolled out in order to have that straight line?

19 A. No.

20 Q. So, the line was imaginary. He was supposed to be able to see
21 straight and walk straight, correct?

22 A. Yes.

23 Q. Okay. Did you demonstrate what you wanted him to do?

24 A. Yes.

25 Q. Okay. Did you take all nine steps from that direction that

1 you wanted him to walk, and did you demonstrate the full turn
2 and then the nine steps walking backwards that you wanted him
3 to perform?

4 A. No, you seen the demonstration I performed, the three steps,
5 then make the turn, and then three steps back. But after I
6 take the third step, I say to him, "Count one, two, three and
7 continue on to the ninth step. And then after you take the
8 ninth step, you have to turn," because I'm going perpendicular
9 to him, so he can see how my feet are touching heel-to-toe and
10 with me being perpendicular to him, it's -- one, if I took
11 nine steps, I'd be far off in the grass over there and it
12 wouldn't be as safe and effective, so that's why I gave a
13 truncated version of the demonstration.

14 Q. So, for your safe -- pardon me. I'm sorry.

15 For your safety, you didn't do so, but you asked him
16 to perform that test, the nine steps?

17 A. Correct.

18 Q. Okay. You had a conversation with him with respect to -- you
19 know, just before these tests that follow starting with
20 heel-to-toe, you had a conversation with him whether there was
21 anything that would stop him from being able to perform the
22 test; is that correct?

23 A. Yes.

24 Q. And he indicated to you that he had a sprained ankle, correct?

25 A. Correct.

- 1 Q. Okay. But he said that he would do it, correct?
- 2 A. Correct.
- 3 Q. Okay. And then you, and correct me if I'm wrong, at this
4 point in the video is where you start explaining to him how
5 the test should work, what do you want to see him perform,
6 correct?
- 7 A. Correct.
- 8 Q. Okay. And you show him with the three steps, you know, going
9 forward, you show him the turnaround, and come back, correct?
- 10 A. Correct.
- 11 Q. Okay. At this point, when he observes you and listens to you,
12 to what you want him to do, he says, "I can't do that"; is
13 that correct? He makes a comment about, "I can't do that."
- 14 A. Correct.
- 15 Q. Okay. You asked him to perform that test nonetheless,
16 correct?
- 17 A. I asked him if he could --
- 18 Q. Is that correct or no?
- 19 A. Yes.
- 20 Q. Okay. Did you ask him any questions -- did you ask him
21 whether his physical shape would stop him from being able to
22 perform the test?
- 23 A. No.
- 24 Q. Okay. Did you ask him whether there were any health
25 conditions that would impair his ability to do that test?

1 A. No.

2 Q. Did you ask him whether there were any other physical
3 conditions other than the sprained ankle that he talked to you
4 about that would stop him from being able to conduct a test as
5 you had requested?

6 A. No.

7 Q. Okay. Did you ask him whether, you know, his weight would be
8 a factor in how he -- would allow him to conduct the test?

9 A. No.

10 Q. Okay. Do you know if a person is at least 50 pounds over
11 their ideal weight that that weight, that additional weight
12 would hamper their ability to perform such a test, do you know
13 that?

14 A. No.

15 Q. You don't know that?

16 A. No, I didn't know that. I'm not saying that's not true, I'm
17 just saying did you (sic) know that, no.

18 Q. That's fair. Thank you. That's what I was looking for.

19 When he walked out of the vehicle to get in the back
20 behind his vehicle, between your two cars, was his walking a
21 concern to you?

22 A. No.

23 Q. Okay. He walked just fine, correct?

24 A. Yes.

25 Q. Was he swaying, was he unsteady, did he have balance problems

- 1 at that particular walk, as he walked in the back?
- 2 A. No.
- 3 Q. Okay. Fair to say he's steady on his feet, correct?
- 4 A. That's fair to say.
- 5 Q. That's one of those cues that you look for; is that correct?
- 6 A. Yes.
- 7 Q. Okay. Did he have any difficulty getting out of his vehicle?
- 8 A. Not that I recall, no.
- 9 Q. That's another one of those cues; is that fair?
- 10 A. That's fair.
- 11 Q. You're trained to look for some difficulty getting out of the
- 12 vehicle when you believe there's signs of impairment, correct?
- 13 A. That'd be a correct statement.
- 14 Q. When you got out of the vehicle to walk to the back, was he
- 15 leaning on the vehicle, holding back to the vehicle, or
- 16 anything like that?
- 17 A. Not that I observed, no.
- 18 Q. Okay. Was he slow to respond to your request to get out of
- 19 the vehicle?
- 20 A. Not that I recall.
- 21 Q. Okay. From what we observed in the video during these
- 22 back-and-forth questions, you know, conversation you had with
- 23 him, was he slow to respond to you?
- 24 A. No.
- 25 Q. Okay. That's another one of those cues you observed, that you

1 looked for, you're trained to look for; is that correct?

2 A. That would be a fair statement.

3 Q. I didn't ask you this earlier, I'm going to do a little quick
4 backtrack.

5 When you're traveling across from him and the radar
6 gave you that beep, did you notice whether his headlights were
7 on or off?

8 A. Did I notice whether his headlights were on or off?

9 Q. Correct.

10 A. When you say there's a beep, there's a continuous tone that's
11 reading whenever there's any type of speed monitoring on the
12 radar.

13 Q. Sure.

14 A. There's a continuous tone, so it's not like one car goes by
15 and it starts beeping. So, there's continuous tone.

16 Q. I see.

17 A. And as it hits --

18 Q. That's a fair statement. Let me --

19 A. Okay.

20 Q. -- narrow it down then.

21 A. Right.

22 Q. I apologize. I guess in my mind that didn't make sense.

23 From the moment you noticed his vehicle, are his
24 headlights on?

25 A. Yes.

- 1 Q. Okay. You know, that's another one of those cues, correct?
- 2 A. Correct.
- 3 Q. Impaired drivers, you know, you look for a clue of whenever
- 4 they're driving, they may have their headlights turned off,
- 5 correct?
- 6 A. Correct.
- 7 Q. Okay. That's missing here, correct?
- 8 A. Correct.
- 9 Q. You conducted -- after you -- you know, after this test, you
- 10 did the balancing test, correct?
- 11 A. Correct.
- 12 Q. You asked him to lift one of his feet and maintain balance,
- 13 correct?
- 14 A. Correct.
- 15 Q. Okay. There was some conversation back-and-forth between you
- 16 and Steve with respect to which foot to lift and which not,
- 17 correct?
- 18 A. Correct.
- 19 Q. And that's based on that earlier conversation with respect to
- 20 the spraining of his ankle, correct?
- 21 A. Correct.
- 22 Q. And you demonstrated this exercise, as well; is that correct?
- 23 A. Correct.
- 24 Q. Okay. And you showed him exactly what you wanted him to do
- 25 and you asked him to perform it, correct?

- 1 A. Correct.
- 2 Q. Okay. And did I hear this incorrectly or is it true that he
3 told you -- his statement was, "I couldn't do that sober,"
4 correct?
- 5 A. That was during the walk-and-turn, I believe.
- 6 Q. Oh, I apologize. Well, let me go back to that one and chat
7 about that for a second because you focused on that, correct?
- 8 A. Yes.
- 9 Q. You asked him a question, a follow-up question, correct?
- 10 A. Correct.
- 11 Q. And you asked him, "Well, does it mean that you're not sober
12 right now"; is that correct?
- 13 A. That's correct.
- 14 Q. Okay. Did he say, "Yes, that means I'm not sober right now"?
- 15 A. No, he did not say that.
- 16 Q. No, he did not. What he did was, he engaged you and gave you
17 his reasoning for the statement, correct?
- 18 A. Yes.
- 19 Q. Okay. And would it be fair to say that that's one of those
20 cues, meaning he's not changing his answers. That's one of
21 the cues that you look for, right? Changing answers and
22 ability to respond to you, correct?
- 23 A. That's a fair statement.
- 24 Q. All right. And that's not what he did here. He reasoned with
25 you, correct? He gave you his reasoning, I should say. Is

1 that correct?

2 A. Yes.

3 Q. Okay. At the time when you started to do the lifting of your
4 foot balance test, did he tell you whether he was able to do
5 that or not? Upon your watching of the video just now. Do
6 you remember if he told you, "I'm not going to be able to do
7 that," or "I'm going to try." Do you remember hearing those
8 words?

9 A. Yeah, he said he would try, yes.

10 Q. He would try. Did you ask him and I won't go through the
11 whole litany, but did you ask him any questions with respect
12 to why he would be unable to, if he had any health conditions,
13 health concerns, physical conditions, physical concerns?

14 A. No.

15 Q. Are there other tests available that you could have performed
16 on this night in question, in place of these physical tests,
17 the nine steps back-and-forth and, you know, the heel-to-toe
18 and the lifting of your leg?

19 A. Yes.

20 Q. Okay. You didn't perform any of those tests, did you?

21 A. No.

22 Q. Okay. You chose not to, correct?

23 A. Yes.

24 Q. Even though he told you that it would be a difficulty for him
25 to perform these tests because of his physical condition, you

- 1 chose to proceed with these same two tests, correct?
- 2 A. Yes.
- 3 Q. Okay. You moved on to perform the HGN, which is the nystagmus
4 test, correct?
- 5 A. Correct.
- 6 Q. And you explained that to us during your Direct Examination
7 upon Mr. Motzny's questions to you, correct?
- 8 A. Correct.
- 9 Q. That is the test where you have the subject, you know, have
10 Steve here directly in front of your police vehicle, correct?
- 11 A. Correct.
- 12 Q. Okay. And in order to -- well, let me ask you, why did
13 Officer Weingart go to turn off the headlights in your
14 vehicle, is that what she did?
- 15 A. No, she turned off the oscillating red and blue lights, the
16 flashing lights.
- 17 Q. I apologize. Okay. Why did she do that?
- 18 A. So, it wouldn't be a distraction.
- 19 Q. A distraction to whom?
- 20 A. To the Defendant.
- 21 Q. To Steve.
- 22 A. Correct. So, he could -- so --
- 23 Q. Okay. You wouldn't be distracted by it.
- 24 A. I personally, no.
- 25 Q. Okay. Because you've got your back; is that correct --

- 1 A. Yes.
- 2 Q. -- to your vehicle as you're performing the HGN, correct?
- 3 A. Correct.
- 4 Q. Okay. At the same time, your headlights are turned on; is
5 that correct?
- 6 A. That's correct.
- 7 Q. And the vehicles on 15 Mile keep going back-and-forth; is that
8 correct?
- 9 A. Correct.
- 10 Q. Okay. And now, when you -- you testified earlier that when
11 you do the finger -- you know, you move your finger across,
12 you know, the peripheral of his eyes, correct?
- 13 A. The pen, but my finger's there also, yes.
- 14 Q. Okay. I'm sorry, what was it that --
- 15 A. A pen.
- 16 Q. A pen. You had a pen. Okay.
- 17 A. The tip of a pen, yes.
- 18 Q. When you move your pen, okay, you didn't want the lights, the
19 red, white -- you know, the red and blue lights or whatever
20 they are, you didn't want them to distract him, correct?
- 21 A. Correct.
- 22 Q. Okay. But you didn't move him away from the other lights, did
23 you? From your headlights, from the other lights from other
24 cars that keep coming back-and-forth, correct?
- 25 A. Correct, I still needed the area to be the illuminated, still

- 1 needed to be able to see his eyes and whatnot, so yes.
- 2 Q. Sure. Sure. When you go to a lit area, you stayed within
3 your headlights and within the other vehicles coming back-and
4 forth, correct?
- 5 A. Yes, we stayed in the same location.
- 6 Q. How long, as you do the -- your pen, right?
- 7 A. Correct.
- 8 Q. How long must you hold your pen at any one extremity, do you
9 know? If you know; if you don't know, it's okay.
- 10 A. Several seconds, but I don't know the exact number off the top
11 of my head.
- 12 Q. You don't know the exact number?
- 13 A. I don't recall the exact number, yes.
- 14 Q. Were you trained in how to perform the nystagmus, the HGN?
- 15 A. Yes.
- 16 Q. Okay. But you don't know whether there was any -- you know,
17 in your training there was any sort of importance placed upon
18 how long you're supposed to keep at maximum deviation over
19 here, correct?
- 20 A. There -- I mean, it's -- I mean, I'd say four to six seconds.
21 I can't recall exactly though, so I don't want to specify a
22 specific number and don't -- because I don't know exactly, but
23 yes, you do keep it out at a certain distance and whatnot,
24 yes.
- 25 Q. What is the reason for keeping it out for any number of

- 1 seconds that you're not aware of?
- 2 A. If it's a lessened amount of time, then there can be nystagmus
3 present if there's fatigue, but if you keep it out for a long
4 period of time, the nystagmus will no longer become present if
5 it is fatigue. If it's alcohol, or narcotics, or whatnot,
6 you're -- the eye will still continue to have the nystagmus of
7 the involuntary jerking. Or if it's a fatigue situation, the
8 eye should -- the nystagmus should resolve itself; the
9 nystagmus should go away after -- yeah.
- 10 Q. That's fair. So, for me to be able to understand this, there
11 may be other reasons that come out if you do this improperly,
12 as far as the amount of time that you hold your pen on the
13 side of his face. Fatigue may be one of those issues,
14 correct?
- 15 A. Correct.
- 16 Q. Okay. So, you would agree with me then that it would be
17 important to know exactly how to perform this test correctly,
18 correct?
- 19 A. That's a fair statement.
- 20 Q. And sitting here as you are today, and your testimony it is
21 varied, you don't want to tell me something that is not true,
22 that you don't know to be true, that's fair. But sitting as
23 you do today, you indicated earlier, you know, you don't know
24 based -- based on the fact that you don't know the amount of
25 time, you don't know whether he performed this test correct or

1 not, is that fair?

2 A. When worded that way, I would have to say that's a fair
3 statement.

4 Q. Okay. So, even though you wouldn't word it that way, that is
5 a fair statement that you would have to know how to perform
6 the test in order for that test to be reliable, correct?

7 A. Correct.

8 Q. Throughout the entire course of this video, which is the
9 arrest, was he slow to respond to you at any time? Or was he

10 --

11 A. Not that I recall.

12 Q. Okay. Not that you recall, you said, correct?

13 A. Yes.

14 Q. Okay. Pardon me, I didn't mean to stop you.

15 MR. NUSHAJ: Your Honor, may I have a brief moment?

16 THE COURT: You may.

17 MR. NUSHAJ: Thank you.

18 Your Honor, I have no further questions at this time
19 for the Officer.

20 Officer, thank you very much.

21 THE COURT: Any Redirect?

22 MR. MOTZNY: Yes, your Honor.

23 REDIRECT EXAMINATION

24 BY MR. MOTZNY:

25 Q. Mr. Nushaj asked you a lot of questions about looking for, was

1 it cues or clues?

2 A. Cues.

3 Q. Cues. Those are things that you are trained to look for in
4 determining whether someone is impaired, correct?

5 A. Correct.

6 Q. Now, somebody had to have all the cues in order to be
7 determined impaired?

8 A. No.

9 Q. For instance, you testified there's no accident in this case,
10 correct?

11 A. Correct.

12 Q. But if it was an accident, that'd be just one cue that maybe
13 this person was impaired, correct?

14 A. Could be.

15 Q. The fact that there was no accident in this case does that
16 mean he was sober?

17 A. No.

18 MR. NUSHAJ: I would object, your Honor. That would
19 call for speculation on account (sic) of this police officer.

20 MR. MOTZNY: I don't think so, your Honor. He's
21 making it look like -- he asked these questions about cues and
22 I think it's important to ask this Officer what those cues
23 actually mean.

24 MR. NUSHAJ: And I agree with Mr. Motzny; however,
25 he's asking this Officer to make inclusory (sic) statements

1 about the final decision and that's my objection. This
2 Officer cannot testify as to final decision-making as to
3 whether this driver was impaired or not. He can only testify
4 to his experience on the road.

5 MR. MOTZNY: I'm pretty sure that's not --

6 MR. NUSHAJ: And whether he noticed --

7 MR. MOTZNY: I'm sorry I didn't mean to interrupt.

8 THE COURT: The Officer can give his opinion.

9 MR. NUSHAJ: Thank you, your Honor.

10 BY MR. MOTZNY:

11 Q. Okay. The fact that there was no accident, does that mean
12 that somebody is sober?

13 A. No.

14 Q. The headlights were on, correct?

15 A. Correct.

16 Q. But if the headlights were off, that would just be one cue --

17 A. Correct.

18 Q. -- that he may be impaired, correct?

19 A. Correct.

20 Q. Okay. So, the fact that he actually drove with his
21 headlights, does that mean he was sober?

22 A. No.

23 Q. Is it fair to say --

24 A. Not necessarily.

25 Q. I'm sorry, go ahead.

- 1 A. I said not necessarily.
- 2 Q. Okay. Is it fair to say it's not like a scoresheet where if
3 you have all the cues, you're drunk; you're looking for some
4 cues that are indications of impairment, correct?
- 5 A. Correct.
- 6 Q. Based on your experience and what you saw Mr. Assi do on that
7 night, it was your determination he had enough cues to show
8 that he was impaired, correct?
- 9 A. Correct.
- 10 Q. Did you ask the Defendant if he had a medical problem that
11 would have caused him to urinate on himself?
- 12 A. I did not ask him, no.
- 13 Q. Did he volunteer that information?
- 14 A. Yes.
- 15 Q. What did he volunteer?
- 16 A. He advised that he urinated himself when I first made contact
17 with the vehicle and advised he was attempting to go home or
18 go somewhere to use a restroom.
- 19 Q. All right. My actual question is, did he say he did that
20 because he has a medical problem?
- 21 A. No, he did not.
- 22 Q. He didn't tell you -- he didn't mention that he had diabetes
23 or anything to that effect?
- 24 A. No.
- 25 Q. In fact, the only health concern that he brought up when you

- 1 asked was he had a sprained ankle, correct?
- 2 A. Correct.
- 3 Q. You told Mr. Nushaj he walked out of the vehicle just fine,
4 correct?
- 5 A. Correct.
- 6 Q. No indication that he was having problems with his ankle,
7 would you agree?
- 8 A. Not that I observed, correct.
- 9 Q. So, is it fair to say that the only time you actually observed
10 difficulties with his coordination was when he was asked to do
11 two things (inaudible); is that correct?
- 12 A. Correct.
- 13 Q. I think Mr. Nushaj asked you if you found any marijuana in the
14 vehicle, what was your response to that?
- 15 A. I don't know if he asked that question. I can respond to it,
16 if you're asking.
- 17 Q. Okay. Did you find marijuana in the Defendant's vehicle?
- 18 A. Yes.
- 19 Q. Okay. And when was that found?
- 20 A. After he was arrested, there was an inventory search of the
21 vehicle and there was edible marijuana, edible cannabis
22 located in the center console of the vehicle.
- 23 Q. Okay. But when you initially asked the Defendant if there was
24 marijuana in the vehicle, what was his response?
- 25 A. He advised there was not.

1 MR. MOTZNY: Your Honor, that's all I have. Thank
2 you.

3 THE COURT: Any Recross?

4 MR. NUSHAJ: Yes, your Honor.

5 RECROSS EXAMINATION

6 BY MR. NUSHAJ:

7 Q. With respect to the marijuana you found, you also asked him
8 whether he was a medical marijuana cardholder, correct?

9 A. Correct.

10 Q. And you did verify that he was, correct?

11 A. Correct.

12 Q. That he is a valid medical marijuana cardholder.

13 A. Correct.

14 Q. Okay. So, it was perfectly legal for him to have the
15 marijuana, correct?

16 A. Correct.

17 MR. MOTZNY: Well, objection, your Honor. I think
18 that's not the exact terminology.

19 MR. NUSHAJ: I'll move on to my next question,
20 Judge.

21 BY MR. NUSHAJ:

22 Q. When you asked him -- you know, so this is off of Mr. Motzny's
23 question just a second ago, you asked him whether he had any
24 marijuana in his vehicle, he indicated to you that he had
25 marijuana things, correct?

1 A. That was after he was outside of the vehicle. When I was
2 doing the pat-down, he said -- I asked him if there was
3 anything on his person that he wasn't supposed to have and he
4 said his marijuana things.

5 Q. Okay. Fair. Off of Mr. Motzny's question earlier with
6 respect to the cues -- that is cues, correct?

7 A. Correct.

8 Q. Okay. Because that's what we're talking about, we're talking
9 about cues.

10 Mr. Motzny asked you "Well, it's not like a scoring
11 card," correct?

12 A. Correct.

13 Q. And you said, "No, it's not," correct?

14 A. Correct.

15 Q. But you indicated earlier that you haven't been certified, you
16 haven't looked at any of their training manuals or anything
17 like that, correct?

18 MR. MOTZNY: Objection, I don't know what the
19 training manual he's referring to, your Honor.

20 MR. NUSHAJ: It's based on his earlier response,
21 Judge.

22 BY MR. NUSHAJ:

23 Q. Are you certified by NHTSA?

24 A. Not that I'm aware of.

25 Q. So, you wouldn't know whether there is actually a score kept

1 of these cues, correct?

2 A. That's a fair statement.

3 Q. Okay. So, if I were to bring some sort of an expert here to
4 say that, yes, there is actually such a score --

5 MR. MOTZNY: Objection, your Honor. It calls for
6 speculation.

7 MR. NUSHAJ: It does, Judge. Thank you.

8 I have no further questions. Thank you very much.

9 THE COURT: All right. You may step down.

10 (At 11:47 a.m., the Witness was excused.)

11 OFFICER MINTON: Thank you.

12 THE COURT: Do the People have any additional
13 witnesses?

14 MR. MOTZNY: Two more, your Honor.

15 THE COURT: And could you both briefly approach?

16 MR. NUSHAJ: Yes, your Honor.

17 (From 11:47 a.m. to 11:47 a.m., a Bench Conference
18 was held.)

19 THE COURT: All right. Ladies and gentlemen, this
20 appears to be a good time to break for lunch. I'm going to
21 now allow you to leave the courthouse. Please be back no
22 later than 10 after 1 for a 1:15 start time. That gives you
23 about one hour and 20 minutes. You may go to lunch together
24 or you may go to lunch alone. If you decide to lunch
25 together, don't discuss this case in any way. And if you

1 wouldn't mind, wear your Juror badges on the outside of your
2 coats, so that people could recognize that you're acting as a
3 juror.

4 Please rise for the Jury.

5 (At 11:48 a.m., the Jury exits the courtroom.)

6 THE COURT: All right. Please be back at 1:10.

7 MR. MOTZNY: 1:10. Thank you, your Honor.

8 MR. NUSHAJ: Thank you, your Honor.

9 Your Honor, may we leave our stuff here?

10 THE COURT: Yes, and we will lock it.

11 MR. NUSHAJ: Thank you.

12 (At 11:48 a.m., off the record.)

13 (At 1:16 p.m., on the record.)

14 THE COURT: People v. Assi.

15 Your appearances.

16 MR. MOTZNY: Allan Motzny on behalf of the City,
17 your Honor.

18 MR. NUSHAJ: Renis Nushaj appearing on behalf of
19 Mr. Assi, your Honor.

20 THE COURT: All right.

21 MR. NUSHAJ: Judge, I reviewed the statement that
22 your Honor (inaudible) as a limiting instruction. I believe
23 upon reading it, you know, it makes it sounds as -- you know,
24 because your Honor used the term Medical Marihuana Act and the
25 you go on to mention impairment, it makes it sound as if my

1 client is charged under the Medical Marihuana Act, which he
2 isn't. So --

3 THE COURT: I would agree, he isn't.

4 MR. NUSHAJ: So, I would respectfully request that
5 we amend the limiting instruction by -- that we amend it,
6 period, and then perhaps we use something other -- some
7 language other than the Medical Marihuana Act when talking
8 about the Medical Marijuana Act, you know, requires that -- if
9 it is proven, the impairment shows so on and so forth.

10 THE COURT: All right. Well, what I'm going to do
11 since it sounds like we very well may not get to the Jury
12 today is, in whatever time you have, pen an addendum and we'll
13 make a copy, give it to the Prosecutor, and then I will
14 consider it.

15 MR. NUSHAJ: Thank you, your Honor.

16 (At 1:18 p.m., off the record.)

17 (At 1:20 p.m., on the record.)

18 THE COURT: People v. Assi.

19 MR. MOTZNY: Again, Allan Motzny on behalf of the
20 City of Troy, your Honor.

21 MR. NUSHAJ: And again, Renis Nushaj on behalf of
22 Mr. Assi, to my left, your Honor.

23 THE COURT: All right. Anything else before we
24 bring in the Jury?

25 MR. MOTZNY: No, your Honor.

1 MR. NUSHAJ: No, your Honor. Whenever your Honor
2 would like to address this, I'm happy to do so.

3 THE COURT: Have you had time to pen something?

4 MR. NUSHAJ: Judge, all I would ask your Honor to do
5 is strike the portion that says, "Pursuant to the Medical
6 Marihuana Act, a driver in Michigan is guilty," in that
7 sentence in the second paragraph, all I'm asking you to do is
8 strike that, "Pursuant to the Medical Marihuana Act," and then
9 leave and start the next sentence with, "A driver in Michigan
10 is guilty of Operating While Impaired if the marijuana
11 ingested or the alcohol and marijuana ingested by the
12 Defendant impaired his ability to drive."

13 THE COURT: I will consider that. I don't think
14 it's relevant for this moment, do you?

15 MR. NUSHAJ: Yes, your Honor. No, I agree. I mean,
16 yes, I agree with you. I apologize.

17 THE COURT: All right. And I know you have two more
18 witnesses and then how many witnesses do you have?

19 MR. NUSHAJ: One, your Honor.

20 THE COURT: All right. I would like to be as
21 expeditious as possible. I think we are running quite behind.

22 MR. NUSHAJ: I agree.

23 THE COURT: All right. Please bring in the Jury.

24 MR. NUSHAJ: Your Honor, we do have a Mutual
25 Sequestration Order.

1 THE COURT: Yes.

2 MR. MOTZNY: My next witness is Officer Weingart,
3 your Honor.

4 THE COURT: All right.

5 MS. KORKES: All rise for the Jury.

6 (At 1:22 p.m., the Jury enters the courtroom.)

7 THE COURT: Please be seated.

8 The record will reflect the Defendant, both
9 attorneys, and the Jury is present.

10 Please call your next witness.

11 MR. MOTZNY: Yes, Officer Melinda Weingart, your
12 Honor.

13 THE COURT: Do you solemnly swear to tell the truth,
14 the whole truth, and nothing but the truth so help you God?

15 OFFICE WEINGART: Yes, your Honor.

16 THE COURT: Please be seated.

17 OFFICER MELINDA WEINGART

18 At 1:22 p.m., sworn by the Court, testifies as follows:

19 DIRECT EXAMINATION

20 BY MR. MOTZNY:

21 Q. Please state your name and spell your name.

22 A. Melinda Weingart. W-e-i-n-g-a-r-t.

23 Q. And how are you employed?

24 A. As a Police Officer with the City of Troy.

25 Q. How long have you been so employed?

1 A. Almost 15 years.

2 Q. And what are your duties and responsibilities?

3 A. Right now, I'm assigned to the K-9 Unit on afternoons.

4 Q. Before you were assigned to the K-9 Unit, what was your
5 responsibility?

6 A. I did some time in Traffic Safety. I worked in the Traffic
7 Safety Unit and I also worked just general Road Patrol.

8 Q. And you still work general patrol (sic); is that correct?

9 A. Correct.

10 Q. And in your experience as a police officer, have you been in
11 contact with people who have been under the influence of drugs
12 or alcohol?

13 A. Yes.

14 Q. And typically, when do those contacts occur?

15 A. A variety of situations, domestics, drunk driving incidents,
16 crashes, disorderly persons, a variety of different things.

17 Q. Based on your experience are you able to make a determination
18 as to whether one is impaired by drinking or the use of drugs?

19 A. Yes.

20 Q. Were you on duty on December 2nd of 2017?

21 A. Yes.

22 MR. MOTZNY: Your Honor, I'm going to show a brief
23 portion of the muted video, just to ask the Officer one
24 question.

25 THE COURT: All right.

1 BY MR. MOTZNY:

2 Q. It's Exhibit 1. Can you look at this for just a second,
3 Officer? Is that you?

4 A. Yes.

5 Q. Okay. And to expedite this, you backed up Officer Minton on
6 that night, correct?

7 A. Yes.

8 Q. And that involved the investigation involving the Defendant,
9 Mr. Assi?

10 A. That's correct.

11 Q. Were you able to observe the Defendant, Mr. Assi, while you
12 were serving as a backup officer?

13 A. Yes.

14 Q. How were you able to observe him?

15 A. Officer Minton was talking to Mr. Assi and having contact with
16 him, and my job as a backup officer is to make sure Officer
17 Minton doesn't get assaulted and keep the scene as safe as
18 possible. And I also observed Mr. Assi while he was talking
19 to Officer Minton.

20 Q. Okay. And what observations did you make of the Defendant?

21 A. He appeared to be intoxicated, his eyes were bloodshot and
22 glassy, he had poor balance, he had urinated himself. There
23 was the strong odor of marijuana coming from himself and the
24 vehicle.

25 Q. And did you watch the field sobriety tests?

1 A. Yes.

2 Q. Did you watch the walk-and-turn test?

3 MR. NUSHAJ: Your Honor, I object to this line of
4 questioning at this time. The Officer is going to testify
5 with respect to what she observed, she did not conduct the
6 tests however. So, any testimony that's coming from this
7 Officer would be duplicative to say the least and it would be
8 irrelevant because the Officer that conducted the tests that
9 determined what the outcome of the tests or what cues he
10 observed or did not, already testified. She would not be the
11 proper foundational officer to testify as to this, Judge.

12 MR. MOTZNY: Your Honor, she's a witness with
13 experience detecting people who are under the influence of
14 alcohol, I believe she can testify as to her observations,
15 they may be different than the other Officer's, it may be the
16 same. I don't know that.

17 THE COURT: Well, it does appear to be essentially
18 testimony that's already been had, so in what way would this
19 not be -- in what way would this be an efficient use of the
20 Court's time?

21 MR. MOTZNY: Just an additional witness, your Honor.
22 A lot of times there's argument, "Well, only one person said
23 this," you know, "Why isn't there more witnesses?" We have
24 two witnesses that I think the Jury should hear from both
25 witnesses.

1 MR. NUSHAJ: Your Honor, if I may. Obviously,
2 there's a reason we don't have every police officer in the
3 force review the video and make a determination as to how, you
4 know, this particular person performed on the day in question.
5 They all have the same training, they all have the same
6 background, they all have the same experience working or a lot
7 of experience with respect to spotting certain cues out there,
8 but there's a reason we don't do that and that is not to be
9 duplicative or not to, you know, go over, you know, and just
10 basically rehash the same testimony when we have the Officer-
11 in-Charge that performed the evaluations and who made the
12 determination on the evaluations testify, which he did and he
13 did so eloquently and completely, I thought.

14 THE COURT: I will give you some latitude, but I do
15 agree with Defense Counsel this is likely to be duplicative.

16 MR. MOTZNY: I will move it along, your Honor.

17 THE COURT: All right.

18 MR. NUSHAJ: Thank you, your Honor.

19 BY MR. MOTZNY:

20 Q. You observed the field sobriety tests, correct?

21 A. Yes.

22 Q. And based on all those observations, in your experience and
23 training, did you make a determination as to whether the
24 Defendant's ability to operate was impaired?

25 A. Yes.

1 Q. What was that determination?

2 A. I believe he was impaired.

3 Q. And was that based on one particular thing or was it based on
4 a number of things?

5 A. It was based on a number of things. I noticed that Mr. Assi
6 had a hard time following instructions. Several points,
7 Officer Minton instructed him not to begin the task until told
8 to do so. He attempted the tasks before he was told to do so.
9 He had to be instructed several times to keep his hands out of
10 his pockets. His balance was poor. He said that he had
11 sprained his, I believe, left ankle and he would be able to
12 complete the tasks; however, he was unable to do so. And then
13 he said at one point, he wouldn't be able to do them even if
14 he were sober.

15 To me, that combined with the way he was talking,
16 the way he was acting, the way his eyes looked, the way he
17 smelled, led me to believe that he was under the influence.

18 Q. You agree you did not see the Defendant drive, correct?

19 A. That's correct.

20 Q. How can you make that determination with even seeing him
21 driving?

22 A. The field sobriety tasks are a tool that we use to help
23 determine whether somebody's ability to drive is good or bad,
24 if they can drive or not. That's one of the ways that we
25 determine if somebody can drive and judging by what I saw, I

1 would say that he was not able to drive sufficiently.

2 Q. Did you see this video? Did you watch it before you came?

3 A. Yes.

4 Q. Can you see everything in a video that an officer actually
5 sees at the scene?

6 A. No. And one of the best examples I can give for Jurors who
7 don't deal with this on a regular basis is, for example --

8 MR. NUSHAJ: Well, your Honor, I would object to
9 this -- I mean, the Officer is testifying to an answer to a
10 question that has not been asked yet.

11 MR. MOTZNY: I'll ask the question, your Honor.

12 THE COURT: All right.

13 BY MR. MOTZNY:

14 Q. You indicated in your last answer that you can't see
15 everything in the video that the officer actually sees.

16 A. That's correct.

17 Q. Can you give us a specific example?

18 A. Yes. If you're standing next to the vehicle or if you're in a
19 patrol car, behind the vehicle you can clearly read a license
20 plate, you can clearly see street signs. When you watch the
21 video, you can't see those things.

22 Q. Okay. Would you agree that a person stopped by a police
23 officer might be nervous?

24 A. Absolutely. I think everybody, including police officers, are
25 nervous when they get stopped.

1 Q. Okay. As a trained police officer, can you detect the
2 difference between when someone who's nervous as opposed to
3 someone who's impaired?

4 A. With a variety of different things, yes, that's why it's not
5 just one specific thing that we ask them to do, it's an
6 accumulation of everything together.

7 Q. Okay. So, with regard to the Defendant, would you say he was
8 impaired or just nervous?

9 A. I would say he's impaired.

10 MR. MOTZNY: All right. That's all I have, your
11 Honor.

12 THE COURT: Cross Exam?

13 MR. NUSHAJ: May I, your Honor?

14 CROSS EXAMINATION

15 BY MR. NUSHAJ:

16 Q. Good afternoon.

17 A. Good afternoon.

18 Q. I just have a couple questions. You obviously didn't hear the
19 testimony from Officer Minton today, correct?

20 A. That's correct.

21 Q. But you were on the scene, correct?

22 A. Yes.

23 Q. Okay. You were there after the traffic stop.

24 A. That's correct.

25 Q. Everything that Officer Minton observed, you also observed,

1 correct, from the moment in time that you got there, correct?
2 You were both paying attention to the same set of facts,
3 right?

4 A. No, I'm paying attention to different things at different
5 times. I'm keeping an eye on traffic. At one time, I know I
6 left to go turn off the front lights of the patrol car. It's
7 not my job to watch everything that Officer Minton is doing.
8 It's my job to make sure that nobody comes up, and stops next
9 to us, and comes up to talk to us, or tries to assault us.

10 Q. Makes perfect sense, which is to say that, you know, he is the
11 better situated person. By he, I mean Officer Minton, is the
12 better situated person to make the determinations with respect
13 to how someone fairs on the field sobriety tests because he is
14 the one performing them; isn't that correct?

15 A. Not necessarily, I think --

16 Q. When I ask isn't that correct, is that correct or not?

17 A. I would say it depends on an officer's experience level.
18 Sometimes one officer might have more experience with certain
19 things than another officer, so maybe the person that's doing
20 the sobriety tasks wouldn't be the best judge or they might
21 be, but they might not be. So, it really depends on the
22 individual.

23 Q. I see. So, you have some doubts with respect to Officer
24 Minton's abilities?

25 A. Absolutely --

1 Q. Okay.

2 A. Absolutely not. I'm talking about experience. Like, you
3 might have a newer officer doing sobriety tasks versus --

4 Q. Okay. But we're not talking about -- frankly, I don't want us
5 to talk about some hypothetical situation that may exist. I'm
6 talking about the experience that we have today or on the date
7 in question with respect to you and Officer Minton.

8 A. Yes.

9 Q. Okay. You indicated that, you know, for safety reasons you
10 are paying attention obviously in many regards, both with
11 respect to oncoming traffic and the fact that you mentioned
12 the fact that you don't want Officer Minton to be assaulted,
13 correct?

14 A. That's correct.

15 Q. But you got no such indication obviously from my client on the
16 date in question.

17 A. Not at all.

18 MR. NUSHAJ: That's all I have at this time, Judge.
19 Thank you very much, Officer.

20 THE COURT: Redirect?

21 MR. MOTZNY: Nothing further, your Honor.

22 THE COURT: All right.

23 (At 1:33 p.m., the Witness was excused.)

24 THE COURT: Please call your next witness.

25 MR. MOTZNY: Police Service Aide Peter Guest.

1 THE COURT: Do you solemnly swear to tell the truth
2 the whole truth, and nothing but the truth so help you God?

3 POLICE SERVICE AIDE GUEST: I do.

4 THE COURT: Please be seated.

5 POLICE SERVICE AIDE PETER GUEST

6 At 1:34 p.m., sworn by the Court, testifies as follows:

7 DIRECT EXAMINATION

8 BY MR. MOTZNY:

9 Q. Please state your name and spell your name.

10 A. My name is Peter Guest. G-u-e-s-t.

11 Q. And how are you employed?

12 A. With the City of Troy Police Department as a Police Service
13 Aide.

14 Q. And is one of your duties to conduct breath tests on people
15 suspected of drinking alcohol?

16 A. Yes, I am.

17 Q. Okay. And what type of instrument do you use to do those
18 tests?

19 A. It's a DataMaster DMT model.

20 Q. Is that instrument used in the State of Michigan by other
21 police agencies?

22 A. Yes, it's used throughout the State of Michigan.

23 Q. And are you certified to operate that instrument?

24 A. Yes, I'm a Class II certified operator.

25 MR. MOTZNY: Your Honor, may I approach the Witness

1 with People's Exhibit 2, Proposed?

2 THE COURT: You may.

3 MR. MOTZNY: Mr. Nushaj has a copy of the exhibit.

4 BY MR. MOTZNY:

5 Q. What is People's Exhibit 2?

6 A. It's a Xeroxed copy of my breath certification card.

7 MR. MOTZNY: Your Honor, I would move to admit
8 People's Exhibit 2.

9 (At 1:35 p.m., People's Proposed Exhibit No. 2
10 offered.)

11 MR. NUSHAJ: I don't have an objection, your Honor.

12 THE COURT: It will be admitted.)

13 (At 1:35 p.m., People's Exhibit No. 2 admitted.)

14 MR. MOTZNY: Your Honor, I have copies to publish to
15 the Jury, but would you prefer I wait to --

16 THE COURT: That's up to you. It doesn't matter.

17 MR. MOTZNY: If I may publish them to the Jury?

18 THE COURT: You may.

19 BY MR. MOTZNY:

20 Q. What does it mean to have this certification as a Operator
21 Class II?

22 A. It means that I'm certified to administer both a PBT test and
23 the actual breath test using the DataMaster.

24 Q. Okay. And you're not a chemist, correct?

25 A. I am not.

1 Q. And you don't know the inner workings of that instrument; is
2 that correct?

3 A. That is correct.

4 Q. But you know how to use it, correct?

5 A. I know how to operate it, yes.

6 Q. And the DataMaster DMT is used to measure breath alcohol on a
7 person, correct?

8 A. That's correct.

9 Q. And what safeguards are in place to make sure the DataMaster
10 is working properly?

11 A. It goes through a weekly test on its own to certify that it's
12 actually operating correctly. And it's also certified every
13 120 days by a representative of the actual corporation,
14 DataMaster, who I believe is a retired State Police Trooper.

15 Q. And are there records kept regarding those tests that were
16 done?

17 A. Yes, there are logs that are kept.

18 MR. MOTZNY: May I approach with People's Exhibit 3,
19 your Honor?

20 THE COURT: You may.

21 MR. MOTZNY: Which Mr. Nushaj has a copy.

22 BY MR. MOTZNY:

23 Q. I'm handing you what's been marked as People's Proposed
24 Exhibit 3. Can you tell me what that is?

25 A. It's a copy of the actual DataMaster logs that are filled out

1 after the instrument does its accuracy check.

2 Q. That's actually a copy of those logs, correct?

3 A. I believe it to be a copy, true copy.

4 Q. And the original logs are kept where?

5 A. In the records -- well, they're kept for the first month or
6 the month that we're actually filling them out in the actual
7 Lockup area next to the DataMaster and after that, they're
8 turned over to the Lockup Sergeant, who puts them in the
9 records division.

10 Q. And you have access to those logs, correct?

11 A. While they're in Lockup, I do, yes.

12 MR. NUSHAJ: Your Honor, I'll object to this line of
13 questioning, Judge. I believe Mr. Motzny is starting to ask
14 questions with respect to the admissibility of these
15 documents. My understanding is that this particular Officer
16 is not the custodian of the records to begin with. I'm
17 objecting for foundation purposes, as well as Sixth Amendment
18 and Confrontation Clause (sic). He is not, as I said, not the
19 custodian of records nor is he the person that performs the
20 120-day test, which is a necessary witness in this case.

21 And I can have -- if your Honor prefers, I can go
22 into further detail when the time comes.

23 MR. MOTZNY: Well, your Honor, he has access to the
24 records. In fact, if I could ask some more questions, we'll
25 note that his signature is probably on those records. The

1 actual records are kept at Lockup. He knows that they're the
2 accurate records, he knows that they're there, and he knows
3 what a true copy is. It's sufficient foundation.

4 THE COURT: I'm going to stop you.

5 Please rise for the Jury.

6 (At 1:38 p.m., the Jury exits the courtroom.)

7 THE COURT: All right. Be seated.

8 All right. Your response again was?

9 MR. MOTZNY: Your Honor, we don't have to have the
10 custodian, this testimonial sponsor has to verify that the
11 records are the accurate copy of the original records that are
12 on file and he has been able to do that.

13 THE COURT: And what Rule of Evidence are you going
14 under?

15 MR. MOTZNY: It's probably in the 900s where records
16 have to be authenticated. Let me grab --

17 MR. NUSHAJ: I presume -- and I don't mean to put
18 words in Mr. Motzny's mouth, I presume he's (inaudible) as a
19 business record of some sort. Obviously, the custodian of the
20 records needs to be present. Under -- you know, obviously
21 there's some case law that came after Crawford v. Washington,
22 Judge, both Bullcoming is the -- you know, Bullcoming versus
23 -- I'll give you the exact cite. Bullcoming v. New Mexico,
24 564 US 647, it's a 2011 case. And basically, it took Crawford
25 and Melendez (sic), which is the other case, another step

1 further in requiring that not anyone from the lab should
2 appear to testify, but either the person who performed the
3 test and directly supervised the testing, so one portion of i
4 was satisfied, however --

5 THE COURT: Well, let me just stop you.

6 Are you saying that you have no objection to these
7 records if the custodian came in?

8 MR. NUSHAJ: No, I do have an objection, Judge,
9 because that's only one portion, based on the four-pong test
10 that we have. The person that performed the 120-day check
11 also needs to be present. We have a court rule in place
12 after Bullcoming, 6.202 was passed by our Supreme Court as a
13 way around (sic) and you gave the Prosecuting Attorney a way
14 around the requirement of having to bring the person that did
15 the 120-day check by --

16 THE COURT: You're saying 6.202?

17 MR. NUSHAJ: Correct. By giving --

18 THE COURT: That's a court rule, correct?

19 MR. NUSHAJ: Yes. MCR 6.202.

20 You know, by giving -- you gave the Prosecuting
21 Attorney in any of these cases the ability to provide the
22 documents ahead of time to, you know, the other side and, you
23 know, provide notice. It's a notice requirement, Judge, that
24 the documents be used in this, you know, contemplating fashion
25 without the need for the 120-day person that performed the

1 check, 120-day check to be present in the courtroom.

2 I haven't received such notice. Had I received such
3 notice, I would have 14 days to respond, to object, or if I
4 didn't object, then the documents would come in. No such
5 notice has been provided to me. I haven't had a need to
6 object. At any rate, to the extent that such notice has been
7 provided today, I'm objecting and I believe the person that
8 did the 120-day test, along with PSA Guest are both necessary
9 pursuant to the court rule and pursuant to our case law, the
10 Supreme Court case law.

11 THE COURT: All right. I'm going to read this.

12 MR. NUSHAJ: Thank you.

13 THE COURT: All right. The first --

14 MR. NUSHAJ: And your Honor, I don't mean to
15 interrupt.

16 THE COURT: You just did.

17 MR. NUSHAJ: I know. Before you make a decision
18 though, I have one thing to add, but I'll let you speak.

19 THE COURT: 6.202 describes disclosure of a forensic
20 laboratory report, which I don't believe this is. So, unless
21 you can provide me with a persuasive argument as to why this
22 would be a forensic laboratory report and certificate, I don't
23 think 6.202 applies.

24 MR. NUSHAJ: They're trying to introduce -- I
25 suppose that is a portion of my objection coupled with a

1 foundational -- my objection --

2 THE COURT: Well, let me deal with one at a time.

3 MR. NUSHAJ: Well, the reason I --

4 THE COURT: Just answer the question. 6.202
5 specifically deals with laboratory reports. Why is this a
6 laboratory report?

7 MR. NUSHAJ: Well, they're trying to introduce
8 documents by way of -- I guess it depends on how Mr. Motzny
9 asked the original question that he asked, what rule are you
10 using to introduce it?

11 I suppose, yeah, if he's not -- he is trying to use
12 it as a forensic laboratory report, which I presume he's
13 looking at the 900s, that's where he's going.

14 THE COURT: Let me stop you. Typically, this would
15 be admitted under a business record exception.

16 MR. NUSHAJ: Correct.

17 THE COURT: So, I assume that would be what --

18 MR. NUSHAJ: My foundational objection.

19 THE COURT: -- ultimately his answer will be. So,
20 why is this not a business record exception?

21 MR. NUSHAJ: They're trying to introduce a document
22 but for which retains the signature of a second party, not to
23 this particular officer. He doesn't perform the 120-day test.

24 Marvin Guyer, to my understanding, is the person
25 that does that test. Foundationally, I have the right to

1 confront -- my client, I should say, has the right to confront
2 that witness.

3 THE COURT: So, you're disagreeing with the business
4 record exception as it relates to Marvin Guyer's testimony?

5 MR. NUSHAJ: Correct, confrontational clause.

6 THE COURT: Do you have any case law that helps you

7 MR. NUSHAJ: Yeah, Bullcoming v. United States
8 (sic), Judge. Here's the -- obviously, Crawford is the
9 seminal case. If --

10 THE COURT: All right. Let me just read.

11 MR. NUSHAJ: And actually, there's precedent on this
12 objection. I'm sorry, I didn't mean to interrupt. Go ahead.
13 Sorry.

14 THE COURT: So, what is your response, Defense
15 Counsel, that 803(6), the Business Record Exception, would
16 need to take a backseat to Crawford?

17 MR. MOTZNY: Your Honor, the Rules of Evidence allow
18 this document to be admitted. We're not -- and I'm not
19 familiar with the case. This is the first time I heard it, so
20 --

21 THE COURT: Well, you're familiar with Crawford.

22 MR. MOTZNY: Yes, it's a Sixth Amendment case and
23 the Sixth Amendment says that you have a right to confront the
24 witnesses against you.

25 The Witness here is Officer Guest, as well as his

1 test results. I'm trying to introduce records of regularly
2 conducted activity just to show that records have been kept
3 showing that the test to test the accuracy was done by the
4 police department. I mean, that's why they have this business
5 record. I mean, there's several tests to have done there
6 (sic). Mr. Nushaj is correct, I would have to call every
7 single officer who signed every single form plus Mr. Guyer to
8 testify and I don't think that's -- I think the reason they
9 allow records to come into evidence under the Hearsay
10 Exception Rule, and if I remember Crawford right, it usually
11 applies to where you're talking about the testimony of a
12 witness, as opposed to an evidence exception.

13 And again, I wasn't prepared for this argument
14 because we usually get these logs in without objection. So,
15 I'm not using that as an excuse, but Crawford applies when you
16 try to bring actual testimonial hearsay, not when you're
17 trying to bring in an item or a document that comes in as an
18 exception to the hearsay rule under the Rules of Evidence.

19 And I think there's even -- if you look at Crawford
20 or some of the cases following Crawford, I think they discuss
21 that you could actually get things in under the exceptions to
22 the Rules of Evidence where Crawford doesn't apply.

23 In this case, we're -- it's a record of regularly
24 conducted activity under the hearsay rule and under the
25 authentication rules, which is 901(A), we only have to

1 identify it if the testimony is sponsored can assure that the
2 documents are what they say they are. And he's testified
3 these are the logs that show that the tests were done. That's
4 all we're trying to admit into evidence at this time.

5 MR. NUSHAJ: But your Honor --

6 THE COURT: I would agree -- let me just -- the
7 authentication seems to have been satisfied and the records
8 would come in under 803(6) as a Business Record Exception and
9 I agree with the Prosecution that typically these come in
10 without objection.

11 So, I empathize with your position of perhaps not
12 being a hundred percent prepared; however, just because
13 something is typically admitted without objection doesn't mean
14 that I am -- I should do so now when an objection has been
15 made. And I also tend to agree with you that if there was
16 exhaustive research done on the progeny post-Crawford, my
17 sense is that there would have been a carved-out exception. I
18 don't know that though as I'm sitting here.

19 So, what do you think you have that says otherwise?

20 MR. NUSHAJ: Your Honor, in order for -- you know,
21 what the Prosecuting Attorney is trying to admit is the
22 120-day test, okay, and he's using someone unrelated to the
23 120-day test. The 120-day test is a document that is signed
24 by Marvin Guyer. Marvin Guyer needs to be here to introduce
25 that document. I'm objecting on the foundation, first and

1 foremost, and the confrontation clause issue.

2 It is only after they introduce and admit this
3 document that Officer Guest (sic) would then be able to
4 testify in order to introduce the result of the DataMaster.

5 THE COURT: I really get the timing. I'm looking
6 for the argument that states that --

7 MR. NUSHAJ: And I have -- I'm sorry, I have a bad
8 habit of interrupting you. I apologize.

9 Your Honor, we have a precedent in this very
10 courtroom. I just happen to know flippantly, my partner tried
11 a case, People v. Romeo Somovski (sic). He just mentioned
12 that at lunch when I mentioned this today in this very
13 courtroom with the same issue, same objection, People of the
14 State of Michigan v. Romeo Somovski. He made the same
15 objection, and your Honor ruled, and it's precedential here
16 obviously, ruled in my business partner's favor and his
17 client's favor saying that, yes, the person that did the
18 120-day test needs to appear to testify.

19 And at the time, I guess the attorney for the State
20 of Michigan was Laura McLane, she had to bring him in, brought
21 him in, Marvin Guyer testified, Officer Guest then testifies,
22 and we move on with our business.

23 I'm not stipulating to this document, I'm not
24 stipulating to do this outside of the order in the sense that
25 we need to do this properly.

1 MR. MOTZNY: Your Honor, I think his objection is he
2 should be allowed to cross examine Marvin Guyer as to whether
3 he did that particular test correctly, then he could do that.
4 He could subpoena them. But as far as admissibility --

5 THE COURT: Well, I really strongly disagree with
6 you. This is an admissibility issue, not the right to cross
7 examine. So, you don't -- if he's correct, then you don't get
8 to admit this document without Marvin Guyer being present.

9 MR. MOTZNY: Your Honor, we're only trying to show
10 that the test was done and that we have records showing the
11 tests were done. That's what we're trying to prove.

12 THE COURT: Well, implicit in that it was done and
13 done correctly. Not just that it was done.

14 So, I really would prefer not to do this, but what I
15 will do is I will give you both the rest of the day to
16 research this issue. I don't believe we can continue until
17 this issue is decided, so I don't want to force the
18 Prosecution to go forward without the opportunity to review it
19 and I am not going to admit this over an objection until I'm
20 certain that it's appropriate to do so.

21 MR. MOTZNY: Very well, your Honor. We will
22 research it and we will also try and get Marvin Guyer here,
23 and we will do what we can.

24 THE COURT: That would be easier.

25 MR. MOTZNY: That's what we'll do, your Honor. If

1 that's what Mr. Nushaj wants, then we'll do it. But it would
2 have been nice to have notice that we would have had this
3 objection.

4 THE COURT: Well, I don't disagree.

5 MR. MOTZNY: I think Mr. Nushaj is aware that we --

6 THE COURT: Sir --

7 MR. MOTZNY: Your Honor, it's just --

8 THE COURT: Sir, this is Trial, these things happen
9 It's not personal to you or this case. Defense Attorneys
10 doing their level best with the Rules of Evidence and case law
11 occurs. I don't take it personally. If you want to, that's
12 your choice.

13 MR. MOTZNY: I apologize, your Honor. You're
14 absolutely correct.

15 THE COURT: So, this is going to put us in a real
16 trick-bag. So, I don't think there's any hope of continuing
17 today. So, we will resume -- is there anything you can ask
18 this Officer today before we get to the ultimate issue or have
19 you asked everything of him?

20 MR. MOTZNY: Well, if we're not going to get the
21 breath test results in without the certification, I mean I
22 could ask to admit those, but if Mr. Nushaj is going to object
23 --

24 THE COURT: That doesn't make sense. I kind of
25 thought you'd asked him everything you could.

1 Then what I will do is I will adjourn this to
2 tomorrow at one p.m. and Mr. Guest would be your last witness
3 unless Mr. Guyer can be here.

4 MR. NUSHAJ: Your Honor -- well, first of all, I
5 should -- if I may, may I have a second just to address
6 something?

7 I've known Mr. Motzny for a long time. I care and
8 respect about Mr. Motzny. I had that very seat right to the
9 right of you before I started my practice as an attorney. I
10 take my job seriously as I know he takes his job seriously.
11 have far less experience than Mr. Motzny does.

12 Did I see this issue? Yes, I saw this issue. Am I
13 doing anything to hold against Mr. Motzny or -- not at all.
14 So, I understand, you know, the trial's not going our way. I
15 understand that it would affect us personally, they certainly
16 do me. But, you know, a lot of trials go again -- you know, a
17 lot of trials go against me than go against the Prosecution,
18 as your Honor knows unfortunately.

19 So, you know, to the extent that I'm asking that,
20 you know, the rules of procedure be followed. I hope
21 Mr. Motzny understands that I'm not doing anything above and
22 beyond.

23 THE COURT: Well, the fact of the matter is, it is
24 unusual for a Defense Attorney to object to the logs coming in
25 under Crawford. You've indicated that I've ruled on this in

1 the past. I do not have any recollection of having done so.
2 So, the most I can do when two lawyers disagree on the law is
3 give you time to figure it out. Frankly, I prefer not to, but
4 I don't see an appropriate way to go forward when you both are
5 disagreeing on how -- and I don't have a font of knowledge on
6 what the law is.

7 So, I agree with Mr. Motzny that having known this
8 is always helpful to the Prosecution, but then from a Defense
9 prospective, had he known it, he would have buttoned up the
10 loophole and sometimes trial is about strategy.

11 MR. NUSHAJ: It is and I must -- you know, for what
12 it's worth, I mean, not that I need to explain it here, but
13 for what it's worth, I prepared for this over the weekend.
14 Over the course of my practice, I don't have time to sit out
15 there and strategize over months, and months, and months.

16 When I realized, I called Mr. Goetz (sic), who is
17 for better or worse my mentor, and he's the one who indicated
18 such an issue. He pointed it out, I confirmed it with him,
19 and here I am now today ready to go to trial.

20 THE COURT: All right. And you have one witness, is
21 that your expert?

22 MR. NUSHAJ: Yes, ma'am.

23 THE COURT: All right, then. I will --

24 MR. NUSHAJ: Well, Judge, yes, the expert. The
25 expert comes from Peoria, Illinois. I forgot about him.

1 He comes from Peoria, Illinois, your Honor, and he's
2 paid top dollar for him to be here.

3 MR. MOTZNY: Your Honor, if Mr. Nushaj wants to call
4 his expert witness provided I get an opportunity to recall my
5 witnesses, I won't object to that. I don't have a problem
6 with that issue.

7 MR. NUSHAJ: And that's gracious. And here's the
8 problem that I have, Judge. I'll lay at your Honor's feet as
9 we usually do in these cases.

10 If Mr. Motzny and the Troy City Attorney, you know,
11 and if your Honor sustains my objection, I will proceed
12 forward tomorrow at one p.m. and Mr. Motzny is either unable
13 to bring Mr. Guyer in to testify and/or I object to Mr. Guyer
14 testifying and your Honor agrees with me because he's not a
15 part of the witness list, he's not a part of the police
16 report, he's not part of anything, okay. And I object to him
17 coming in as a witness, you know, in this case and let's say
18 your Honor agrees with me, and I --

19 THE COURT: That would be very unlikely.

20 MR. NUSHAJ: Okay. But now -- you know, if these
21 documents don't come in. So, if either the latter happens or
22 the documents don't come in on account of Marvin Guyer not
23 being able to be here tomorrow at one o'clock, then I'll have
24 placed my expert on the record today --

25 THE COURT: Yeah, I understand the trick-bag you're

1 in and I can't solve it for you.

2 MR. NUSHAJ: Well, but Judge -- but --

3 THE COURT: All I can tell you is that we can either
4 go -- the rest of the day belongs to this trial and you can
5 call him out of order based on what the Prosecutor indicated.
6 I understand the decision you have to make, but you have to
7 make it.

8 MR. NUSHAJ: Right, but it's a decision that I have
9 to make and I agree. And thank you. I'll place an objection
10 on the record for purposes of -- and this is my offer of
11 proof, I suppose because I would have to bring my expert and,
12 you know, out of order to testify on the case and I would have
13 to ask him -- if I were to bring him in right now, I would
14 only talk about the field sobrieties with my expert, not about
15 the DataMaster because I would have no need for the data (sic)
16 -- to have a conversation with respect to the DataMaster
17 because those results it sound like they're not coming in.

18 THE COURT: I can't tell you how much --

19 MR. NUSHAJ: Well, but I'm making --

20 THE COURT: -- I understand your dilemma.

21 MR. NUSHAJ: No, and I agree, but this is for
22 purposes of the record, Judge, so that I --

23 THE COURT: Okay.

24 MR. NUSHAJ: And I know you're with me, but I need
25 to be explicitly clear because I don't know how this is going

1 to play out and how my client is going to operate in the
2 future.

3 So, for purposes of the record, I would have to --
4 you know, I wouldn't be asking him today any questions with
5 respect to the DataMaster, which then if Mr. Motzny is able to
6 bring Marvin Guyer in and over my objection you allow
7 Mr. Guyer to testify, then he will testify as to the
8 DataMaster. And these results would have come in, you know,
9 the DataMaster results, and I will be robbed of the
10 opportunity, my client would be robbed of the opportunity to
11 have this expert testify as to the DataMaster and what he
12 thinks about the DataMaster.

13 So, I guess understanding your Honor's ruling
14 saying, "This is your decision and now, you do (sic)," will
15 your Honor consider allowing me to place my expert out of
16 order and then with respect -- if the DataMaster does become
17 an issue, maybe provide an affidavit from the expert on
18 account of his thoughts on the DataMaster with respect to this
19 specific case.

20 THE COURT: No.

21 MR. NUSHAJ: All right.

22 THE COURT: I've never -- that's just not going to
23 happen.

24 MR. NUSHAJ: Have him testify, you know, if he has
25 Skype. Would your Honor consider allowing him to testify via

1 Skype? And I'm talking about only if the issue of the
2 DataMaster comes about.

3 THE COURT: I might consider that. I don't have a
4 problem with that.

5 Mr. Motzny, do you?

6 MR. MOTZNY: I've never done that before, but as
7 long as he's subject to Cross Examination, I suppose it's
8 acceptable. I don't know how the mechanics would work, your
9 Honor.

10 THE COURT: I will allow that. It does appear to be
11 appropriate under the circumstances. So, you plan to call him
12 now and I'll alert the Jury that we're calling witnesses out
13 of order and frankly leave it at that.

14 MR. NUSHAJ: Will your Honor -- that's fair. That's
15 fair, Judge.

16 THE COURT: All right. So, just to be clear, we're
17 dismissing PSA Guest from the stand, he'll return tomorrow at
18 one o'clock.

19 THE WITNESS: Can I have permission to just check my
20 calendar real quick?

21 THE COURT: You may.

22 THE WITNESS: Because I work tonight and sleeping
23 becomes an issue.

24 THE COURT: Maybe the Chief can assist you.

25 THE WITNESS: Tomorrow will not be a problem.

1 THE COURT: Excellent. That's great news.

2 All right. So, you can step down, sir.

3 (At 1:59 p.m., the Witness was excused.)

4 POLICE SERVICE AIDE GUEST: Thank you.

5 THE COURT: So, we'll bring the Jury in, inform them
6 that we're calling witnesses out of order and do you need
7 three minutes with your expert?

8 MR. NUSHAJ: If you don't mind, Judge.

9 THE COURT: Three.

10 MR. NUSHAJ: May I have that time now, Judge, or do
11 you want me to wait?

12 THE COURT: Yes. Go.

13 MR. NUSHAJ: Okay. Thank you.

14 (From 1:59 p.m. to 2:02 p.m., a recess was held.)

15 THE COURT: Mr. Nushaj, who's your expert?

16 MR. NUSHAJ: My expert is -- his name is
17 Dr. Ronald Henson. He's come from Peoria, Illinois today.

18 MS. KORKES: All rise for the Jury.

19 (At 2:02 p.m., the Jury enters the courtroom.)

20 THE COURT: Please be seated.

21 The record should reflect that both Counsel, the
22 Defendant, and the Jury are here.

23 I apologize, we're going to be taking a couple
24 witnesses out of order or at least one witness out of order.

25 So, the People have not yet rested their case, but

1 because we have an out-of-state witness, we're going to take
2 that witness now.

3 Mr. Nushaj?

4 MR. NUSHAJ: Thank you, your Honor.

5 Your Honor, I call Dr. Ronald Henson to the stand.

6 THE COURT: Do you solemnly swear to tell the truth
7 the whole truth, and nothing but the truth so help you God?

8 DR. HENSON: I will, Judge.

9 THE COURT: Please be seated.

10 DR. RONALD HENSON

11 At 2:03 p.m., sworn by the Court, testifies as follows:

12 DIRECT EXAMINATION

13 BY MR. NUSHAJ:

14 Q. Good afternoon, Dr. Henson.

15 A. Good afternoon.

16 Q. Would you please state your name for the record?

17 A. Yes, Ronald Henson. H-e-n-s-o-n.

18 Q. And please state your occupation and profession.

19 A. Yes, I'm an independent consultant in drug and alcohol related
20 matters. I work for insurance companies, employers, civil law
21 firms, and criminal law firms, as well.

22 Q. Thank you, Doctor. Please state your post-high school and
23 formal education that you may have.

24 A. Yes, I graduated from the vocations of Illinois State Police
25 Academy. From academia, I have four college degrees. I have

1 an Associate degree in sociology/psychology with studies of
2 drugs and alcohol. I have a Bachelor of Science degree from
3 the University of Illinois with further studies in drugs,
4 alcohol, physiology, and pharmacology under the criminal
5 justice curriculum program. I have a Masters degree of public
6 administration that focused on -- at that time, I was in
7 charge of the drug and alcohol programing at the University of
8 Illinois for the police training academy there. And I have a
9 Ph.D. degree from Walden University, and my residency is
10 performed at Indiana University, and my final dissertation was
11 drug and alcohol testing in the workplace.

12 Q. Thank you, sir. Will you please state to the Jury your
13 employment that is relevant to law enforcement and related
14 investigations?

15 A. Sure. Well, I started around 39 years ago, so in summary, I
16 started as a police cadet in 1979. I became a police officer
17 in the suburbs of Chicago. Worked with the undercover unit
18 for a short period of time in drug and narcotics, and
19 developed expertise at the department's direction in drugs and
20 alcohol. And then I became a police academy instructor on a
21 full-time basis at the University of Illinois and eventually
22 supervised that program until the mid-1990s.

23 At that time, I embarked on my doctoral studies. I
24 served as a tenure track professor in the State of Iowa. I
25 held other academic positions while originally starting

1 getting calls in the private sector, if you would, with
2 regards to drug and alcohol questions and really started with
3 drug and alcohol testing in the workplace as that started to
4 ramp up. And currently, that's all I do is independent work
5 and consulting in this arena.

6 Q. As a police officer, did you receive any formal training with
7 respect to detection, investigating, alcohol use
8 investigation, combinations of alcohol and drugs?

9 A. Yes, I did, as well as standardized field sobriety testing
10 came on the scene in the early 1980s and then also advanced
11 studies with regards to drugs, alcohol, and narcotics.

12 Q. Have you been professionally licensed or certified in any
13 areas relevant to alcohol or drugs?

14 A. Yes, both as a practitioner and by the State of Illinois
15 Police Training Board.

16 Q. So, it's fair to say you're familiar with field sobriety
17 testing, sir?

18 A. Yes, sir; I was one of the first trained in the 1980s.

19 Q. Have you been both a practitioner and instructor with respect
20 to field sobriety testing?

21 A. Yes, sir.

22 Q. Okay. And have you testified before in court with respect to
23 issues of field sobrieties?

24 A. Yes, I have.

25 Q. Have you been certified as an expert on prior occasions with

1 respect to field sobriety testing?

2 A. Yes, sir; in multiple states, including this courthouse.

3 Q. Thank you.

4 MR. NUSHAJ: Your Honor, may the City Attorney and I
5 briefly approach?

6 THE COURT: You may.

7 (From 2:07 p.m. to 2:08 p.m., a Bench Conference was
8 held.)

9 MR. NUSHAJ: Thank you, your Honor.

10 BY MR. NUSHAJ:

11 Q. Do you remain current with respect to your training and
12 vocation when it comes to field sobriety testing and
13 literature thereof?

14 A. Yes, I do.

15 Q. Okay. And you've indicated that you've testified in this very
16 court before, you've testified in other courts in the State of
17 Michigan as an expert witness?

18 A. Yes, throughout the United States, as well.

19 Q. Okay. Now --

20 MR. NUSHAJ: May I approach the Witness, your Honor?

21 THE COURT: You may.

22 BY MR. NUSHAJ:

23 Q. I'm showing you Defense Proposed Exhibit A. Do you recognize
24 these documents?

25 A. Yes, sir; I do.

1 Q. Can you tell us what it is?

2 A. This is a copy of my curriculum vitae, last updated January of
3 2018.

4 Q. Okay. And does it have listed in there -- you created the
5 document obviously, correct?

6 A. Yes, I did.

7 Q. And it has there all of your qualifications, is that fair?

8 A. That's correct. It's typically used in academia and
9 professoral duties with regard to your training, education,
10 background, publications, speaking, the development of your
11 expertise, and courts use it, as well.

12 Q. Thank you, sir. And you've introduced -- you know, that
13 document has been introduced before in courts of law on your
14 behalf; is that correct?

15 A. Yes.

16 MR. NUSHAJ: Your Honor, at this time, I move to as
17 Defense Proposed Exhibit A, Dr. Henson's curriculum vitae.

18 (At 2:10 p.m., Defense Proposed Exhibit A offered.)

19 THE COURT: Any objection or voir dire?

20 MR. MOTZNY: No objection, your Honor.

21 THE COURT: It will be admitted.

22 (At 2:10 p.m., Defense Exhibit A admitted.)

23 MR. NUSHAJ: Thank you, your Honor. May I retrieve
24 the document?

25 THE COURT: You may.

1 MR. NUSHAJ: And with your Honor's permission, I'll
2 publish it to the Jury at the end, so the Jury may have it.

3 BY MR. NUSHAJ:

4 Q. Have you reviewed the video of this particular incident on
5 December 2nd?

6 A. I did.

7 Q. Okay. That's the video where they intrude (sic) to Mr. Assi's
8 police encounter and stop; is that correct?

9 A. Yes.

10 Q. And have you reviewed it in its entirety?

11 A. Yes.

12 Q. Okay.

13 A. As far as I know, yes.

14 Q. Right.

15 A. It looked complete.

16 Q. Mr. Assi was stopped for speeding on this day.

17 A. Yes.

18 Q. Is speeding one of the top ten, 20 cues that we use, that
19 NHTSA uses with respect to impaired driving?

20 MR. MOTZNY: Well, objection, your Honor, I don't
21 know if this Witness has been accepted as an expert. The
22 Court accepted his resume, but I don't think he --

23 MR. NUSHAJ: That's fair, Judge. Actually, I didn't
24 finish that.

25 At this time, your Honor -- let me ask you a couple

1 more questions.

2 BY MR. NUSHAJ:

3 Q. Do you know what NHTSA stands for?

4 A. Yes, National Highway Traffic Safety Administration.

5 Q. Okay. And what is that organization all about?

6 A. Well, the organization is a government agency that works in
7 conjunction with the Department of Transportation, United
8 States Department of Transportation. Its function is to
9 oversee research and provide grant funding for research with
10 regards to traffic safety.

11 Q. Okay. And, you know, do their manuals, their, you know,
12 totality of their work product, is that important to you, and
13 what you do, and why?

14 A. Yes. There's numerous manuals, there's numerous articles and
15 publications. It's important that you certainly understand
16 the research so that you have the latest information or if
17 there was a different examination within previous conducted
18 research that maybe was in narrow defined area (sic) or maybe
19 a different element or variables that were plugged in for the
20 research. It's important to understand how all of that
21 integrates, impacts, either contradicts or it raises questions
22 of saying, "That's an interesting finding, there's a
23 recommendation for future research in the following
24 categories." Then, of course, if funding is available, and so
25 on then that will be conducted.

1 Research is expensive and people generally can't
2 embark on large studies on their own without some type of
3 funding.

4 Q. NHTSA deals with field sobriety testing and research; is that
5 correct?

6 A. They did. They were the ones that originally funded the
7 Southern California Research Institute, which developed what
8 we now know today is standardized field sobriety testing. So
9 it was under the NHTSA umbrella that provided the funding to
10 that organization and they came out through research with the
11 best field sobriety tests were and then made standardizations,
12 and then from that became police training through that
13 research. That research was conducted in the 1970s, late
14 '70s.

15 Q. And when you have testified in the past as an expert in field
16 sobriety testing, obviously, you've taken this into account in
17 your field sobriety testing experience and expertise comes
18 from your understanding and knowledge of these materials, as
19 well. Is that fair?

20 A. As well training and my experience, as well.

21 MR. NUSHAJ: Your Honor, this time I would move to
22 admit Dr. Ronald Henson as an expert in field sobriety
23 testing.

24 THE COURT: Any objection or voir dire?

25 MR. MOTZNY: Voir dire, your Honor?

1 THE COURT: You may.

2 MR. MOTZNY: Your Honor, may I approach the Witness?

3 THE COURT: You may.

4 VOIR DIRE

5 BY MR. MOTZNY:

6 Q. Dr. Henson, that is a document, Exhibit A and that exhibit is
7 your CV, correct?

8 A. Yes, sir.

9 Q. Okay. Let's start out with the first page, which is
10 education.

11 A. Yes, sir.

12 Q. You have a degree from Walden, correct?

13 A. Walden University, yes.

14 Q. That degree is in Business Administration?

15 A. It was in Applied Management and Decision Sciences.

16 Q. That's a Business Administration-type degree.

17 A. No, sir; it isn't.

18 Q. Does Applied Management and Decision Sciences have anything to
19 do with field sobriety tests?

20 A. Only elements of proper research would it be related, but
21 standardized field sobriety itself, it would not.

22 Q. Okay. And your second degree, Governor's State University,
23 that's a degree in Public Administration, correct?

24 A. It is, yes.

25 Q. And you have a degree from the University of Illinois. That

1 degree, if I'm not mistaken, is in criminal justice, correct?

2 A. That's correct.

3 Q. Okay. And then you have a degree from Parkland College.

4 A. That's correct.

5 Q. And that is a liberal arts degree, correct?

6 A. Generally, yes.

7 Q. You mentioned you were a police officer, correct?

8 A. I was.

9 Q. When was the last time you served as a police officer?

10 A. In sworn capacity, it would have been about 1990, '91.

11 Q. Would that be on Page 3 of your CV?

12 A. Yes, sir.

13 Q. Okay.

14 A. At the bottom, yes.

15 Q. So, you served as a part-time police officer with the

16 University of Illinois Police Department from 1986 to 1990,

17 correct?

18 A. Correct. I held dual appointments in faculty, as well as the

19 police department during that time period.

20 Q. When were the NHTSA standard field sobriety tests first

21 adopted or promulgated?

22 A. By whom? By NHTSA?

23 Q. By NHTSA.

24 A. I believe the first -- I believe the first opportunity was

25 1980 and then I was trained in 1983. The research was

1 conducted in the late 1970s up to 1979.

2 Q. Was there such a thing as a standardized field sobriety test
3 when you are still serving as a police officer?

4 A. Oh, yes. I was trained in '83 and I went until 1990.

5 Q. When was the last time you performed a standard field sobriety
6 test as a police officer?

7 A. It would have been probably around 1990.

8 Q. So, it's been 28 years since you actually performed a
9 standardized field sobriety test; is that correct? As a
10 police officer.

11 A. Right. Yeah.

12 Q. Okay. Thank you.

13 A. That's the key part, as a police officer; that's correct.

14 MR. MOTZNY: Your Honor, my objection is he's
15 supposedly an expert in standard field sobriety tests, yet his
16 education background doesn't involve any study of standard
17 field sobriety tests. And as you know, there's been many
18 changes since standard field sobriety tests. It's 1990 when
19 this gentleman served as a police officer. I don't believe
20 his testimony will be helpful to this Jury in deciding whether
21 or not the field sobriety tests were performed. And I don't
22 think it's proper to admit him as an expert.

23 That's my objection, your Honor.

24 MR. NUSHAJ: Your Honor, obviously, Dr. Henson's
25 resume speaks for itself. It has been admitted by this

1 Honorable Court without objection.

2 His education is continuing. It doesn't stop at the
3 academy, obviously.

4 He has testified that he's kept up with his
5 literature, he has testified that he publishes in the area of
6 field sobriety tests. He testifies he's been admitted as an
7 expert by this Honorable Court, as well as other courts
8 throughout the State of Michigan, and throughout the State of
9 Illinois, and country-wide.

10 I believe he's satisfied the criteria. If your
11 Honor is not satisfied, I will continue my questioning, but I
12 believe he satisfies the criteria. As your Honor knows, the
13 rules with respect to expert witnesses doesn't say that your
14 education must be specific the area.

15 THE COURT: I agree. I am going to allow and admit
16 this Witness as an expert in field sobriety tests.

17 MR. NUSHAJ: Thank you, your Honor. May I continue,
18 your Honor?

19 THE COURT: You may.

20 MR. NUSHAJ: I don't know if Mr. Motzny had any
21 further questions.

22 MR. MOTZNY: Not at this time, your Honor.

23 MR. NUSHAJ: Thank you, your Honor.

24 DIRECT EXAMINATION (Continued)

25 BY MR. NUSHAJ:

- 1 Q. So, you know, to recap, you viewed the video with respect to
2 this particular traffic stop, correct?
- 3 A. Yes, the police reporting and the video.
- 4 Q. Is speeding on of the top 20 cues associated with alcohol
5 impaired driving?
- 6 A. No, it is not.
- 7 Q. When you observed this particular video and Steve's actions on
8 the night in question, what stood out to you? What did you
9 think about, you know, the cues and its mandates that we ought
10 to observe?
- 11 A. Well, the only identifier was speeding, which it's not part of
12 the top 20. There was a later publishing of top 24, it's not
13 within the top 24. And it seems reasonable because if you go
14 out on the interstate today, it's a lot of speeding, but
15 people aren't intoxicated. It's just generally the
16 relationship to speed that NHTSA did find is that people that
17 drive below the speed limit because they're having difficulty
18 with coordination and that is a clue.
- 19 Q. So, speeding above the limit is not considered -- it's not one
20 of these cues you look out for.
- 21 A. That's correct.
- 22 Q. Okay. When you saw the video, I presume like the rest of us,
23 you didn't observe any weaving, straddling, swerving, and
24 drifting. Are those cues that NHTSA mandates us to observe
25 and look out for?

1 A. Yes, those are a part, a portion of the top 20.

2 Q. Okay. And did you observe any such cues in this video?

3 A. No.

4 Q. Okay. When the Officer stopped the vehicle and asked Mister
5 -- you know, had a conversation with Steve and in their
6 testimony, they indicated that they observed, they detected
7 the odor of alcohol. What can you tell us about the odor of
8 alcohol?

9 MR. MOTZNY: Objection, your Honor. This has
10 nothing to do with field sobriety tests. There's no evidence
11 that this Witness is a chemist, or physicist, or a biologist,
12 or any type of medical expert. So, this is not a proper
13 question. I object.

14 MR. NUSHAJ: I am actually inclined to agree with
15 him, so I will withdraw that question. I'll move on to other
16 questions.

17 BY MR. NUSHAJ:

18 Q. You observed the video and Steve, my client Steve, was brought
19 by the Officers to the beck, between the police car and his
20 vehicle, and a series of standard field sobriety test were
21 performed.

22 A. Well, there was both standard and non-standard, yes.

23 Q. Okay. Could you tell us about that? What were the
24 non-standard ones, what were the standard ones?

25 A. Well, the non-standard would be the alphabet test and the

1 backward counting test.

2 Q. Okay. You reviewed the alphabet test. What did you think of
3 Steve's performance on the alphabet test?

4 A. There was no -- nothing that would be indicative of impairment
5 at all.

6 Q. Okay. He performed the alphabet correctly, therefore, in your
7 expert opinion in field sobriety testing, he performed well on
8 that test.

9 A. That would be a generic yes.

10 Q. What about with respect to the backward counting test that
11 followed? That's also you're indicating a non-standard field
12 sobriety test.

13 A. Correct, it's a non-standard test. There was nothing
14 remarkable beyond him going back and establishing a number
15 during his initial sequence. The Officer indicated he slowed
16 down as he approached the final number. That's pretty typical
17 as people don't want to get into a rhythm pattern where you go
18 beyond where you were told to do. There was nothing
19 remarkable or anything that NHTSA would identify as
20 alcohol-related impairment.

21 Q. Okay. Steve, in the video, based on your observation started
22 at the correct number, and counted back, and stopped at the
23 correct number, correct?

24 A. Correct.

25 Q. What does that tell us about the fact that -- you know, is

1 that a cue towards impairment?

2 A. Again, there was nothing that would be under the NHTSA
3 standard that would identify alcohol-related impairment.

4 Q. Thank you. Then the three other tests followed. Were these
5 standard field sobriety tests?

6 A. Yes.

7 Q. Okay. The first test that followed the non-standard ones was
8 the walk-and-turn, the nine-steps forward, heel-to-toe, back
9 nine steps. Did you review that particular portion of the
10 video?

11 A. I did.

12 Q. Could you tell us your thoughts with respect to that
13 particular portion of the video?

14 A. The test was not properly administered in my opinion.

15 Q. Could you tell us why?

16 A. The Officer, prior to starting the tests, is to ask the
17 individual, "Do you have any back, leg, or inner ear
18 problems." There was a rather generic inquiry about physical
19 capability, but did not specifically identify back, leg, or
20 inner ear problems. That is outlined by NHTSA in the training
21 and in the manuals.

22 The second portion of that is the driver indicated
23 that he had a left ankle sprain, which he ended up making some
24 complaint of.

25 The third element is that NHTSA identified

1 throughout all the decades of publications to the latest one,
2 which is 2015, from the original research that someone who is
3 50 pounds or more overweight will have difficulty performing
4 the walk-and-turn and the one-leg stand test. Here, clearly
5 the driver is in excess of 50 pounds overweight to perform
6 those tests.

7 So, those were my observations of the conditions and
8 the administration of the test, which was going to impact the
9 ability to properly perform them.

10 Q. And so, you mentioned that, you know, but just so that I'm
11 clear, you're indicating that based on your expert opinion the
12 fourth test, the second -- you know, the test after the
13 heel-to-toe, which is Steve raising his leg also was not
14 performed properly. Is that a fair assessment?

15 A. It wasn't administered properly.

16 Q. Pardon me, it wasn't administered properly. Wasn't
17 administered properly by whom?

18 A. By the Officer.

19 Q. Okay. Meaning that the Officer should have -- you know,
20 should have done what in order for it to be properly
21 administered?

22 A. Need to have further -- proper inquiry of assessment. "Do you
23 have any back, leg, or inner ear problems." I did note that
24 the Officer had identified because of the left ankle sprain
25 issue, the Driver raised his -- his left leg so not to have

1 all the pressure. We still don't know about any back issues,
2 still don't know about any inner ear problems, but we do have
3 somebody that's clearly in excess of 50 pounds overweight and
4 they're going to have difficulty with the test with no alcohol
5 on board. So, the reliability of the results are clearly
6 compromised.

7 Q. Thank you. And this is your opinion as an expert, but this is
8 not something that you're coming up with. This is based on
9 your review and understanding of NHTSA's training manual, its
10 studies (sic), correct?

11 A. Yes. Training and then also experience.

12 Q. Now, with respect to, you know, the final test, which is the
13 HGN nystagmus test, can you tell us about that test?

14 A. Yes. Well, the HGN test in standardized fashion is performed
15 first. I don't know why it was performed last. But given
16 that change in process, the horizontal gaze nystagmus also
17 wasn't performed properly.

18 Q. What is the nystagmus test seek to accomplish? What does it
19 -- you know, what is the purpose behind it?

20 A. The purpose behind it is to determine whether or not a person
21 has alcohol in their system and whether or not there can be an
22 estimate of the amount of that alcohol, based upon the
23 sequence of observations. Everybody has nystagmus, which is
24 an involuntary jerking of the eye. You'll get kind of a
25 bouncing or twitching of the eye, but alcohol along with some

1 other substances will magnify that to where you can see it
2 with the naked eye.

3 And there are various different types of nystagmus
4 that wouldn't be alcohol related and those can be demonstrated
5 even today in the courtroom, if needed to, to show nystagmus.
6 But a person wouldn't be intoxicated, it would be a different
7 type of nystagmus.

8 So, focusing on the alcohol methodology of
9 nystagmus, there's a certain process and procedure that has
10 been established by the National Highway Traffic Safety
11 Administration to determine if there's alcohol on board or to
12 what level of indication of impairment. Alcohol on board, the
13 Driver indicated that he had consumed beer earlier, so I don't
14 know that that is high (sic) of question, but rather, is there
15 alcohol-related impairment due to this test.

16 Q. Okay. Now, based on your review of the nystagmus test as
17 performed in this question, what were your thoughts with
18 respect to how this particular test was administered by the
19 police officer?

20 A. It was not administered under proper NHTSA protocol.

21 Q. What are the proper NHTSA protocols?

22 A. Well, the NHTSA protocol is to have the stimulus slightly
23 above eye level. It should not exceed more than two inches
24 above eye level. Here we have the stimulus higher than the
25 Driver's head. The top of the stimulus was higher than the

1 Driver's head, you can tell via the video.

2 At the nystagmus phase of maximum deviation, which
3 is all the way out to where there's no white of the eye
4 showing. That is maximum deviation, but I can still see a
5 finger in the peripheral. You're to hold that position for a
6 minimum of four seconds. It's not four seconds exactly, but
7 minimum of four seconds. That was not done in this case, as
8 well. So, that clue cannot be identified.

9 There were 12 passes to the test, there should be
10 14 passes total to the test. There should be an indicator as
11 to equal tracking and equal pupil size and any abnormality of
12 pupil size, that wasn't listed in the police reporting.

13 Q. Okay. So, in conclusion, what is your opinion, your expert
14 opinion with respect to, after viewing the video, reviewing
15 the field sobriety tests that you reviewed, what is your
16 opinion with respect to alcohol-related impairment in this
17 case?

18 A. There was one other notation. I can leave that and answer the
19 question or should I --

20 Q. Go ahead. What other thoughts do you have with respect to
21 this?

22 A. Sure, the only last notation was that you're not to have the
23 person facing passing motor vehicles during the test and in
24 view of any flashing lights. In this case, a secondary
25 officer did go back and turn off the lighting strobes that you

1 could definitely tell that change in the environment; however
2 the inside camera still indicated strobing light activity
3 inside the squad car. The driver in this case was facing that
4 territory, but you're clearly in view of the passing cars.
5 NHTSA recommends to easily deal with that, turn the person
6 away and you don't have to worry about is there any type of
7 residual strobing effect and definitely have them turned away
8 from any passing motorists or cars that may interfere with the
9 test.

10 And then that concludes all of my observations with
11 regards to that test. And then I can answer your next
12 question.

13 Q. My last question was, what was your overall opinion with
14 respect to the field sobrieties and alcohol-related
15 impairment?

16 A. The test results were compromised with regards to validity and
17 reliability.

18 MR. NUSHAJ: Thank you, sir.

19 I have nothing further, your Honor.

20 THE COURT: Cross Exam?

21 MR. MOTZNY: Thank you, your Honor.

22 CROSS EXAMINATION

23 BY MR. MOTZNY:

24 Q. It's true that you do not have a degree in chemistry, correct?

25 A. I do not. I have some --

1 Q. Do you have a degree in biochemistry?

2 A. No.

3 Q. Do you have a degree in biology?

4 A. No.

5 Q. Do you have a degree in human anatomy?

6 A. Not a degree, I have course work in most of those areas, but
7 not a degree.

8 Q. Yeah, that wasn't the question, sir.

9 Do you have any medical degree?

10 A. No, I'm not a medical doctor.

11 Q. You testify a lot on behalf of criminal defendants, correct?

12 A. In a fair amount of cases, yes.

13 Q. Okay. And you're paid to be here to testify on behalf of this
14 Defendant, correct?

15 A. Oh, yes, it'd be very expensive to me if I wasn't paid.

16 Q. And would you agree that in most of the cases you testified in
17 Michigan you've testified on behalf of a criminal defendant;
18 is that correct?

19 A. In the State of Michigan, yes, that would be correct. Just in
20 the way the system is set up, yes, in criminal cases. I've
21 had civil cases. One of them was a plaintiff, but in criminal
22 cases, you'd be correct.

23 Q. Okay. Your CV on Pages 16 and 17 shows your Michigan
24 experience. If you would take a look.

25 A. Sure. Okay.

1 Q. On Page 16, about six lines down, it says you testified in the
2 City of Troy Municipal Court, do you see that?

3 A. Yes.

4 Q. Do you know what year that was?

5 A. I don't recall. I know it was this building, but I don't
6 recall what year.

7 Q. Were you aware that there hasn't been a court called a
8 municipal court since 1978?

9 A. You're talking about somebody from Illinois and I'm familiar
10 with the system, but I know that when I come here, you're
11 Oakland County and I just told somebody today, it's the big
12 building is what I call it, but you folks would have a
13 specific name for it versus district courts. I don't know of
14 any other state so far that has that kind -- everybody's a
15 little different. But the City of Troy Police Department and
16 the sign where I turn into says City of Troy and that's what I
17 had originally listed.

18 Q. So, you just listed what you thought the name of the court
19 was, correct?

20 A. No, that's what the sign says. City of Troy buildings and
21 that's what I did.

22 Q. But it's not a municipal court.

23 A. Sure, to go back now, I could go back and whatever it says out
24 there, 52-2 or 54-whatever it is, I could get that specific,
25 but it was this location.

1 Q. All right. But that part of the resume is technically
2 incorrect, would you agree?

3 A. Well, I disagree with you.

4 Q. Okay.

5 A. My goodness.

6 Q. And you can do that.

7 A. Yeah, I disagree.

8 Q. Your testimony regards what you know about NTHSA, which is --
9 what does NHTSA stand for?

10 A. As I said, the National Highway Traffic Safety Administration.

11 Q. Now, you agree that under Michigan law, an officer doesn't
12 have to follow NHTSA standards in order to testify as to field
13 sobriety, would you agree with that?

14 MR. NUSHAJ: I would object, your Honor, that calls
15 for speculation. He doesn't know Michigan --

16 MR. MOTZNY: Well, he's an expert, he should know
17 this answer.

18 MR. NUSHAJ: He doesn't know what Michigan law
19 stands for and doesn't stand for, your Honor.

20 THE COURT: Restate your question, please.

21 BY MR. MOTZNY:

22 Q. Are you familiar with the Michigan law regarding NHTSA
23 standards?

24 A. No, I'm not. I travel 50 states -- well, I haven't done
25 Hawaii, but done what they call the lower 48 and Alaska, and

1 everybody's law is different.

2 Q. So, the NHTSA standards are a set of rules or guidelines that
3 are suggested that officers follow; is that correct?

4 A. I -- if it's regarding your law, I can't opine to that.
5 Guidelines, I wholeheartedly disagree.

6 Q. Well, let me ask you, if an officer -- just because an officer
7 might not follow every single step of particular field
8 sobriety, does that automatically mean the subject is sober?

9 A. It doesn't, but what it does mean is that it --

10 Q. Yes or no. That's my question, it doesn't mean they're sober
11 just because the officer doesn't follow the standards; is that
12 correct?

13 A. You're right.

14 Q. Okay. Thank you. You work for a company called Baron
15 Consulting Lab Works; is that correct?

16 A. Baron Consulting and Lab Works, yes.

17 Q. Are you the owner of that company?

18 A. In a non-technical sense, yes. You understand corporations
19 how they go, but yes, I'm the principle.

20 Q. And does that company manufacture any products?

21 A. No, it's all service.

22 Q. Your testimony regarding your observations of the field
23 sobriety are based solely on your observation of the video; is
24 that correct?

25 A. The video and the documentation, yes.

1 Q. Will you agree that a video does not accurately show
2 everything that an Officer sees at the scene?

3 A. Well, I would hope that it's accurate, but there might be some
4 finite details that we may not see on video that an officer
5 may see.

6 Q. When you were a police officer, did they have in-car videos?

7 A. You're going to date me, but the answer is no.

8 Q. Okay. So, you've never seen yourself actually in an in-car
9 video as a police officer; is that correct?

10 A. I've seen myself on video doing demos, but they wouldn't have
11 been in the early 80s.

12 Q. Okay. So, is it fair to say you don't know for sure whether
13 or not what you see on the video is actually what a police
14 officer would have seen up close and personal to the subject
15 of the field sobriety test?

16 A. Well, again, I think it's -- I think it should be a fair and
17 accurate depiction of what occurred.

18 Q. But you don't know for certain, correct? You can't say that
19 for certain, correct?

20 A. I'm fairly certain or it probably wouldn't be in evidence, but
21 again, I agree with you in that if there are some finite
22 details that video may not pick up, you are correct, I
23 wouldn't see that nor would anybody else.

24 Q. Okay. So, you sort of agree that finite details might not be
25 picked up in the video. You agree with that?

1 A. Certain finite details, that's correct, but I don't think it
2 makes the video inaccurate.

3 Q. Okay. Thank you. Have you met the Defendant, Mr. Assi, in
4 person before this date?

5 A. Not before today.

6 Q. So, is it fair to say that you're not familiar with his
7 physical characteristics or any medical conditions; is that
8 true?

9 A. Based upon documentation, and observations, and then
10 confirmation today that that would be the extent.

11 Q. Okay. Three of the tests that the Officer performed based on
12 your observation are, in fact, standard field sobriety tests;
13 is that correct?

14 A. Yes.

15 Q. You said the alphabet is not a standard field sobriety test?

16 A. No, sir. No, sir.

17 Q. Isn't it true that the alphabet is actually an alternate
18 standard field sobriety test?

19 A. It is not a standardized field sobriety test, sir. That's
20 very clear.

21 Q. Isn't there an alternate finger count field sobriety test?

22 A. Those are alternate tests, but they are not standardized field
23 sobriety tests.

24 Q. But they are alternate tests that officers can perform?

25 A. They are alternate tests that have not been researched to

1 determine any level of reliability or intoxicant level.

2 Q. And that's based on NHTSA again, correct?

3 A. Based on NHTSA. There's absolutely no research even beyond
4 NHTSA.

5 Q. So, is it your testimony that NHTSA says just because
6 someone's speeding it doesn't mean they're intoxicated. Is
7 that kind of what you testified to?

8 A. Could you say that again, please?

9 Q. That was poorly worded. Let me ask you this, somebody who's
10 speeding could be intoxicated, would you agree with that?

11 A. That's possible.

12 Q. And that speeding could be caused because the person has had
13 too much to drink, would you agree with that?

14 A. That's possible.

15 MR. MOTZNY: Your Honor, I don't have any further
16 questions.

17 THE COURT: Any Redirect?

18 MR. NUSHAJ: Yes, your Honor, may I?

19 REDIRECT EXAMINATION

20 BY MR. NUSHAJ:

21 Q. Dr. Henson, just a couple of questions.

22 Mr. Motzny asked you some questions with respect to
23 the fact that you've testified always on the side of criminal
24 defendants and he also --

25 A. In the State of Michigan.

1 Q. In the State of Michigan. You've testified for other parties
2 in other states, sir?

3 A. Yes, prosecution, law enforcement, et cetera.

4 Q. With respect to this kind of subject matter?

5 A. Yes.

6 Q. Okay. And Mr. Motzny also asked you whether you had gotten
7 paid to be here today.

8 A. Yes.

9 Q. And you have gotten paid. My client has retained your
10 services; is that correct?

11 A. Yes.

12 Q. Okay. Now, have you ever lied in court?

13 A. No, sir.

14 Q. Okay. Have you ever perjured yourself?

15 A. No, sir.

16 Q. Do you know what perjury means?

17 A. I sure do.

18 Q. Okay. Have you ever testified untruthfully in any way, shape,
19 or form?

20 A. No, sir. If I had, I wouldn't be doing this for 39 years.

21 Q. I believe you. Would you lie in court, perjure yourself,
22 testify untruthfully, change your professional expert opinion
23 in court simply because somebody paid you?

24 A. No, sir. In fact, I've turned cases away. I've had people
25 identify certain sums of money. If the facts aren't there and

1 the information's not there, number one; and number two, if
2 you're trying to buy my testimony, you and I would never speak
3 again for the rest of my life. And it was that same way in
4 law enforcement. I had law enforcement ask me and I said the
5 same thing. A million dollars wouldn't do it.

6 Q. So, it's fair to say then you've never compromised your
7 opinion, your professional expert opinion?

8 A. Absolutely not. Absolutely not.

9 Q. And you haven't done so here today after the review if this
10 video, correct?

11 A. No, my testimony would be the same if I still worked for the
12 police academy overseeing this program and viewing that video.
13 My conclusions would be the same in that job capacity, as a
14 job capacity.

15 MR. NUSHAJ: Thank you.

16 Thank you, your Honor.

17 THE COURT: Any Recross?

18 MR. MOTZNY: No, your Honor.

19 THE COURT: All right. May this Witness be excused?

20 MR. MOTZNY: Yes, your Honor.

21 May we approach the Bench after the Witness is
22 excused?

23 THE COURT: You may.

24 DR. HENSON: Thank you, Judge.

25 THE COURT: Thank you.

1 (At 2:44 p.m., the Witness was excused.)

2 THE COURT: If you could both briefly approach
3 before the Witness leaves the courthouse.

4 MR. NUSHAJ: Yeah, that's okay.

5 Can you just have a seat in the courtroom for just
6 moment?

7 DR. HENSON: In the courtroom?

8 MR. NUSHAJ: Yes, please.

9 THE COURT: Ladies and gentleman, I know you
10 recently took a break, but I think now we're going to take
11 another afternoon break and we'll recall. It should be about
12 ten minutes.

13 Please rise for the Jury.

14 (At 2:45 p.m., the Jury exits the courtroom.)

15 THE COURT: All right. The reason I asked and we'll
16 deal with whatever your issues -- please be seated. The only
17 other time we have done Skype is the City of Troy set it up
18 through -- I'm not really sure what the technology is, so
19 you're going to need to work with the City of Troy so that the
20 Doctor can be called via Skype. I'm just placing both of you
21 on notice.

22 We do not know how to do it nor do we believe we
23 have the technology to assist you.

24 MR. MOTZNY: May we still approach the Bench, your
25 Honor?

1 THE COURT: You may, but the jury isn't here. Do
2 you still need to approach the Bench?

3 MR. MOTZNY: Yes, I want to ask you something.

4 THE COURT: All right.

5 (From 2:46 p.m. to 2:46 p.m., a Bench Conference was
6 held.)

7 THE COURT: Ten minutes.

8 (At 2:46 p.m., off the record.)

9 (At 2:58 p.m., on the record.)

10 THE COURT: All right.

11 MR. MOTZNY: Your Honor, I changed my mind about
12 resting my case. We will try to get Mark Guyer (sic) here,
13 but I have a question regarding your actual ruling.

14 Is the only issue the Sixth Amendment confrontation
15 issue at this point or -- because I could also bring in the
16 actual supervisor in charge of the records, if it's a question
17 --

18 THE COURT: No, I believe that the new court rule
19 allows for PA Guest (sic) to testify as to their authenticity.
20 So, at present, the only issue is the Crawford issue and I'm
21 going to require that whatever briefing you want to submit
22 will need to be to my Clerk's email by midnight tonight and I
23 will make a plan to come in early. I will not have any
24 ability to assess any briefing after I begin my criminal call
25 tomorrow at 8:30.

1 All right, then.

2 MR. NUSHAJ: Your Honor, with respect to the one
3 other procedural issue, I had a conversation with Dr. Henson
4 with respect to his schedule, he is in trial tomorrow in the
5 afternoon in Illinois.

6 Is that correct, sir?

7 DR. HENSON: Wisconsin tomorrow.

8 MR. NUSHAJ: And his availability, from what it
9 sounds like, a certain availability is Friday.

10 I lay at your Honor's feet. Obviously, you know,
11 PSA Guest is available. My witness has some limitation,
12 Judge. He is in court, in trial.

13 THE COURT: Well, I understand that. I don't -- I'm
14 not going to pre-date an issue. I'll be honest with both of
15 you, this issue has caused me to move my trial from tomorrow
16 to Wednesday afternoon and the only way I'm going to get that
17 done is I already have to give them Friday. Friday is no
18 longer available.

19 MR. MOTZNY: Your Honor, we're supposed to be back
20 here tomorrow at one, correct?

21 THE COURT: Correct.

22 MR. MOTZNY: Okay. All right. Not Wednesday.
23 Tomorrow.

24 THE COURT: So, I've already given this away and my
25 trial that was supposed to begin tomorrow at one now has to be

1 moved into Wednesday. That's about a two-day trial, which
2 will take up Friday. So, I don't have Friday to give you.

3 MR. NUSHAJ: I understand that. I appreciate it,
4 Judge, but for example, with respect to -- is your Honor
5 telling us that, you know, with respect to the Skype
6 conferencing that we're going to do, that -- it sounds like
7 the City -- obviously, I've never done it either. Sounds like
8 the City of Troy has. Is the City of Troy arranging for this
9 piece on their end?

10 MR. MOTZNY: I don't know anything about it, your
11 Honor. Mr. Nushaj is going to have to call somebody at the
12 City that knows how to do that. I don't have any idea, your
13 Honor, how to do that.

14 MR. NUSHAJ: Which I'm happy to do, but I can tell
15 you the answer --

16 THE COURT: I believe it was Julie Dufrane who from
17 the Prosecutor's Office created the Skype arrangement. So, I
18 would hope that the City of Troy would assist Mr. Nushaj and
19 if they don't, then I'll have to figure out how to deal with
20 that tomorrow. We do have telephone capability.

21 We know how to do that, right?

22 MS. KLIEWER: Yes, your Honor.

23 THE COURT: All right. So --

24 MR. NUSHAJ: I mean, that would not be my preferred
25 way of doing it, but I'm going to contact Ms. Dufrane

1 tomorrow.

2 THE COURT: I would think you would do that today.

3 MR. NUSHAJ: Well, you're right and that was my
4 retreating thought. Not tomorrow.

5 THE COURT: Do either one of you have an objection
6 to telephone testimony?

7 MR. NUSHAJ: Yeah, I supposed I wouldn't, I mean --
8 I would not, so no.

9 MR. MOTZNY: As long as there's some assurance that
10 there's no outside influence, or notes, or anything to that
11 effect, which I'm sure Dr. Henson will agree to that.

12 THE COURT: All right. Barring any objection, I
13 will allow telephone testimony if Skype testimony cannot be
14 accomplished.

15 MR. NUSHAJ: Thank you, Judge.

16 THE COURT: Anything else?

17 MR. MOTZNY: No, your Honor.

18 THE COURT: All right. Then I'll see all parties
19 tomorrow promptly at one p.m.

20 I'm going to bring the Jury in.

21 MS. KORKES: All rise for the Jury.

22 (At 3:03 p.m., the Jury enters the courtroom.)

23 THE COURT: Please be seated.

24 All right. Ladies and gentlemen, we are going to
25 adjourn for the day and I'll have you present tomorrow at

1 1:15.

2 Please rise for the Jury.

3 If you just leave those, we will collect them, and
4 then we'll give them back tomorrow.

5 (At 3:04 p.m., the Jury exits the courtroom.)

6 THE COURT: All right. Since we have some time, I
7 do want to deal with that request for the special jury
8 instruction to be amended.

9 MR. NUSHAJ: It was on Page 4, your Honor, of your
10 initial --

11 THE COURT: I think there's a couple different
12 fours, so I'm looking for it.

13 MR. NUSHAJ: Okay. Sorry.

14 THE COURT: That's okay.

15 These are final jury instructions. My preliminary
16 jury instructions are not on the Bench.

17 MR. NUSHAJ: May I approach?

18 THE COURT: Yes, may I see what you have?

19 MR. NUSHAJ: Would you like the Page 4 or the whole
20 thing, Judge?

21 THE COURT: Just Page 4 would be great.

22 All right. So, you're asking me to strike the
23 verbiage, "Pursuant to the Michigan Medical Marihuana Act"?

24 MR. NUSHAJ: Correct.

25 THE COURT: All right. What are your thoughts?

1 MR. MOTZNY: Do you have a -- if I may look at what
2 you have?

3 MR. NUSHAJ: No, I gave it to the Judge. Here's
4 what I -- what I'm asking you is that this, "Pursuant to the
5 Michigan Medical Marihuana Act," should be stricken and the
6 sentence should start as, "A driver in Michigan is guilty of
7 Operating While Impaired if the marijuana ingested or the
8 alcohol," so on and so forth.

9 That's my proposal and the Judge is asking for your
10 thoughts.

11 MR. MOTZNY: Your Honor, that's fine. I also do
12 think that we should probably indicate that this is actually
13 not (sic) what the Prosecution has to prove. The way it's
14 read, I think it says, "The Prosecutor also has to prove this
15 element." I mean, I think -- when you read the preliminary
16 instructions, I was actually thinking about that.

17 THE COURT: All right. So, just initially to be
18 clear, you don't have an objection to striking the verbiage,
19 "Pursuant to the Michigan Medical" --

20 MR. MOTZNY: No objection to that.

21 THE COURT: And so, the sentence will start out, "As
22 a driver".

23 MR. NUSHAJ: Thank you, your Honor.

24 THE COURT: So, we would make this -- what is the
25 next page? I need the next page, please.

1 MR. NUSHAJ: Oh, sorry.

2 THE COURT: That's okay.

3 MR. NUSHAJ: Yes. Somehow, I've missed five. The
4 next page I have is six.

5 MR. MOTZNY: Your Honor, I think we're missing
6 Page 5.

7 THE COURT: That may be.

8 MR. NUSHAJ: I think maybe it starts on Page 6.

9 MR. MOTZNY: I think the next page is six.

10 THE COURT: Okay. Then to satisfy the Prosecutor's
11 concerns, I think I would just make this Paren D and start,
12 "Fourth, at the time of the alleged offense."

13 MR. NUSHAJ: I understand the Paren's fourth part,
14 but I'm sorry at the time (sic). Where are you looking with
15 respect to the time?

16 THE COURT: Well --

17 MR. NUSHAJ: Oh, I'm sorry. I apologize.

18 THE COURT: -- there's the word, third --

19 MR. NUSHAJ: Yes.

20 THE COURT: -- after Paren C.

21 So, pursuant to Mr. Motzny's concerns, I would add
22 Paren D and start the sentence out with the word, "Fourth, at
23 the time."

24 MR. MOTZNY: Okay.

25 MR. NUSHAJ: Okay. I have no objection to that,

1 Judge.

2 THE COURT: Does that satisfy your concerns?

3 MR. MOTZNY: I think so, your Honor. As long as it
4 appears to be one of the elements. It's just, that was my
5 concern.

6 THE COURT: I agree. I agree. I get that.

7 All right. Then at final jury instructions, I will
8 make those changes and you will both make certain that they
9 have been changed.

10 MR. NUSHAJ: Thank you, your Honor.

11 THE COURT: All right. Then I'll see you both at
12 one p.m.

13 MR. NUSHAJ: Thank you, your Honor.

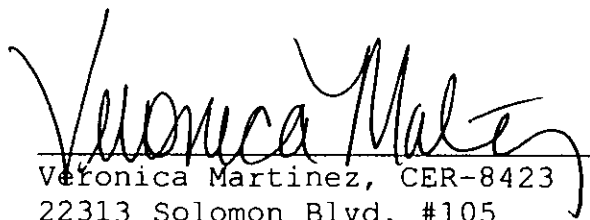
14 MR. MOTZNY: Thank you, your Honor.

15 (At 3:09 p.m., the trial was adjourned.)
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STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 185 pages, is a complete, true, and accurate record of the proceedings and testimony taken in the matter of People of the City of Troy versus Steven Assi, Case number 17-006229, as recorded on Monday, March 5, 2018.

Dated: April 16, 2018


Veronica Martinez, CER-8423
22313 Solomon Blvd. #105
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APPENDIX F

OAKLAND COUNTY

18-164475-AR



JUDGE MICHAEL WARREN
TROY CITY v ASSI, STEVEN

STATE OF MICHIGAN
IN THE FIFTY-SECOND JUDICIAL DISTRICT - FOURTH DIVISION
(COUNTY OF OAKLAND)

THE CITY OF TROY,
Plaintiff,

v.

STEVEN ASSI,
Defendant.

17-006229

JURY TRIAL - VOLUME II OF II

BEFORE THE HONORABLE KIRSTEN NIELSEN HARTIG, DISTRICT JUDGE

Troy, Michigan - Tuesday, March 6, 2018

APPEARANCES:

For the People:

MR. ALLAN T. MOTZNY P3758
City of Troy
500 W. Big Beaver Road
Troy, MI 48084
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For the Defendant:

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WITNESSES: PEOPLE

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None

WITNESSES: DEFENDANT

None

EXHIBITS:

Offered

Admitted

None

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1 Troy, Michigan

2 Tuesday, March 6, 2018 - 1:16 p.m.

3 THE COURT: Calling People v. Assi. 17-6229.

4 MR. MOTZNY: Your Honor, good afternoon. Allan
5 Motzny on behalf of the City of Troy.

6 MR. NUSHAJ: Good afternoon, your Honor. My name
7 is Renis Nushaj. I appear with and on behalf of Mr. Assi, to
8 my left.

9 THE COURT: All right. When we broke last, you were
10 going to hope to have Mr. Guyer (sic) present. I don't see
11 him, so is it your intention to continue without him?

12 MR. MOTZNY: Your Honor, Mr. Guyer is available by
13 telephone if the Court requires his testimony. I said I'd
14 call him and ask if we could have the same privilege that
15 Mr. Nushaj's expert -- he's testifying in another court today.
16 I have his number, but my hope is the Court will rule in our
17 favor on the admissibility and we won't need him, obviously,
18 but I'm prepared to make that argument.

19 THE COURT: All right. And you may be seated.

20 I just wanted the record to reflect sort of the
21 trajectory of the last day.

22 This matter came to my attentions at around
23 three p.m. with a jury waiting. Because of the constitutional
24 nature of the rights at issue in this case and neither Counsel
25 having any law available, I discharged the Jury, and allowed

1 them to go home, and ordered them to return today. All are
2 present and waiting.

3 I continued with the rest of my docket and ordered
4 the parties to have law to me by midnight last night. I came
5 in this morning, reviewed some of the materials and then had
6 about a four-hour State call.

7 I then took the entirety of my lunch hour to
8 attempt, to the best of my ability, to read and absorb the
9 very nuanced constitutional nature of these arguments.

10 So, my ruling will be less than what it might have
11 been had I had real time to delve into this matter. I think
12 both parties can agree that there's no precedential case law
13 on point.

14 Would you both agree?

15 MR. MOTZNY: No published case in Michigan on point;
16 correct, your Honor.

17 MR. NUSHAJ: I agree.

18 THE COURT: You can be seated.

19 So, essentially that means I can do what I think is
20 best, and what is right, and what is most in keeping with
21 current case law, as well as the statutes at issue.

22 Essentially, a criminal trial and drunk driving
23 cases, this occurs with regularity. I want to say a Class II
24 Operator, PSA Guest will take the stand and there will really
25 be frankly a desire to distance the Class II Operator from the

1 machine. It's called an instrument and the Class II Operator
2 really, I believe, is instructed to testify, "It's an
3 instrument, I don't understand how it works. My job is to go
4 through a checklist and do things exactly as the checklist
5 pertains and this is the result."

6 I have seen this over, and over, and over again in
7 drunk driving trials. So, there is really, I think, a method
8 which is the machine or the instrument is an instrument, it's
9 accurate, and all I do is push a button and get a result after
10 I make sure that the Defendant hasn't regurgitated, or eaten,
11 or placed anything in his mouth.

12 This instrument or machine is really presented as
13 the end-all-be-all of accuracy in a drunk driving case, that
14 this is really the tradition as has been established, in my
15 opinion. So, it really calls into serious question whether or
16 not the instrument or machine is validly tested. In other
17 words, when you get on the scale in the morning, if you don't
18 know whether or not the scale is accurate, you have no reason
19 to believe that what the scale tells you you weigh is
20 accurate.

21 So, when I reviewed the case law, the unpublished
22 opinion in Michigan and the eight out-of-state case law which
23 has dealt with this exact point -- first of all, I'll note
24 that in People v. Hagadorn (sic), which is the unpublished
25 Opinion, the court pointed out that the defense failed to

1 object to the admission of the logs and therefore their review
2 was limited to plain error affecting substantial rights.

3 So, I just want to note that in Hagadorn, although
4 Hagadorn ultimately found that there was no abuse of
5 discretion, their review was severely limited because the
6 defendant in that case had not objected to the logs'
7 admission.

8 Both the cases, both the unpublished case of
9 Hagadorn and the case that's outside of the State of Michigan,
10 they make a distinction. It's a very important to both of the
11 writers of these opinions that the DataMaster logs were not
12 prepared for this particular defendant's litigation. Both, I
13 believe, agree that the business records would be admissible
14 under MRE 803(6). Both cases clearly establish that these are
15 business record exceptions and do meet the hearsay exception
16 rules of 803(6); however, both agreed that the constitutional
17 protections of Crawford trump 803(6) assuming that the offered
18 evidence is testimonial in nature.

19 The Hagadorn case says that, "The business record
20 exception to the rule against hearsay is based on the inherent
21 trustworthiness of business records." It goes on to state
22 that, "Trustworthiness is undermined; however, and can no
23 longer be presumed when the records are prepared in
24 anticipation of litigation.

25 Clearly, in my opinion, logs of the instrument are

1 prepared in anticipation of litigation because if they're not
2 prepared in anticipation of litigation, they are prepared for
3 no reason and that does not make sense to me.

4 However, Hagadorn and the out-of-state case, it
5 distinguishes the logs as not being testimonial because the
6 logs are not created for any one particular defendant's
7 litigation. In other words, when the Class IV Operator
8 certified this machine or instrument as accurate, Mr. Guyer
9 did not do that in anticipation of People v. Ossie (sic).
10 Clearly, he didn't. There's no reason to believe he would
11 have anticipated People v. Ossie. However, I believe that he
12 clearly anticipated the use of the logs in litigation because
13 otherwise, there's no reason to create the logs.

14 In People v. Hagadorn, the majority stated that,
15 "The officer testified that the DataMaster logbooks are
16 sometimes presented at trials. The evidence shows that the
17 logs are not prepared for the purposes of litigation, but
18 rather because the administrative regulations require the
19 keeping of such a log."

20 That, to me, is sort of double-speak. You create
21 the log because the administrative regulations tell you to
22 because the accuracy is important.

23 So, essentially, both of these cases that the
24 Prosecution has cited to me make a distinction that does not
25 make sense to me. The distinction that makes sense to both of

1 these cases is that if something was created for anticipation
2 for use in litigation, but not in this particular Defendant's
3 litigation. It's not testimonial, but if you create something
4 in anticipation of this particular Defendant's litigation, it
5 is testimonial.

6 I don't see how that is a distinction with a
7 difference. I think what the cases are attempting to do is
8 solve a real problem that exists when if I make this ruling,
9 that Mr. Guyer has to be present and let's say I'm appealed,
10 which I'm certain I would be and ultimately it becomes
11 precedent that every one of the seven-day operators, and
12 Mr. Guyer or a Class IV Operator has to appear at every trial,
13 the criminal justice system will grind to a halt.

14 There's no way that the criminal justice system can
15 handle that at every trial. So, in my opinion, these two
16 cases try to pretzel themselves to try and find that the logs
17 are not testimonial when, in fact, they are testimonial.

18 And I'll state it again, if they're not testimonial,
19 then a lot of people are doing things for no reason and no
20 effect, and that doesn't make sense.

21 So, I am finding that the rule that the records are
22 inadmissible under People v. Crawford and I believe it's
23 Menendez, Diaz (sic) and I will require that Mr. Guyer testify
24 if the People wish to admit the logs.

25 That having been said, I would permit Mr. Guyer to

1 testify by phone.

2 I've heard from the Prosecution, do you wish to hear
3 (sic) --

4 MR. NUSHAJ: Yes, Judge, and briefly.

5 THE COURT: Okay.

6 MR. NUSHAJ: I thought that was thoughtful and well-
7 articulated. I'm sorry we took away your lunch from you, but
8 I thought the decision was well-thought. Clearly you read
9 everything, and I appreciate that, and I thank you for it.

10 As I indicated yesterday, I objected to Mr. Guyer
11 certainly testifying, not being a witness on the witness list
12 that Mr. Motzny prepared for this Honorable Court, not being
13 in the police report in any way shape or form, and not being
14 offered on the list of witnesses when presented to the Jury
15 upon your Honor's question at the beginning of Trial.

16 I'm certainly objecting to him appearing by
17 telephone. I think that's a violation of my -- it will
18 continue to remain and continue to be a violation of my
19 client's right to confront someone testifying against him.
20 He's testifying by telephone.

21 My expert witness, which we arranged yesterday to
22 testify by telephone today, appeared from eight hours away.
23 He was here, he was ready to go. He was present, and ready to
24 go, and he did testify to the portion that he could yesterday.
25 I think --

1 THE COURT: All right. Well, let me just stop you.
2 I've already ruled that there is no right to
3 Discovery in misdemeanor cases. So, your failure to know that
4 Mr. Guyer was listed on the proposed list is -- I mean,
5 really, lawyers exchange witness lists in misdemeanor cases.
6 If I were making the law, it would be mandatory, but I am
7 confident that it is not mandatory. However, unless you agree
8 to Mr. Guyer testifying by telephone, I would not allow it
9 because I do think your client has the right to be confronted
10 by the witnesses against of him and having the witness be in
11 court.

12 So, this then leaves the People without a critical
13 piece of evidence that they wish to admit into trial. Knowing
14 that jeopardy attaches and that should the trial continue and
15 the Defendant be found not guilty, the People would be devoid
16 of the ability to appeal.

17 I will grant a Motion for a Mistrial and I would
18 indicate that based on the questions presented, I do not
19 believe jeopardy has attached and that would give the People
20 the opportunity to appeal my ruling.

21 MR. NUSHAJ: Thank you. Judge, may I take a moment
22 with Mr. Motzny then?

23 THE COURT: Certainly.

24 Did you want to speak before you spoke to
25 Mr. Nushaj?

1 MR. NUSHAJ: Yeah, I presume Mr. Motzny and I
2 perhaps have a conversation to be had (sic), but maybe I'm
3 wrong.

4 MR. MOTZNY: Just so I'm clear, I know you ruled
5 against me, we have to have Mr. Guyer to testify. Mr. Guyer
6 is testifying in another court and I talked to him yesterday.
7 I've got to call him. Mr. Nushaj has objected to that and
8 you're granting his objection.

9 THE COURT: I am.

10 MR. MOTZNY: But you indicated you would grant a
11 Mistrial --

12 THE COURT: To give you the opportunity to appeal my
13 ruling.

14 MR. MOTZNY: Then I would -- I don't know what
15 Mr. Nushaj wants to talk to me about, but --

16 MR. NUSHAJ: You know exactly what I want to talk to
17 you about, and we're just going to take a couple minutes to
18 talk, and then you can continue your thought.

19 THE COURT: All right. I'll give you no more than
20 ten minutes.

21 MR. NUSHAJ: Thank you, your Honor.

22 THE COURT: You're welcome.

23 (At 1:30 p.m., off the record.)

24 (At 1:37 p.m., on the record.)

25 THE COURT: Recalling People v Assi.

1 MR. MOTZNY: Yes, your Honor, Allan Motzny on behalf
2 of the City of Troy.

3 MR. NUSHAJ: Again, your Honor, Renis Nushaj on
4 behalf of Mr. Assi, to my left.

5 MR. MOTZNY: Your Honor, in this case, I told the
6 Jury we were going to have breath test results of .07.
7 They've heard that testimony or that argument, and now, of
8 course, that's not going to happen. I think that actually it
9 might even be prejudicial to the Defendant, but I also think
10 it's not fair to the City to proceed when they've been told
11 there's going to be breath test results and obviously at this
12 point, there's not. I think that is a basis for a mistrial
13 and I would move for a mistrial, your Honor.

14 MR. NUSHAJ: I'll leave it to your Honor's
15 discretion.

16 THE COURT: I had not recalled that you had told
17 them in your opening that there would be breath test results,
18 so it does appear that continuing with the Trial would be
19 potentially prejudicial to the People inasmuch as a not guilty
20 would foreclose retrial and potentially precedential (sic) --
21 it's been that long of a day, prejudicial to the Defendant
22 inasmuch as they were told something would come in and there's
23 no way to unring that bell.

24 So, based on the Motion and everything else, I know
25 I will grant a Mistrial in this matter.

1 MR. NUSHAJ: Thank you, your Honor.

2 MR. MOTZNY: Thank you, your Honor.

3 MR. NUSHAJ: Thank you for your time with us, Judge

4 THE COURT: And we're still on the record. I'm
5 going to set this for --

6 MS. KORRES: All rise for the Jury.

7 (At 1:39 p.m., the Jury entered the courtroom.)

8 THE COURT: Please be seated.

9 Ladies and Gentlemen of the Jury, I have declared a
10 Mistrial in this matter, so your jury service is now
11 completed. You may very well have some questions and I'll be
12 back to hopefully answer some of them.

13 Although we did not complete this Trial, it's not
14 unusual for lawyers to want to speak to the Jurors. That's
15 completely voluntary. If you wish to speak to the lawyers,
16 then one of my staff members will be in the room at all times.
17 One person can agree to stay, all seven of you can agree to
18 stay, it's completely up to you, but I'll be in to share a few
19 words with you.

20 Please rise for the Jury.

21 (At 1:40 p.m., the Jury exited the courtroom.)

22 THE COURT: All right. You may be seated.

23 I am going to issue a Stay in this matter and set a
24 Review for approximately 60 days. If no paperwork is filed,
25 then I will set this for either the June or July jury terms.

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And should either one of you appeal this in any way, you should ask the Circuit Court judge for continuation of the Stay, if they are willing to grant same.

MR. MOTZNY: Thank you, your Honor.

MR. NUSHAJ: Thank you, Judge.

THE COURT: And testing will continue.

MR. NUSHAJ: Thank you, your Honor.

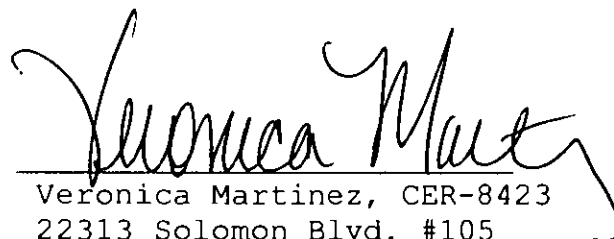
(At 1:41 p.m., the Trial concluded.)

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STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I certify that this transcript, consisting of 15 pages, is a complete, true, and accurate record of the proceedings and testimony taken in the matter of the City of Troy versus Steven Assi, Case number 17-006229, as recorded on Tuesday, March 6, 2018.

Dated: April 7, 2018


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