

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3
4 TROY RICHARD WHITE,
5
6 Appellant,

7 vs.

8 THE STATE OF NEVADA,
9
10 Respondent.

) NO. Electronically Filed
) Feb 17 2016 08:34 a.m.
) Tracie K. Lindeman
) Clerk of Supreme Court

11
12 **APPELLANT'S OPENING BRIEF**

13 (Appeal from Judgment of Conviction)

14
15 PHILIP J. KOHN
16 CLARK COUNTY PUBLIC DEF.
17 309 South Third Street, #226
18 Las Vegas, Nevada 89155-2610
19 (702) 455-4685

20 Attorney for Appellant

 STEVEN B. WOLFSON
 CLARK COUNTY DIST. ATTY.
 200 Lewis Avenue, 3rd Floor
 Las Vegas, Nevada 89155
 (702) 455-4711

 ADAM LAXALT
 Attorney General
 100 North Carson Street
 Carson City, Nevada 89701-4717
 (775) 684-1265

 Counsel for Respondent

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

TROY RICHARD WHITE,) NO.

Appellant,)

vs.)

THE STATE OF NEVADA,)

Respondent.)

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES	ii, iii
ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE FACTS.....	1
ARGUMENT	10
I. The District Court Abused Its Discretion in Excluding the Voice Messages.....	10
A. The Hearsay Rule Did Not Apply.....	10
i. State of mind was the relevant issue at trial.	11
ii. The voice message where admissible under State of mind exception to the hearsay rule.....	12
B. The voice messages were admissible under the Rule of Completeness.....	14
II. Failure to instruct that the provocation causing heat of passion Can take place over a period of time.....	16
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

PAGE NO.

Cases

<u>Beech Aircraft Corp. v. Rainey</u> , 488 U.S. 153, 172 (1988).....	14
<u>Boykins v. State</u> , 116 Nev. 171, 995 P.2d 474 (2000).....	18
<u>Commonwealth v. Galloway</u> , 336 Pa.Super. 225, 485 A.2d 776, 783 (1984)	20
<u>Conyers v. State</u> , 345 Md. 525, 544, 693 A.2d 781, 790 (1997)	16
<u>Johnson v. State</u> , 823 So.2d 1, 39 (Ala.Crim.App.2001).....	15
<u>People v. Wharton</u> , 53 Cal.3d 522, 660-661, 809 P.2d 290, 319-320 (Cal., 1991):	19
<u>Rosas v. State</u> , 122 Nev. 1258, 1267-8, 147 P.3d 1101, 1108 (2006):	17
<u>Tabish v. State</u> , 119 Nev. 293, 310, 72 P.3d 584, 595 (2003)	12

Statutes

NRS 47.120	14
NRS 175.161	17
NRS 200.030	11
NRS 47.0120	15

1	NRS 50.035	10
2	NRS 50.105	10
3		
4	NRS 51.105	11, 12
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 _____

3 TROY RICHARD WHITE,) NO. 68632

4)

5 Appellant,)

6)

7)

8)

9 Respondent.)

10 _____

11 **APPELLANT'S OPENING BRIEF**

12 **Issues Presented for Review**

13

14 **I. The District Court Abused its discretion in excluding the voice**

15 **messages.**

16 **II. Failure to instruct that the provocation causing heat of passion can**

17 **take place over a period of time.**

18 **Statement of Facts**

19 Troy White shot and killed his wife, Echo Lucas-White, in the family

20 home. AA 194-7. White then shot her lover, Joe Averman. Id. Averman

21 survived. Id. There had been marital discord in the weeks leading up to the

22 shooting. There had also been talks of reconciliation. The only issue at trial

23 was White's state of mind.

24

25

26 In the months leading up to the shooting Troy White and Echo Lucas-

27 White were going through marital problems including a separation in early

28

1 June of 2012. AA 1412-3. Despite the separation, White continued to support
2 his family and paid the mortgage on the family home. AA 1450. The home
3 was in Troy White's name and he kept a key to the residence. AA 1449.
4 Lucas-White stayed at the family home during the week and White stayed at
5 the family home on weekends. AA 1458. The couple shared the child care
6 duties for their five children---Jody; Jaycee; Jesse; Jett and Jazzy. AA1458.
7

8
9 Unbeknownst to White, his wife had started a romantic relationship
10 with Joe Averman in early 2012. AA 1456; AA 1410. Averman was recently
11 divorced. AA 1406. Averman had met Troy White more than a decade
12 earlier while the two were attending the Potter's House Church. AA 1405.
13 White and Averman quickly became close friends. AA 1407.
14

15
16 Eventually Troy White became aware of the relationship between his
17 longtime friend Averman and his wife Echo Lucas-White. Shortly after
18 White and Lucas-White separated Averman began staying the night at the
19 White family home. AA 1414-5. Troy White desperately wanted his family
20 back. AA 1413 White was understandably upset with the situation, but when
21 Lucas-White and Averman started looking for a new place to live White
22 convinced them not to saying it would be easier for the children if they stayed
23 at the family home. AA 1413. Averman, now unemployed, had moved into
24 the White home. During the week White bunked on an air mattress in the
25
26
27
28

1 living room of a friend from the Potter's House Church, Herman Allen. AA
2 1528.

3
4 In the weeks leading up to the shooting White expressed his
5 displeasure with the situation to friends through comments and some hateful
6 postings on Facebook. AA 1820 The state argued that the Facebook
7 postings from several weeks before the shooting evidenced deliberation and
8 premeditation. AA 1820-1. Their also 100 plus texts. AA 1967-87.
9
10 According to her mother, Amber Gaines, Lucas-White used a combination of
11 texts and voicemails as a primary means of communication and would text at
12 all hours. AA 1633.

13
14
15 Just when it looked like the marriage was over, in the last few days
16 leading up the shooting, texts between White and Lucas-White reveal that
17 there was some discussion of reconciliation. AA 1967-87. Four days before
18 the shooting Lucas-White texted Troy White pictures of their children,
19 broken hearts and asked to meet with him the following day. AA 1980.
20
21 Later texts make clear the meeting took place at a store on the Wednesday
22 before the shooting. AA 1971. Averman was unaware meeting. AA 1482.
23
24 Averman was also unaware of the texts concerning reconciliation. AA 1485.

25
26 The night before the shooting White had went by the family home and
27 rattled the windows. A series of text made clear that, at least in White's
28

1 mind, Lucas-White had promised White reconciliation with the family he
2 wanted so desperately. AA 1974. It's also clear that, as far as getting rid of
3 Joe Averman was concerned, things weren't moving as quickly as White had
4 hoped. Id.

5
6 The shooting was on a Saturday. AA 1423. White and his wife shared
7 a single vehicle which was left at the family home during the week for use in
8 caring for the children. AA 1416. During the week White was without a car
9 and ether had to walk to the family home or take the bus. AA 1462. That
10 morning White took a city bus. AA 1462. Usually White would get to the
11 family home around 3:00 or 4:00. AA 1425. On this day, he arrived shortly
12 before noon. AA 1423. Present at the family home were Echo Lucas, Joe
13 Averman and all five children. AA 194-7.

14
15 At trial the details of what happened during the shooting were relayed
16 by Averman. White arrived early and was perhaps a bit irritated, but
17 otherwise Averman noticed nothing particularly amiss. AA 1426. When
18 White entered the home the children called to their mother, "Mommy,
19 Mommy, Daddy is here." AA 11423. White wanted to speak with his wife.
20 AA 1425. At first She told him to come back later. AA 1425-6. White then
21 addressed both his wife and Averman, saying "Joe, please just let me talk to
22 her for five minutes." AA 1426. After White sought Averman's permission
23
24
25
26
27
28

1 to speak with his wife privately for a few minutes, Lucas-White agreed to
2 speak with her husband. AA1425-6; AA 1462. White was not openly
3 agitated and no threats were made. AA 1452.

4
5 On cross-examination Averman testified that he did no did not feel
6 anything out of the ordinary or unusual----certainly nothing that would cause
7 him to be afraid or prompt him to call the police. AA 1453. According to
8 Averman he wasn't freighted of White, despite claiming at trail that White
9 had sent him some threatening texts and/or voicemails.¹ AA 1454. He had
10 known White for years and agreed that White didn't seem to be type of
11 person he needed to be concerned about. AA 1454.

12
13
14
15 Troy and Echo went to a back bedroom/crafts room of the family home
16 and closed the door. AA 1426. Initially there was nothing unusual, but after
17 about five minutes Averman heard an argument through the closed door. AA
18 1428; AA 1463. It was the first time Averman became concerned with the
19 situation. AA 1464. Given what was described before the argument and how
20 quickly the situation turned it is reasonable to infer that something happened
21 inside the room to send into White's a fit anger. The only question left for the
22
23
24

25
26 ¹ Averman did not recall the specifics of the alleged texts/voice mails and
27 didn't keep any copies. AA 1454. Averman had also told the police shortly
28 after the incident that he had not received any threatening texts. AA 1455-6.

1 jury was whether the state could prove something more than the heat of
2 passion.
3

4 When the door opened Troy White had a gun and his demeanor
5 changed. White was angry and irrational. AA 1478. White was inside the
6 room and Lucas was in the doorway, placing her between White and
7 Averman. AA 1445. A shot was fired hitting Lucas, then several more
8 striking Averman. AA 1430-32. Averman would later tell police that it
9 appeared Lucas-White had gone for the gun or was attempting to wrestle it
10 away from White. AA 1466. The children were nearby. The whole incident
11 was over in a matter of a few seconds. AA 1433. After the first few shoots
12 White came to his senses and the shooting stopped.
13
14
15

16 After the shooting there was confusion. AA 1471. As Averman lay
17 on the floor White threatened him saying something akin to "if I'm going to
18 prison I might as well kill you." AA 1435. Having come to his senses White
19 chose not to fire more shots. AA 1475. White took a cell phone from
20 Averman but initially had problems placing a call to 911. AA 1582.
21 Averman heard White saying he couldn't get the cell to work. AA 1447. At
22 approximately 11:50 a.m., the oldest child, Jodey White, called 911. AA
23 1574. Troy White was able to call 911 and ask for medical services about 3
24 minutes later. AA 1574. The sirens could be heard very quickly thereafter.
25
26
27
28

1 AA 1448. As sirens approached White fled the scene leaving his children
2 unattended at the family home for a few moments. AA 1448-9.
3

4 White drove to Prescott Arizona, birthplace of the Potter's House
5 Church. During the drive to Arizona, White called Herman Allen and told
6 him what had happened. AA 1538 Having previously heard about the
7 shooting, Herman had been trying to call White and was worried that White
8 would commit suicide. AA 1537; AA 1551-2 In Prescott, a crying Troy
9 White turned himself in without incident. AA1141; AA 1117-8. It had been
10 only a few hours since the shooting.
11
12

13
14 For the killing of Echo Lucas-White, the state charged First Degree
15 Murder with the use of a deadly weapon. AA 194-7 For the shooting of Joe
16 Averman, the state charged Attempted Murder with Use of a Deadly
17 Weapon. AA 194-7.
18

19 At trial the stated arguing that White had went to home planning to kill
20 his wife and Averman. The defense argued that the facts did not support the
21 charges. If anything it appeared that White went home to a volatile situation
22 when an argument broke out as the result of ongoing series of events in which
23 ended with White firing shots in the heat of passion.
24
25

26 The defense theory was simple: For White losing his family, desperate
27 for reconciliation, being told his relationship was over and seeing Averman
28

1 had been too much. He snapped inside the bedroom/craft room. The State
2 could prove no more than voluntary manslaughter with use of a deadly
3 weapon in the shooting of Lucas. As to Averman the shots were also fire in
4 the heat of passion, which as the jury was instructed meant he lacked the
5 mental state to support the charge of attempted murder with the use of a
6 deadly weapon.²

7
8
9 To support's it's claims the state introduced over 100 text messages
10 between White and Lucas from the day and hours leading up to the shootings.
11 The texts were highlighted in the opening³ and closing.⁴ They were
12 interwoven throughout the trial. They also pointed the fact that White
13 entered his home with a loaded weapon. AA 840.

14
15
16 To rebut the state's arguments concerning the texts, the defense offered
17 two voice messages White had left on Lucas's cell phone in the hours leading
18 up to shortly before the shooting.⁵ AA 1641-3. The voice messages directly

19
20
21
22 ² The jury was correctly instructed that under Nevada Law heat of passion
23 precludes a conviction for attempted murder. AA 1944; See also Curry v.
24 State, 106 Nev. 317, 792 P.2d at 397 (1990): Voluntary manslaughter can not
25 be committed with a specific intent because "[o]ne cannot logically
specifically intend to act pursuant to a spontaneous, unanticipated and
therefore, truly irresistible passion."

26 ³ AA 831-836; opening AA 830 to 841.

27 ⁴ AA 1822-23; AA 1825; AA 1862-64; AA 1867-69.

28 ⁵ Copies of the voice messages are attached to Appellant's Appendix as MP3
files. The authenticity and foundational requirements for the phone calls were
not in question. AA 1643. The first voice message, defendant's proposed OO

1 rebutted the state's claim that White had harbored some kind of long term
2 plan to kill his wife. The messages had been left during course of various
3 texts the state admitted and relied upon in their case in chief. In the messages
4 White's voice can be heard breaking as he professes his desire to reconcile
5 with Echo Lucas. He asks her to leave Averman and to come back to him.
6 He tells he will be waiting for her, but doesn't know how long. The voice
7 messages provide the best evidence of White's state of mind in the hours
8 leading up to the shooting.

12 The timing of the voice messages overlapped with the timing with the
13 hundred plus text messages the state out before the jury. AA 1822-5. It was
14 days after the Facebook postings the state argued proved premeditation and
15 deliberation. AA 1820-21. The voice messages paint a very different picture
16 of White than that advocated by the state. In short, the defense sought to put
17 the entity of conversation/conversations before the jury. The voice messages
18 from White to Lucas which ran directly into face of state's claims and were
19 clear rebuttal to both the Facebook post and the texts offered by the state.

23 It's important to note that even without hearing the voice messages, the
24 jury rejected the state's claims of deliberate premeditated murder. White was
25 was sent at around 5:00 a.m. the morning of the shooting. (AA 1642; 1647)
26 The second voice messages, defendant's proposed PP, was sent at 9:41 am.
27 (AA 1647)

1 ultimately convicted of Count 1-Second Degree Murder with Use of a Deadly
2 Weapon; Count 2-Attempt Murder with use of a Deadly Weapon; Count 3-
3 Carrying a Concealed Weapon; Counts 4 through 8-Child Abuse, Neglect, or
4 Endangerment. AA 359-61.
5

6
7 White appeals because he was denied meaningful opportunity to have
8 the jury fairly consider his claims of voluntary manslaughter---the district
9 court's exclusion of the voice messages was an abuse of discretion.
10

11 ARGUMENT

12 I. The District Court Abused its discretion in excluding the voice 13 messages. 14

15 A. The Hearsay rule did not apply

16 While hearsay is not generally admissible (NRS 50.035), there are
17 many exceptions to this rule. In particular, statements offered to show then
18 existing state of mind fall outside the hearsay prohibition. (NRS 50.105) So
19 long as the state of mind is relevant, statements evidencing state of mind
20 should not be excluded on hearsay grounds.
21

22 i. State of mind was the relevant issue at trial 23

24 The physical act of killing, firing a shot which results in the death of
25 another, can have legal consequences ranging from nothing to the death
26 penalty. NRS 200.030. What distinguishes an accident from an act of self-
27
28

1 defense from a manslaughter from a murder rest solely and completely with
2 the defendant's mental state. In the instant case White's state of mind in not
3 only relevant to the charge of murder, it was determinative.

4
5 As human beings, our state of mind leading up to an event is often the
6 best indication of our state of mind at time of the event. This principle led
7 the state to admit 100 plus text against White during their case in chief; it is
8 embraced in the notation of manslaughter ("sudden heat of passion") and
9 provides the underlying basis for the language set forth in NRS 51.105 which
10 codifies the "state of mind exception" to the hearsay rule.

11
12 The state presented evidence concerning the defendant's mental state
13 in the days and hours leading up to the shooting in the form of text messages
14 and Facebook postings, but the evidence failed to tell the full story. White
15 sought to admit two voice messages to rebut the state's claims and the voice
16 messages were relevant for this purpose.⁶ They should have been heard by
17 the jury.

18
19 ii. The voice messages where admissible under State of mind exception to
20 the hearsay rule
21

22
23
24
25 ⁶ See, for example, Tabish v. State, 119 Nev. 293, 310, 72 P.3d 584, 595
26 (2003) recognizing that state of mind may be relevant to rebut an opposing
27 party's theory--here the state went on at length arguing that the texts sent by
28 White in the days and hours leading up to the shooting evidenced a plot to
murder---the voice mails were in complete contradiction of this claim as they
evidenced a desire a reconciliation and a longing for family.

1 NRS 51.105 Then existing mental, emotional or physical condition reads:

- 2 1. A statement of the declarants then existing state of mind,
3 emotion, sensation or physical condition, such as intent, plan,
4 motive, design, mental feeling, pain and bodily health, is not
5 inadmissible under the hearsay rule.
6
7

8 The voice messages in question were offered for just these purposes and
9 were in fact the best evidence of White's his state of mind in the hours
10 leading up to the shooting. The state put the time frame directly at issue by
11 introducing into evidence various texts sent between White and his wife
12 contemporaneously to voice messages---then vigorously arguing that the texts
13 proved murder. During closing took advantage of the court's error, going as
14 far as arguing during rebuttal that:
15
16
17

18 "the defense made some interesting, very creative arguments
19 about the text messages and that they show the defendant wanted
20 to kick Joe out of the house. Fortunately for you have the entire
21 conversation. That's State's 85. And what will be abundantly
22 clear to you from their entire conversation is that at about
23 approximately 8:30, 9:00 a.m. the defendant realized that Echo
24 was never coming back." AA 1862.

25 The voice messages rebut the state's claims and paint a very different
26 picture of White's state of mind. In particular, the voice message offered as
27 defendant's proposed PP was left some 40 minutes to an hour after the state
28 claims White "realized that Echo was never coming back" --- the voice

1 message proves this isn't true. As to the claim that of state providing the jury
2 with the "entire conversation", well that is the basis for this appeal. Other
3 references to texts sent both before and after the voice messages are made
4 throughout the closing. AA 1820-23; AA 1867-71.
5

6
7 In the voice messages, White speaks of his plans for the future and his
8 desire to have his family backing. He tells Lucas White he will be waiting
9 for her, but he doesn't know for how long. He tells her he loves her. These
10 statements were relevant to show that White did not have some sort of
11 cohesive plan to kill his wife when he returned to the family home some
12 hours later; they are also relevant as direct rebuttal of the evidence admitted
13 by that state during the cases in chief, to wit: the 100 plus texts and an angry
14 Facebook positing from a more than a week earlier which the state argued
15 proved premeditation and deliberation. The messages clearly fell under the
16 state of mind exception to the hearsay rule and the district court abused its
17 discretion by refusing to allow the jury to hear the voice messages.
18
19
20
21

22 **B. The voice messages were admissible under the Rule of**
23 **Completeness**
24

25 N.R.S. 47.120 Remainder of writings or recorded statements:

- 26 1. When any part of a writing or recorded statement is
27 introduced by a party, the party may be required at that time to
28

1 introduce any other part of it which is relevant to the part introduced,
2 and any party may introduce any other relevant parts.
3

4 2. This section does not limit cross-examination.

5 In Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988), the
6 Supreme Court noted: "when one party has made use of a portion of a
7 document, such that misunderstanding or distortion can be averted only
8 through presentation of another portion, the material required for
9 completeness is ipso facto relevant." The texts and voice messages are
10 recorded statements which form a conversation. The State admitted portions
11 of the conversation, namely the hundred plus texts it argued about during the
12 trial. The defense had the right under the doctrine of completeness to admit
13 the voice messages which make up the remainder of the conversation.
14 Fundamental fairness also dictates as much, as the state should not have been
15 allowed to represent the texts as "the entire conversation" during closing then
16 argue that they proved something the voice messages rebutted. AA 1862.
17

18 The state may attempt to seek refuge by claiming that each individual
19 text or voice mail somehow represents a single conversation,⁷ but anyone
20
21

22 ⁷ By its plain language one could argue that NRS 47.0120 only seems to
23 apply to a single recorded statement---and the rule would make sense in the
24 context of, for example, multiple statements to the police taking place hours
25 apart. See Johnson v. State, 823 So.2d 1, 39 (Ala.Crim.App.2001) declaring
26 that "the doctrine of completeness does not extend beyond a single
27
28

1 familiar with modern technology knows better. Conversations take place over
2 the course of time and a single text does not a conversation make. During
3 rebuttal the state itself virtually conceded this point when it repeatedly
4 referred to the 100 plus texts as "the entire conversation." AA 1862.
5

6
7 Even if the court were to adopt the nonsensical approach of treating
8 each separate text or voice mail as a distinct conversation the state should still
9 not prevail under a simple theory of fundamental fairness. The Maryland
10 high court phrased it thus: "The doctrine of completeness allows, and under
11 some circumstances fairness may require, a court to admit statements from
12 separate conversations." Conyers v. State, 345 Md. 525, 544, 693 A.2d 781,
13 790 (1997)
14

15
16 Conclusion concerning the voice messages
17

18 In the instant case the government was allowed to paint a false of what
19 picture of White's state of mind. The voice messages were admissible under
20 the completeness doctrine as well as the state of mind exception to the
21 hearsay rule.
22

23 ///

24
25 ///

26
27 conversation." This is clearly distinct from the situation at bar where the
28 voice message take place in very midst of the tests messages relied upon the
state.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

4
5
6
7
8
9

1
2
3
4
5
6
7
8
9
10
11

24
25
26
27
28

1 In specifics, the defense wanted the jury to be instructed that while the
2 heat of passion must be sudden, the provocation causing it can brew and
3 fester over a series of events and a considerable amount of time. The
4 following instructions was offered:
5

6 “Legal provocation may occur over a short or long period of time and
7 can be the result of a series of events.” AA 1778; AA 1926.⁹ The instruction
8 was refused.
9

10 Pursuant to NRS 175.161(3): “Either party may present to the court
11 any written charge, and request that it be given. If the court thinks it correct
12 and pertinent, it must be given; if not, it must be refused.” The submitted
13 instruction is a correct statement of the law, although there are no specific
14 Nevada cases concerning instructions on the point.
15

16 The principle of provocation over time can be seen in several Nevada
17 cases. For example, Boykins v. State, 116 Nev. 171, 995 P.2d 474 (2000)
18 and Roberts v. State, 102 Nev. 170, 717 P.2d 1115 (1986) both infer the
19 principle.
20

21 In Boykins, supra, the Nevada Supreme Court held that the ongoing
22 abuse of “battered women syndrome” is admissible to show state of mind as
23

24 ⁹ The defense also advised the court that White was alternatively requesting
25 the either the first portion of the proposed instruction: “Legal provocation
26 may occur over a long or short period of time” or the second portion: “Legal
27 provocation can be the result of a series of events”. AA 1778.
28

1 it relates to self-defense. By extension ongoing provocation should also
2 provide the basis for showing how a person reached a state of mind
3 amounting to heat of passion.
4

5 Roberts, supra, also clearly infers the principle that ongoing
6 provocation can lead to heat of passion. The Roberts court reversed a
7 conviction for failure to instruct on a lesser charge of voluntary manslaughter.
8 Here is a short excerpt from the fact of Roberts which demonstrates the point:
9

10
11 “Prior to the night of the shooting Roberts was a senior
12 highway maintenance foreman for the Nevada Department of
13 Transportation. He had worked for the department for twenty
14 eight years and had no prior record of criminal activity. For six
15 years he and Loddy had lived together in his home with her two
16 children. Ms. Loddy and her children moved out of that house in
17 September of 1983, although she and Roberts continued to see
18 each other. Loddy's son, Rick, continued to live with Roberts for
19 a month after she moved out. Thereafter, Rick occasionally
20 visited Roberts on weekends.

21
22 Roberts testified that he believed that he and Loddy would
23 get back together.”

24 Roberts at 171-2; 115-6.

25 Other states have also considered the issue.

26 In California it was addressed in People v. Wharton, 53 Cal.3d 522,
27 660-661, 809 P.2d 290, 319-320 (Cal., 1991):
28

“By contrast, the court erred in refusing to instruct the jury, at defendant's request, that legally adequate provocation could occur over a considerable period of time. It was defendant's theory at trial that no single action on the part of the

1 victim provoked the fatal blow but that the book-throwing
2 incident was merely the culmination of his pent-up frustration
3 and anger emanating from his ongoing dysfunctional
4 relationship with the victim. In other words, his defense theory
5 at trial was that he killed after enduring provocatory conduct by
6 the victim over a period of weeks.

7 The People argue there was insufficient evidence of this theory
8 to justify the instruction. We disagree; defendant proffered
9 evidence from which reasonable persons could have concluded
10 there was sufficient provocation to reduce murder to
11 manslaughter. (See Wickersham, supra, 32 Cal.3d at p. 324, 185
12 Cal. Rptr. 436, 650 P.2d 311.) Because defendant requested a
13 "pinpoint" instruction on his theory of the case that was neither
14 argumentative nor duplicated in the standard instructions, the
15 trial court erred in failing to deliver it to the jury. (Wright, supra,
16 45 Cal.3d at p. 1144, 248 Cal. Rptr. 600, 755 P.2d 1049.)

17 The above rationale is applicable to the case at bar. Without requested
18 the instruction being given the defense unable to argue the most viable theory
19 of the case—namely that the provocation which led White to act in the heat
20 of passion was the culmination of a series of events which would have caused
21 a reasonable man to snap.

22 In Pennsylvania, for example, the legal principle was explained as
23 follows: "Whether the provocation was sufficient to support the defense of
24 voluntary manslaughter is determined by an objective standard—whether a
25 reasonable man, confronted by the *same series of events*, would become
26 impassioned to the extent that his mind was incapable of cool reflection."
27
28

1 Commonwealth v. Galloway , 336 Pa.Super. 225, 485 A.2d 776, 783 (1984)
2 *emphasis added.*
3

4 The error of failing to give the requested instruction was compounded
5 by instructions 13-15 in which the jury was instructed concerning heat of
6 passion. AA 1938-40. These instructions are written in the present tense and
7 say nothing about the fact that provocation can be result an ongoing series of
8 events, thus wrongfully implying provocation itself must be sudden. Id.
9 Failure to give the requested instruction left the jury without guidance on a
10 key issue in the case and constituted reversible error. See Wharton, Supra.
11
12

13 Conclusion

14

15 For the reasons set forth above, Appellant respectfully submits that he
16 was denied a fair trial in respect to Counts 1 and 2.
17

18 He prays that this court will reverse and remand Count 1 with
19 instruction to the district court that upon retrial the jury should be allowed to
20 hear the critical voice messages so as to fairly evaluate his claim that the
21 killing of his wife amounted to Voluntary Manslaughter with use of a deadly
22 weapon.
23

24 He further prays that this Court will reverse and remand Count 2 so
25 that the jury can fairly evaluate his claim that he shot his wife's lover in the
26
27
28

1 heat of passion and that he did not possess the mental state necessary to
2 support a conviction for attempted murder.
3

4 Finally, Appellant prays that upon remand this court will instruct the
5 district court that White is entitled to a specific instruction informing the jury
6 that the provocation caused by the sudden heat of passion need not itself be
7 sudden and can arise over a period of time and as the result of a series of
8 events.
9

10
11 Respectfully submitted,

12 PHILIP J. KOHN
13 CLARK COUNTY PUBLIC DEFENDER
14

15
16 By: /s/ Scott L. Coffee
17 SCOTT L. COFFEE, #5607
18 Deputy Public Defender
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6

7
8

9
10
11
12

13
14
15

16
17
18
19
20
21
22
23
24
25
26

1 accompanying brief is not in conformity with the requirements of the Nevada
2 Rules of Appellate Procedure.
3

4 DATED this 16th day of February, 2016.

5 PHILIP J. KOHN
6 CLARK COUNTY PUBLIC DEFENDER
7

8
9 By /s/ Scott L. Coffee
10 SCOTT L. COFFEE, #5607
11 Deputy Public Defender
12 309 South Third Street, Suite #226
13 Las Vegas, Nevada 89155-2610
14 (702) 455-4685
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

ADAM LAXALT
STEVEN S. OWENS

SCOTT L. COFFEE
HOWARD S. BROOKS

TROY RICHARD WHITE
NDOC No: 1143868
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

24