

Office of Paula S. O'Neil
Clerk & Comptroller
Pasco County, Florida

ON APPEAL TO THE DISTRICT COURT OF APPEALS OF FLORIDA
SECOND DISTRICT

Shannon Stephen

Appellant

VS.

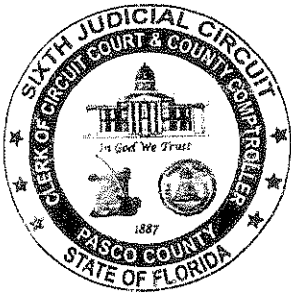
State of Florida

Appellee

Case: 06-1591CFAWS

Appeal: 10-4018

Supplemental
Transcript of Record on Appeal
Volume XIII



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Pasco County, Florida

ON APPEAL TO THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Shannon Stephen,
Appellant,

vs.

State of Florida,
Appellee.

FIRST SUPPLEMENTAL

Transcript of Record in the case of State of Florida, Plaintiff(s) vs. Shannon Stephen, Defendant(s). Circuit Criminal Number(s) 06-1591CFAWS in the Circuit Court of the Sixth Circuit in and for the County of Pasco, State of Florida, prepared for use on appeal to the District Court of Appeals, Second District.

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Presiding Judge: Honorable Shawn Crane

SHANNON STEPHEN
VS.
STATE OF FLORIDA
CT.CR.NO. 06-1591
APPEAL NO. 10-4018
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SUPPLEMENTAL INDEX

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JANUARY 18, 2012

PROCEEDINGS: JURY TRIAL VOLUME VI HELD JUNE 18, 2008

1027-1085

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
CASE NO. CRC06-01591CFAWS-3

STATE OF FLORIDA, :
 :
 Plaintiff, :
 -VS- :
 :
 SHANNON L. STEPHEN, :
 :
 Defendant. :

PROCEEDINGS: JURY TRIAL

BEFORE: HONORABLE JACK DAY
Circuit Judge
Sixth Judicial Circuit

DATE: June 18, 2008

PLACE TAKEN: Pasco County Government Center
7530 Little Road
New Port Richey, FL 34654

REPORTED BY: Maria A. Fortner, RPR
Notary Public
State of Florida at Large

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1 P-R-O-C-E-E-D-I-N-G-S

2 THE BAILIFF: The jury is entering the
3 courtroom, Your Honor.

4 JURY PRESENT:

5 OPEN COURT:

6 THE BAILIFF: All jurors are present and
7 seated in the courtroom, Your Honor.

8 THE COURT: Thank you. Mr. Rosario, proceed.

9 MR. ROSARIO: Reasonable doubt is not a mere
10 possible doubt, a speculative doubt, imaginary or
11 forced doubt. Such a doubt should not influence
12 you if you have an abiding conviction of guilt.
13 That's the jury instruction summed up.

14 Defense counsel got up here and just asked you
15 to speculate, speculate wildly. Let's talk about
16 what he just provided to you. Let's talk about two
17 witnesses in particular to begin with. Let's talk
18 about Valerie Herbert.

19 Valerie Herbert, who has no interest in this
20 case whatsoever, other than the fact she made a 911
21 call at 1:04 in the morning about a drunk driver
22 who was all over the road and gave this tag number
23 to the police. She's in a F150. She's not in a
24 Miata or some small car. She's in a F150, about
25 the same size as this truck. She sees one person

1 in this vehicle.

2 The Defense, in its attempt to establish
3 reasonable doubt, brought you Walter Schubart, a
4 man that just for some reason went over and talked
5 to the Defense attorney, a man who knows somebody
6 was wrongly charged with a crime. He doesn't go to
7 the police, but he goes to the Defense.

8 MR. FOOTE: Objection. Improper
9 characterization.

10 THE COURT: Ladies and gentlemen of the jury,
11 I will reiterate that what the attorneys tell you
12 in closing argument is not evidence. That doesn't
13 mean anyone is intentionally trying to mislead you
14 for either side at any time, but they're going to
15 tell you their view of the evidence. It's up to
16 you to depend upon your own recollection about what
17 the evidence was and I'll trust you to do that.

18 Go ahead, Mr. Rosario.

19 MR. ROSARIO: A man who is a part-time bouncer
20 at the bar that served all these drinks to Shannon
21 Stephen, and he tells you that three people got
22 into the front of this truck and drove off at 1:00
23 o'clock in the morning, three people in the front
24 of this truck at 1:00 o'clock in the morning. Now,
25 Valerie Herbert sees this truck at 1:04 with one

1 person in it.

2 Let's take a look at some videotapes. This is
3 the crime scene video. Take a look at the center
4 divider. This is right after the defendant has
5 been stopped. Take a look at the center divider,
6 it's full of CDs, it's organized, it's straight and
7 it's down. Take a look at this picture here. That
8 thing is down, somebody is up, and somebody is
9 sitting on CDs. Take a look at it. Right there.
10 That is down immediately after the crash.

11 Walter Schubart comes in here and tells you,
12 oh, I don't know how they got in the vehicle. I
13 had to cross-examine him. It's like three people
14 got into the front seat of that truck and four
15 minutes later there's only one person in this
16 vehicle, and you're supposed to believe, speculate
17 that that's somebody other than Shannon Stephen.

18 Look at these phone records. Ignore what came
19 from the stand. Look at these phone records and,
20 oh, wait, let me tell you what we think, let me
21 tell you what we think. Those phone records are
22 just as consistent with innocent circumstances.

23 Marvin Dalzell calls Jim Wallace right as he
24 sees Shannon's truck all smashed up and doesn't get
25 through. Jim Wallace gets a cellphone call from

1 his friend at 1:20-something in the morning, he's
2 not returning the call, I'm going to call him back,
3 and it's a matter of four minutes he calls him
4 back. It's just as consistent, but it's not
5 testimony from this witness stand. It's pure
6 speculation, it's a possible doubt, an imaginary
7 doubt, a forced doubt.

8 Trooper Styers wasn't here. Trooper Styers is
9 an investigator, he collects the witnesses'
10 information and takes the pictures. What was
11 presented to you here today are the witnesses who
12 have to testify. What is Styers going to get up
13 here and talk about, hearsay to you? There would
14 be objections, objections, objections. You have to
15 put the witnesses on.

16 Mr. Murdoch, an expert for 29 years, 28 years,
17 an expert in accident reconstruction, took the data
18 and proved beyond a reasonable doubt that the
19 damage to this vehicle is consistent with the
20 injuries to the victims, and as you recall, it's
21 conceded the defendant's truck was involved in this
22 case. Trooper Styers just took the calculations,
23 the distances.

24 You have to look to what came from here, not,
25 oh, why didn't they call this person? Why didn't

1 they call that person? Because that's speculation,
2 that's a possible doubt, it's an imaginary doubt,
3 and it's a forced doubt.

4 Take a look at what you have. You have
5 testimony from Jim Wallace and Marvin Dalzell that
6 the defendant was parked over in this spot over
7 here and that Jim was parked over in this spot.
8 Oh, if you think about it, if you think about
9 Mr. Schubart's story, they drove out in this truck
10 and they went north.

11 And the Defense counsel is saying, well, Jim
12 Wallace lives three minutes away. Okay. If it's
13 three minutes to there and three minutes back,
14 that's six minutes. Why is Valerie Herbert seeing
15 it here less than a mile away four minutes? Their
16 theory doesn't fit.

17 What you have is Jim Wallace and Marvin
18 Dalzell, who are friends with the defendant, they
19 don't want to get him in trouble. Kara Wallace
20 doesn't want to get him in trouble. They tell you
21 Kara Wallace gives a story, now they're attached,
22 now the police go and find Jim Wallace and they
23 tell what happened.

24 They drove this way, opposite of the flow of
25 traffic towards Sevens, and then out to Old County

1 Road 54, and then across, and at 1:04 Valerie
2 Herbert sees that truck. There's no need to
3 speculate with any of those facts at this point,
4 none.

5 Valerie Herbert, the independent eyewitness,
6 sees that truck at 1:04 in the morning driving that
7 way. She sees it go all the way down and she's on
8 the 911 call telling them, we're coming up on
9 Grand, he's all over the place, then she leaves off
10 and he's turning on U.S. 19. You follow U.S. 19
11 up, you can turn onto Marine Parkway and you're
12 back down where the point of impact occurred, where
13 the two human being were killed.

14 You have Robert Bartlett, who's walking along
15 the side of the road, off the road. They're doing
16 the right thing. They're walking home. They're
17 calling for a ride. He hangs up the phone and his
18 friends are killed.

19 He calls 911 -- and you've got the 911 tape --
20 and while he's on the 911 call, Jim Ramsey and Rick
21 Scott are coming up State Road 54. While he's on
22 the phone, while Robert Bartlett is on the phone,
23 Jim Ramsey and Rick Scott are observing the
24 defendant get out from the truck and run around the
25 front of the truck and it looks like he's on the

1 cellphone, it looks like it.

2 If they got up there and said, oh, yeah, I
3 know he was on the cellphone, would that be
4 believable? They're in a car the length of this
5 courtroom away, they don't hear him talk. I asked,
6 did you hear him talking? No. One of them said, I
7 don't know if he was singing, I don't know if he
8 was talking, all I know it appeared he was on the
9 phone.

10 Now, let's use the most logical conclusions
11 that you can pick. Is it somebody running around
12 and there's some bizarre conspiracy about phone
13 calls or you got a drunk guy who's body is pumped
14 full of adrenaline because he just killed two
15 people who just bounced off his hood? His
16 adrenaline is going.

17 And the field sobriety test, that tape there,
18 you can see he's not falling down drunk like the
19 Defense wants to go back and forth, he is, he
20 isn't. We're not saying he's falling down drunk.
21 No one has ever said he's falling down drunk.

22 He's got a .24 blood alcohol content at 2:45,
23 he's drunk. He's pumped full of adrenaline after
24 killing two people, he runs out, he's, oh, crap,
25 oh, crap, oh, crap, and he forgets to press send on

1 his cellphone. Is that more logical than a big
2 conspiracy involving cellphones?

3 Well, Jim Ramsey comes in and talks to you
4 today and tells you -- and the Defense wants to
5 hammer on, you said blue jeans, you said blue
6 jeans -- he said, anyone that knows me, when I say
7 blue jeans, I mean jeans, they're not necessarily
8 blue, they were lighter-colored blue jeans, that's
9 just what I called them.

10 Yet the Defense wants to hang their hat on,
11 oh, he said blue jeans, there's a
12 misidentification. No, it was clear, the person
13 that you saw get out of that truck and go around
14 the front of the truck, is that the same person
15 that Rick Scott pulled out of the truck when you
16 got there? Yes, yes. That's from the witness
17 stand. That's direct testimony. That doesn't
18 require you to speculate, to imagine, to force.
19 Yes, that's the same person.

20 So from the span of that Robert Bartlett 911
21 call to them getting back, you have a defendant one
22 mile from point of impact to State Road 54 at 45
23 miles per hour, he gets there, everything happens.

24 I'm not asking you to speculate, to leap to
25 conclusions. I'm asking you to use your brains and

1 use logic, what makes sense and what requires you
2 to wildly speculate and to guess. Well, what if he
3 this and what if he this? There is multiple,
4 multiple ways of getting to this conviction.

5 Robert Bartlett tells you he's walking along
6 the side of the road with his friends and they get
7 hit and both of them are bent backwards like
8 horseshoes. Joe Swiech's spinal cord is severed in
9 his head, dead as soon as he hits this car, this
10 truck, right here.

11 Murdoch tells you this is consistent with
12 being struck here by one person and here with
13 another. And Bartlett's story is identical, Sarah
14 was here, Joe was here. Sarah was hit and run off
15 the side of this vehicle, and her spinal cord was
16 not severed, so she was Bayflited, and died from
17 these injuries.

18 The defendant's blood alcohol content was .24.
19 As the toxicologist told you, it's going to go down
20 if you don't have anything to drink, and then this
21 breath test shows you three hours later a decrease
22 in the breath alcohol.

23 There's no conspiracy here. There's no rush
24 to judgment here. As you recall, it was the State
25 stipulating to the admission of these records.

1 There was no the State doesn't want to have you see
2 this. Put Defense Counsel's argument where it
3 belongs, away, because it's speculation, it's
4 imaginary, it's forced.

5 Look at what came from the witness stand and
6 what the witnesses said. Why does Jim Ramsey have
7 to lie? He's not. He's right there telling you
8 what happened. Robert Bartlett, Valerie Herbert,
9 John Murdoch, Jeff Hays, Sergeant Frye, all these
10 people came in here and told you what they did.

11 This case has been proven beyond and to the
12 exclusion of every reasonable doubt. If you go
13 back there and you start speculating over phone
14 records and notice that the times don't add up,
15 this phone call is not connecting with that, you're
16 engaging in speculation.

17 Look at what came from that witness stand,
18 apply the law, and come back with a verdict you'll
19 be proud of, a verdict of guilty of DUI
20 manslaughter two counts and the leaving the scene
21 of an accident involving death, because that's the
22 real evidence you have here, two people died at the
23 hands of that drunk driver. Come back with a
24 verdict of guilty. Thank you.

25 THE COURT: Could you move that tripod.

1 THE BAILIFF: Yes, sir.

2 THE COURT: Thank you. Members of the jury,
3 thank you for your attention during this trial.
4 Please now pay attention to the instructions I'm
5 about to give you. I will tell you that you will
6 receive a written set of instructions for your
7 guidance, but please pay close attention now.

8 Shannon Stephen, the defendant in this case,
9 has in Count I been accused of the crime of DUI
10 manslaughter, he has in Count II also been accused
11 of the crime of DUI manslaughter, and he has in
12 Count III been accused of the crime of leaving the
13 scene of an accident involving death.

14 As to Count I, regarding Sarah Gleason, to
15 prove the crime of DUI manslaughter, the State must
16 prove the following three elements beyond a
17 reasonable doubt; number one, that Shannon Stephen
18 drove or was in actual physical control of a
19 vehicle; number two, that while driving or in
20 actual physical control of the vehicle, Shannon
21 Stephen either was under the influence of alcoholic
22 beverages or a chemical substance or a controlled
23 substance to the extent that his normal faculties
24 were impaired, or had a blood or breath alcohol
25 level of 0.08 or higher; number three, as a result

1 Shannon Stephen caused or contributed to the cause
2 of the death of Sarah Gleason.

3 For your guidance, a vehicle is any device by
4 which any person or property is or may be
5 transported or drawn upon a highway except devices
6 used exclusively upon stationary rails or tracks.

7 Normal faculties include but not are not
8 limited to the ability to see, hear, walk, talk,
9 judge distances, drive an automobile, make
10 judgments, act in emergencies, and in general to
11 perform normally the many mental or physical acts
12 of our daily lives.

13 Alcoholic beverages are considered to be
14 substances of any kind of description which contain
15 alcohol.

16 In considering the evidence, you should
17 consider the possibility that although the evidence
18 may not convince you the defendant committed the
19 main crime of which he is accused in Count I, there
20 may be evidence that he committed other acts that
21 would constitute a lesser included crime.

22 Therefore, if you decide the main accusation
23 in Count I has not been proved beyond a reasonable
24 doubt, you will next need to decide if the
25 defendant is guilty of any lesser included crime.

1 The lesser included crime and the definition
2 of DUI manslaughter is DUI or driving while under
3 the influence. To prove the crime of driving under
4 the influence, the State must prove the following
5 two elements beyond a reasonable doubt, and those
6 are; number one, that Shannon Stephen drove or was
7 in actual physical control of a vehicle; number
8 two, that while drinking or in actual physical
9 control, he was under the influence of alcoholic
10 beverages to the extent that his normal faculties
11 were impaired or had a blood or breath alcohol
12 level of 0.08 or higher. Again the same
13 definitions of vehicle, normal faculties, and
14 alcoholic beverages apply.

15 It is a defense to the charge of driving or
16 being in actual physical control of a vehicle while
17 under the influence if at the time of the alleged
18 offense the vehicle was inoperable. However, it's
19 not a defense if while impaired the defendant drove
20 or was in actual physical control of the vehicle
21 before it became inoperable.

22 Therefore, if you are not convinced beyond a
23 reasonable doubt that the vehicle was operable at
24 the time of the alleged offense, you should find
25 the defendant not guilty. However, if you are

1 convinced that the vehicle was operable at the time
2 of the alleged offense, then you should find the
3 defendant guilty if all the other elements of the
4 charge have been proved beyond a reasonable doubt.

5 As to Count II, that's DUI manslaughter, as to
6 Joseph Swiech, to prove the crime of DUI
7 manslaughter the State must prove the same three
8 elements beyond a reasonable doubt as applied in
9 Count I, as to Joseph Swiech, namely, number one,
10 that Shannon Stephen drove or was in actual
11 physical control of the vehicle; number two, that
12 while driving, while in actual physical control of
13 the vehicle, Shannon Stephen was under the
14 influence of alcoholic beverages or a chemical
15 substance or a controlled substance to the extent
16 that his normal faculties were impaired, or had a
17 blood or breath alcohol level of 0.08 or higher;
18 and, third, that as a result Shannon Stephen caused
19 or contributed to the cause of the death of Joseph
20 Swiech, this is Count II.

21 Again we apply the same definitions of
22 vehicle, normal faculties and alcoholic beverages.
23 And again as to Count II, in considering the
24 evidence, you should consider the possibility that
25 although the evidence may not convince you that the

1 defendant committed the main crime of which he is
2 accused of in Count II, there may be evidence that
3 he committed other acts that would constitute a
4 lesser included crime.

5 And again if you decide the main accusation
6 has not been proved beyond a reasonable doubt, you
7 will next need to decide if the defendant is guilty
8 of any lesser included crime. The lesser crime
9 indicated in the definition of DUI manslaughter is
10 again driving while under the influence.

11 Excuse me. Counsel, I found a typo on Page
12 11, where it says Count I, it should say Count II.
13 I'm having the clerk correct that on this page.
14 With a little luck that will be our last technical
15 glitch.

16 I'm instructing you about Count II, and the
17 lesser included offense of driving while under the
18 influence. Again the elements are the same as you
19 heard before. For driving under the influence
20 there are two elements: That Shannon Stephen drove
21 or was in actual physical control of a vehicle, and
22 that while driving or in actual physical control,
23 he was under the influence of alcoholic beverages
24 to the extent that his normal faculties were
25 impaired or had a blood or breath alcohol level of

1 0.08 or higher.

2 Again we have the definitions of vehicle,
3 normal faculties and alcoholic beverages in case
4 you didn't get that the first two or three times.

5 And again it is a defense to the charge of
6 driving or being in actual physical control of a
7 vehicle while under the influence if at the time of
8 the alleged offense the vehicle was inoperable.
9 And as I stated previously, however, it's not a
10 defense if while impaired the defendant drove or
11 was in actual physical control of the vehicle
12 before it became inoperable.

13 And, therefore, if you're not convinced beyond
14 a reasonable doubt that the vehicle was operable at
15 the time of the alleged offense, you should find
16 the defendant not guilty. But if you are convinced
17 the vehicle was operable at the time of the alleged
18 defense, then you should find him guilty if all the
19 other elements of this charge have been proved
20 beyond a reasonable doubt.

21 Count III is leaving the scene of an accident
22 involving death or injury. To prove the crime of
23 leaving the scene of an accident, the State must
24 prove the following four elements beyond a
25 reasonable doubt; number one, that Shannon Stephen

1 was the driver of a vehicle involved in an accident
2 resulting in death of any person; number two, that
3 Shannon Stephen knew or should have known that he
4 was involved in an accident; number three, that
5 Shannon Stephen knew or should have known of the
6 death of the person or persons; number four, that
7 Shannon Stephen willfully failed to stop at the
8 scene of the accident or as close to the accident
9 as possible and remain there until he had given
10 identifying information to the injured person and
11 to any police officer investigating the accident,
12 or that Shannon Stephen willfully failed to render
13 reasonable assistance to the injured person and
14 such treatment appeared to be necessary or was
15 requested by the injured person.

16 And if the State proves that the defendant
17 willfully failed to give any part of the
18 identifying information or willfully failed to give
19 reasonable assistance, the State satisfies this
20 element of the offense.

21 Identifying information means name and
22 address, vehicle registration number, and if
23 available or requested the exhibition of a driver's
24 license or permit to drive.

25 Reasonable assistance includes carrying or

1 making arrangements to carry the injured person to
2 a physician or a hospital for medical treatment.
3 Willfully means intentionally or purposely.

4 The defendant has entered a plea of not
5 guilty. This means you must presume or believe the
6 defendant is innocent. The presumption stays with
7 the defendant as to each material allegation in the
8 Information, through each stage of the trial,
9 unless it has been overcome by the evidence to the
10 exclusion of and beyond a reasonable doubt.

11 To overcome the defendant's presumption of
12 innocence, the State has the burden of proving that
13 the crime in which the defendant is charged was
14 committed and that the defendant was the person who
15 committed the crime. The defendant is not required
16 to present evidence or to prove anything.

17 Whenever the words "reasonable doubt" are
18 used, you must consider the following: A
19 reasonable doubt is not an impossible doubt, a
20 speculative, imaginary or forced doubt. Such a
21 doubt must not influence you to return a verdict of
22 not guilty if you have an abiding conviction of
23 guilt. On the other hand, if after carefully
24 considering, comparing and weighing all the
25 evidence there is not an abiding conviction of

1 guilt, or, if, having a conviction it is one which
2 is not stable or one which wavers and vacillates,
3 then the charge is not proved beyond every
4 reasonable doubt and you must find the defendant
5 not guilty because the doubt is reasonable.

6 It is to the evidence introduced in this trial
7 and to it alone that you are to look for that
8 proof.

9 A reasonable doubt as to the guilt of the
10 defendant may arise from the evidence, from
11 conflict in the evidence or from the lack of
12 evidence. If you have a reasonable doubt, you
13 should find the defendant not guilty. If you have
14 no reasonable doubt, you should find the defendant
15 guilty.

16 It is up to you to decide what evidence is
17 reliable. You should use your common sense in
18 deciding which is the best evidence and which
19 evidence should not be relied upon in considering
20 your verdict. You may find some of the evidence
21 not reliable or less reliable than other evidence.
22 You should consider how the witnesses acted as well
23 as what they said. Some things you should consider
24 are:

25 Did the witness seem to have an opportunity to

1 see and know the things about which the witness
2 testified?

3 Did the witness seem to have an accurate
4 memory?

5 Was the witness honest and straightforward in
6 answering the attorney's questions?

7 Did the witness have some interest in how the
8 case should be decided?

9 Does the witness' testimony agree with the
10 other testimony and other evidence in the case?

11 Has the witness been offered or received any
12 money, preferred treatment or other benefit in
13 order to get the witness to testify?

14 Did the witness at some other time make a
15 statement that is inconsistent with the testimony
16 he or she gave in court?

17 You may rely upon your own conclusion about
18 the witness. A juror may believe or disbelieve all
19 or any part of the evidence or the testimony of any
20 witness.

21 Expert witnesses are like other witnesses with
22 one exception, the law permits an expert witness to
23 give his or her opinion. However, an expert's
24 opinion is only reliable when given on a subject
25 about which you believe him to be a witness. Like

1 other witnesses, you may believe or disbelieve all
2 or any part of an expert's testimony.

3 The constitution requires the State to prove
4 its accusations against the defendant. It's not
5 necessary for the defendant to disprove anything,
6 nor is the defendant required to prove his
7 innocence. It's up to the State to prove the
8 defendant's guilt by evidence.

9 The defendant exercised a reasonable right by
10 choosing not to be a witness in this case. You
11 must not view this as an admission of guilt or be
12 influenced in any way by his decision. No juror
13 should ever be concerned that a defendant did or
14 the did not take the witness stand to give
15 testimony in a case.

16 A statement claimed to have been made by the
17 defendant outside of court has been placed before
18 you. Such a statement should always be considered
19 with caution and be weighed with great care to make
20 certain it was freely and voluntarily made.
21 Therefore, you must determine from the evidence
22 that the defendant's alleged statement was
23 knowingly, voluntarily and freely made.

24 In making this determination, you should
25 consider the total circumstances including but not

1 limited to whether when the defendant made the
2 statement, he had been threatened in order to get
3 him to make it and whether anyone had promised him
4 anything in order to get him to make it. If you
5 conclude the defendant's out-of-court statement was
6 not freely and voluntarily made, you should
7 disregard it.

8 There are some general rules that apply to
9 your discussion. You must follow these rules in
10 order to return a lawful verdict. You must follow
11 the law. There are eight of them. Number one, you
12 must follow the law as it is set out in these
13 instructions. If you fail to follow the law, your
14 verdict will be a miscarriage of justice. There's
15 no reason for failing to follow the law in this
16 case. All of us are depending upon you to make a
17 wise and legal decision in this matter.

18 Number two, this case must be decided only
19 upon the evidence that you heard from the testimony
20 of the witnesses and have seen in the form of
21 exhibits and evidence and from these instructions.

22 Number three, this case must not be decided
23 for or against anyone because you feel sorry for
24 anyone or are angry at anyone.

25 Number four, remember the lawyers are not on

1 trial, your feelings about them should not
2 influence your decision in this case.

3 Number five, your duty is to determine if the
4 defendant has been proven guilty or not in accord
5 with the law, it is my job as the judge to
6 determine what is a proper sentence if the
7 defendant is found guilty.

8 Number six, whatever verdict you render must
9 be unanimous, that is, each juror must agree to
10 that same verdict.

11 Number seven, it's entirely proper for a
12 lawyer to talk to a witness about what testimony
13 the witness would give if called to the courtroom,
14 and the witness should not be discredited for
15 having spoken with a lawyer about his or her
16 testimony.

17 Number eight, your verdict should not be
18 influenced by feelings of prejudice, bias or
19 sympathy. Your verdict must be based on the
20 evidence and on the law contained in these
21 instructions.

22 Deciding a verdict is exclusively your job. I
23 cannot participate in that decision in any way. If
24 I have said or done anything to give the impression
25 to you that I preferred one verdict over another,

1 please disregard that impression.

2 You may find the defendant guilty as charged
3 in the Information, or guilty of such lesser
4 included crime as the evidence may justify, or not
5 guilty.

6 If you return a verdict of guilty, it should
7 be for the highest offense which has been proven
8 beyond a reasonable doubt. If you find no offense
9 has been proven beyond a reasonable doubt, then, of
10 course, your verdict must be not guilty.

11 Only one verdict may be returned as to the
12 crimes charged. This verdict must be unanimous,
13 that is, all of you must agree to the same verdict,
14 and the verdict must be in writing, and for your
15 convenience the necessary forms of verdict have
16 been prepared for you.

17 They are as follows -- and that's one verdict
18 for each count. This is the verdict form that will
19 go in with you to the jury room. All three of them
20 have the name of the case at the top.

21 The first one says, Information for DUI
22 manslaughter, Count I. It has the title, verdict,
23 and it says, we the jury finds as follows, and has
24 the instruction, check one and only one on this
25 form by inserting a single check mark on the line

1 next to the description of verdict which you have
2 found.

3 Then there are three choices with a place to
4 check for each. Number one, the defendant is
5 guilty of DUI manslaughter as charged in the
6 Information. Number two, the defendant is guilty
7 of driving under the influence as included. Number
8 three, the defendant is not guilty. And it has, so
9 say we all this blank day of June, 2008, and
10 there's a place for the foreperson of the jury to
11 sign. It should be checked, signed and dated.

12 The second verdict is as to Count II. It is
13 otherwise identical to the one I just read to you.
14 It says, Information for DUI manslaughter, Count
15 II. It says check one and only one, and there's a
16 place to check for guilty of DUI manslaughter as
17 charged in the Information, guilty of driving under
18 the influence as included, and, number three, the
19 defendant is not guilty. And, likewise, a place
20 for you to sign and date it.

21 The third one is for Count III, and since
22 that's a different charge, it's different. It
23 says, Information for leaving the scene of an
24 accident involving death, Count III. Again, it has
25 the name of the case at the top. It's entitled

1 verdict. We the jury find as follows, same
2 instructions, check one and only one on this form
3 by inserting a signal check mark, and there's a
4 choice of two places to check. The first is, one:
5 The defendant is guilty of leaving the scene of an
6 accident involving death as charged in the
7 Information; and, two, the defendant is not guilty.
8 So say we all this blank day of June, and a place
9 for the signature of the foreperson.

10 A separate crime is charged in each count of
11 the Information, and although they have been tried
12 together, each crime and the evidence applicable to
13 it must be considered separately and a separate
14 verdict returned as to each. A finding of guilty
15 or not guilty as to one crime must not affect your
16 verdict as to the other crimes charged.

17 In just a few moments you'll be taken to the
18 jury room by the bailiff. The first thing you
19 should do is elect a foreperson who will preside
20 over your deliberations like the chairperson of a
21 meeting. It is the foreperson's job to sign and
22 date the verdict form when all of you have agreed
23 on a verdict in this case, and to bring the verdict
24 back to the courtroom when you return.

25 Your verdict finding the defendant either

1 guilty or not guilty must be unanimous in each of
2 your verdicts on each of the three counts. The
3 verdict must be the verdict of each juror as well
4 as that of the jury as a whole.

5 In closing, let me remind you that it is
6 important to follow the law spelled out in these
7 instructions in deciding your verdict. There are
8 no other laws that apply to this case. Even if you
9 do not like the laws that must be applied, you must
10 use them. For two centuries we have lived by the
11 constitution and the law. No juror has the right
12 to violate these rules that we all share.

13 Counsel, is there any issue or problem with
14 the jury instructions as read?

15 MR. FOOTE: May we approach, Judge?

16 THE COURT: Yes.

17 BENCH CONFERENCE:

18 MR. FOOTE: Judge, the only issue that I heard
19 was on Page 21, the defendant not testifying.
20 Although it's correct on the form, the Court --

21 THE COURT: Did I misread it?

22 MR. FOOTE: It was read incorrectly.

23 THE COURT: What did I say?

24 MR. FOOTE: The defendant exercised a
25 reasonable right by choosing --

1 THE COURT: I said reasonable instead of
2 fundamental?

3 MR. FOOTE: Correct. And that was the only
4 objection. Is that what you picked up?

5 THE COURT: I don't think it will prejudice
6 anything for me to be just straightforward and tell
7 them that I misread it and I used the wrong word,
8 instead of saying reasonable, I should have said
9 fundamental. I'll do the entire single sentence as
10 the correction.

11 MR. FOOTE: That's fine.

12 THE COURT: Okay. Anything else?

13 MR. FOOTE: Oh, apparently there may be a
14 problem with some of the evidence going back. For
15 example, Schaub's video has sound and they can turn
16 it up.

17 MR. ROSARIO: Yes, Judge, I don't think that
18 the video should go back with them. If they want
19 to watch it --

20 THE COURT: Well, if you both agree to not
21 send it, we just won't send it, and then we'll just
22 deal with it if they request it.

23 MR. FOOTE: I actually requested that they
24 look at that particular video as far as vantage
25 point.

1 MR. ROSARIO: They can request to watch it.

2 THE COURT: Okay. Time out. This is the
3 video of the truck that Schaub took?

4 MR. FOOTE: Yes. The noise was coming up from
5 here when you were watching it.

6 THE COURT: Yes. It was played on that TV.
7 Can we mute it? Okay. I don't want to not just
8 send it in light of your desire. We're going to
9 tell them that if they want to see the video again,
10 we'll have them come back in here and watch it.

11 MR. ROSARIO: That's fine.

12 MR. FOOTE: Or just remove the audio cable.

13 THE COURT: Well, that's cool. That's
14 actually better, then they can talk about it. The
15 point is we don't want to tie their hands from any
16 part of the deliberations.

17 MR. ROSARIO: The difficulty I have, Judge, is
18 being the AV guy, like you joked earlier this week,
19 all they have to do if they want to get the audio
20 is unplug it from video and plug audio and then
21 they can hear it. So the best thing to do is if
22 they want to see it, they can bring it out and
23 watch it.

24 THE COURT: I don't think I'd be sharp enough
25 to think of that. I mean that's probably more of

1 an insult to me. I can instruct them, okay, option
2 C is we send the videos back with them, if they
3 request to see the video, just have the bailiff
4 there.

5 MR. ROSARIO: I have no objection.

6 MR. FOOTE: That would bother me.

7 THE COURT: Well, it's an inhibition on
8 discussion. It's the same situation to bring them
9 back out here to look at it. Option D is we can
10 pull the cable and tell them not to mess with the
11 hardware.

12 MR. FOOTE: Curious minds will do it. I'm
13 going to go with the original option if they
14 request to see the video.

15 THE COURT: Okay. And I won't highlight it by
16 identifying it. I'll say if there's any technical
17 information that's not sent back that they want to
18 review, to let the bailiff know. Just keep it
19 generic.

20 MR. FOOTE: Will they remember that video is
21 there? I think we should let them know there is a
22 video, however, due to technical difficulties with
23 this particular one, we'll do it out here.

24 THE COURT: Man, we're really splitting hairs.

25 MR. FOOTE: They have so much stuff.

1 THE COURT: I'll say something kind of in
2 between.

3 MR. FOOTE: Okay.

4 MR. ULANO: The 911 tape, the audiotape has
5 several other 911 calls that weren't admitted.

6 THE COURT: Well, we'll just keep that out for
7 the same reason. That makes it all the easier to
8 be generic.

9 OPEN COURT:

10 THE COURT: Folks, I misspoke and I wish to
11 correct it. This will be correct in your written
12 instructions, but when I was talking about the
13 defendant not testifying in the case, I misspoke
14 and used the word reasonable instead of the word
15 fundamental.

16 The correct sentence in question is: The
17 defendant exercised a fundamental right by choosing
18 not to be a witness in this case.

19 Now, there is a very important function
20 besides that of serving as a juror, and, that is,
21 making it possible that if, as sometimes happens, a
22 juror is struck ill or has a family tragedy or God
23 forbid drops dead or what have you, we don't have
24 to start all over, that means we have an alternate
25 juror.

1 There are six members of the jury. Ms. Vokey,
2 thank you for your service. When the jury retires,
3 I'm going to ask you to stay behind and we'll talk
4 some more at that point.

5 With that, members of the jury, you may retire
6 with Deputy Eddings. Deputy, here are their jury
7 instructions.

8 THE BAILIFF: All right. Ladies and
9 gentlemen.

10 THE COURT: Folks, one other item. You're
11 going to have with you or access to all of the
12 exhibits. There are one or two exhibits where
13 there is a technical problem as far as sending them
14 back with you. If you find yourself wanting to
15 review a tape or a video that you don't have with
16 you or a CD, let the bailiff know and we will work
17 that out one way or another. Thank you.

18 **JURY ABSENT:**

19 THE COURT: Ms. Vokey, I'm glad you're
20 smiling. You can come out this way, I won't
21 broadcast quite as much. Did you suspect?

22 JUROR VOKEY: I don't have any problem.

23 THE COURT: Thank you for your time and
24 effort. I really want to say it's a big sacrifice.
25 All the members of the jury have been very

1 conscientious. I usually at this point give you a
2 certificate of appreciation as just a token of
3 thanks, and it didn't get done for some reason.
4 Here is your souvenir set of jury instructions.

5 JUROR VOKEY: Thank you.

6 THE COURT: And you'll just have to settle for
7 my sincere thanks on behalf of all the judges of
8 the circuit. You're now free from any obligations
9 as a juror.

10 JUROR VOKEY: Okay.

11 THE COURT: If you want to know about the
12 outcome of the case -- and you're free to stick
13 around, for that matter. You are also free to talk
14 to people about your impressions, but you don't
15 have to and you won't be harassed by anybody in
16 that regard.

17 If you want to know the outcome of the case
18 and you don't get it out of the news media, you're
19 welcome to call my office tomorrow and see what the
20 verdict is. Maybe I have a card. I don't have
21 those too. This is our office number. Thank you
22 very much.

23 JUROR VOKEY: Thank you very much.

24 THE BAILIFF: The jury is out, Your Honor.

25 THE COURT: Thank you, Deputy.

1 THE BAILIFF: They just want the tripod.

2 THE COURT: Okay. Do you need to get anything
3 for Ms. Vokey, J.R.?

4 JUROR VOKEY: And you said I was free to say
5 anything if I want?

6 THE COURT: Yes. On the other hand --

7 JUROR VOKEY: I don't have to if I don't want
8 to?

9 THE COURT: Exactly.

10 JUROR VOKEY: Thank you, sir.

11 THE COURT: Do you want a head start or
12 anything before I recess?

13 JUROR VOKEY: I'm sorry?

14 THE COURT: Do you want to get a head start
15 before I recess the court?

16 JUROR VOKEY: Oh, no, no. That's fine.

17 THE COURT: The Information went back, right?

18 THE CLERK: I'm sorry?

19 THE COURT: The Information went back, a copy
20 of the Information?

21 THE CLERK: No.

22 THE COURT: Okay. We should do that. You
23 know, I don't usually do that.

24 THE CLERK: No, we don't do that.

25 THE COURT: What I was going to ask, I did not

1 send back a copy of the Information.

2 MR. FOOTE: The charging document?

3 THE COURT: Correct.

4 MR. FOOTE: It's not in the court file?

5 THE COURT: I didn't send it back.

6 MR. FOOTE: Oh.

7 THE COURT: Does anybody care? Is anybody
8 asking me to do that?

9 MR. FOOTE: Yes.

10 THE CLERK: I'll have to make a copy.

11 THE COURT: Okay. Does anybody have anything
12 else to bring before the Court while we await the
13 return of the jury?

14 MR. FOOTE: No, Your Honor.

15 MR. ROSARIO: No, sir.

16 THE COURT: We'll stand in recess awaiting the
17 call of the jury.

18 RECESS TAKEN:

19 THE COURT: Thank you, Deputy. I understand
20 the jury has a question?

21 THE BAILIFF: Yes, Your Honor.

22 THE COURT: Do you have a copy of the written
23 question?

24 THE BAILIFF: I'll retrieve the question, Your
25 Honor.

1 THE COURT: The question is, "If we can't come
2 to a unanimous decision, what do we do?"

3 Any suggestions?

4 If anybody wants to help me find what I'm
5 looking for. I'm looking for the standard
6 instruction. I think we're talking about, it's the
7 instructions that begin at 4.

8 MR. ROSARIO: 4.1, Judge.

9 THE COURT: Well, I'm looking. Yes, 4.1 is
10 what I was looking for. Do you all have that at
11 the Defense table? I only have the one set up
12 here.

13 There might be a question as to whether that's
14 premature. They haven't said we can't come to a
15 unanimous decision.

16 I think I could probably give 4.1 with a
17 little introductory, I'm taking your question to
18 mean that you're encountering difficulties reaching
19 a unanimous decision, but it doesn't come carved in
20 stone, and then go into 4.1.

21 Since you haven't been through this with me
22 before, when I do a jury question, sometimes I'll
23 throw out, this is what I'm thinking of doing, and
24 that's my way of asking for feedback from counsel
25 to see if you agree, disagree, or you want to

1 suggest some other tact.

2 MR. FOOTE: Judge, in reviewing 4.1, I think
3 at this point that would probably be the proper
4 thing to do.

5 THE COURT: What about what I suggested as a
6 lead-in. I suppose it's not necessary. I was
7 looking for a segue way.

8 MR. FOOTE: I'm sorry. I was reading.

9 THE COURT: Okay. I was thinking of leading
10 into 4.1 with something sort of mild like, I
11 understand from your question that you may be
12 having difficulty reaching a unanimous agreement or
13 a verdict, then go into the verbiage here, "I know
14 that", and so forth.

15 MR. ROSARIO: I have no objection with that,
16 Judge.

17 THE COURT: Would you rather do it or lose it?

18 MR. ROSARIO: I have no objection.

19 THE COURT: Either way.

20 MR. ROSARIO: You using it is fine.

21 THE COURT: Okay.

22 MR. ROSARIO: As I understand the case law,
23 they have to say that they are deadlocked before
24 the 4.1. And I understand why you're doing what
25 you're doing.

1 THE COURT: Well, I don't want to force them
2 prematurely into galvanizing them into that
3 position by making them state that when they
4 haven't actually quite gone that far.

5 MR. FOOTE: Can I just ask what is the
6 question again?

7 THE COURT: The question verbatim is, "If we
8 can't come to a unanimous decision, what did we
9 do?"

10 MR. ROSARIO: I think based upon the way
11 that's phrased, giving a little lead-in the way you
12 did, I think that's appropriate.

13 THE COURT: Mr. Foote, do you agree, disagree,
14 or do you want to suggest something else?

15 MR. FOOTE: May I have a moment?

16 THE COURT: Sure.

17 MR. FOOTE: Judge, we have no objection. We
18 concur with the State that 4.1 should be read with
19 no objection to the Court's segue way.

20 THE COURT: I'm going to give the note to the
21 clerk to file in the court file. Do we have Court
22 Exhibit Number K?

23 THE CLERK: We do now.

24 THE BAILIFF: Jurors are entering the
25 courtroom, Your Honor.

1 JURY PRESENT:

2 THE BAILIFF: All jurors are present and
3 seated in the courtroom, Your Honor.

4 THE COURT: Thank you, Deputy Eddings.

5 I understand from your question that you may
6 be having some difficulty reaching a unanimous
7 agreement on a verdict. I know all of you have
8 worked hard to try and find a verdict in this case
9 and apparently it's been impossible for you so far.

10 Sometimes an early vote before discussion can
11 make it hard to reach an agreement about the case
12 later. The vote not to discuss it might make it
13 hard to see all sides of the case.

14 We're all aware that it is legally permissible
15 for a jury to disagree. There are two things that
16 a jury can lawfully do, agree on a verdict or
17 disagree on what the facts of the case may truly
18 be.

19 There's nothing to disagree about on the law.
20 The law is as I've told you. If you have any
21 disagreements about the law, I should clear them up
22 for you now. That should be my problem and not
23 yours.

24 If you disagree over what you believe the
25 evidence showed, then only you can resolve that

1 conflict if it is to be resolved. Therefore, I
2 have only one request of you. By law I cannot
3 demand this of you, but I want you to go back into
4 the jury room, then taking turns tell each of the
5 other jurors about any weaknesses of your own
6 position. You should not interrupt each other or
7 comment on each other's views until each of you has
8 had a chance to talk. After you've done that, if
9 you simply cannot reach a verdict, then return to
10 the courtroom and I will declare this case a
11 mistrial and we'll discharge you with my sincere
12 appreciation for your service and your effort.

13 With that, you may now retire to continue to
14 your deliberations.

15 **JURY ABSENT:**

16 **THE BAILIFF:** The jury is out of the hearing
17 of the Court, Your Honor, and in deliberations.

18 **THE COURT:** Thank you. We will recess until
19 the call of the jury.

20 **RECESS TAKEN:**

21 **THE BAILIFF:** It looks like everyone is
22 present, Judge.

23 **THE COURT:** Mr. Foote, would you and
24 Mr. Rosario come up, please.

25 **BENCH CONFERENCE:**

1 THE COURT: Okay. I kind of hate to do this
2 on the record. I've never been in this situation
3 before. I believe it's incumbent upon me, after
4 the jury is out here -- the jury has advised that
5 they're hopelessly deadlocked.

6 I would like to see if we can all be on the
7 same page about the appropriate procedure with
8 regard to the extent to which you both may deem it
9 necessary for me to confirm that on the record with
10 the foreman.

11 Secondly, I actually have a legal question.
12 Quite candidly I don't think it's necessary for me
13 to characterize this as a manifest necessity. I
14 think this takes the place of that finding.

15 If anybody wants me to declare such, assuming
16 that they are truly deadlocked, I will do that. If
17 there are any other procedural steps that anybody
18 feels are called for, I'd rather have you educate
19 me here than in front of the whole courtroom.

20 MR. FOOTE: I'm in pretty much the same boat
21 you are.

22 THE COURT: And I don't think that there is
23 any magic words, but I'd rather talk about it now
24 than find out later there were some magical words.

25 MR. FOOTE: Did you find any other procedures?

1 THE COURT: A hung jury is granted for a
2 mistrial.

3 MR. FOOTE: That you declare upon motion.

4 THE COURT: Well, that's kind of what I'm
5 thinking. I would kind of like a consensus. I
6 would kind of like to know that nobody is going to
7 find an objection to this procedure, and that is,
8 I'll ask the foreman to basically confirm to me
9 what I've been told, I will thank them and excuse
10 them, and I will on my own motion declare a
11 mistrial, I'll throw the term "manifest necessity"
12 in there just in case.

13 MR. ROSARIO: Well, I think something like
14 that has to be said.

15 THE COURT: Well, that's my concern. I don't
16 want some technical thing that we're all oblivious
17 to tripping us up and causing discord later. Then
18 I will excuse and thank the jury and I'll schedule
19 the case for a pretrial conference.

20 MR. FOOTE: Are there procedures in the book
21 with regard to this?

22 THE COURT: I've got a bunch of books. You
23 mean this one? There's no rule on point.

24 MR. FOOTE: Case law.

25 THE COURT: Most of the case law is dealing

1 with double jeopardy issues.

2 MR. FOOTE: Meaning that you would have to
3 make a certain finding?

4 THE COURT: Let me go on the record. We're on
5 the record now. I'm proceeding on the
6 understanding that, after the jury confirms to us,
7 after receiving the Allen charge that they've
8 received, that they are hopelessly deadlocked, that
9 there is no issue on anybody's part about the
10 necessity to declare a mistrial.

11 I think the law is technically -- see, the
12 concept is that jeopardy having attached, remains
13 attached when the mistrial is declared under these
14 circumstances, but I wouldn't have you up here if I
15 were a scholar on this.

16 MR. FOOTE: And I'm not either. What I would
17 like, Judge, if there's no objection, is to have
18 ten minutes or so.

19 THE COURT: Okay. You want to borrow my West
20 Law?

21 MR. FOOTE: Judge, about ten minutes.

22 MR. ROSARIO: Just give me a few minutes.

23 THE COURT: Sure. We can do that.

24 MR. ROSARIO: Are you going to have them
25 announce what they said. Are you also going to

1 give them, is there anything more that we can do?

2 THE COURT: I'm happy to do that if counsel
3 agrees to that.

4 MR. FOOTE: What's the answer?

5 MR. ROSARIO: No, no. I'm saying exactly what
6 he said. You bring the jury out, you have them
7 announce what they have to announce, and I think
8 the Judge should say, is there anything more?

9 THE COURT: No, that wasn't part of my agenda
10 now. I'm saying if you are requesting that.

11 MR. ROSARIO: That's what I'm trying to
12 request.

13 MR. FOOTE: Which is what?

14 MR. ROSARIO: That he asks them if there is
15 anything more we can do for you?

16 MR. FOOTE: I have no objection to that.

17 THE COURT: Okay. I will tell you that Deputy
18 Eddings said they were very apologetic and they
19 sort of feel like they've failed, and I'm going to
20 give them a little shot in the arm, because I think
21 they're very conscientious.

22 MR. FOOTE: The other issue, Judge, just for
23 procedural purposes and a 3.850, the Court has yet
24 to rule on the JOA and what affect would that have
25 when you declare a mistrial.

1 THE COURT: Thank you. Okay. I think I
2 needed to do that, and I appreciate you raising
3 that. Let's do that first right now. I'm going to
4 deny it and I'm going to tell you why I'm going to
5 deny it. I'm going to deny it most of all because
6 of the Law case.

7 OPEN COURT:

8 THE COURT: Okay. Before we bring the jury
9 back, the Defense renewed their motion for the
10 Court to grant a judgment of acquittal at the end
11 of the Defense's case, and I took that under
12 advisement.

13 I can say that when I had said to Defense
14 about a lack of reasonable alternative hypothesis,
15 that had changed somewhat after the Defense
16 presented its evidence. However, I would also
17 reiterate what I said about the difference between
18 the circumstantial evidence rule and when there are
19 factual disputes, evidentiary factual disputes.

20 I found that the court reinforced, when I went
21 back to the Law case, because I did do some more
22 research on this -- and that's State v. Law, 559,
23 187 at -- well, I think it's Page 190, it's at the
24 fifth headnote.

25 The court is taking the various alternative

1 hypothesis for -- this is a child death case,
2 murder and aggravated child abuse, and the Court
3 looked a various scenarios and addressed each of
4 them. In the first one, they put out there that
5 there was a scenario, a defense scenario that
6 explained the circumstantial evidence in a way
7 contrary to guilt, but to buy the defense's
8 scenario would require buying defense's evidence,
9 undisputed matters of evidence.

10 In responding to a JOA motion, the Court needs
11 to interpret fact disputes in the evidence in the
12 light most favorable to the State. In doing
13 that -- and now I'm going to quote from Law,
14 because this capsulated what I was trying to say --
15 the State's evidence was sufficiently contrary to
16 the defense's theory to allow the jury to consider
17 the State's contention.

18 That's where we are. There's factual disputes
19 as to the alternate reasonable hypothesis in terms
20 of circumstantial evidence. I don't know whether
21 that made sense to anybody in this room.

22 MR. FOOTE: I didn't see where the Court was
23 referring to in the Law case.

24 THE COURT: I'll tell you what, I'll give you
25 what I marked on mine. It's at the end where

1 they're considering one, two, three, the different
2 scenarios. It's at the end of scenario number one,
3 the scenario that the victim's mother may have
4 delivered the fatal blow.

5 Based upon that and my interpretation of Law,
6 and the fact that there are conflicting facts,
7 there is evidence, State's evidence that conflicts
8 with -- most notably the State has evidence that
9 absolutely contradicts the testimony of
10 Mr. Schubart. That's a fact conflict. Fact
11 conflicts are for the jury.

12 In regard to addressing the matter of
13 circumstantial evidence, I look at the conflicting
14 fact evidence in the light most favorable to the
15 State, and that satisfies the circumstantial
16 evidence rule.

17 That's what I've got to say. It's late and
18 I've got a lot of folks here who really don't want
19 to be hearing about this anyway. I wanted to just
20 share that with you. Based upon that, I am denying
21 the motion for judgment of acquittal.

22 It appears the jury has made serious efforts
23 and the jury has informed the Court through the
24 bailiff that they do not feel they can reach a
25 unanimous decision, that they are deadlocked.

1 I want to protect their prerogatives as jurors
2 to be left alone. I'm expecting that if they
3 confirm that, I'm going to declare a mistrial and
4 discharge them.

5 They, if they choose, are able to speak to
6 people, but they also have an absolute right to be
7 left the heck alone, and I want to advise everybody
8 of that for the respective folks involved in this
9 case.

10 With that, will you please bring the jury in.

11 THE BAILIFF: Yes, Judge.

12 JURY PRESENT:

13 THE BAILIFF: The jury is entering the
14 courtroom, Your Honor.

15 THE COURT: Mr. King.

16 JUROR KING: Yes, sir.

17 THE COURT: I understand you are the foreman
18 of the jury?

19 JUROR KING: Yes, sir.

20 THE COURT: I've been advised that the jury --
21 well, I don't want to put words in your mouth.
22 Could you advise what the jury's situation is as
23 far as reaching a verdict, please.

24 JUROR KING: We the jury cannot come to a
25 unanimous decision in this case on any of the three

1 counts.

2 THE COURT: All right, sir. Well, that was my
3 understanding. I gave you what's called the Allen
4 charge the last time you were out, and that's
5 better than over an hour, did you try to do the
6 procedure that I talked to you about before?

7 JUROR KING: Yes, we did.

8 THE COURT: Okay. And that was not successful
9 obviously. This is a tragic case for at least
10 three families and it's also a case that's been
11 long and we've run at it very hard, working long,
12 working late. It's legally and factually complex.
13 It's difficult.

14 I want to tell you that you've been one of the
15 more attentive juries that I've had in a jury
16 trial, one of the more conscientious juries. I
17 don't want you to have a sense of failure over
18 this.

19 I believe very strongly that it's because
20 you're trying to be conscientious and do your
21 respective duties, individually as well as
22 collectively, that you are at this frustrating
23 point.

24 So even though all of us are disappointed, I
25 don't want you to feel that you're letting us down

1 or failing us. You know, it sounds to me like you
2 have done your duty as best you could. So I thank
3 you for your service and your sacrifice.

4 I want to advise you of some special
5 privileges enjoyed by jurors. No juror can ever be
6 required to talk about the discussions that
7 occurred in the jury room except by court order.
8 For many centuries our society has relied upon
9 juries to consider difficult cases. We recognize
10 for hundreds of years that a jury's deliberations,
11 discussions and votes should remain their private
12 affair as long as they wish it. Therefore, the law
13 gives you a unique privilege not to speak about the
14 jury's work.

15 Although you are at liberty to speak with
16 anyone about your deliberations after I discharge
17 you, which I'm going to do momentarily, you are
18 also at liberty to refuse to speak to anyone. A
19 request to discuss either your verdict or your
20 deliberations may come from those who are simply
21 curious, from those who might seek to find fault
22 with you, from the media, from the attorneys or
23 elsewhere. It will be up to you to decide whether
24 to preserve your privacy as a juror.

25 MR. ROSARIO: Pardon me, Judge, may Defense

1 Counsel and I approach?

2 THE COURT: Now, I wasn't done.

3 MR. ROSARIO: Okay.

4 THE COURT: Yes. I think I said I'm about to
5 discharge you. Does anybody want to have the jury
6 polled in regard to the foreman's statement?

7 MR. ROSARIO: No, sir.

8 THE COURT: You don't. Mr. Foote?

9 MR. FOOTE: Yes, Judge.

10 THE COURT: Yes?

11 MR. ROSARIO: Judge, may we approach?

12 THE COURT: All right. I'm going to share
13 this with everybody, this doesn't come up that
14 often, we're sort of feeling our way. I'm making
15 sure we're following the appropriate procedure.

16 BENCH CONFERENCE:

17 MR. ROSARIO: I want to make sure that they
18 said that they're deadlocked. We need to make
19 absolutely clear that even if we offered them any
20 more help, they wouldn't be able to.

21 THE COURT: I'm sorry?

22 MR. ROSARIO: And I do not think we're allowed
23 to poll them even after they're deadlocked.

24 MR. FOOTE: I think he may be correct.

25 THE COURT: What I'm about to say, is there

1 anybody who disagrees that you are deadlocked? I
2 don't even have to do that. Do you have a problem
3 with that?

4 MR. ROSARIO: As long as you leave them one
5 last out essentially.

6 THE COURT: Yes. Okay.

7 MR. FOOTE: Okay. Before we get back out
8 there, so the polling --

9 THE COURT: I'm going to say, is there
10 anything more we can do to help you before I
11 discharge you?

12 MR. FOOTE: I understand that part.

13 THE COURT: And then I'm going to negate that
14 and I'm going to say, is there anybody who does not
15 feel that the jury is deadlocked?

16 MR. FOOTE: Right. That's what you mean by
17 polling?

18 THE COURT: Yes. It's kind of semi, it gets
19 me to the same thing.

20 OPEN COURT.

21 THE COURT: As I said, ladies and gentlemen,
22 we are trying to observe the correct procedure
23 here.

24 I do want to ask, is there anything further
25 we, and by we I mean Counsel and the court

1 personnel can do that might help you do otherwise
2 than reach a deadlock? Raise your hand if you
3 think so. Mr. King?

4 JUROR KING: No.

5 THE COURT: Okay. And then the other question
6 I would like to ask, since there are six of you,
7 Mr. King has been acting as your spokesman, is
8 there anybody else who will dispute that you're at
9 a deadlock? Raise your hand if you wish to speak
10 up.

11 JURY PANEL: (Indicating negatively.)

12 THE COURT: Okay. Well, based upon that, the
13 Court finds the jury is, in fact, deadlocked
14 despite conscientious efforts. As a result, I
15 believe there is a manifest necessity for the Court
16 to declare a mistrial, and I do so declare. I
17 discharge your duty with thanks.

18 And I'm going to set a pretrial for this case,
19 but I don't have the calendar for that.

20 You are dismissed, ladies and gentlemen, with
21 my thanks. I said discharged, dismissed. Thank
22 you very much. You can take the rest of the night
23 off.

24 All right. I need a pretrial date. Actually,
25 do we need a trial or should I just set it on

1 another trial date?

2 MR. ROSARIO: I'd ask for another trial date
3 within 60 days, Judge?

4 THE COURT: Okay. August 18th.

5 And I think that brings us to the end of the
6 jury. Is there any other business to come before
7 the Court?

8 MR. FOOTE: Judge, we would ask, with the
9 other matters that I already have previously
10 engaged during that week, if we can set it at least
11 the first week of September?

12 MR. ROSARIO: I think they have to waive
13 speedy trial to get to that date, Judge.

14 THE COURT: Is speedy trial waived?

15 MR. FOOTE: Judge, I think we're within
16 speedy. It's only 60 days. September would be
17 well within that.

18 THE COURT: Sixty from now brings it out in
19 August. You want to go easy? It's a little late
20 and stuff. I'll set a pretrial/status conference
21 for July 1st at 9:00 o'clock.

22 MR. FOOTE: That will be fine.

23 THE COURT: I don't have my full calendar
24 here. If it turns out that that's an unfeasible
25 date, you'll hear from my J.A. about it tomorrow.

1 MR. FOOTE: You're setting it just for
2 pretrial?

3 THE COURT: Pretrial/status check. That will
4 be an opportunity to do further scheduling to see
5 if there's anything else we can talk about.

6 Is there anything else to come before the
7 Court?

8 MR. FOOTE: No, Judge.

9 THE COURT: We are adjourned.

10 (HEARING CONCLUDED.)

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1 STATE OF FLORIDA)

2 COUNTY OF PASCO)

3

4 I, Maria A. Fortner, Registered Professional
5 Reporter, certify that I was authorized to and did
6 stenographically report the foregoing proceedings, pages
1 through 1085, and that the transcript is a true and
complete record of my stenographic notes.

7

8 I FURTHER CERTIFY that I am not a relative,
9 employee, attorney or counsel of any of the parties, nor
am I a relative or employee of any of the parties'
10 attorney or counsel connected with the action, nor am I
financially interested in this action.

11

12 Dated this 15th day of January, 2012.

13

14

15

16 MARIA A. FORTNER, RPR

Notary Public State of Florida

17 My Commission Expires 04-27-2015

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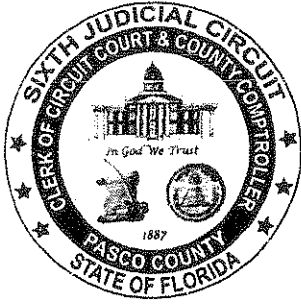
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Office of Paula S. O'Neil
Clerk & Comptroller
Pasco County, Florida

STATE OF FLORIDA }
{
COUNTY OF PASCO }

I, Paula S. O'Neil, Clerk & Comptroller of Circuit Court for the County of Pasco, State of Florida, do hereby certify that the foregoing pages 328-1444 & 1-1085 & 1-1735, inclusive, contain a correct Supplemental Transcript of the Record in the case of State Of Florida, Plaintiff(s) vs. Shannon Stephen, Defendant(s), being Case Number(s) 06-1591, Circuit Criminal, and a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and files of my office that have been directed to be included in the record by the directions furnished to me.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 4 day of February, 2013.

By: Brenda Mabel
Deputy Clerk

