

1 THE COURT: Anything further, Mr. Burdette?

2 MR. BURDETTE: Nothing from this witness,  
3 Your Honor.

4 THE COURT: May he be excused?

5 MR. BURDETTE: No objection.

6 MR. RUSHING: No objection.

7 THE COURT: Thank you, sir. You may step  
8 down and be excused.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Call your next witness.

11 MR. BURDETTE: State calls Officer Anna  
12 Laura.

13 THE BAILIFF: This witness has not been  
14 sworn.

15 (Witness sworn.)

16 THE COURT: Have a seat, please.

17 You may proceed.

18 MR. BURDETTE: Thank you, Judge.

19 **OFFICER ANNA LAURA,**

20 having been called as a witness and being first duly  
21 sworn, testified as follows:

22 **DIRECT EXAMINATION**

23 **BY MR. BURDETTE:**

24 Q. Good afternoon, Officer Laura.

25 A. Good afternoon.

1 Q. How are you doing?

2 A. Pretty good.

3 Q. Good. Thanks for being here.

4 Do me a favor and introduce yourself to the  
5 members of the jury.

6 A. I'm Officer Anna Laura, and I work in the  
7 Robbery Division.

8 Q. Are you a certified peace officer by the State  
9 of Texas?

10 A. Yes.

11 Q. How long have you been employed with the  
12 Houston Police Department?

13 A. Twelve years.

14 Q. Tell us a little bit about the jobs that you've  
15 had within the police department since graduating from  
16 the academy.

17 A. I was on patrol for seven years on the east  
18 side. After that, I went to Juvenile Sex Crimes, and I  
19 was there for a little bit over two years, and then I  
20 transferred to Robbery.

21 Q. Tell us a little bit about your day-to-day  
22 duties and responsibilities in the Robbery Division.

23 A. Robbery Division, as investigators we'll  
24 receive cases. We go out and speak to complainants,  
25 witnesses. We'll try to get evidence, video, pictures,

1 whatever can help with the case.

2 Q. So, are cases assigned to you?

3 A. Yes.

4 Q. Who assigns them?

5 A. Case management.

6 Q. Is that just a random assignment?

7 A. Yes.

8 Q. When you get a case assigned to you, what do  
9 you do?

10 A. We'll get it assigned to us. The first thing  
11 that we do is we'll make contact with the complainants,  
12 gather all the information that we need. If we have to  
13 go out to a scene, we'll go out there. We'll talk to  
14 the primary officer that responded to the scene so that  
15 he can -- he or she can debrief us on what happened.  
16 We'll talk to the complainants and witnesses, and if  
17 they need to go to the hospital for anything, we'll send  
18 them on their way.

19 Q. From time to time, are you asked to come out to  
20 an active scene?

21 A. Yes.

22 Q. Okay. In what situations?

23 A. A situation where there's injury. The monetary  
24 value of -- like for instance, in robberies, if it's  
25 over \$10,000, we'll go out to the scene. If it's

1 serious bodily injury or instances where the -- like,  
2 sexual assault, for example, we'll go out to the scene.

3 Q. Okay. But in other instances, say maybe  
4 somebody gets robbed, the suspect gets away and it's  
5 just a purse-snatching or something, you may not  
6 necessarily go out to that scene?

7 A. Right.

8 Q. In that case, a patrol officer would make a  
9 report and it would come across your desk and you would  
10 then conduct your investigation; is that right?

11 A. Yes, sir.

12 Q. In this particular case, however, you did make  
13 a scene visit; is that right?

14 A. Yes.

15 Q. That was normal based on the type of call or  
16 information you received; is that right?

17 A. Yes, sir.

18 Q. So I want to talk about what you did  
19 specifically in this case. Okay?

20 A. Okay.

21 Q. On April 1st, 2012, how did you become involved  
22 in this case?

23 A. I was -- it was a Sunday. Usually on Sundays,  
24 it's a minimal staffing. So it's -- we go by a list of  
25 who gets a case and we just go in the order. So that

1 particular morning, I was up for a call-out scene or a  
2 case, and I proceeded from there.

3 Q. All right. Where did you go to?

4 A. To Broadway Street.

5 Q. Specifically the 8400-block of Broadway?

6 A. Yes.

7 Q. In Harris County, Texas, right?

8 A. Yes, sir.

9 Q. Tell us what you did once you got there.

10 A. We first got to the scene, walked through with  
11 the officers, the primary officer told us everything  
12 that happened, took some notes down, talked to my first  
13 complainant and obtained her statement because she  
14 needed -- I talked to her first because she needed to go  
15 to the hospital. And then after talking to her, I spoke  
16 with her husband and talked to the Crime Scene Unit and  
17 looked at all the evidence that was picked up and went  
18 to the jail after that.

19 Q. Okay. Let's talk a little bit about those  
20 pieces in particular. When you arrived on scene, you  
21 met with the patrol officers?

22 A. Yes.

23 Q. And they told you what they had observed?

24 A. Yes.

25 Q. Is that customary?

1 A. Yes.

2 Q. Is that something you want to know to help your  
3 investigation?

4 A. Yes.

5 Q. At some point, were you directed towards the  
6 complainant?

7 A. Yes.

8 Q. Did you make contact with her?

9 A. Yes, I did.

10 Q. Describe her physical and emotional condition  
11 at that time.

12 A. She was very emotional. She had been crying.  
13 She was afraid. She was traumatized. Her hands were  
14 shaking.

15 Q. Was she cooperative with you?

16 A. Yes, she was cooperative.

17 Q. Did she give you a statement?

18 A. Yes, she did.

19 Q. Okay. Did you record that statement?

20 A. Yes.

21 Q. And provide a copy of that --

22 A. Yes.

23 Q. -- to our office for this investigation?

24 A. Yes, sir.

25 Q. Did you meet with the complainant -- well, the

1 complainant you met with, is that Andreanne Hernandez?

2 A. Yes, that's her.

3 MR. BURDETTE: Judge, may I approach the  
4 exhibits?

5 THE COURT: You may.

6 Q. (By Mr. Burdette) Is this Ms. Hernandez  
7 (indicating)?

8 A. Yes, that's her.

9 Q. Okay. Now, we can't get into what she told  
10 you, but did you listen to the 911 call that she made  
11 that day?

12 A. Yes, I did.

13 Q. Now, you listened to it after the fact, right?

14 A. Yes.

15 Q. Okay. Not that day?

16 A. No.

17 Q. Did you hear the excitement in her voice during  
18 the 911 call?

19 A. Yes.

20 Q. Okay. Was her emotional condition similar to  
21 that when you interviewed her?

22 A. Yes, it was.

23 Q. Okay. In what sense?

24 A. Her voice. Like I said, she was very  
25 emotional. She had been crying. She was still very

1 afraid.

2 Q. Did you meet with her husband, Armando Trevino?

3 A. Yes, I did.

4 Q. Did you determine that that was their  
5 residence?

6 A. Yes.

7 Q. Describe his demeanor and physical condition.

8 A. He was very upset. He was very scared for his  
9 kids because of what had just happened, and he was very  
10 worried about his wife.

11 Q. Did you take a statement from him?

12 A. Yes, I did.

13 Q. Okay. Was that recorded as well?

14 A. Yes, sir.

15 Q. Did you find him to be cooperative as well?

16 A. Yes.

17 Q. Did you find that Ms. Hernandez's statement was  
18 consistent with what you heard on the 911 call?

19 A. Yes.

20 Q. Did you find that Mr. Trevino's statement was  
21 consistent with what you heard on the 911 call?

22 A. Yes.

23 Q. After taking statements from the complainants,  
24 what did you do?

25 A. We went to the -- we drove to the jail because



1 they transported the defendant, and we drove up there to  
2 obtain his statement.

3 Q. Okay. Before we get there, let me go back a  
4 little bit and ask you a few more questions about the  
5 scene.

6 Being a robbery investigator and having  
7 this scene, did you ensure that a Crime Scene Unit  
8 responded?

9 A. Yes.

10 Q. Why?

11 A. To gather all the evidence.

12 Q. Like, did you make sure that photographs were  
13 taken?

14 A. Yes.

15 Q. And swabs that could potentially be useful were  
16 taken?

17 A. Yes.

18 Q. Did you ensure that the complainant was  
19 transported to the hospital?

20 A. Yes.

21 Q. For what type of exam?

22 A. A sexual assault exam.

23 Q. Okay. Why is that important?

24 A. To obtain the evidence that -- if there's any.

25 Q. Is that an important process --

1 A. Yes.

2 Q. -- to ensure that the complainant is seen by a  
3 medical professional?

4 A. Yes.

5 Q. Okay. Was that done in this case?

6 A. Yes.

7 Q. Was Ms. Hernandez cooperative and willing to  
8 go?

9 A. Yes, she was.

10 Q. Anything else done out there at the scene?

11 A. Not that -- everything that I said.

12 Q. Okay. Now, at some point when the scene  
13 investigation is complete, you have a suspect in  
14 custody; is that right?

15 A. Yes.

16 Q. Who transported the suspect downtown to the  
17 jail?

18 A. A patrol officer that was on the scene.

19 Q. So you did not transport him?

20 A. No.

21 Q. Did you go downtown to the jail to meet with  
22 the suspect?

23 A. Yes.

24 Q. And did you, in fact, meet with him?

25 A. Yes.

1 Q. Do you see the suspect in the courtroom today?

2 A. Yes.

3 Q. Could you point to him and identify him by an  
4 article of clothing?

5 A. He's sitting right there wearing a blue shirt  
6 (indicating).

7 MR. BURDETTE: Judge, may the record  
8 reflect the witness has identified the defendant, Khalon  
9 Jovon Westbrooks?

10 THE COURT: The record will so reflect.

11 Q. (By Mr. Burdette) Did you request a Crime Scene  
12 Unit officer to come down to the jail to photograph the  
13 defendant as well?

14 A. Yes.

15 Q. Did you also have him swab the defendant?

16 A. Yes.

17 Q. Were those items of evidence submitted to the  
18 lab for testing?

19 A. Yes, they were.

20 Q. After all the evidence was collected, were some  
21 of the items of evidence submitted to the lab for  
22 testing?

23 A. No.

24 Q. Were there any items that were submitted for  
25 testing?

1 A. Yes.

2 Q. Which items were those?

3 A. The penile swab.

4 Q. And the buccal swabs?

5 A. Yes.

6 Q. Were any of the knives submitted for testing?

7 A. No.

8 Q. Okay. Or any of the other swabs that Officer  
9 Taravella took submitted for testing?

10 A. No.

11 Q. In order for the crime lab to conduct that sort  
12 of testing, do they have to receive a request?

13 A. Yes.

14 Q. Who is it that can make those requests?

15 A. Myself, the State, or the defense.

16 Q. Were any additional requests made to test any  
17 of the evidence in this case?

18 A. No.

19 MR. BURDETTE: I'll pass the witness.

20 THE COURT: Mr. Rushing?

21 MR. RUSHING: Thank you, Judge.

22 **CROSS-EXAMINATION**

23 **BY MR. RUSHING:**

24 Q. You interviewed Mr. Westbrook, didn't you?

25 A. Yes, sir.

1 Q. Where did that interview take place?

2 A. At 61 Riesner in our interview room.

3 Q. Was there a device there capable of making  
4 recordings?

5 A. Yes, sir.

6 Q. Was it working properly that day?

7 A. Yes, sir.

8 Q. And was a recording of that interview made?

9 A. Yes, sir.

10 Q. And was that turned over to the D.A.'s office?

11 A. Yes, sir.

12 Q. Can you describe for me what you observed  
13 Mr. Westbrook's demeanor to be at that point in time?

14 A. In the interview room?

15 Q. Uh-huh.

16 A. He was nonchalant, talking. He was  
17 cooperative.

18 Q. How long did you say you've been an officer  
19 for?

20 A. Twelve years.

21 Q. Do you have any specific DRE training?

22 A. No, I don't.

23 Q. Have you ever had the opportunity to encounter  
24 individuals that are on drugs?

25 A. Yes.

1 Q. And have you ever observed those individuals to  
2 have memory lapses due to those drugs?

3 A. Can you repeat the question?

4 Q. Have you ever observed any, in your years of  
5 being an officer, individuals have memory lapses due to  
6 drugs or narcotics?

7 A. Yes.

8 Q. And have you ever observed people not be aware  
9 of their physical actions due to drugs or narcotics?

10 A. Not be aware? I mean, they're aware, but...

11 Q. So you never have observed in -- you said  
12 12 years?

13 A. Yes.

14 Q. You've never observed anybody in 12 years,  
15 because of narcotics, not know what they're doing?

16 A. No.

17 Q. Okay.

18 MR. RUSHING: May we approach, Your Honor?

19 THE COURT: Sure.

20 (At the Bench, on the record.)

21 MR. RUSHING: Judge, at this point, I was  
22 going to seek to bring in the video of Mr. Westbrook.  
23 I believe that Officer Taravella has opened that door by  
24 saying that he was denying that he did these things.  
25 The video will show quite the contrary, that at that

1 point, he didn't remember doing these things.

2 THE COURT: This is the last witness of the  
3 day?

4 MR. BURDETTE: That's right.

5 THE COURT: I'll excuse the jury for the  
6 day, and we'll take it up outside the presence of the  
7 jury.

8 MR. RUSHING: Okay.

9 MR. BURDETTE: Do you want to do more  
10 questioning?

11 MR. RUSHING: Do you want me to finish?

12 THE COURT: Yes.

13 MR. RUSHING: Okay.

14 (Open court, defendant and jury present.)

15 Q. (By Mr. Rushing) Let's talk for a few minutes  
16 about the interview that you did with Mr. Westbrook.  
17 Who was in the room with you?

18 A. Lieutenant Guzman.

19 Q. And he did most of the questioning, didn't he?

20 A. Yes.

21 Q. Who was the lead investigator in this, you or  
22 him?

23 A. Both of us were.

24 Q. Do you know where he is today?

25 A. He's in the Robbery Division, evening shift.

1 Q. Well, I mean right now. Do you know?

2 A. No, I don't.

3 Q. Did Mr. Westbrooks discuss the facts of the  
4 aggravated sexual assault and burglary with you?

5 A. No.

6 Q. Did -- you said he was cooperative with you.

7 A. What I meant by that was he was talking to us.  
8 He waived his rights to talk about what happened.

9 Q. So he talked about what happened, but he didn't  
10 discuss the burglary with you?

11 A. Yes. He didn't remember anything.

12 Q. Did he, in fact, ask you --

13 MR. BURDETTE: I object to this question as  
14 it calls for hearsay.

15 THE COURT: Can I hear the rest of the  
16 question?

17 MR. RUSHING: Kind of my train of thought  
18 was thrown off. Sorry.

19 Q. (By Mr. Rushing) Based -- without specifics of  
20 what he said, based on what your interaction was with  
21 Mr. Westbrooks, was he even aware of what he was being  
22 charged with at that point in time?

23 MR. BURDETTE: I object. That calls for  
24 speculation.

25 THE COURT: She can answer if she knows.



1           A.    If he was aware of what he was being charged  
2 with?  No, he wasn't aware.  Or he said he wasn't.  He  
3 didn't know.

4           Q.    (By Mr. Rushing) Without getting into specifics  
5 of what was said, was there a discussion of injuries  
6 sustained by Mr. Westbrook on his face and hand?

7           A.    Can I refer back to my report?  Because I do  
8 not remember.

9           Q.    Do you have it with you or do you need --

10          A.    Well, I have mine over there.

11                   MR. RUSHING:  May I approach the witness,  
12 Judge?

13                   THE COURT:  Sure.

14          A.    What was your question again?

15          Q.    (By Mr. Rushing) Based on what you remember,  
16 without getting into the specifics of what was said, was  
17 there some confusion that you observed on the part of  
18 Mr. Westbrook on how he sustained injuries, whether it  
19 be to his hand, to his face, or to his thigh?

20          A.    The thigh, he said he had gotten shot, but he  
21 didn't know when.

22          Q.    Does it seem, based on your experience -- you  
23 said that you had dealt with people that were  
24 intoxicated before.  Does it seem normal to you for  
25 somebody to not remember being shot?

1           A.    I don't know.  I don't understand that  
2 question.

3           Q.    Well, based on your experience, does it seem  
4 normal -- in all your interactions with various people,  
5 does it seem normal for someone not to remember being  
6 shot?

7           A.    No.

8           Q.    Did Mr. Westbrooks appear to be intoxicated or  
9 under the influence of a narcotic to you during your  
10 investigation?

11          A.    During our interview, he didn't seem like he  
12 was intoxicated.

13                   MR. RUSHING:  I'll pass the witness, Judge.

14                   MR. BURDETTE:  I do have redirect, Your  
15 Honor.

16                                   **REDIRECT EXAMINATION**

17 **BY MR. BURDETTE:**

18          Q.    Officer Laura, you've probably met with several  
19 suspects over the years; is that correct?

20          A.    Yes.

21          Q.    Is every person who is suspected of a crime  
22 forthcoming with you?

23          A.    No.

24          Q.    In other words, do -- does everybody just  
25 confess to the crime that they committed to you?

1 A. No, they don't.

2 Q. Do people often fake not remembering what  
3 happened?

4 A. Yes.

5 Q. You've seen that happen?

6 A. Yes.

7 Q. Do people often lie to you about what happened?

8 A. Yes, a lot.

9 Q. Did you smell any alcohol on the defendant?

10 A. No, I didn't.

11 Q. Did you have any reason to believe he was under  
12 the influence of narcotics or a substance when you were  
13 interviewing him?

14 A. No.

15 Q. If somebody is, in fact, under the influence of  
16 a substance like that, isn't it a policy of the Houston  
17 Police Department to wait until they're no longer under  
18 the influence of that to take a statement from them?

19 A. Yes.

20 Q. And why is that?

21 A. Because they're not coherent.

22 Q. And do you need somebody to be coherent in  
23 order for you to get a statement from them?

24 A. Yes.

25 Q. Did you observe Mr. Westbrook to be coherent

1 at that time?

2 A. Yes, he was.

3 Q. Although he did tell you he didn't know what  
4 happened?

5 A. Right.

6 MR. BURDETTE: No further questions.

7 THE COURT: Mr. Rushing?

8 MR. RUSHING: Judge, I will pass the  
9 witness.

10 THE COURT: Okay. And is this witness  
11 excused at this time?

12 MR. BURDETTE: I have no objection at this  
13 time.

14 MR. RUSHING: Judge, I may want to recall  
15 her tomorrow.

16 THE COURT: Okay. Ma'am, you are excused  
17 at this time, but if you would not mind just waiting  
18 outside. We'll talk to you about scheduling issues for  
19 tomorrow.

20 THE WITNESS: Okay.

21 THE COURT: And that's it for today?

22 MR. BURDETTE: Yes. No further witnesses  
23 for today.

24 THE COURT: Okay. So, ladies and  
25 gentlemen, there's been some scheduling issues with the

1 remainder of the witnesses. They cannot be here this  
2 afternoon, and so I'm going to release you early. So I  
3 guess the good news is, your wife may not have to wait  
4 for you, and the other good news is you won't probably  
5 get stuck in rush-hour traffic. The bad news is we do  
6 need you back here again tomorrow at 10:00 o'clock.

7                   So please keep in mind my earlier  
8 instructions about not discussing the case, not doing  
9 any independent research. Be sure and wear your juror  
10 badges again tomorrow when you return, and if you will  
11 return again to the jury room. And weather permitting,  
12 we'll take you out for lunch. If it's raining again  
13 tomorrow, which I think it's supposed to be, we'll  
14 probably order in again.

15                   All right. So have a good evening and a  
16 good afternoon.

17                   Yes, sir?

18                   ALTERNATE JUROR: Thank you for lunch.

19                   THE COURT: You're welcome.

20                   (Open court, defendant present, no jury.)

21                   THE COURT: Okay. Thank you. Be seated.

22                   So just as far as scheduling, did you want  
23 to tell the witness what time you want her back or -- if  
24 you think you might recall her or you want to put on  
25 something now, it's --

1                   MR. RUSHING: The only thing I'd recall her  
2 for is to lay a predicate, but if you'll stipulate in  
3 the event, then we can release her.

4                   MR. BURDETTE: I don't have any problem  
5 with that as far as its authentication in the event that  
6 the Court finds that there is substance on the tape that  
7 becomes admissible. I'll certainly stipulate it's an  
8 accurate copy that we have and we can play it. If  
9 you're going to need to cross her on a statement that  
10 was made, that's different, whether or not you need her.

11                  THE COURT: Does she work downtown? Is  
12 Robbery downtown, or is she out at one of the  
13 substations?

14                  MR. BURDETTE: I'm pretty sure she's  
15 downtown.

16                  THE COURT: She can just be on-call if  
17 she's on Travis.

18                  MR. RUSHING: I'm okay with that. That  
19 will be fine.

20                  THE COURT: You've got a couple of other  
21 witnesses you're going to put on, and we could get her  
22 down her during a lunch break.

23                  MR. RUSHING: That will be fine.

24                  MR. BURDETTE: I should able to get  
25 everyone else on before lunchtime.

1                   THE COURT:   Okay.   All right.   So, we want  
2 to talk about the admissibility of the statement, and  
3 any other issues, we can take up this afternoon.   We've  
4 got a proposed charge, I believe.   We can start talking  
5 about that and try to get any kind of housekeeping stuff  
6 taken care of.

7                   All right.   So, outside the presence of the  
8 jury, the defense had indicated their intent to offer  
9 the defendant's statement that has been referred to but  
10 not admitted.   So it's the State's position that it's  
11 hearsay.   And your position is, it's admissible to  
12 show -- as part of his defense to show demeanor and  
13 possible intoxication, which, to me, seems a little bit  
14 of problem since the witness said he didn't appear to be  
15 intoxicated.   But I guess we can -- if you want to look  
16 at it and -- I don't know what to do with that.

17                  MR. RUSHING:   Right.   Judge, to me, that  
18 would make it all the more admissible, because if the  
19 witness has directly contradicted what I see in the  
20 video, that should be a question for the jury to go  
21 directly to the credibility of the witness.

22                  MR. BURDETTE:   Well, what evidence is there  
23 that he's intoxicated on the video?

24                  MR. RUSHING:   The fact that he is out of it  
25 at the beginning, especially.

1                   THE COURT:   Why don't we play it and see  
2 what I think?

3                   MR. BURDETTE:   Okay.

4                   (Defendant's video statement played.)

5                   THE COURT:   Okay.   So, Mr. Rushing, I've  
6 now viewed the videotape which, according to the  
7 officers at the end of the tape, happened the next  
8 morning around 10:00 a.m.   And so, why don't you let me  
9 know why you think it is that this obviously a statement  
10 containing all hearsay would be admissible.

11                   MR. RUSHING:   Judge, several reasons.   I'm  
12 seeking to have it admitted not for the truth of the  
13 statements, but rather Mr. Westbrooks' demeanor in this  
14 video.   Our chief defense is involuntary intoxication  
15 and there's a progression through the video of him  
16 becoming more and more alert and more cognizant as he's  
17 talking to these officers.   At the beginning he's down  
18 on a desk, and by the end he's sitting up.   And it looks  
19 like, as the video was cutting off, he's reaching over  
20 for something on the wall.

21                   Secondly, it would go directly to testimony  
22 of Officer Laura that -- I asked her very pointedly in  
23 cross-examination if there was discussion about any of  
24 the injuries sustained by Mr. Westbrooks.   Specifically,  
25 I mentioned her -- his thigh, his hand, and his face.



1 She responded in testimony that his thigh was addressed,  
2 but she didn't specifically mention either of the other  
3 two, which at the end very clearly it shows that his  
4 hand injury was addressed, which goes directly to  
5 Laura's credibility.

6           So, Judge, it would be primarily for the  
7 demeanor of Mr. Westbrooks, to show the intoxication,  
8 but also for the impeachment of Officer Laura.

9           THE COURT: Response?

10           MR. BURDETTE: Yes, Judge. Demeanor does  
11 not require admissibility of anything that is said on  
12 the videotape. So if he's seeking to have it admitted  
13 for purposes of showing the defendant's demeanor, all  
14 audio track from that tape should be redacted. And if  
15 he wants to play a 23-minute silent video to show his  
16 demeanor, well, we can take that up, if that's what he  
17 seeks to do. But demeanor is not made apparent by  
18 listening -- or seeing what's on the tape and listening  
19 to what he has to say.

20           In addition, if he's seeking its  
21 admissibility based on impeachment value, first of all,  
22 Officer Laura needs to be given the opportunity to view  
23 the statement to determine whether or not there was that  
24 discussion. And then if she says, no, there was no  
25 discussion of injuries sustained to his hand after

1 viewing it, at that time Mr. Rushing can impeach her  
2 with the -- by the playing of the tape to show the  
3 discussion of the injuries to the hand.

4 I do not share his view of not only the  
5 demeanor, but of what was said on the tape. The fact  
6 that the defendant's head is down when the statement  
7 first begins is indicative of the fact that he was up  
8 all night and could be tired or just resting, but  
9 otherwise, he appeared to be coherent and articulate.  
10 He remembered names, phone numbers. He wasn't  
11 stumbling, he wasn't swaying. There was a noticeable  
12 kind of drawl throughout, but that seems indicative of  
13 how he speaks rather than any type of intoxication.

14 Additionally, he seemed to have selective  
15 memory insofar as he remembered things before and after  
16 the crime, and I do not think selective memory is  
17 indicative of intoxication.

18 THE COURT: Okay. Well, let me ask you  
19 this question, because the defense is -- you know, it's  
20 been clear in voir dire and in opening statement that  
21 their defense is involuntary intoxication. So certainly  
22 someone's demeanor, someone's manner of speaking and  
23 whether or not someone remembers certain portions of  
24 what happened in the recent past would be indicative of  
25 either voluntary intoxication or involuntary



1 to put this charge in about extraneous offenses, unless  
2 there something that I don't know about.

3 MR. RUSHING: I think tomorrow we may try  
4 some of --

5 MR. BURDETTE: Well, the extraneous  
6 offenses come in as his possession of someone else's  
7 prescription.

8 THE COURT: Well, anyway, it's an  
9 independent page. We can take it out if we decide to.

10 You guys can look at it more closely  
11 overnight, if you want, but if there was something  
12 obvious that we needed to work on, we could get started  
13 on it.

14 MR. BURDETTE: I believe on the burglary,  
15 there needs to be a second instruction regarding  
16 commission of the offense with a deadly weapon.

17 THE COURT: So, I think that's actually a  
18 punishment issue, but you can check what the current  
19 state of the law is with the appellate section, but I  
20 know it's given as a special issue to juries when it's  
21 not in the indictment, but I thought that was when they  
22 were doing punishment.

23 MR. BURDETTE: Okay. I'll double-check.

24 THE COURT: Yeah, just double-check on  
25 that.

1                   MR. BURDETTE:  And I know I read a case  
2 several weeks ago regarding involuntary intoxication and  
3 the instructions that were given to a jury.  I don't  
4 recall exactly what it says, so I'll review it tonight,  
5 but it has to do specifically with the language  
6 regarding "if you have a reasonable doubt thereof,"  
7 because as I understand it, involuntary intoxication is  
8 an affirmative defense that must be proven by the  
9 defense by a preponderance of the evidence.  And I know  
10 that's what that case stated, that the defense has the  
11 burden of proof and it's by a preponderance of the  
12 evidence as an affirmative defense, but there was a  
13 discussion about whether or not it was error to include  
14 in the instructions, or you have a reasonable doubt  
15 thereof.

16                   So, I'll go back and find that case and  
17 also check with appellate to see what their take on it  
18 is.

19                   THE COURT:  Okay.

20                   MR. BURDETTE:  According to Penal Code  
21 Section 2.04, which is for affirmative defenses, the  
22 prosecuting attorney is not required to negate the  
23 existence of an affirmative defense.  The issue of the  
24 existence of an affirmative defense is not submitted to  
25 the jury unless there is evidence admitted supporting

1 the defense and the issue of the existence of an  
2 affirmative defense is submitted to the jury. The Court  
3 shall charge that the defendant must prove the  
4 affirmative defense by a preponderance of evidence.

5 THE COURT: Well, how is it any different  
6 than self-defense? Isn't self-defense an affirmative  
7 defense?

8 MR. BURDETTE: Right.

9 THE COURT: We don't charge that. We don't  
10 tell the jury that, that they have to prove it by a  
11 preponderance because that actually would be a  
12 misstatement of the law in self-defense. It is the  
13 State's burden of persuasion to disprove it. Now, this  
14 is different, obviously. This is probably more closely  
15 akin to insanity, but see what you can find out in the  
16 case law. And if you would do the same, Mr. Rushing.  
17 Any assistance you can give on the Court's charge --

18 MR. RUSHING: Yes, Judge.

19 THE COURT: -- it would be helpful.

20 So, I do think it's their burden to raise  
21 it by a preponderance, but I just don't know about this  
22 language in the indictment saying whether they have a  
23 reasonable doubt.

24 MR. BURDETTE: I have an unpublished  
25 case -- you can take a look at it -- that you actually

1 opined on back in 2001. It states that -- under Section  
2 2.04 of the Penal Code it states that if an affirmative  
3 defense is submitted to the jury, the Court shall charge  
4 that the defendant must prove the affirmative defense by  
5 a preponderance of the evidence. Involuntary  
6 intoxication is an affirmative defense, and it cites  
7 Hardy v. State.

8                   And so it says, "Thus, the trial court  
9 erred by charging the jury that it may acquit if it had  
10 only a reasonable doubt that the appellant's mental or  
11 physical capacity was sufficiently disturbed as a result  
12 of involuntary intoxication." Again, it's unpublished.

13                   MR. RUSHING: What court was that out of?

14                   THE COURT: The Fourteenth. I don't  
15 understand how it could be error. It seems like it's  
16 raising the State's burden, not lowering it. So, how  
17 would it be error to charge them on reasonable doubt if  
18 the standard is on the defense by a preponderance? I  
19 know I said it, but I don't remember. Anyway...

20                   MR. BURDETTE: I'll go copy it.

21                   (Pause.)

22                   THE COURT: Well, maybe I need to read that  
23 case, but may be what that is saying is that because the  
24 terminology here is that you have a reasonable doubt  
25 thereof, that's not necessarily saying that the State

1 has the burden of disproving it by -- maybe what that's  
2 saying in there is that it's raising your burden to  
3 reasonable doubt instead of a preponderance.

4           So, is it saying that by that terminology  
5 in there, that you have a reasonable doubt thereof,  
6 that we were raising the defense's -- it's raising the  
7 defense's burden to beyond a reasonable doubt? Because  
8 otherwise it wouldn't make any sense. The way this  
9 charge reads, although there's boilerplate language in  
10 other places that say the burden is always on you by a  
11 all reasonable doubt, that sort of indicates to me that  
12 they're saying: Or you have a reasonable doubt thereof  
13 is raising the defense's burden, that they only have to  
14 prove it by a preponderance, not beyond a reasonable  
15 doubt.

16           MR. BURDETTE: To me it sounds like it is  
17 shifting the burden of persuasion on the affirmative  
18 defense to the State.

19           THE COURT: Why? Because it uses the term  
20 "reasonable doubt"? But that's not what it says.

21           MR. BURDETTE: Where it says "if you have a  
22 reasonable doubt thereof, you will find the defendant  
23 not guilty." And so, it sounds like it's putting the  
24 burden of persuasion upon me.

25           THE COURT: All right. So, I guess we just



1 need to look at this closer and work on that reasonable  
2 doubt language in there.

3 MR. BURDETTE: And I'll double-check with  
4 appellate because this was my own research.

5 THE COURT: Yeah, because it may be better  
6 to track the language that -- whatever they use when  
7 insanity is raised or something. That may be more  
8 correct than this. I don't know. I'll take a closer  
9 look at this incredibly brief case.

10 Okay. So, that gets me to another issue  
11 that we need to take up before we recess for the day.  
12 And that's the matter of your prescription. Where is  
13 it?

14 MR. RUSHING: Stand up.

15 THE DEFENDANT: It was in Missouri City at  
16 my mother's house.

17 THE COURT: I gave you since Friday  
18 afternoon to get it.

19 THE DEFENDANT: Yes, ma'am. My mother  
20 wasn't there. And I had everybody -- everybody went to  
21 work today and everybody gets off about 4:00 or  
22 5:00 o'clock. I do have it. I do have it. It's at my  
23 mother's house in Missouri City. And none of us that  
24 came today had a car. We all got dropped off up here by  
25 my little brother's girlfriend, by her dad.

1                   THE COURT:   Okay.  You know what,  
2 Mr. Westbrooks?  Most judges would have taken you into  
3 custody on Friday when they found out you had a positive  
4 UA.

5                   THE DEFENDANT:  Yes, ma'am.

6                   THE COURT:  And you haven't provided  
7 anybody, including the probation department who's  
8 supervising you, with a prescription.  I gave you until  
9 today.  You still don't have it.  That was Friday night,  
10 Saturday night, Sunday night, and this morning.  You're  
11 going into custody.  Maybe they'll bring it to you  
12 tomorrow and I'll let you out, but not right now.

13                   Go with the bailiff.

14                   (Proceedings recessed.)

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3 **REPORTER'S CERTIFICATE**4  
5 THE STATE OF TEXAS )  
6 COUNTY OF HARRIS )7  
8 I, Gayle Patterson, Deputy Official Court Reporter  
9 in and for the 351st District Court of Harris County,  
10 State of Texas, do hereby certify that the above and  
11 foregoing contains a true and correct transcription of  
12 all portions of evidence and other proceedings requested  
13 in writing by counsel for the parties to be included in  
14 this volume of the Reporter's Record, in the  
15 above-styled and numbered cause, all of which occurred  
16 in open court or in chambers and were reported by me.17 I further certify that this Reporter's Record of  
18 the proceedings truly and correctly reflects the  
19 exhibits, if any, admitted by the respective parties.20  
21 WITNESS MY OFFICIAL HAND this the 18th day of  
22 October, 2014.23  
24 /s/ Gayle Patterson  
25 Gayle Patterson, Texas CSR 3355  
Expiration Date: 12/31/2015  
Deputy Official Court Reporter  
351st District Court  
P.O. Box 5224  
Alvin, Texas 77512  
713.582.9121