

JOSHUA BACHARACH
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

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Clerk of Supreme Court

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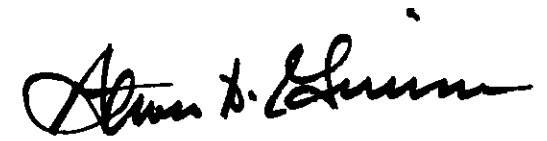
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

VS.

JOSHUA W. BACHARACH,

Defendant.

CASE NO. C299425

DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

WEDNESDAY, NOVEMBER 4, 2015

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 3

VOLUME III

APPEARANCES:

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Chief Deputy District Attorneys

For the Defendant:

ROCHELLE T. NGUYEN, ESQ.

RECORDED BY: JILL JACOBY, COURT RECORDER

TRANSCRIBED BY: BRITTANY MANGELSON, INDEPENDENT TRANSCRIBER

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WEDNESDAY, NOVEMBER 4, 2015 AT 9:32 A.M.

[Outside the presence of the jury]

THE COURT: All right. You guys have looked at these. I got one set.

MS. THOMSON: Yes, Your Honor, we have.

MS. NGUYEN: Yes.

THE COURT: You're objecting to something.

MS. NGUYEN: Yes. Would you like me --

MS. THOMSON: She's objecting to flight and the prior inconsistent statement instruction.

MS. NGUYEN: And then we have some other objections that I would like to argue as well.

MR. FATTIG: Yeah, and other little things of witnesses that --

THE COURT: All right.

MR. FATTIG: -- we're going to deal with.

MS. NGUYEN: I'll waive his presence if you want to do it right now.

THE COURT: Okay.

MR. FATTIG: Well, only the instructions, right?

THE COURT: Just the instructions.

MR. FATTIG: Yeah.

MS. NGUYEN: Yes.

MR. FATTIG: And then we'll do the other little things when he's here.

THE COURT: All right. Instruction Number 1, Then members of the jury. The introduction.

Instruction 2, If in these instructions.

1 And I will give you copies of this. We'll have Alan make 13, 14, 15, 16,
2 17.

3 MS. NGUYEN: Do they read over them? Do they have them when we're
4 going --

5 THE COURT: They have them.

6 MS. NGUYEN: Okay.

7 THE COURT: I'll read them to them.

8 All right. Number 2, If in these instructions.

9 Number 3 is the information or indictment.

10 Now if I have a -- since it's been such a short trial, do you want me to
11 read these to them or do you guys waive me reading that Instruction 3.

12 MS. NGUYEN: Wait, what's on Instruction 3?

13 THE COURT: That's the indictment.

14 MR. FATTIG: Listing all the charges.

15 THE COURT: Since they just got it read to them. I mean --

16 MS. NGUYEN: Yeah, I don't have a problem with that. Well -- no, I don't
17 have a problem with that.

18 THE COURT: All right. Number 4, To constitute the crime charged.

19 Number 5, The Defendant is presumed innocent.

20 Number 6, You are here to determine.

21 Number 7, The evidence which you are to consider.

22 Number 8, The credibility or believability.

23 Number 9, A witness who has special, knowledge, skill, experience.

24 Number 10, Attempt murder is.

25 Number 11, Malice aforethought as used.

1 And 12, It is not necessary to prove premeditation.
2 Number 13, The elements of an attempt to commit a crime are.
3 14, If you find the Defendant guilty of attempt murder.
4 15, Deadly weapon.
5 16, If you find beyond a reasonable doubt.
6 17, A person who is in or under a structure.
7 18, It shall be unlawful within the city limits.
8 19, It is unlawful and willfully discharge a firearm.
9 20, Assault means.
10 21, You are instructed that.
11 22, If you find beyond a reasonable doubt.
12 23, A driver of a motor vehicle.
13 24, A person in any case.
14 25, A person shall not knowingly possess.
15 26, The law recognizes two kinds of possession.
16 27, The flight of a person. Now that's got cites on it.

17 MS. NGUYEN: That's correct, Your Honor, and that's the one that we would
18 object to.

19 THE COURT: All right. My understanding of the current status of law that
20 this -- the flight of a person immediately after commission of a crime, or after he is
21 accused of a crime, is no sufficient in itself to establish his guilt, but is a fact which, if
22 proved, may be considered by you in light of all other facts in deciding the question
23 of his guilt or innocence. Whether or not the evidence of flight shows a
24 consciousness of guilt and the significance to be attached matter -- are matters for
25 your deliberation.

1 Tom, get Alan in here for me.

2 Put on record your objection.

3 MS. NGUYEN: And Your Honor, I would just say that I don't think that there
4 has been anything presented that show consciousness of guilt. A lot of times when
5 you see these flight instructions you see someone who is actually trying to flee the
6 area. This -- in this case, even if you believe the State's argument, one -- if you
7 believe the State's argument that there is -- he engaged in some sort of shootout on
8 the street, I would say that that's evidence that he wasn't fleeing, he was actually
9 there and not retreating.

10 Second of all, a lot times you'll see this when someone retreats to
11 another jurisdiction. They go to Mexico, the go to another state, and they're actively
12 hiding and concealing themselves for long periods of time and that's evidence in
13 consciousness of guilt. In this case, I think from start to finish this whole thing
14 occurred in a seven-minute timespan. And that's from the time that that body
15 camera came to the time that they apprehended a suspect in this case. And with
16 that I'd submit.

17 THE COURT: Do you want to put anything on record?

18 MS. THOMSON: Just that the definition of flight includes no timeline. Clearly
19 here we have flight over and over and over again. The fact that he's found hiding in
20 a dark backyard and does not submit to commands, I think speaks significantly to
21 his intent to flee.

22 THE COURT: And he left the property under the truck; the bullet-proof vest
23 and the gun. I'm going to give the flight instruction over the objection -- do we have
24 a clean --

25 MS. NGUYEN: Can I --

1 THE COURT: Clean copy?

2 MS. THOMSON: I will e-mail a new full set that has everything clean.

3 THE COURT: I'm numbering these.

4 MS. THOMSON: Then I won't do that. I'll e-mail --

5 THE COURT: Just --

6 MS. THOMSON: -- a new full set --

7 MS. NGUYEN: Maybe Alan could delete it.

8 MS. THOMSON: -- that has that clean.

9 THE COURT: Can you delete those?

10 THE JUDICIAL EXECUTIVE ASSISTANT: Yeah.

11 THE COURT: All right. Alan will delete.

12 MS. NGUYEN: And Your Honor, if I could just make one more brief record --

13 THE COURT: All right.

14 MS. NGUYEN: -- on that? I also think that this particular instruction and the

15 case law that supports it actually shifts the burden. And I don't believe that's

16 something that's actually been addressed by the Nevada Supreme Court. So I think

17 it is appropriate for the Court to make a ruling on that.

18 THE COURT: All right.

19 MS. NGUYEN: I think when you -- this instruction essentially with the

20 evidence of guilt, I think it burden shifts.

21 THE COURT: All right. Thank you.

22 [Colloquy between the Court and the Clerk]

23 THE COURT: All right. I'm going to give that instruction over the objection of

24 the Defense.

25 28, Mere presence.

1 29, If necessary to prevent escape.

2 30, You have heard evidence of prior inconsistent statements. You
3 may consider those for purposes of impeachment or as substantive evidence, at
4 your discretion.

5 MS. NGUYEN: And Your Honor, this is one where I'm also objecting to.

6 MS. THOMSON: And Your Honor, it's our position that it's supported by the
7 statute, in addition to case law, specifically, *Levi v. State*, which was a '79 case.
8 And *Atkins v. State*, which later confirmed the holding in --

9 THE COURT: Wait. She hasn't argued yet her --

10 MS. THOMSON: Oh, sorry.

11 THE COURT: Put your object -- just --

12 MS. NGUYEN: Your Honor, this is indicates that we've heard evidence of
13 prior inconsistent statements. It's my understanding that Detective Jaeger -- what's
14 his -- is that his name?

15 MS. THOMSON: There is a Detective Jaeger, but Detective Hodson is the
16 one who's on it.

17 MS. NGUYEN: Hodson, okay. That there will be a witness that comes in to
18 testify, perhaps to lay the foundation for this prior inconsistent statement. I would
19 argue that we don't have that at this point. There hasn't been any kind of evidence
20 of any prior inconsistent statements.

21 In addition, I think while having that evidence admitted, you know, as
22 perhaps appropriate I think that the credibility determination instruction and those
23 things kind of cover this. I think when you say you've evidence of prior inconsistent
24 statements, it's a forgone conclusion that that's exactly what they heard. And I think
25 that's a determination and that's in the province of the jury to determine whether or

1 not those statements are inconsistent.

2 So, the legal rulings as far as, you know, determining whether or not
3 those statements are even admissible I think is in the province of the Court. But I
4 think determinations of whether or not those are actually inconsistent is up to the
5 jury. And I think this instruction instructs the jury that they are inconsistent. And I
6 think that's up to their determination to determine whether or not the statements are
7 in fact inconsistent.

8 THE COURT: Okay. Now finish your argument.

9 MS. THOMSON: Sorry, Judge. While we haven't yet had the evidence of the
10 prior inconsistent statement, the detective is here, it is going to come in to -- I mean,
11 obviously the jury's going to be aware that they've heard two different versions of
12 the same fact associated to one witness that's not a shock that it is a prior
13 inconsistent statement. The case law is hear that that may be considered
14 substantively.

15 And what we have on the instruction credibility talks about
16 impeachment but it doesn't discuss the fact that they may consider that prior
17 statement substantively instead of just for purposes of impeachment and they have
18 a right to know what they can consider.

19 THE COURT: Well we sort of had a prior inconsistent because she said no, I
20 didn't say anything about the bullet-proof vest but you had eluded to it.

21 MS. THOMSON: But that information hasn't come in --

22 THE COURT: Hasn't come in yet.

23 MS. THOMSON: -- yet, but it will.

24 THE COURT: All right. I'm going to give that with the understanding I'll pull it
25 if they don't get that in, over your objection.

1 MS. NGUYEN: Okay.

2 THE COURT: 31, It is the constitutional of a Defendant not to be compelled
3 to testify. Is it your anticipation he's not going to or do you know?

4 MS. NGUYEN: At this time I don't believe he is.

5 THE COURT: All right. 32, Although you are to consider.

6 33, In your deliberation.

7 34, When you retire.

8 35, Playback.

9 36 is then the signature line.

10 We'll have Lana make -- fix 27. With that understanding, State you're
11 familiar with Jury Instructions 1 through 36?

12 MS. THOMSON: Yes, Your Honor.

13 THE COURT: Do you have -- are you satisfied with them?

14 MS. THOMSON: Yes, Your Honor.

15 THE COURT: Do you have any more that you wish to offer the Court?

16 MS. THOMSON: No, Your Honor .

17 THE COURT: You've reviewed the verdict form?

18 MS. THOMSON: Yes, Your Honor.

19 THE COURT: You're satisfied with it?

20 MS. THOMSON: You have the version that has on Count 10, guilty of
21 discharge of firearm from or within a structure --

22 THE COURT: Yes.

23 MS. THOMSON: -- or vehicle, not of vehicle?

24 THE COURT: Or vehicle.

25 MS. THOMSON: Okay. I had made a typo, so I just wanted to make sure I

1 had the one that's proper.

2 THE COURT: All right.

3 MS. THOMSON: Perfect. Thank you.

4 THE COURT: All right. Defense, you're familiar with Jury Instructions 1
5 through 36.

6 MS. NGUYEN: that's correct.

7 THE COURT: Except for the objections that you already made, do you have
8 any further that you wish to supply?

9 MS. NGUYEN: No, Your Honor. And there were -- just for record, there were
10 changes that the State did accommodate on some of the instructions that we
11 previously included prior to submitting them to the Court.

12 THE COURT: So I'll make 13 -- and you've reviewed the verdict form?

13 MS. NGUYEN: I have. I do have some questions and concerns about the
14 verdict form.

15 THE COURT: Okay. What's that?

16 MS. NGUYEN: I know that it is unusual. I don't think it's been done before,
17 but I don't think there's any precedent that it can't be done. Because there are so
18 many different charges involving discharge of a firearm from within a structure or
19 vehicle and assault with a deadly weapon and they are pled with more specificity
20 within the charging document, I don't know if the Court would consider putting
21 something in there so we know the location to which the State is referring.

22 MS. THOMSON: I have no problem doing that--

23 MS. NGUYEN: For each one of those things.

24 MS. THOMSON: -- quickly and I --

25 THE COURT: Why don't you do that --

1 MS. THOMSON: -- can forward that to --
2 THE COURT: -- and supply that --
3 MS. THOMSON: It'll still be attached --
4 THE COURT: -- with the streets.
5 MS. THOMSON: -- to the instructions because separating it out is a hassle,
6 but it'll be the last pages.
7 THE COURT: Okay. That's fine.
8 MS. THOMSON: And it's going to come from my personal e-mail address,
9 which is absolutely preposterous, but it's the only one I know how to log in to on this
10 computer.
11 THE COURT: WE will publish it.
12 All right. I will Alan make 13, 14, 15, 16. Do we only need one copy for
13 Jill? Do you need -- okay.
14 MS. NGUYEN: Can I get two for my table --
15 THE COURT: 17, 18.
16 MS. NGUYEN: -- so I don't have to share?
17 THE COURT: Yeah.
18 MS. NGUYEN: Thank you.
19 THE COURT: Make 18 copies, please.
20 MS. NGUYEN: And then I have some objections to make on some stuff that's
21 coming in.
22 THE COURT: Okay.
23 MS. NGUYEN: So I don't know if you want to wait for my client to be here.
24 THE COURT: Yeah, we want to wait until he gets here. In fact, if you're
25 sending those, why don't you take the cites out of 27.

1 MS. THOMSON: I'm sorry?

2 THE COURT: Take the cites out of 27 --

3 MS. THOMSON: Okay.

4 THE COURT: -- if you're sending them over.

5 [Pause in proceedings]

6 THE MARSHAL: They're all here, Judge.

7 THE COURT: All right. We're ready? Are you guys ready?

8 MS. THOMSON: Yes, Your Honor.

9 THE COURT: All right. Okay. Bring the jury in, Tom.

10 MS. THOMSON: Are you go --

11 MS. NGUYEN: Oh, can we make the argument on these?

12 THE COURT: Oh, wait, wait. Yes. We settled Jury Instructions 1 through 36.

13 You looked at the verdict forms?

14 MS. NGUYEN: I did, I did.

15 THE COURT: And he's printing them --

16 MS. NGUYEN: that's correct.

17 THE COURT: -- and your client will have one and you'll have a copy.

18 MS. NGUYEN: Thank you, Your Honor.

19 Your Honor, it's my understanding the State intends to seek three

20 separate jail phone calls made by my client. And if I could just discuss --

21 THE COURT: Okay.

22 MS. NGUYEN: -- them? There's one jail call I'm going to -- it's referred to as

23 Jail Call Number 3.

24 MS. THOMSON: Rochelle, we don't have -- his aren't labeled. Will you just

25 put date and time.

1 MR. FATTIG: [Indiscernible].

2 MS. NGUYEN: Oh, I'm sorry. July 12th, 2014 at 8:43.

3 THE COURT: Now do we have to take -- to -- have you got them cleaned up,
4 so it doesn't say jail call?

5 MR. FATTIG: No, it's going to say CCDC, this is a recorded call. But
6 these -- all the calls are within a couple weeks of the arrest. None of them are
7 anywhere near the trial.

8 THE COURT: Okay.

9 MS. NGUYEN: These are calls -- obviously they're from the Clark County
10 Detention Center. One, I would say that they're prejudicial. It clearly indicates that
11 he is incarcerated.

12 THE COURT: All evidence is prejudicial.

13 MS. NGUYEN: I understand. I think that, you know, we go to such great
14 lengths to show that he is not incarcerated and not wearing things and then we play
15 a phone call that starts off, this is a phone call from the Clark County Detention
16 Center. But that aside, we did go through -- I think that they should be kept out in
17 their entirety and I'll get into that for each reason. But if they are allowed in, I know
18 that we were able to go through and redact the things that we both agreed shouldn't
19 be in there in there on some of these calls.

20 THE COURT: I wish when you redact you would take CCDC issues.

21 MR. FATTIG: My concern with that, Your Honor, is, you know --

22 THE COURT: I mean, they know he was arrested. They know it's going to be
23 a jail call. But we should take that out when we can. I don't know that it's
24 necessarily overly prejudicial because it's close in time, but in the future if you can
25 take it out, I would. We did that in that murder case.

1 MR. FATTIG: Yes. Sometimes some jurors then speculate well, why is the
2 government listening in on his calls? What's the basis here?

3 MS. NGUYEN: They listen in on calls.

4 MR. FATTIG: Well they do when you're an inmate and they have a right to,
5 but they need to know the context of that.

6 MS. NGUYEN: I think Snowden showed us they listen all the time. So,
7 anyway, that was a side note.

8 THE COURT: There's a building in Utah that listens to everything. And you
9 can't even get within 500 yards of that place.

10 MS. NGUYEN: Well I'm going to talk --

11 THE COURT: True story.

12 MS. NGUYEN: With -- specifically with this call I also have issues, pursuant
13 to NRS 48.045, I think character evidence is inadmissible. The reason that I think
14 that the character evidence in this particular call is inadmissible is this call centers
15 around a telephone call that Mr. Bacharach had with Eufrasia Nazaroff. She was a
16 witness that previously testified.

17 THE COURT: Right.

18 MS. NGUYEN: This obviously didn't come in through her testimony, but it
19 goes through and it talks about a truck. It talks about Mr. Bacharach's truck, it talks
20 about selling it. There's some insinuation that perhaps they're current on some sort
21 of payments. I think that this is an uncharged bad act. I think that it is not relevant.
22 I don't think it's appropriate. And I don't think this particular call and the contents of
23 this call should be admitted. We do have the transcripts here if the Court would like
24 to review those transcripts.

25 THE COURT: What --

1 MR. FATTIG: Your Honor --

2 THE COURT: Why do you -- what do you want them for?

3 MR. FATTIG: She never mentioned she didn't want the truck stuff. I don't

4 want it for the truck stuff.

5 THE COURT: What do you want it for?

6 MR. FATTIG: So we're willing to take that out.

7 THE COURT: What do you want it for?

8 MR. FATTIG: This particular call --

9 THE COURT: Let me see, Rochelle.

10 MR. FATTIG: They begin a conversation about testifying and they're referring

11 to the Grand Jury that occurred around the time of this call. The Grand Jury was

12 actually commenced two days after this call on July 14th of 2014 and they're talking

13 about --

14 THE COURT: Okay. Tell me what it starts with because --

15 MR. FATTIG: It starts on page 8, this conversation. The Defendant is

16 concerned that witnesses are subpoenaed to come testify against him. She's

17 commenting she's -- she has been subpoenaed as well as she makes some

18 statements regarding another female.

19 THE COURT: Okay. Where -- tell me where you're at?

20 MR. FATTIG: Page 8, the middle of the page. It says JB, being Joshua

21 Bacharach. Quote: I guess they served her a subpoena to come testify against me

22 too, I guess.

23 And then EN is Eufrosia Nazaroff. So it starts there and continues on

24 page 9, the Defendant --

25 THE COURT: Who is she talking -- who is he talking about is getting

1 subpoenaed?

2 MR. FATTIG: Well they're talking about Eufasia was subpoenaed, as well as
3 another female. And I believe they're talking about Marisala Tarango, who is the
4 Defendant's girlfriend/ex-girlfriend, depending on the day.

5 Page 9, he talks about it --

6 THE COURT: Okay, but --

7 MR. FATTIG: -- doesn't matter, you're not --

8 THE COURT: Okay, but -- oh, okay, you're going to tell me what the
9 relevance is. I -- the -- a part about an uncharged act on the truck I'm not real
10 concerned with.

11 MR. FATTIG: Okay.

12 THE COURT: And I'm going to overrule it. The relevance though, I want to
13 know what relevance this is.

14 MR. FATTIG: Well he talks about you're not supposed to testify against
15 nobody. That's on page 9.

16 And then she says: They can show that I let you use my car and all this
17 and that.

18 And he says: Yeah, well then guess what -- what that does?

19 What?

20 That means I'm -- you're incriminating me.

21 And then she says: Shut the fuck up. No, that means that you didn't
22 steal my car out of my fucking parking lot.

23 He says: I --

24 She says: Mother fucker.

25 He says: I don't know who had my car.

1 She says: You had my car you asshole.

2 He says: No, I didn't.

3 She says: You didn't have my car.

4 He said: Somebody -- I don't know. Somebody else must have been
5 driving it.

6 So it directly goes to the issue of who was in the car.

7 THE COURT: It appears to be relevant and over the objection of the
8 Defense, I'll allow that one in.

9 MR. FATTIG: DO you want us to redact the portion about the truck and the
10 earlier part of that call?

11 THE COURT: No, conversations need -- they -- it is what it is. I just don't
12 think you're going into the truck. You want the issue about the testimony. That's
13 fine.

14 MR. FATTIG: Correct. It's the latter portion of the call.

15 THE COURT: Right. Okay. What's the next one?

16 MS. NGUYEN: If we look at call dated 7/7/2014 at 10:10.

17 THE COURT: Okay. And why don't you want that in?

18 MS. NGUYEN: I'm going to direct you to the page and then I'll approach so
19 you can see it. If you go to page 8 and I'll approach.

20 THE COURT: Okay.

21 MS. NGUYEN: There's a section in there and I know the State wasn't aware
22 of who that individual was, but I think that kind of portrays kind of like this Bonnie
23 Polley as like some nefarious figure that we don't know who is coming and telling
24 the client certain things. He's just repeating something that was told to him. This
25 isn't any kind of admission, he's just repeating something that was told to him. And I

1 think the reason --

2 THE COURT: You know --

3 MS. NGUYEN: -- that I have issues with this --

4 THE COURT: you know who Bonnie Polley is.

5 MS. NGUYEN: I know who Bonnie Polley is.

6 THE COURT: Okay.

7 MS. NGUYEN: The State wasn't aware of who Bonnie Polley is?

8 THE COURT: They didn't?

9 MS. NGUYEN: I don't know if the detective knows who Bonnie Polley is.

10 MR. FATTIG: I'd never heard of her.

11 THE COURT: I'm sure the detectives do. She's the minister over in the jail.

12 MR. FATTIG: Yeah.

13 MS. NGUYEN: And so my point is, is I think just by itself the jury doesn't
14 know that person is and short of me having to now subpoena that person at the last
15 minute to come and testify as to who she is and those are --

16 THE COURT: No, we can tell them who she is.

17 MR. FATTIG: Well if the detective knows it, she could ask the detective.

18 MS. NGUYEN: And I'm fine doing it that way. Or if the State's willing to
19 stipulate that that's who that is instead of --

20 THE COURT: That's who it is.

21 MR. FATTIG: I would be willing to stipulate, but could -- maybe we could get
22 it in through the detective. I'll check with the detective.

23 MS. NGUYEN: Okay.

24 MR. FATTIG: Okay.

25 MS. THOMSON: I'll go tell him.

1 THE COURT: What -- okay. And what in this phone call makes it relevant,
2 because I'm taking your objection as relevance to all of the phone call.

3 MS. NGUYEN: That's correct.

4 MR. FATTIG: There's a number of points in this particular call, Your Honor,
5 so let me go through it.

6 THE COURT: When I -- say I got me some crack that probably --

7 MR. FATTIG: No, we're taking that out.

8 MS. NGUYEN: We redacted that.

9 MR. FATTIG: We've already taken that out.

10 THE COURT: Okay.

11 MR. FATTIG: There's several portions of this transcript that have been
12 removed via stipulation of all three transcripts.

13 THE COURT: Tell me then what's the relevance of this call?

14 MR. FATTIG: Page 5 of this one. This is a phone call to Marisala Tarango
15 who is the other female, the girlfriend of the Defendant.

16 THE COURT: All right. Page 5.

17 MR. FATTIG: Towards the bottom center there's some conversation about
18 what happens. She is commenting. He says: Oh, yeah, I love you. I can't believe
19 this shit's happening, but it is.

20 She says: I don't understand.

21 And then it goes -- this is Joshua Bacharach's words: It just happened
22 like real, real fast and that's all I got to say.

23 That's certainly a very accurate description. It goes to the issue that -- I
24 certainly view it as an admission that he is driving that car, because when we look at
25 the body camera video I would certainly agree that this happened very, very fast,

1 from the point in time when it began, to the point in time when he shot him -- at the
2 officer on the corner and then hid.

3 And then it kind of goes on from there. He makes some statements
4 about how he's never, ever coming home. He's got a lot of time to do. That's on
5 page 6. And it kind of --

6 MS. NGUYEN: You know what, we had already agreed to redact those
7 actually, Tim.

8 MR. FATTIG: I thought we were --

9 THE COURT: All right. Make sure you take out the bad stuff. I think it's
10 relevant when it talks about --

11 [Colloquy between Counsel]

12 THE COURT: Just make sure they're redacted the way that you guys have
13 agreed to. But it is relevant when he takes about it happened real, real, real fast.

14 MS. NGUYEN: And then --

15 THE COURT: If it's redacted and taken out any crimes or things like that,
16 then we need to make sure that -- I mean, if we have to do a jury instruction --

17 MS. THOMSON: Hi.

18 THE COURT: We have to do a jury instruction that says, you know, there's
19 been evidence of other uncharged misconduct that, you know, like drug usage
20 sometimes. I don't think it's come in on this case, but I've had other trials where we
21 say you can't use that against him as being a bad person.

22 MR. FATTIG: Yeah.

23 THE COURT: It just tells the whole story. So if we --

24 MR. FATTIG: No, that's fine.

25 THE COURT: -- have to, we'll do that.

1 MS. NGUYEN: And Your Honor, I don't know if for clarity I know that Tim is
2 kind of arguing some of this stuff but I had talked most of the redaction information
3 with Megan. So I don't know -- Megan, do you want --

4 MR. FATTIG: She --

5 MS. NGUYEN: -- to put on the record what we -- what was taken out?

6 MS. THOMSON: Sure.

7 MS. NGUYEN: Because it's not very much --

8 MS. THOMSON: Which one do you want me to start with?

9 MS. NGUYEN: Whatever one you want to start with.

10 THE COURT: Well there was one in there that I read that talked about getting
11 some crack. That probably should be redacted.

12 MR. FATTIG: We definitely redacted that.

13 MS. THOMSON: That was taken out. So Track 3, which is the July 12th didn't
14 have any redactions. So everything stayed in because that was the one that didn't
15 have anything that came out.

16 MS. NGUYEN: Okay.

17 MS. THOMSON: July 7th of 2014 on -- we should probably mark one of these
18 as a court exhibit.

19 Page 6 he states: Cause I know they're going to give me some time
20 man. I know they're going to get a -- I'm going to get a lot of time. I'm not like --
21 I'm not ever come -- not coming home, but I'm just going to have a lot of time to do.

22 I took that out.

23 And then on the next page, page 7, he states: So I know they give me
24 a good 15 years.

25 That one may have been one where I had to take out a little bit more of

1 the paragraph. In fact, I'm sure it is because I just couldn't get it segmented out in a
2 way that didn't sound ridiculous. But that statement was taken out and I think in to
3 that the part where he talks about being in his cell last night. I'm pretty sure that
4 came out also because I couldn't get it out otherwise.

5 Page 8 he states -- or I'm sorry. Marisala states: Did you get your
6 receipt yet?

7 He says: Yes, I got it. Thank you. I got me some crack.

8 That came out.

9 MS. NGUYEN: And just so you know, crack is slang for coffee at the jail.

10 MS. THOMSON: It is.

11 MS. NGUYEN: Okay.

12 THE COURT: Oh, it is?

13 MS. NGUYEN: Yes.

14 THE DEFENDANT: Yeah.

15 MS. THOMSON: It's -- I mean, contextually it is.

16 MS. NGUYEN: Yeah.

17 MS. THOMSON: But it just --

18 MS. NGUYEN: Obviously -- I don't think anyone else might know that.

19 THE COURT: Oh.

20 MS. NGUYEN: So we took that out --

21 THE COURT: I didn't know.

22 MS. NGUYEN: -- as abundance of caution.

23 MS. THOMSON: And then on page 11 --

24 THE COURT: I do know now.

25 MS. THOMSON: -- I took out everything after one minute remaining. It was

1 just easier.

2 THE COURT: Okay. What about the --

3 MS. THOMSON: On --

4 THE COURT: I think it's relevant that I talked about -- I've ruled on the
5 second call. Now the third call?

6 MR. FATTIG: This is actually the first call. We were going backwards.

7 MS. NGUYEN: Yeah. I'm sorry. I picked them up in the wrong order.

8 MS. THOMSON: On July 1st the --

9 MS. NGUYEN: There's a reference to they put me in some psych ward.

10 MS. THOMSON: Page 2. I took that out, so it's going to hear: They just --
11 they didn't move me around man, they put this is in this medical. They -- they just.

12 So that comes out, the psych ward portion. And then page 4, at the
13 end, she, being Eufrosia states: Your -- your -- you're for a long time.

14 And that is out. And then on page 5, she also states: We'll be -- we'll
15 be down there to see you every year. I got to figure out how to -- and then it's
16 inaudible for the transcript but it says something about figure out the jail or the
17 prison and we'll be down there. I took that out.

18 On page 7 I took out -- Eufrosia states: Anyways, just know that we'll
19 be down there. Inaudible, inaudible. I have to figure out how to, inaudible, so where
20 I take, inaudible, but when you go, inaudible, be there.

21 And that's referencing there -- her coming down with the children to the
22 prison to visit him. That's taken out. And --

23 THE COURT: What's the relevance in this call?

24 MR. FATTIG: This particular call it's on page 5. I don't know if you have the
25 transcript.

1 THE COURT: I don't.

2 MR. FATTIG: Eufrasia indicates -- it's the middle of page 5.

3 You had my high beams on. That's why they pulled you over. None of
4 this -- when you left the house I said turn off my high beams. That's -- that's why
5 they pulled you over because of your high beams.

6 And Defendant says: Oh yeah?

7 And she says: Yeah.

8 And he says: Yeah.

9 So that certainly is corroborative that he is the driver because he was
10 pulled over for his high beams.

11 THE COURT: It looks like he decided way -- she -- just shut up. High beams.
12 Shut up.

13 MR. FATTIG: Yeah.

14 THE COURT: He knows it's being recorded.

15 MR. FATTIG: Yes.

16 MS. NGUYEN: Your Honor, I understand the relevance there. I'm not sure
17 why we need the remaining 1, 2, 3, 4, 5, 6 --

18 THE COURT: Well --

19 MS. NGUYEN: -- 7 pages. I don't know if they have anything -- if the State
20 wants to prove it -- show any relevance there. I think at that point, I mean, we just
21 get into some pretty foul language, putting money on books --

22 MR. FATTIG: This is July 1st of 2014, so we're talking about one of the first
23 calls.

24 MS. NGUYEN: We're talking about getting visits up at the jail and --

25 THE COURT: AS long as we take out that -- the psych part, I'm happy with

1 that. I mean, I -- it's admissible, over the objection of the Defense. What I would
2 like you to do though is make copies of each of those transcripts and provide them
3 to the Court and we'll mark them as Court's exhibits not to go back to the jury.

4 MS. THOMSON: Unless the Court has an objection to it, I will provide the
5 ones where I actually have the marking of what I took out. Everything in pink is what
6 I took out.

7 THE COURT: Pink is your color.

8 MS. THOMSON: Well there's some stuff in yellow. But pink's what I
9 redacted.

10 THE COURT: All right.

11 MS. NGUYEN: And Your Honor, just on -- on the -- and the calls -- I mean,
12 my concern is, is -- I mean, there's some like graphic kind of like sexual language
13 about her not sleeping with anyone else and -- I don't know I just -- I don't know how
14 that's relevant, but.

15 THE COURT: All right. What else?

16 MS. NGUYEN: That's all.

17 THE COURT: All right. Bring them in, Tom.

18 [Colloquy between Counsel]

19 MS. NGUYEN: Oh, there was a *Facebook* picture that was, I guess, taken by
20 one of the detectives off of a *Facebook* page with the name Joshua Bacharach on it.
21 IT had a gun. There were two guns on it. One of them doesn't look like any of the
22 guns that we have, so I know the State did redact that photo out. And then there
23 was reference in the status line to two guns and they redacted that out. So the only
24 gun that is pictured in there appears to be similar to one of the weapons that was
25 impounded here. I would just --

1 MR. FATTIG: And that has been -- if Your Honor wants to look at it, it's been
2 marked as Proposed 203. We again redacted out the second gun, any reference to
3 it.

4 THE COURT: Okay.

5 MR. FATTIG: But that's the gun that we believe is the gun used to shoot at
6 Officer McNabb.

7 THE COURT: All right.

8 MS. NGUYEN: And Your Honor, I would just say it's not relevant. It's just a
9 picture of a gun. It's not a picture of him with a gun. It is on -- obviously on his
10 *Facebook* page.

11 THE COURT: It came off his *Facebook*.

12 Okay. Bring them, Tom.

13 Hey, if we can get all your witnesses on this morning, take a late lunch
14 and then you'll come back.

15 MS. THOMSON: I like it.

16 MR. FATTIG: Yes.

17 [In the presence of the jury]

18 THE MARSHAL: All rise, please.

19 And be seated.

20 THE COURT: Stipulate to the presence of the jury.

21 MR. FATTIG: Yes, Your Honor.

22 THE COURT: Thanks.

23 MS. NGUYEN: Oh, I'd stipulate to the presence of the jury.

24 THE COURT: Thanks for being prompt, ladies and gentlemen. Again, it's my
25 fault that we're drawn out.

1 Call your next witness, State.

2 MS. THOMSON: Judge, the State calls Detective Hodson.

3 **BRECK HODSON**

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

5 THE CLERK: Thank you. Please be seated. State your full name, spelling
6 your first and last name for the record, please.

7 THE WITNESS: I'm Detective Breck Hodson. It's B-R-E-C-K, H-O-D-S-O-N.

8 THE COURT: Go ahead.

9 MS. THOMSON: Thank you, Your Honor.

10 **DIRECT EXAMINATION**

11 BY MS. THOMSON:

12 Q Good morning. Directing your attention back to June 26th of 2014, were
13 you a firearms detective?

14 A Yes, I was.

15 Q And since then Metro has reorganized and now you're generally -- just
16 a general detective, is that fair?

17 A That's correct.

18 Q Okay. In June of 2014, did you have contact with an individual by the
19 name of Eufrasia Nazaroff?

20 A Yes, I did.

21 Q And was that pursuant to an investigation regarding an incident that had
22 occurred on June 26th?

23 A That'd be correct.

24 Q When you had contact with Ms. Nazaroff, where was that?

25 A It was at an apartment complex. I believe it was in the area of

1 Cheyenne and Michael.

2 Q And approximately how far is that apartment complex from the area of
3 Carey and Dolly?

4 A At least ten miles away.

5 Q When you had contact with Ms. Nazaroff, were you discussing an
6 individual by the name of Joshua Bacharach with her?

7 A Yes.

8 Q And during that conversation with her, did you show her any
9 photographs or stills?

10 A Yes, I did.

11 MS. THOMSON: May I approach the witness?

12 THE COURT: Yes.

13 BY MS. THOMSON:

14 Q Showing you what's been marked as State's Proposed Exhibit 203. Do
15 you recognize what I'm showing you here?

16 A Yes.

17 Q Okay. And is this something that you had shown to her during your
18 discussion?

19 A Yes, it was

20 Q And is this a still from a *Facebook* page?

21 A Yes.

22 Q And specifically was that a page that you had determined belonged to
23 Joshua Bacharach?

24 A Yes, it was.

25 Q And did you determine that by name and other photographs on the

1 page?

2 A Yes, that'd be correct.

3 Q Okay. Those other photographs, do they include photographs of Mr.
4 Bacharach?

5 A I believe so, yes.

6 MS. THOMSON: I'd move for admission of State's Proposed Exhibit 203.

7 MS. NGUYEN: Submit.

8 THE COURT: It'll be admitted.

9 **[STATE'S EXHIBIT 203 ADMITTED]**

10 BY MS. THOMSON:

11 Q And during your contact with Ms. Nazaroff, when you showed her what
12 has now been marked as State's Exhibit 203, did you discuss whether she had seen
13 Joshua with firearms?

14 A That'd be correct.

15 Q And did she indicate to you that she had in fact seen him with --

16 MS. NGUYEN: Objection, Your Honor, hearsay.

17 MS. THOMSON: Your Honor, at this point, it's impeachment.

18 THE COURT: She's already testified, so --

19 MS. NGUYEN: I would just argue that the jury's already had the opportunity
20 to hear directly from her.

21 THE COURT: Okay. Overruled. Go ahead.

22 MS. THOMSON: Thank you, Your Honor.

23 BY MS. THOMSON:

24 Q Did she indicate to you that she had in fact seen him with three
25 separate firearms?

1 A Yes, she did.

2 Q And one of those was the firearm depicted in this still?

3 A That'd be correct.

4 Q Did she indicate to you whether she saw that *Facebook* post or if he

5 had sent photographs to her phone?

6 A Yes, she did.

7 Q And which was it?

8 A She stated that it was on his *Facebook* and that he also sent it directly

9 to her phone.

10 Q When you spoke with her, did she indicate to you how recently she had

11 seen him with those guns?

12 A They had been with him -- it was a close -- I can't remember exactly --

13 specifically what -- how many days, but it had been recent.

14 Q Okay. Do you recall her indicating that he -- she had last seen the guns

15 right before he came back and that he had come back earlier in the week?

16 MS. NGUYEN: Objection, Your Honor, leading.

17 THE COURT: Sustained.

18 MS. THOMSON: may I approach?

19 THE COURT: Yes.

20 BY MS. THOMSON:

21 Q You recorded the conversation with her, correct?

22 A That's correct.

23 Q I'm going to direct you first to page 6 and have you read that over

24 quietly to yourself.

25 A Okay.

1 Q And then for context, page 2, and read that quietly over to yourself.

2 A Okay.

3 Q And in reviewing that, does that refresh your recollection as to when
4 she indicated she had last seen the firearms?

5 A Yes.

6 Q And what did she tell you?

7 A She told me a couple days prior to our conversation.

8 Q And when you spoke with her, did you discuss with her whether she
9 had seen the Defendant with a ballistic or bullet-proof vest?

10 A Yes.

11 Q And did she indicate to you that she had?

12 A She stated he was wearing the evening that he left. So the night in
13 question, the 26th.

14 Q And you spoke with her on the 27th?

15 A Yes.

16 Q And did you ask her if he was wearing it underneath or over his
17 clothing?

18 A I did and she stated it was over his clothing.

19 MS. THOMSON: Court's indulgence.

20 Pass the witness.

21 **CROSS-EXAMINATION**

22 BY MS. NGUYEN:

23 Q Was it just you when you met with Ms. Nazaroff?

24 A During our conversation, yes. My team was on scene within probably
25 20 feet of me.

1 Q Okay. The picture that was reference to in there, was it printed out like
2 that?

3 A It was -- I believe it was on --

4 MS. THOMSON: Judge can we --

5 MS. NGUYEN: I'm sorry.

6 MS. THOMSON: Okay.

7 MS. NGUYEN: I can clarify that question.

8 BY MS. NGUYEN:

9 Q Was it in a print format or was it on your phone?

10 A It was on the phone.

11 Q Okay. So you showed her the *Facebook* page from your phone, is that
12 correct?

13 A That's correct.

14 Q Okay. Prior to recording the conversation, did you have a conversation
15 with her?

16 A Yes, we did.

17 Q Okay. So the entirety of your conversation was not recorded, is that
18 fair to say?

19 A No, because we were going consent for her apartment.

20 Q Okay. During the course of your investigation and your meeting with
21 her, were you aware that she was upset that she did not have her vehicle?

22 A Yes.

23 Q Okay. And she had inquired of you about how she could get her
24 vehicle back, is that correct?

25 That's correct.

1 Q Okay. And that was her one mode of transportation for her and her
2 children, is that correct?

3 A Outside of his vehicle that she didn't want to drive.

4 Q Okay. And at the time was she pregnant?

5 A Yes.

6 Q And so having that vehicle was important to her?

7 A That's correct.

8 Q Okay. Did she make it known on multiple occasions during that
9 conversation that she was upset about the car?

10 A Yes.

11 Q Okay. And there were -- her property was also in the car, is that
12 correct?

13 A I would assume. I don't remember -- recall exactly.

14 Q Okay. Do you remember her indicating if she could get her property or
15 her kids' property out of that vehicle?

16 A She did want the vehicle back, I know that.

17 Q Okay. During the course of your conversation with her, either recorded
18 or not recorded, do you remember her also being upset about another woman that
19 she knew of Joshua Bacharach's life?

20 A I don't remember her being upset about it. She knew about it.

21 Q Okay. And so she was aware of this other woman, is that correct?

22 A That's correct.

23 Q Okay. Is it fair to say that she was unhappy about this whole situation?

24 A In general or --

25 Q Yes, in general.

1 A In general, yes.

2 MS. NGUYEN: Okay. Nothing further.

3 MS. THOMSON: I have no further questions.

4 THE COURT: Jury have any questions of this witness? Seeing no hands.

5 You're free to go, Detective.

6 THE WITNESS: Thank you very much.

7 THE COURT: Call your next witness, State.

8 MS. THOMSON: Court's indulgence.

9 The next witness is Beata Vida.

10 **BEATA VIDA**

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

12 THE CLERK: Thank you. Please be seated. State your full name, spelling
13 your first and last name for the record, please.

14 THE WITNESS: My name is Beata Vida and it's spelled B-E-A-T-A, V-I-D-A.

15 MS. THOMSON: May I proceed?

16 THE COURT: Uh-huh.

17 **DIRECT EXAMINATION**

18 BY MS. THOMSON:

19 Q Good morning, how are employed?

20 A I am employed by the Las Vegas Metropolitan Police Department as a
21 forensic scientist II in the biology/DNA section?

22 Q And for how long have you been in that position?

23 A I have been with them since June of 2010.

24 Q What training or education did you go through to get that position?

25 A I have a Bachelor's of Art degree in Biology, with a minor in Chemistry

1 and I also have an Associate's of Science degree in crime scene technology. In
2 addition to my formal training, I also have on-the-job training, most of which took
3 place at my former employer which was the Florida Department of Law enforcement
4 in Orlando where I worked as a DNA analyst for approximately four years and one
5 year of that was just training.

6 And then when I was hired at Metro in 2010 I went through another
7 training program that lasted about eight months.

8 Q And what do you do for the Las Vegas Metropolitan Police Department?

9 A I examine various items of evidence that comes into the laboratory for
10 biological materials. Most often I look for things such as blood, semen, or saliva.
11 And once a stained is identified I perform DNA analysis on it to either include or
12 exclude specific individuals. In addition to body fluids I also look for touch DNA,
13 which is DNA that is transferred to items from skin cells and it happens when a
14 person either comes into contact with or touches an item.

15 Q SO does -- do we leave DNA behind every time we touch something?

16 A Not every time. It depends on a lot of circumstances.

17 Q And if we touch an item and we are leaving DNA behind, is there
18 always enough for you to be able to compare?

19 A No, there is not.

20 Q Can you explain for -- why that is?

21 A Yes. So for example, if I was to touch this folder, there's a lot of factors
22 that depend on whether I not -- whether or not my skin cells transferred to it. It
23 depends on how long I handled the item, the longer I touch it the more DNA I'm
24 likely to leave. It depends on the surface, if a surface area is rough, DNA sticks to it
25 better versus smooth surfaces where DNA can come off of easier.

1 It also depends on how the item is stored or where it's kept after it's
2 been touched. Things such as heat, humidity, and sunlight will destroy DNA on an
3 item. And lastly, if I was to swab this item, it would depend whether I swab it really
4 lightly or really hard. If I swab it harder I'm probably get more DNA. Also, if I clean
5 off the file or if I wear gloves, I'm not going to leave any DNA.

6 Q And are there situations where there's too much DNA?

7 A Yes, there are.

8 Q Can you explain that for us?

9 A Yes. So we have what are called mixture DNA profiles, which are DNA
10 profiles from multiple individuals. So if I went out there and I swabbed the handle of
11 the door I would expect to find a mixture because so many people have handled that
12 handle, so I would get a mixture and I wouldn't be able to make any conclusions on
13 that because too many people have touched it and left DNA on it.

14 Q Are there situations where you have a mixture of say two profiles and
15 you're able to determine to whom those two belong?

16 A Yes. Sometimes if we do have a mixture, if one person leaves more
17 DNA than another person, I'm able to actually pull the two DNA profiles apart and
18 that way I can tell who left what DNA profile.

19 Q And can you explain for us what -- how you compare profiles? How you
20 make that determination?

21 A Yes. So once a DNA profile is obtained -- let's say there is a stain at a
22 crime scene. So the detectives or police officers will collect that stain for me and
23 then I will take it on through DNA. Then I also usually get what are called buckle
24 swabs or standards, which are DNA profiles from known individuals. And all that is
25 is taking a swab from a person's cheek with a Q-tip and then attaching a name to it,

1 and then I get that, and that also runs through a DNA process.

2 After that I compare the Q sample, which is the blood stain from the
3 crime scene to the person's DNA profile to see if they match or not.

4 Q And were you asked to com -- to do some comparison of 140626-4091?

5 A Yes.

6 Q Okay. And as part of those comparisons you had a known sample?

7 A Yes.

8 Q And that was a known sample for Joshua Bacharach, correct?

9 A Correct.

10 Q Okay. Showing you what's been marked as State's Exhibit 201. Is this
11 a package that you received -- that's a little bit better -- from the vault for purposes
12 of comparison?

13 A Yes.

14 Q And how can you tell that you've handled this package?

15 A On the top right is has the lab number, the item number, the date, and
16 my number on the bottom. And I also signed on the bottom, the chain of custody,
17 and the blue seal, that's also my number.

18 Q So the writing up in the top right hand corner of the envelope is your
19 writing?

20 A Yes.

21 Q And the blue seal along the bottom, those are your initials with your P-
22 number?

23 A Yes.

24 Q And what is the reason for putting the initials and P-number over the
25 tape?

1 A We do that to make sure that the evidence hasn't been tampered with
2 and that I was the one who sealed it.

3 Q And this is in the same condition as when you last saw it?

4 A Yes.

5 Q Showing you what's been marked as State's Exhibit 194. Is this also an
6 item that you examined?

7 A Yes.

8 Q And you can tell from the writing and the tape again?

9 A Yes.

10 Q Okay. And each of these envelopes included swabs that were taken by
11 a CSA and impounded for your comparison, is that correct?

12 A Yes.

13 Q Now, when they are impounded they include a description of where
14 they came from, is that correct?

15 A Yes.

16 Q That way you don't just get five random swabs and come back with five
17 results that you don't know what they associate to?

18 A Correct. It usually -- it may or may not say on the outside of the
19 package, but if it doesn't it -- there is a swab box within the package and it will
20 usually say what it's from.

21 Q Were you asked to compare swabs that were taken from a Colt .45?

22 A Yes.

23 Q And were you able to form a conclusion with regard to those swabs?

24 A Yes.

25 Q And can you explain for us what your conclusion was?

1 A May I look at my report?

2 Q Yes, if that would help refresh your recollection.

3 A And which item was it?

4 Q And I don't have your report in front of me. I apologize.

5 That is Lab Item Number 16.

6 A Okay. So for that one I got what we call an inconclusive result.

7 Q Okay. And can you explain for us what an inconclusive result is?

8 A Yes. So that just means that I did get some sort of a DNA profile but it

9 was limited that I wasn't able to make any conclusions. So I wasn't able to include

10 or exclude or make any kind of determinations on it. All I can say is that there was

11 something there but it was basically useless.

12 Q Okay. And you were also provided a swab from the base or feed ramp

13 of the magazine on that firearm, correct?

14 A Yes.

15 Q As Lab Item 17?

16 A Correct.

17 Q Okay. Were you able to form a conclusion on that swab?

18 A Yes. I did not obtain a DNA profile from that item.

19 Q Did you receive a swab from a Colt .25, which was Lab Item Number

20 20?

21 A Yes.

22 Q And were you able to determine if there was any DNA on there that you

23 could test?

24 A Again, it was inconclusive because I didn't obtain enough data.

25 Q And did you also receive a swab from the base and feed ramp of the

1 magazine for that firearm?

2 A Yes.

3 Q And what was your conclusion associated to that swab?

4 A I did not obtain a DNA profile from that item.

5 Q And so that means that there was no DNA on the swab for you to be
6 able to prepare?

7 A Either -- yeah, either there was no DNA or our testing is not sensitive
8 enough to pick up the DNA that was there.

9 Q And Lab Item Number 22. Did you receive a swab from the trigger --
10 trigger, forestock, and butt of a rifle?

11 A Yes.

12 Q And did you form a conclusion associated to that?

13 A Again, it was inconclusive results.

14 Q Did you receive several swabs associated to a vehicle?

15 A Yes.

16 Q And those were from several different locations within the vehicle?

17 A Correct.

18 Q And did you compare each of those swabs?

19 A Compare them for --

20 Q To the known -- to the buckle?

21 A Yes, I did do DNA analysis on all of them.

22 Q Speaking of Lab Item Number 25, was one of those swabs from the
23 driver's interior door handle?

24 A Yes.

25 Q And were able to form a conclusion about that swab?

1 A No, it was a -- again, inconclusive results.

2 Q And why was that inconclusive?

3 A Believe the data that I obtained, again, there wasn't enough for me to
4 make any determinations on.

5 Q Lab Item Number 26, did you receive a swab from the steering wheel
6 cover?

7 A I did not receive the swab, I actually received the actual item.

8 Q And did you swab the steering wheel cover?

9 A Yes, I did.

10 Q And were you able form a conclusion on that?

11 A Yes, I was.

12 Q And will you explain for us what that conclusion was?

13 A Yes. So the DNA profile that I obtained from that item was a mixture of
14 at least three people. So whenever we actually have results I -- and I compare a
15 person to that mixture, I have to also perform statistical calculations to show how
16 common or rare that DNA profile might be in the population.

17 So in this case I obtained a mixture of at least three people. And one
18 person was basically too low and I couldn't make any conclusions on them. But the
19 other two -- there was two people that contributed a lot more DNA and I was able to
20 look at the DNA profile from those two people and make conclusions on that. And
21 so what I found was there is an unknown female and Joshua Bacharach could not
22 be excluded from that mixture.

23 Q That --

24 A And -- I'm sorry. Go ahead.

25 Q Go ahead. I'm sorry.

1 A So as far as the statistics was approximately 1 in 163,000 unrelated
2 individuals in the population could be included in that mixture.

3 Q Can you use that statistic and sort of explain what it means in a way
4 that is more communicable?

5 A Yes. So what that means is if I randomly took a person from the
6 population that was not related to whoever is in my mixture, the probability of them
7 having the DNA profile that would fit into my mixture would be 1 in 163,000.

8 Q Did you also receive a swab from the gear shift of that vehicle?

9 A Yes, I did.

10 Q And were you able to form a conclusion associated to that?

11 A Yes.

12 Q And what was that conclusion?

13 A The DNA profile obtained was consistent with an unknown female
14 individual.

15 Q Okay. Showing you what's been marked as State's Exhibit 129. Are
16 you able to tell if this is the steering wheel cover that you received and swabbed?

17 A I am not.

18 Q The steering wheel cover that you received, however, was impounded
19 under the same event number?

20 A Yes.

21 Q And did you also receive a bullet-proof vest to examine?

22 A Yes, I did.

23 THE COURT: Is it unusual not to find DNA?

24 THE WITNESS: On handguns or just generally speaking?

25 THE COURT: Handguns and you're about to see a vest.

1 THE WITNESS: Yes, because like -- as I mentioned before, touching
2 something it's very -- there's a lot of factors that influence it, whether DNA will be left
3 on or not. So for touch, yes. But for blood, semen, and saliva which are body fluids,
4 it contains a lot more DNA, so we are most likely going to find DNA in those.

5 THE COURT: So our TV shows are wrong.

6 THE WITNESS: Yes, they are. They, yes, very wrong.

7 BY MS. THOMSON:

8 Q And to clarify, it's unusual to find touch DNA, but not when there are
9 body fluids left behind?

10 A Correct. And I would also like to say that for guns, we either have -- get
11 no DNA profiles or if I do get a DNA profile it's from a lot of people because a lot of
12 people tend to handle firearms. So, again, it's -- it would be inconclusive because
13 too many people have touched it.

14 Q Showing you what's been marked as State's Exhibit 192. Can you tell if
15 you have had contact with that box?

16 A I have, yes.

17 Q And how do you know?

18 A It has, again, the lab number, the item number, the date that I
19 examined, and my P-number, and also there is a blue seal with my initials.

20 Q Okay. And when you received it, it was sealed with the red seal?

21 A Correct.

22 Q Okay. And typically you will open a package like we saw with the
23 envelopes in a place where it has not been sealed with the red seal, is that fair?

24 A Yes. Unless it's sealed in all places, then I will have to cut through the
25 seal that's already there.

1 Q And so that's an example in this case where all the flaps are sealed
2 with the red tape?

3 A Correct.

4 Q When you received this package, did it contain what has been marked
5 as State's Exhibit 192a?

6 A Yes.

7 Q And is this the item that you swabbed and tested for DNA?

8 A I believe so. There should be -- I should have marked it somewhere or
9 there should be something hanging off it. Yeah, right there. If you open it up, right
10 there is my initials.

11 Q And if you could show us what your --

12 A Right here. Again, it's the same information that I put on the package.

13 Q Okay. And that reads the lab number and -- I'm sorry. Yeah, the lab
14 number and the item number?

15 A Yes. My initials and the date.

16 Q And if you could explain for us, what was your process in swabbing?

17 A So I was -- from what I understood -- for every case we get there is
18 usually a really brief scenario telling me what the detective or whoever's request the
19 evidence to be looked at, what they want me to do. Am I looking for blood on here,
20 am I looking touch, what do they want me to look for. So in the case, basically, I
21 swabbed for touch evidence to see if somebody wore it and maybe I can get some
22 DNA, so I swabbed the entire item, focusing on the armpits and the straps.

23 Q Can you explain for us swabbing entails?

24 A Yes. So when I saw we swab that just means we have swabs that look
25 like Q-tips, we add some water to it, and then just swab the item to get the DNA off

1 that's on there.

2 Q When you say you swabbed the entire item, is that the entirety of the
3 surface?

4 A Yes.

5 Q Okay. And the Q-tip that you use, is it just from CVS, it's a sterilized --

6 A Yes, it is.

7 Q When you swabbed the vest, did you come to a conclusion on DNA?

8 A Yes.

9 Q And what was that?

10 A Again, I obtained a mixture of at least four people or more. So I
11 obtained so much information off that item that again, it was useless information and
12 I couldn't make any conclusions off of it.

13 Q You indicated when we first began speaking that there are times that
14 you'll have a mixture profile, lots of different people, but one person will be stronger
15 than the others and you can pull them out. Is that kind of a fair --

16 A Yes.

17 Q Okay. And do you expect there to be a stronger profile when there is a
18 lot of someone's body fluids?

19 A Absolutely.

20 Q Okay. Would you anticipate there being a lot of fluids if, for example,
21 the vest was worn over clothing?

22 A No, because obviously the skin contact has to occur for that to happen.

23 MS. THOMSON: Court's indulgence.

24 Pass the witness.

25 **CROSS-EXAMINATION**

1 BY MS. NGUYEN:

2 Q When you're looking items such as like a vest or a jacket or something,
3 are there certain areas that you focus that you believe there would be more touch
4 DNA to collect from?

5 A Yes, I do.

6 Q Like for example, like the areas where something might zip up, would
7 you focus your attention there?

8 A Yes. So if I jacket I would probably focus on the pockets, the neck
9 area, and the armpits, and the zippers.

10 Q So you look at places where there's more likely to be contact, is that
11 correct?

12 A Yes.

13 Q And is that something that you've learned in your training?

14 A Yes.

15 Q And common sense?

16 A Correct.

17 Q You had indicated that obviously if you go to a scene and there's blood
18 all over the place and pools of liquid, it's probably easier to find DNA, is that correct?

19 A Yes, it is.

20 Q Okay. And touch DNA is a little bit more difficult?

21 A Correct.

22 Q So for -- and if there are more people that have come into contact, it's
23 more difficult too?

24 A Yes.

25 Q Okay. So if a hundred people touch something and you were

1 comparing it, it's going to be more difficult than if say two people touched it, is that
2 fair to say?

3 A Yes.

4 Q Okay. So you'd expect in areas with high traffic like a doorknob, you
5 might be able to collect DNA, but too many people have touched that area?

6 A Yes.

7 Q You said that touch DNA is influenced by a lot of different things or
8 other -- is touch DNA just fingerprints or is that -- does that include other things?

9 A It's just skin cells.

10 Q Okay.

11 A Skin cells contain DNA, so I need skin cells in order to get the DNA.

12 Q Okay. So for example you wouldn't be just -- this would be considered
13 touch DNA, is that correct?

14 A Correct.

15 Q If I was to touch something?

16 A Yes.

17 Q Would touch DNA also include like the skin cells on the back of like my
18 jacket where my neck and jacket touch?

19 A Yes. So clothing items, things like that -- hats would also be considered
20 touch.

21 Q Those kind of things would be touch DNA, is that correct?

22 A Yes.

23 Q Okay. And you said things can influence that, like humidity, is that
24 correct?

25 A As in so far as how long the item has sat in humid area -- or air, sunlight

1 and UV, things like that. But just, you know, because I touched this, the humidity
2 might not necessarily destroy it, unless it sits there for maybe a couple weeks, a
3 month and then I take a swabbing of it.

4 Q And the items that you reviewed -- items -- did you review those all on
5 the same day?

6 A I believe so. I would have to double-check my notes.

7 Q Would it refresh your recollection to look at your notes in your report?

8 A Yes.

9 Q Okay. Can you take a look at those to see when you reviewed those
10 items?

11 A Well I actually started examination on November 4th, 2014. And it
12 appears that the ballistic vest, I actually looked at November 5th. And the buckle
13 swab I looked at November 13th.

14 Q Okay. Of the items that you -- I think it was 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.
15 There were ten total items that you examined, is that correct?

16 A Yes.

17 Q Were there any other items that you examined that you did not include
18 in this?

19 A No, there were not.

20 Q Okay. As far as choosing what items to examine are -- do you make
21 that determination or are you directed to those items?

22 A I do not make the determinations. I'm usually told what the detective or
23 whoever wants me to look at because I'm not at the scene and I have no
24 background story or anything, so they have to tell me what they want me to look at.

25 Q Okay. But as far as what to examine on, for example, the ballistic vest,

1 do you make a determination on what areas to swab, is that correct?

2 A Yes. That's correct.

3 Q And that's based on what we talked about before?

4 A Yes.

5 Q The swabs -- when we look at Item Number 19, the swab from the
6 trigger grip inside of the Colt .45 handgun, did you actually swab that handgun or
7 was that something that had previously been swabbed by someone else?

8 A It was just the swab that I received and it was swabbed by somebody
9 else.

10 Q Okay. So you did not do the collection of that DNA?

11 A That's correct.

12 Q Okay. And the same things with Item Number 20, the swab from the
13 base and feed ramp of the magazine, that wasn't a swab that you collected?

14 A Correct.

15 Q Okay. The swab from the trigger grip inside of the Colt .25 handgun,
16 again, you did not collect that, is that correct?

17 A That's correct.

18 Q Okay. And is it fair to say all those swabs that were just -- we just
19 talked about that were included in the evidence, you did not collect those swabs, is
20 that correct?

21 A That's correct. The only thing I got were the actual swabs.

22 Q Okay. And as far as the steering wheel cover and the swab from the
23 gear shift knob, did you collect those?

24 A I actually swabbed the steering wheel cover myself, but the gear shift, I
25 did not, that was a swab that was submitted to me.

1 Q The ballistic vest, you swabbed that?

2 A I did.

3 Q Okay. So those two items you actually were the one that collected and

4 testing those items?

5 A Yes.

6 Q Okay. And you did -- you started your -- in the collection from the

7 steering wheel cover and the ballistic vest, you did that in October or had you don't

8 that prior to October?

9 A It all took place in November.

10 Q I meant November. I'm sorry, I apologize.

11 A Yes, I did in November.

12 Q Okay. And you're aware that this incident occurred in June of that

13 same year, June of 2014?

14 A I was not aware.

15 Q Okay. So you don't know the difference between when the evidence is

16 collected and when you process it?

17 A No, it doesn't really influence my testing in any way, so usually it's not

18 really something that matters to us.

19 Q Is that something that can influence your results?

20 A It depends on how the evidence is stored.

21 Q Okay. So that may influence on how much DNA can be collected from

22 a particular item, is that correct?

23 A It may and -- yeah -- like as I said, depending on how it was stored.

24 Q Could it affect something like if you had the ballistic vest for example,

25 if -- the minute when it was collected let's say it was saturated with some sort of

1 sweat or other touch type DNA from like skin cells, after months of being in a box or
2 in storage is that something that could influence the ability for you to collect DNA
3 from it?

4 A It could, but in this case it didn't because I did get a lot of information.
5 So if it was inconclusive because there was limited data that would have been
6 something that, you know, was possible. But in this case I got a lot of information, it
7 was just useless information. So I would have to so no for that one.

8 Q If for -- but you don't have any way of comparing with this particular one
9 because nothing was collected immediately after?

10 A You mean a swab?

11 Q Yes.

12 A There was no swab.

13 Q No. You said things like a saliva and --

14 A Blood.

15 Q -- blood would be easier to collect. Is sweat another -- or tears, is that
16 something that could leave a -- I guess a more useable sample?

17 A Possibly. Only because when your hands sweat you are more likely to
18 transfer DNA to something because your hands are wet.

19 Q Okay. You didn't test any clothing, is that correct?

20 A Correct.

21 Q In this case we made reference to a buckle swab and that's a known
22 sample from Joshua Bacharach, is that correct?

23 A Yes.

24 Q Okay. Were there any other known samples that you compared these
25 items to?

1 A There were not.

2 Q Okay. So the only known sample that you compared these -- how
3 many items are there? 1, 2, 3, 4 --

4 A Nine.

5 Q Nine items to just that one individual, is that correct?

6 A That's correct.

7 Q People hear about running -- getting DNA hits through like a database.
8 Is this something -- any of these items, were they run through any kind of general
9 database of DNA?

10 A No. There are certain guidelines that we have to follow for us to
11 actually put something in those databases and I did not put anything in there.

12 Q Okay. And you weren't directed to put anything in there by any other
13 detectives, is that correct?

14 A Correct. Although even if they did direct me, guidelines weren't met
15 that would allow me to put them in there. So even if they would have directed me, I
16 couldn't have put anything in.

17 Q Okay. You never received a court order directing you by order a court
18 to do that as well?

19 A I never did.

20 Q Okay.

21 MS. NGUYEN: Nothing further.

22 **REDIRECT EXAMINATION**

23 BY MS. NGUYEN:

24 Q What are the guidelines that affect whether or not you put information
25 into database?

1 A Things -- well, we can't put anything from victims in there. Also we
2 have to have a really good profile for it to go in there. Also depends on whether we
3 expect a person's DNA profile to be on that item or not. If I -- let's say I take a -- a
4 gun is taken off of a suspect, we cannot put that DNA profile into the database
5 because it came off of the suspect, so we expect his DNA profile to be on it. So
6 there's things like that that, you know, we have to know before it can go up there.

7 Q And who gives you those guidelines? Are those the Metro guidelines?

8 A No, they're by the FBI's.

9 Q Okay. So federal?

10 A Yes.

11 Q So a State court can't order you to not comply with federal guidelines,
12 would that be fair?

13 A Correct.

14 Q Okay. And I just want to confirm, you indicated that, for example, when
15 someone sweats they're more likely to leave behind DNA from their hands. Is
16 that -- does sweat itself carry DNA or is it that the sweat will take with it skin cells?

17 A The second part, yes. It will -- it's -- if you have something on your
18 hand and it's wet, it's easier to transfer it to something.

19 Q Okay. So sweat that came through for example a shirt is not going to
20 carry the DNA with it necessarily?

21 A Yeah, I would expect no.

22 MS. THOMSON: Pass.

23 MS. NGUYEN: Nothing further.

24 THE COURT: The jury have any questions of this witness? Seeing no -- got
25 one. You got to raise your hand.

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EXAMINATION BY THE COURT (JURY QUESTIONS)

BY THE COURT:

Q How long does it take for DNA to degrade a surface of clothing material before -- or fabric -- before it is no longer useable in analysis?

A Well, gain, it depends on a lot of things. But if I leave a shirt outside in this -- in Las Vegas heat, the UV, the heat will destroy it. If I throw a shirt into water, it's probably going to destroy it. So it again depend on something like different variables. But I would say maybe from like four or five days to whatever weeks, months.

THE COURT: State?

FOLLOW-UP EXAMINATION

BY MS. THOMSON:

Q Just to confirm. With regard to the bullet-proof vest, it wasn't that there was not DNA, it was just that there was too much for you to be able to make a conclusion, is that fair?

A Correct.

MS. THOMSON: Pass.

MS. NGUYEN: No further questions.

THE COURT: Thank you. You're free to go. Call your next witness.

MS. THOMSON: State calls Anya Lester or Anya Sanko.

ANYA LESTER

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

THE CLERK: Thank you. Please be seated. State your full name, spelling your first and last name for the record, please.

THE WITNESS: My name is Anya, A-N-Y-A; Lester, L-E-S-T-E-R.

1 MS. THOMSON: May I proceed?

2 THE COURT: Yes.

3 **DIRECT EXAMINATION**

4 BY MS. THOMSON:

5 Q Good morning, ma'am, how are you employed?

6 A I am employed at the Las Vegas Metropolitan Police Department
7 forensic laboratory in the firearms and tool marks analysis unit as a forensic
8 scientist.

9 Q And what training or education did you go through for that position?

10 A I have a Bachelor's of Science degree in Forensic Science. And since
11 being hired with the Metropolitan Police Department I underwent a training program
12 which consisted of about 2500 hours of training. I did things such as internal
13 courses, external training courses. I did tours of firearm and ammunition
14 manufacturing facilities. I attended various firearms armorers' courses from the
15 manufacturers.

16 And when I finished that training I did a series of supervised cases
17 underneath an experienced examiner. And at the end of that training I took a series
18 of competency exams which allowed me to begin my own independent case work in
19 the spring of 2011.

20 Q And for how long have you been with Metro?

21 A I started with Metro in December of 2008 as a forensic laboratory aid
22 and I promoted into the forensic scientist position in October of 2009.

23 Q Can you explain for us, what is the process when you're asked to do a
24 comparison associated to a firearm?

25 A Well, if I have a firearm the first thing I do is I of basically a check on the

1 firearm to make sure that I can fire it. I do things such as look at the serial number,
2 looking at the barrel length, the overall length, measure the trigger pull. I make sure
3 that it's not damaged in any way, nothing that I note. I look at the safeties on it, the
4 magazine, all of those different items, and I basically convince myself that it's safe
5 enough for me to test fire it.

6 Then I take that gun and I load it with ammunition from our collection --
7 from our general supply that we have at the laboratory and I test fire into an indoor
8 shooting tank. It's a tank which has about 600 gallons of water in it. It allows me to
9 shoot into that water and obtain pristine samples of the bullets and of the cartridge
10 cases from that particular firearm that I fired myself so I know that they came from
11 that gun.

12 Then if I have a piece of evidence, either a bullet or a cartridge case
13 that I'm asked to compare it to, the first thing I do is take two knowns, the ones that I
14 fired myself, I put them on my comparison microscope -- it's like two microscopes
15 that are hooked together with an optical bridge. It allows me to look through it and
16 see two things side by side, together, simultaneously. I look at the marks that are
17 on the two knowns, see how good that gun marks, see those marks, how they
18 repeat from one to the other, and determine if there is enough information there for
19 me to do a comparison.

20 Once I've made the determination I will take the piece of evidence that
21 I've asked to compare, I'll leave the known on one side, the evidence on the other
22 side on my microscope and I do that microscopic comparison looking for those
23 individual characteristics for me to make a determination of identification to that
24 particular firearm.

25 Q So when a firearm shoots a bullet, it will leave individualized marks on

1 the casing and the bullet?

2 A Yes, that's correct.

3 Q And you said that you, when you're examining the firearm to decide if
4 you are safe to fire it that you look at the serial number. Does every firearm have a
5 serial number?

6 A Yes.

7 Q It's manufactured with it?

8 A Yes, that's correct.

9 Q Can you explain for us what is the operation of a semi-automatic
10 weapon?

11 A Semi-atomic firearm is a firearm that for each singular pull of the trigger
12 it fires one shot. And if you think of the word semi-automatic, it's partially automatic,
13 so it's not like a full automatic gun which is where if you hold the trigger down it
14 keeps firing, you have to pull the trigger every single time. But because it is semi-
15 automatic it does perform some part of the firing cycle for you. It's usually the
16 loading process. Usually the extraction and ejection and loading of a new cartridge.

17 So, for example, if you have a semi-automatic pistol you would have a
18 magazine, which you put in your cartridges, your ammunition, you load that into the
19 firearm, you have to do an action to load a cartridge into the chamber which is
20 usually you take the slide to rack one or put one forward into the chamber. At that
21 point in time the gun's cocked, you have one in the chamber, and you're ready to
22 shoot.

23 When you pull the trigger what happens is the firing pin goes forward,
24 hits the primer on the cartridge, it makes a little spark, that ignites the powder that's
25 inside that cartridge, that powder when it expands it liberates gas and it pushes the

1 bullet down the barrel and out of the muzzle of the firearm.

2 You have that action of the bullet going forward, you have the cartridge
3 case which is being pushed backwards. It gets pushed backwards against the back
4 of the slide. You have a hook which is called an extractor, pulls that out of the
5 chamber. You have a piece which is called the ejector which it hits against and it's
6 ejected out of the firearm.

7 So then the slide, it has a spring. When it goes backward that spring is
8 compressed and then when that spring energy is released that slide goes back
9 forward and it picks up the next cartridge out of that magazine and loads it into the
10 chamber and that way it's ready for you to pull the trigger again and fir the next shot.

11 Q When the cartridge is being moved by the extractor and ejector, will that
12 leave marks on the cartridge?

13 A Yes, the extractor and the ejector can both leave marks on the cartridge
14 case.

15 Q Okay. Will it always leave marks?

16 A Not necessarily.

17 Q And when the casing is ejected, is it always at the same angle and the
18 same direction?

19 A No, it depends on the specific firearm, the manufacturer, and the model.
20 In general, they tend to go back and to the left, but that would be if you were
21 standing stationary, holding the firearm upright, and it's just sort of in general that's
22 the way that they tend to go. They can go in different directions depending on the
23 gun.

24 Q And would it also be affected by outside factors; wind, items in the way,
25 things like that?

1 A Yes.

2 Q Were you asked to compare -- excuse me -- or I'm -- not -- examine
3 four firearms in Event Number 140626-4091?

4 A Yes, I was.

5 Q And along with that request there were several casings and cartridges,
6 is that fair?

7 A Yes, there were.

8 Q First of all, talking about State's Exhibit 180, were you asked to
9 examine a Glock 9 mm?

10 A May I refer to my case file?

11 Q Yes. Would that help refresh your recollection?

12 A Yes.

13 Yes, I was asked to examine a Glock pistol, 9 mm Luger caliber.

14 Q Okay. And for you that was Lab Item Number 1?

15 A Yes, that's correct.

16 Q And were you -- did you know to whom this firearm belonged?

17 A I did not know specifically to whom it belonged. I knew just because of
18 the fact that the case was submitted to me as an officer-involved shooting that it was
19 an officer's firearm.

20 Q And when you examined the Glock, is it the same firearm as we're
21 seeing in this exhibit?

22 A Can you move it in so I can see the serial number?

23 Yes, it -- that has the same serial number as the one that I did examine.

24 Q And this is State's Exhibit 180. When you examined this firearm, was it
25 operational?

1 A Yes, it was.

2 Q Okay. Functioned normally?

3 A Yes, it did.

4 Q And can you explain for us what is on sort of below where the barrel is
5 on the firearm?

6 A That's a flashlight.

7 Q And that was working?

8 A Yes, it was.

9 Q Along with that firearm, did you also receive casings that were 9 mm?

10 A Yes, I did.

11 Q And did you examine whether those 9 mm casings associated to this
12 firearm?

13 A Yes, I compared eight 9 mm Luger +P cartridge cases to this particular
14 firearm.

15 Q And you went through the same process you particular described of
16 expelling bullets into the water tank and comparing the cartridges?

17 A Yes, I went through the process that I described; did the function exam,
18 test fired this particular firearm, looked at the cartridge cases that I test fired from
19 this gun to each other and then compared those to the unknowns that I was given in
20 the case.

21 Q And the eight cartridges that you were provided that were the 9 mm
22 Luger + P, did all or any of them match as having been expelled from this firearm?

23 A Those eight cartridge cases that I was asked to compare, the 9 mm
24 Luger + P, I identified all eight of them as having been fired by this firearm.

25 Q Were you also asked to examine a Colt .45?

1 A I was asked to examine a Colt pistol .45 auto caliber, yes.

2 MS. THOMSON: And may I approach?

3 THE COURT: Yes.

4 BY MS. THOMSON:

5 Q Showing you what's been marked as State's Exhibit 191. Is this -- and
6 specifically 191a. Is this the firearm that you examined?

7 A Can I see the front of that?

8 Q Yes.

9 A Yes, it is.

10 Q Okay. And how do you know?

11 A The box has my signature and my personnel number, as well as
12 evidence tape with my signature and date on it, and the firearm itself has a sticker
13 on it, on the slide, which I placed there with our laboratory event number, our
14 laboratory item number, and my initials and personnel number.

15 Q And it's hooked into the box with orange tabs. Are those tabs that you
16 use in the lab?

17 A Yes. We -- in the lab we use these orange safety straps to strap the
18 gun open and to secure it into the box.

19 Q Okay. And you use orange instead of black so you can tell that you
20 removed the firearm and placed it back in?

21 A That's correct.

22 Q And at the vault they used the black safety straps?

23 A Yes, they do.

24 Q In comparison -- or in your examination of this firearm, did it operate
25 normally?

1 A Yes, it did. It had no noted malfunctions.

2 Q And did you notae the serial number from this firearm when you

3 examined it?

4 A Yes, I did.

5 Q and what was the serial number?

6 A Serial Number CP33432.

7 Q When you received the firearm you also received the magazine with it,

8 is that correct?

9 A Yes.

10 Q And that's the magazine that's been marked as 191b?

11 A It should be, yes.

12 Q It has --

13 A Does it have my sticker on the back? Oh, there we go. It has my

14 initials, and my personnel number, and our laboratory number, and item number on

15 it. Yes, thank you.

16 Q And when you put it back in box it was secured in but that has since

17 been changed, is that fair?

18 A Yes.

19 Q Okay. When you examined the magazine, how many cartridges did it

20 hold?

21 A It held ten cartridges.

22 Q Okay. And when you received it, it was empty, is that fair?

23 A Yes.

24 Q But anytime you receive a magazine is it empty?

25 A Not necessarily. Sometimes they are booked with cartridges?

1 Q Do you know if it's procedure to empty them or --

2 A I don't believe there is a policy on that either way.

3 Q Firearms, however, will be booked with the magazine in them and
4 cartridges in the magazine?

5 A Correct. You can't have the firearm booked loaded itself. So the
6 magazine would have to be removed.

7 Q With this firearm specifically, what is the significance when the slide is
8 locked back?

9 A The slide can be locked back a number of ways. If you have a
10 magazine that's in the gun that's empty, that doesn't have any cartridges in it and
11 you pull it back, that will keep the slide lock back.

12 Q When you looked at this firearm there were no noted malfunctions;
13 however, were you able to tell if there had ever been a time when it was jammed?

14 A I was not able to make that determination.

15 Q And in your experience with firearms, are there times that a firearm will
16 jam but still operate normally thereafter?

17 A Yes, I'd say that's fair.

18 Q Is it uncommon for firearms to jam?

19 A Not necessarily. There's different types of jams that exist. It could be
20 feeding issue, extracting, ejecting issue, it could be how the firearm is being held by
21 the shooter. There's several different reasons why it could jam when you were
22 shooting it.

23 Q With that firearm, were you asked to compare casings to casings that
24 you expelled from that firearm?

25 A Yes, I was.

1 Q And did you do so?

2 A Yes. I had three cartridge cases that I was asked to compare to that
3 firearm.

4 Q Okay. Showing you what's been marked as State's Exhibit 193. First of
5 all, can you tell if this is an envelope that you have handled?

6 A Yes, my signature and my personnel number, as well as my initials, and
7 our laboratory number are there on the bottom.

8 Q And then zooming in, is this the envelope that was -- that contained four
9 cartridge casings for a .45 -- or .45 caliber cartridge casings?

10 A It contained three.

11 Q Thank you. And then there was a fourth, unrelated that you didn't
12 examine, is that fair?

13 A The fourth item was said to be a shot shell, which I was not asked to
14 examine.

15 Q And Showing you what's been marked as 193a. Are these the vials that
16 contained the casings that you examined?

17 A Yes. Just like with the gun there's stickers on here that I put there
18 which contain my initials, personnel number, laboratory case number, and the item
19 number.

20 Q And with the shotgun case we see that there is not a sticker because
21 you didn't examine it, correct?

22 A Correct. My initials and the case number I think are on the side but
23 there's no sticker because I didn't examine it.

24 Q When you examined those three casings and compared them to the
25 Colt .45 that -- or .45 caliber that you received, were you able to come to any

1 conclusions?

2 A Yes.

3 Q And can you explain for us what those were?

4 A I identified all three of those cartridge cases as having been fired by
5 that submitted Colt pistol.

6 Q And you did that by the side by side comparison with the microscope
7 that you described earlier?

8 A Yes.

9 Q Were you also asked to look at some cartridges that were .45 caliber?

10 A Yes.

11 Q And what's the difference between a cartridge and a cartridge casing?

12 A Cartridge is the whole unit of ammunition. It's when it's unfired. It
13 contains the case, that primer that I talked about, and also one or more projectiles
14 which would be a bullet in this case. So it's the whole entire unit. The cartridge
15 case is the casing that holds everything and that's that part that's left over after the
16 cartridge is fired that's the piece that's extracted and ejected from the firearm.

17 Q So a cartridge is an unexpelled bullet -- has an unexpelled bullet,
18 correct?

19 A Yes, it would have an unfired bullet contained in it.

20 Q And how many cartridges did you receive that were .45 caliber?

21 A I received three.

22 Q When you examined those, did they come in what's been marked as
23 State's Exhibit 190?

24 A Yes.

25 Q And same, you wrote your name in at the chain of custody on the front

1 of the envelope, sealed it with the blue tape?

2 A Yes.

3 Q In examining those three cartridges, were you able to come to a
4 conclusion about the manufacturer of the three?

5 A There was one that was Winchester and two that were Speer.

6 Q Okay. And given the way they're packaged they're a little bit difficult to
7 see that, but -- here, let me approach. When you hold it up you can see through the
8 bottom of the packet -- the vial, the brand, is that fair?

9 A Let me just make sure.

10 Yes.

11 Q And of the Speer cartridges, were you able to come to any conclusions
12 about whether or not those cartridges were associated to the firearm that was the
13 .45 caliber that you examined?

14 A I was.

15 Q And what -- can you explain for us what you did and what conclusions
16 you reached?

17 A The -- one of the spare cartridges which was my Item 29, Impound Item
18 11. I was able to say that it was associated to the Colt pistol, based on marks that
19 are made during the feeding process of that firearm.

20 Q And when you say the feeding process, is that when the bullet is going
21 up in the chamber or when the bullet is being sent out -- the cartridge is being sent
22 out?

23 A Nope, it's when the cartridge is unfired, just like I talked about when you
24 have cartridges that are in the magazine and you take the slide to pull it back and it
25 takes the top one and feeds it into the chamber. On the sides of that chamber there

1 can be areas where the cartridge slides against those and it can create marks.

2 So there were marks there and also that extractor that we talked about,
3 which is that hook that pulls the cartridge out can make a mark underneath the rim
4 and that mark can be there too if that cartridge is fed, extracted, cycled through that
5 firearm, but yet, not necessarily fired.

6 Q Okay. And you said that that can occur when one loads it up into the
7 chamber and then racks to eject it, is that correct?

8 A Yes

9 Q The other cartridges -- the other Speer and the Winchester, they did not
10 have those markings?

11 A One had a small amount of extractor markings but it was not sufficient
12 for me to make any determination either way.

13 Q Okay. And was that the Speer or the Winchester?

14 A If I may refer to my notes?

15 Q Yes, if that will help refresh your recollection.

16 A It was my Item 30, which was the Speer. Item 12, it had a very light
17 extractor marks, but again, it was insufficient for me to make any association based
18 on those marks.

19 Q And you made reference to Item Number 11. That was the CSA's item
20 number, not the lab number, correct?

21 A That's correct.

22 Q You were also asked to examine a .25 caliber firearm, correct?

23 A Yes.

24 Q And did you receive that in State's Exhibit 198?

25 A Yes.

1 Q And you can tell the same thing with this package that you examined it
2 based on the tape and your markings on the --

3 A My signature and my personnel number.

4 Q Okay. When you examined this firearm, did you go through the same
5 process that you described previously in determining if it's safe to fire?

6 A Yes.

7 Q And that included, you said, looking for the serial number?

8 A Yes.

9 Q Were you able to locate a serial number on this firearm?

10 A I was not.

11 Q And you said that all firearms have serial numbers when they're
12 manufactured?

13 A Yes.

14 Q What did you do, if anything, to determine what the serial number to this
15 firearm was?

16 A I noted that in the area of the gun where this manufacturer typically
17 places a serial number there was an area of what looked like to be obliteration. IT
18 looked like grinding marks in that area. There was also some dirt and corrosion
19 over top of that area so I used some acetone, it's like fingernail polish remover,
20 cleaned that area so that I was able to visualize that area a little bit better, looked at
21 those grinding marks, and then we have a process that we use to attempt to restore
22 a serial number.

23 When a serial number is stamped into metal, the metal -- what you
24 actually have is molecules that are hold together by bonds. And that stamp, what it
25 does is, it breaks those bonds. It does it the whole way down on a molecular level.

1 So even if there's grinding on the surface down below in that metal there's bond
2 breakage. So if you have grinding where someone tries to grind off a serial number,
3 as long as it's not below that area of the breakage, you can make a restoration or
4 attempt to make a restoration.

5 So, what I did after I cleaned it was I polished it to kind of make the
6 metal nice and smooth and then I used a reagent, it's called Fry's Reagent. It's
7 basically a dilute hydrochloric acid. And what happens when you put that on metal,
8 if there's areas where the bonds have been broken and areas where the bonds
9 haven't been broken, it actually eats it away at two different rates. The area where
10 the bonds have been broken eats it away at a faster rate than in the unbroken area.

11 So I applied that reagent to that area and looked to see if I could raise
12 any numbers or characters if I could see anything in that specific area. I did that
13 multiple times, took some photographs, inspected it under a microscope, and was
14 unable to restore any characters in that area, most likely due to the depth to which
15 that grinding was done on that metal.

16 MS. THOMSON: I'd move for admission of State's Proposed Exhibit 182. I
17 believe that Ms. Nguyen will stipulate to it.

18 MS. NGUYEN: That's correct.

19 THE COURT: It'll be admitted.

20 **[STATE'S EXHIBIT 182 ADMITTED]**

21 BY MS. THOMSON:

22 Q And you indicated that you took some photographs. Showing you
23 what's been marked as State's Exhibit 182. Is this a document that you created
24 associated to those photographs?

25 A Can I see the top right? And then the bottom?

1 Yes, that -- you see my initials and personnel number again in the
2 bottom right, along with our laboratory identification number, and the event number
3 in the upper right.

4 Q And so the photographs at the top of the page, the two sides of the
5 firearm, are those in the condition that you received them or are those after you
6 have done your examination?

7 A Those will be in the condition in which I received the firearm.

8 Q Okay. So it's fair to say that you received it in better condition than it
9 appears to be in the box today?

10 A In better condition?

11 MS. THOMSON: May I approach?

12 THE COURT: Yes.

13 BY MS. THOMSON:

14 A Yes, it did not look like that when I received it.

15 Q And it didn't look like that when you put it back into evidence, is that
16 fair?

17 A That is fair.

18 Q On firearms, does -- do each make and model have a particular location
19 that they put the serial number or is it a random stamp that gets placed on it?

20 A It's not necessarily random, but each manufacturer has particular
21 places where they put a serial number; however, it's not necessarily always in the
22 same spot. A manufacturer may sometimes put it on the side of the frame,
23 sometimes on the back strap, sometimes on the underneath. It just depends on the
24 particular manufacturer and the on the particular model of the firearm.

25 Q In this situation where the serial number has been destroyed, how are

1 you able to tell where specifically to look for it?

2 A We have a firearms reference collection, which contains approximately
3 2500 guns and we had two of this particular model in our collection, which allowed
4 me to look and see where typically that manufacturer would place the serial number.

5 Q And the location where it is typically placed is where the red arrow
6 points?

7 A Yes, that's correct.

8 Q The next photograph is how you received it, is that fair?

9 A Yes, it's just a magnification of that area where I have the red arrow
10 pointing and that is the area in which I received it. I said earlier there was some
11 grinding marks and what appeared to be some rust or dirt also on top of that area.

12 Q And you cleaned off the rust and dirt?

13 A Yes.

14 Q And can you show us in this photograph what you're referring to with
15 the grinding marks? The after cleaning photograph.

16 A Yes. You see those round-shaped marks here that go the whole way
17 around both sides.

18 Q And then you said after cleaning, you used the Fry's Reagent. The next
19 photograph down, is that what you're referring to?

20 A Yes, that's after I polished it. I actually polished the area with a Dremel
21 tool and that's just to make it smooth, so that when I apply the reagent there's not
22 pieces on it, you know, to make -- to make it nice and smooth when I do that. You
23 can still see a little bit of the remnants of the grinding. There's a line there, maybe a
24 line over here. But that was after I smoothed it down to sort of get rid of those
25 marks and after my first application of the reagent.

1 Q Okay. And as you've described what the reagent pulls up is the
2 breaking of bonds. So your smoothing it isn't further destroying any serial number
3 that would be there?

4 A Correct, because we're looking down on the molecular level of that
5 metal.

6 Q And then the final result is the photograph that shows that there was no
7 serial to be extract -- or no serial number able to be extracted?

8 A Yes.

9 Q And this firearm, when you tested it, did it operate normally?

10 A Yes, it did.

11 Q Finally, were you asked to examine a rifle?

12 A Yes, I was.

13 Q And showing you what's been marked as State's Exhibit 200. Is this the
14 package you received with the rifle in it?

15 A Yes.

16 Q And what is the serial number associated to this rifle?

17 A 004478.

18 Q Looking inside State's Exhibit 200, is that the rifle that you in fact
19 received?

20 A Yes.

21 Q And you went through the same process of examining this item?

22 A Yes, I did.

23 Q Did it operate normally?

24 A It was found to be operational, although I did note that there were some
25 modifications that had been made to it.

1 Q Did those modifications affect its ability to expel rounds?
2 A No.
3 Q The modifications, did they make it from a manual to a semi-automatic?
4 A No, the firearm was designed as a semi-automatic and functioned as a
5 semi-automatic when I test fired it.
6 Q Did you also receive a magazine for that firearm?
7 A Yes, I did.
8 Q And what was the capacity of the magazine?
9 A 31.
10 Q Okay.
11 MS. THOMSON: Move for admission of State's Proposed Exhibit 183.
12 MS. NGUYEN: No objection.
13 THE COURT: Be admitted.
14 **[STATE'S EXHIBIT 183 ADMITTED]**
15 MS. THOMSON: Permission to publish?
16 THE COURT: Yes.
17 BY MS. THOMSON:
18 Q And is this a document that you created associated to that rifle?
19 A Yes.
20 Q Looking at the top two photographs, are those actual photographs of
21 this particular firearm or are those representative photographs?
22 A Those are the actual photographs that I took of this particular firearm.
23 Q And can you explain for us on the top photograph -- and I'm just going
24 to zoom in a little bit to the main portion. Other than obviously the handle, I think we
25 all know what part that is, can you describe what each of the parts that we're seeing

1 are?

2 A This part up you have up here is the barrel. This wooden part here we
3 call the forend, that's the area that you would hold with your front hand. This metal
4 whole area here, this is a receiver. And then the back part would be the stock or the
5 butt stock -- the back wooden part.

6 Q Is there a portion on this firearm that is commonly referred to as a
7 charging handle?

8 A Yes.

9 Q And where is that located?

10 A Can you move the pink -- or the -- thank you. This piece right here.

11 Q What does a charging handle do?

12 A Just like we talked about with pistols, semi-automatic, you have to pull
13 the slide back and move it forward to get one of the cartridges from the magazine
14 and into the chamber. On this particular firearm it doesn't have that slide because
15 it's a rifle. So what you have instead is what we call a charging handle.

16 So in order to load this gun you would load the cartridges into the
17 magazine, insert the magazine into the magazine well, and then to get one of those
18 cartridges into the chamber you will pull that handle back and when it went forward it
19 would pick up that top cartridge and put it into the chamber.

20 Q And in your examination of firearms, would it be fair to say that they
21 typically aren't super smooth surfaces?

22 A Some of the surfaces are smooth, some are not as smooth.

23 Q Okay. Specifically handles, do you find common to have rough or
24 textured handles?

25 A Handles in general tend to be textured or ribbed or rigged just so that it

1 makes it an easier surface to grip for your hand.

2 Q And that would help prevent moving around as you're firing?

3 A And for your hand to move or slip.

4 Q And when you fire a firearm, does it have any kind of reaction in the
5 actual body of the weapon that you can feel in your hand?

6 A Recoil?

7 Q Yes.

8 A Yes.

9 Q Can you explain for us what that is?

10 A It's the felt pressure that comes back towards you when the gun gets
11 fired. So like I talked about earlier, when the bullet goes forward you have all the
12 pressure pushing that bullet forward and for every reaction you have an equal and
13 opposition reaction, so you have the pressure of the cartridge case pushing
14 backwards against you.

15 So you have a forward action and a backward action and that is an
16 action that can be felt back, a recoil towards you if you fire that firearm.

17 Q And if that's not accounted for by the shooter that could potentially
18 affect the trajectory of the bullet that comes out of the weapon, is that fair?

19 A Potentially, yes.

20 Q Okay.

21 MS. THOMSON: Court's indulgence.

22 [Colloquy between Counsel]

23 BY MS. THOMSON:

24 Q So Mr. Fattig was listening more closely to what were you saying and
25 what you were doing than I was. When you described the semi-automatic and the

1 expulsion of the cartridge from that, you said it can go out and back to the left and
2 then you motioned to the right. Does it typically go out and to the left or out and to
3 the right?

4 A Typically it goes back and to the right.

5 Q Okay. And you -- when I asked you about the three cartridge casings
6 that you examined for the .45 caliber firearm, you said that those three .45 caliber
7 cartridge casings that were the Speer and were your Lab Item Numbers 13 through
8 15 that those would have been expelled from a .45 caliber firearm. Were you able
9 to tell if they were expelled specifically from the .45 caliber firearm that is marked as
10 State's Exhibit 191a?

11 A Yes. I identified those three cartridge cases as having been fired by
12 that specific firearm.

13 MS. THOMSON: I'll pass the witness.

14 **CROSS-EXAMINATION**

15 BY MS. NGUYEN:

16 Q In your examination of all three of these firearms -- or I guess, 1 -- how
17 many firearms did you examine in this case? 1 --

18 A There were four total.

19 Q All four of them. There were no jamming issues, is that correct?

20 A Yes, that's correct.

21 Q no malfunction issues?

22 A That's correct.

23 Q Okay. And it's fair to say that Colt 40 -- or .25, it was kind of rusty and
24 dirty, is that correct?

25 A Yes.

1 Q Okay. And it's fair to say that the Glock that you done was in pretty
2 good condition and was clean, is that correct?

3 A Yes, that's correct.

4 Q Okay. And as far as your testing and comparison, does it make it
5 easier if you have a well-cared for firearm, as opposed to one that is perhaps not
6 and is corroded and dirty?

7 A Potentially. Basically what would happen is maybe the bullets or the
8 cartridge cases may have some dirt, grease, or oil on them after I test fired them.
9 But I would clean them before I compared them.

10 Q When you compared the cartridge cases from the .45 or even the
11 cartridge cases from the 9 mm, would -- you said that the cartridges that came back
12 being shot from the Glock, they matched, is that correct?

13 A I did identify all eight of those as having been fired from that Glock, yes.

14 Q Okay. Would it -- would you show the same results if they were
15 expended from a Glock of the same make and model?

16 A No. I identified them particularly to that specific firearm.

17 Q Would there be any similarities within the same make and model gun?

18 A I would expect there to be some similarities, yes.

19 Q But you would be able to definitively say they came from Glock A or
20 Glock B.

21 A Yes.

22 Q Okay. And that would be the same on any gun?

23 A Yes, provided that the gun marked that bullet or cartridge case well
24 enough for me to make that determination.

25 Q Okay. So as long as you get a significant or a testable or comparable

1 mark on that, you would be able to compare?

2 A Yes, that's correct.

3 MS. NGUYEN: Nothing further.

4 **REDIRECT EXAMINATION**

5 BY MS. THOMSON:

6 Q The markings that you're talking about, the same gun will repeat or
7 leave those on their cartridges or cartridge casings, is that fair?

8 A Yes.

9 Q Okay. And when you talked about the extractor and the other word that
10 goes with that --

11 A The ejector.

12 Q Thank you. Extractor and ejector. That will not necessarily always
13 leave a marking, correct?

14 A That's correct.

15 Q Do you know approximately how far generally a casing will fly when it is
16 ejected from the Colt .45 caliber?

17 A I do not. It's very difficult to say.

18 Q Okay. And same question with regard to the 9 mm Glock?

19 A Yeah. Unfortunately, it's very difficult to say.

20 Q Okay. And with regard to that Colt .45 caliber that we were talking
21 about, you indicated that the slide locked back. Is that what happens when the last
22 bullet is expended or can that be done manually, can you --

23 A Yes, it can also be done manually. IF the magazine is empty and you
24 pull the slide back it will lock back. But you can pull it back and -- if I may refer to
25 my notes --

1 Q Yes.

2 A -- quickly?

3 Yes. There's a slide stop on the side of this particular firearm. So you
4 could pull that back and push that lever up and that would hold it open also.

5 Q Okay. If the magazine is empty and you pull it back, do you have to put
6 the slide stop up to hold it up?

7 A No, it's the magazine that pushes that slide stop up, so when you pull it
8 back and let it go, it will be held back in that open position.

9 Q Okay. So if it doesn't have a magazine, you pull it back, it'll come back
10 into --

11 A That's correct.

12 Q Okay. And the -- assuming that the final bullet that was in the
13 magazine is expelled in the traditional way from a firearm, would that slide lock back
14 or would it go back into the forward position?

15 A Assuming that the firearm is functioning as it is meant to, if you have
16 one last cartridge that's in the chamber and no more in the magazine and you pull
17 the trigger and you fire it and it fires, and the bullet goes forward and the cartridge
18 case is extracted and ejected and that slide moves backwards, it will lock open in a
19 lock back position.

20 MS. THOMSON: Court's indulgence.

21 BY MS. THOMSON:

22 Q The Colt .45 that you -- .45 caliber that you examined, you said that the
23 magazine that came with it -- and by that I mean that you received in evidence, had
24 a capacity of ten cartridges. When that is fully-loaded, is it possible for the firearm to
25 actually have 11 cartridges in it?

A Yes, because there could be one in the chamber as well. So you could have one the chamber and ten in the magazine and there would be 11 total cartridges in the firearm.

Q And that ten cartridge magazine, is that an extended magazine for that firearm?

A I know there's different capacity magazines that exist for those firearms, some are seven, eight, nine, ten. This particular magazine, it was not a Colt magazine, it was from another manufacturer. So it was a ten-round magazine.

MS. THOMSON: Pass the witness.

CROSS-EXAMINATION

BY MS. NGUYEN:

Q It's not unusual for people to have different magazines that are of a different manufacturer for a gun, is that correct?

A Yes, that's correct, it's no unusual.

Q Okay. There are different manufacturers that make compatible magazines, is that correct?

A Yes.

Q Okay. And you said the Colt. 45 could be in a locked position because it was the last bullet or because someone manually just put it that way, is that correct?

A Yes, I did.

MS. NGUYEN: Nothing further.

MS. THOMSON: I have no further questions.

THE COURT: Jury have any questions for this witness?

[Pause in proceedings while the Court and Counsel discuss jury questions]

1 THE COURT: Yeah.

2 **EXAMINATION BY THE COURT (JURY QUESTIONS)**

3 BY THE COURT:

4 Q Did the Colt .45 have any gun powder residue prior to your test of the
5 weapon?

6 A I did not do any test for gun powder residue on the firearm before I
7 tested it.

8 THE COURT: Questions by the State?

9 MS. THOMSON: Thank you, Your Honor.

10 **FOLLOW-UP EXAMINATION**

11 BY MS. THOMSON:

12 Q What is gun powder residue?

13 A Well I talked earlier about the cartridge and how it has powder inside it
14 which burns, which propels the bullet down the barrel, and out of the muzzle of the
15 firearm. That powder, when it burns, it doesn't all burn. Some of it burns up, some
16 of it partially burns, and some of it is expelled from the firearm. And traces of that
17 could potentially be on the gun, in the area where the shooting occurred, on the
18 shooter, any of those areas.

19 Q Okay. Did those get limited to certain areas, for example, if someone is
20 shooting a firearm that that residue would only be found on their hand?

21 A No, it could be on anyone who's in the proximity of that person.

22 Q Okay. And how long would it stay on a person after shooting a firearm?

23 A It could be any number of hours. I don't have a specific number.

24 Q And does it come out strictly from the muzzle of the firearm or does it
25 come out from other areas also?

1 A From a semi-automatic firearm, the only opening you have on it is at the
2 muzzle, but you also have that ejection port area, so you could get some from that
3 area as well.

4 Q Okay. You indicated that the residue can be around -- on anything that
5 is around where the firearm is expelled, is that correct?

6 A Yes.

7 Q Okay. Based upon that, would you agree that residue is not an
8 accurate predictor of who has expelled a firearm?

9 A Yes, I would agree with that.

10 Q Is that something that the lab tests for?

11 A We do a test for distance determination, which is based on gunshot
12 residue. We do that in the lab. But for the gunshot residue which is collected off of
13 the hands of a suspected shooter that is not a test that we do in the laboratory. That
14 actually requires a scanning electron microscope which is an instrument that we
15 don't have to examine that powder. And we actually would send that out to another
16 lab if we had a request for that exam.

17 Q Okay. And you used a phrase and I don't remember specifically what it
18 was, but it was associated to distance of gun powder residue that you do in the lab?

19 A Yes. That is an examination that we do. I didn't do it in this case. But
20 if you have a shooter and a victim and that victim has clothing on them and we get
21 clothing in as evidence, we could be asked to determine the distance from the
22 muzzle of the firearm to the clothing -- the garment on that specific victim.

23 Q Okay. And you'd be able to do that based upon whether or not there
24 was gun powder on it?

25 A We use three different tests. We use a gun powder pattern that we look

1 at microscopically. We also do two different chemical tests, one for nitrites, which is
2 products of that burned gun powder, and also for lead, which is a process of the
3 combustion of that cartridge. So we use those three different tests to examine a
4 garment to figure out the distance from which the muzzle was to that garment.

5 Q If I were, for example, standing here, I shot a gun and then Mr. Fattig
6 came into this area very quickly thereafter, is there a possibility that he would have
7 gun powder residue on him from having come through the area where I had just
8 shot the firearm?

9 A I would say that's a possibility, yes.

10 MS. THOMSON: Pass the witness.

11 **FOLLOW-UP EXAMINATION**

12 BY MS. NGUYEN:

13 Q You -- your lab does have the capability to do certain gun powder
14 residue, is that correct? Testing?

15 A Just that distance determination test that I described.

16 Q Okay. And obviously there is a science and there are tools that are
17 able to test gun powder residue. You just said you sent it out to a laboratory that
18 has that capability, is that correct?

19 A If we had a request to determine whether the dabbings from a potential
20 shooter's hands did contain gunshot residue -- if we got that request that does get
21 sent out to another laboratory.

22 Q In this case you never received such request, is that correct?

23 A I did not, no.

24 Q Okay. And did you handle all of the testing involving this case and any
25 firearms testing in this case?

1 A Yes, I -- well, I was just requested to do the firearms evidence, which
2 was those four guns, the cartridge cases that I mentioned, the magazines, and the
3 cartridges.

4 Q Okay. As far as the same testing that you would send out for like
5 residue that was collected from someone's hands, is that the testing -- like let's say
6 someone tested like a shirt someone was wearing -- like a shooter.

7 A Uh-huh.

8 Q Would that be something that you would test in your lab or is that
9 something additionally that would have to be sent out to another place?

10 A Yes, that would be sent out as well.

11 Q Okay. So the only thing that you do is the distance, is that correct?

12 A Yes, that's correct.

13 Q The State had asked you if, for example, she shot something and then
14 the other individual came in shortly after. How soon after would they have to come
15 into that area to be affected by that gun powder residue?

16 A Yeah. I don't have a specific time limit or number of hours for that. It's
17 just that there's a potential for a transfer if that gunshot residue's in that area.

18 Q Okay. So you don't have any indication of whether it would seconds,
19 minutes, or hours, or days?

20 A I couldn't even venture a guess on to that.

21 Q Okay. In your capability in determining distance of gun powder residue,
22 how far of a distance have you found?

23 A Powder residue at?

24 Q Yes.

25 A The longest one I ever found was seven -- I think it was 72 inches.

1 Q Okay. So most of the time you're talking about a fairly limited space.
2 You're not talking about yards, is that correct?

3 A That's correct.

4 Q Okay. Or I should say you're not talking about more than three yards?

5 A Correct.

6 Q And that was -- 72 inches was an unusually -- usual far distance that
7 you're able to collect that?

8 A That's pretty long.

9 Q Okay.

10 MS. NGUYEN: Nothing further.

11 THE COURT: All right.

12 **EXAMINATION BY THE COURT (JURY QUESTIONS)**

13 BY THE COURT:

14 Q The weapons recovered were any recently fired prior to your testing?

15 A I don't do any testing to make any determination as to whether or not
16 those firearms had been recently fired.

17 THE COURT: State?

18 MS. THOMSON: Nothing, Your Honor.

19 MS. NGUYEN: Just briefly.

20 THE COURT: Defense?

21 **FOLLOW-UP EXAMINATION**

22 BY MS. NGUYEN:

23 Q Are you able to determine whether or not the time period of when
24 something was fired?

25 A Time period? No.

1 Q Okay.

2 **EXAMINATION BY THE COURT (JURY QUESTIONS)**

3 BY THE COURT:

4 Q Did you find any marks on the Winchester cartridge?

5 A If I may refer to my notes?

6 Q Yes.

7 A I did find two light extractor marks that would be consistent with
8 previous firing. But again, insufficient amount for me to make a determination to a
9 particular firearm.

10 THE COURT: State?

11 MS. THOMSON: Indulgence.

12 **FOLLOW-UP EXAMINATION**

13 BY MS. THOMSON:

14 Q When you were examining those cartridges, the Winchester and the
15 two other .45 auto cartridges that were the Speer, were there marks on them and
16 only one that you could make an association? Or were there marks only on two?

17 A I did note that there were marks on all three. Two had very light marks
18 and one had sufficient marks for me to make the association.

19 Q And you're talking about the extractor marks, correct?

20 A Yes.

21 Q And so those marks indicate to you that they were cycled through a
22 firearm, is that correct?

23 A If there in an extractor mark that indicates to me that it's been cycled
24 because that extractor goes into that extractor groove and pulls it out of the
25 chamber.

1 Q Thank you.

2 **FOLLOW-UP EXAMINATION**

3 BY MS. NGUYEN:

4 Q I'm sorry. I'm referring to your report on page 2. Lab Item 29 you refer
5 to that and that is the Speer .45 auto cartridge, is that correct?

6 A Yes.

7 Q And in that case you said that the association is based on an
8 examination of marks relating to the cycling process of the firearm. So this wasn't
9 fired, but it appears to you that it was cycled through a firearm, is that correct?

10 A Yes.

11 Q Okay. And then on the next line you said that two cartridges, Lab Item
12 28 and 30 -- so that would be the Winchester .45, is that correct?

13 A Yes, that's 28.

14 Q Cartridge?

15 A Yes.

16 Q And then also another Speer .45 auto cartridge, is that correct?

17 A Yes.

18 Q You said could not be associated with the submitted Colt pistol -- and
19 that's the .45, is that correct?

20 A Yes.

21 Q Due to insufficient marks, is that correct?

22 A Yes.

23 Q Okay. So only one of them had markings that you could associate with
24 being processed through a gun, is that correct?

25 A Had sufficient marks --

1 Q Sufficient marking.

2 A -- for me to associate it to a particular gun.

3 Q Okay. So they had marks that they had been cycled through a gun, not
4 shot and fired through a gun, but had been cycled through a gun?

5 A Yes.

6 Q Okay.

7 MS. NGUYEN: Nothing further.

8 MS. THOMSON: Can I have one follow-up on that?

9 THE COURT: Yes.

10 **FURTHER FOLLOW-UP EXAMINATION**

11 BY MS. THOMSON:

12 Q The marks that were not sufficient to associate it to that gun, were they
13 sufficient to tell you that they did not go through that gun? Does that question make
14 sense?

15 A It does make sense. I was unable to make a determination of
16 identification or elimination to that particular gun, due to the insufficiency of those
17 marks.

18 Q Thank you.

19 MS. NGUYEN: Nothing further.

20 **EXAMINATION BY THE COURT (JURY QUESTIONS)**

21 BY THE COURT:

22 Q What are some common operation issues with the Colt model
23 presented today? In other words, what mechanical problems would the average
24 person experience using it?

25 A I don't have any study or article or anything stating any known particular

1 problems with that specific firearm. I think I stated earlier there could be feeding
2 issues, potentially. Like say if you loaded the magazine and didn't put it -- load it the
3 whole way in that could affect feeding the cartridge. There could maybe be a
4 problem with eh extraction if you were holding the gun in a certain away. But I don't
5 know of any particular common known issues with that specific firearm.

6 THE COURT: State?

7 **FOLLOW-UP EXAMINATION**

8 BY MS. THOMSON:

9 Q When you say that there could be a problem with the extraction holding
10 the gun in a particular way is -- are there any particular ways that you are aware of
11 that cause problems or is that generally if you were holding it in a bag and it gets
12 jammed kind of thing?

13 A If you hold the gun the way that it's meant to be -- the way that it's
14 meant to function, you hold it with a tight grip. If you hold it with sort of a loose grip,
15 when you have that detonation of the cartridge and the bullet goes forward, there's
16 less force for the cartridge case to come back on because if you're not holding it
17 tight it doesn't have anything to push back on.

18 So, you can get a jam from that from -- in the extraction and ejection of
19 a fired cartridge case just from holding the grip loosely.

20 Q Every time you've sort of demonstrated holding a firearm, you're holding
21 it the way I think that we're all sort of taught at the range, the straight out. Was there
22 anything about angle that it would be held that could affect the extraction?

23 A I didn't do any testing on that, so I couldn't really say.

24 Q Generally, with your experience with firearms, are you aware of any
25 affect that the angle being held on the firearm would affect that?

1 A I'm not aware of an effect on the angle, just of the effect of the
2 looseness of the grip.

3 Q Thank you.

4 **FOLLOW-UP EXAMINATION**

5 BY MS. NGUYEN:

6 Q Based on your experience, holding it improperly could affect your aim?

7 A I would say that's fair, yes.

8 Q And your accuracy?

9 A Yes.

10 Q And some of the things that you mentioned, those aren't manufacturer
11 errors are -- is that correct?

12 A I'm sorry, which things were you referring to?

13 Q the question had to do with any known malfunctions with a Colt .45.

14 A Oh like the feeding and the extraction errors.

15 Q Those are kind of user errors, is that correct?

16 A Yes.

17 MS. NGUYEN: Nothing further.

18 THE COURT: I saw some movement over in the jury box.

19 **EXAMINATION BY THE COURT (JURY QUESTIONS)**

20 BY THE COURT:

21 Q Did any of the bullets match up to what was shot at Officer McNabb?

22 A I was not asked to examine any bullets in this case.

23 THE COURT: State?

24 **FOLLOW-UP EXAMINATION**

25 BY MS. THOMSON:

1 Q You were asked to examine casings, is that correct?

2 A Cartridge cases, yes.

3 Q Okay. And are you aware of whether there were any actual bullets
4 impounded into evidence?

5 A I am not aware one way or another. I only work on a request-based
6 basis. And I was asked to examine only the four firearms, the cartridge cases, and
7 the cartridges that I've mentioned.

8 Q Okay. And just sort of a recap. The bullet is the part that goes inside
9 the cartridge, right?

10 A Yes, that's correct.

11 THE COURT: The lead part, basically?

12 THE WITNESS: Lead part can also have a jacket.

13 THE COURT: A jacket. But that's the part where the -- it goes out the end of
14 the gun once it's fired?

15 THE WITNESS: Yes, that's correct.

16 THE COURT: Defense, any questions?

17 **FOLLOW-UP EXAMINATION**

18 BY MS. NGUYEN:

19 Q The only .45 auto cartridge cases that you examined were Items 13,
20 14, and 15 -- Lab Items 13, 14, and 15, is that correct?

21 A Yes.

22 Q And the other ones that we just referenced, the Winchester and the
23 other two, they were actually cartridges, is that correct? Like the full bullet intact?

24 A Yes.

25 MS. NGUYEN: Nothing further.

1 THE COURT: Thank you. You may step down.

2 THE WITNESS: Thank you.

3 THE COURT: We'll take a five-minute recess. We're going to try and finish
4 up our witnesses before we go to lunch.

5 During the recess you're admonished not to talk or converse among
6 yourselves or with anyone else on any subject connected with this trial. Or read or
7 watch or listen to any report of or commentary on the trial or any person connected
8 with this trial by any medium of information including, without limitation, newspapers,
9 television, the radio, or the internet. Or form or express an opinion on any subject
10 connected with the trial until the case is finally submitted to you.

11 Take five minutes, please.

12 [Outside the presence of the jury]

13 THE COURT: Watch too much CSI I can tell you that.

14 All right. Take five minutes.

15 How many witnesses do you have left? Three?

16 MR. FATTIG: Two.

17 MS. NGUYEN: Two.

18 THE COURT: Two. Oh, good.

19 [Recess taken at 12:09 p.m.]

20 [Trial resumed at 12:17 p.m.]

21 [Outside the presence of the jury]

22 THE COURT: Are you ready?

23 MS. THOMSON: Yes, Judge.

24 THE COURT: All right. Bring them in.

25 [In the presence of the jury]

1 THE MARSHAL: All rise.

2 And be seated.

3 THE COURT: Stipulate to the presence of the jury.

4 MS. THOMSON: Yes, Your Honor.

5 MS. NGUYEN: Yes, Your Honor.

6 THE COURT: All right. Call your next witness, State.

7 MR. FATTIG: Ryan Jaeger.

8 **RYAN JAEGER**

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

10 THE CLERK: Thank you. Please be seated. State your full name, spelling
11 your first and last name for the record, please.

12 THE WITNESS: My name is Ryan R-Y-A-N; Jaeger, J-A-E-G-E-R.

13 THE COURT: Go ahead.

14 **DIRECT EXAMINATION**

15 BY MR. FATTIG:

16 Q Sir, how are you employed?

17 A Currently I'm employed as a detective with the Las Vegas Metropolitan
18 Police Department.

19 Q How long have you been with Metro?

20 A 17 years.

21 Q And are you a detective assigned to a particular unit?

22 A I am. I'm a detective assigned to the force investigation team.

23 Q And that's commonly referred to as FIT?

24 A That's correct.

25 Q And how long have you been a FIT detective?

1 A Just under two years.

2 Q And is that -- when was the FIT team created by Metro?

3 A Early last year it was created. Our responsibilities are we handle all
4 investigations of any major uses of force that officers use or any police operation
5 that results in death.

6 Q Regarding an incident on June 26th of 2014, near the area of Lamb,
7 Carey, and Dolly, that part of the city, did you have occasion to respond as part of
8 your duties that evening?

9 A I did.

10 Q Do you remember about when you got out to that scene?

11 A It was around 11:00 that I think we got the call. I'm not sure the exact
12 time that I arrived.

13 Q Okay. When you arrived out to that scene, did you go to the area of El
14 Tovar and Dolly, initially?

15 A I did.

16 Q And did you get to that scene by driving on Carey and going south
17 Dolly?

18 A I did.

19 Q Now when you got to the scene, approximately how many other Metro
20 personnel were there?

21 A By the time we get to the scene everything's pretty well contained. The
22 call is probably hours old by the time we get there. So there was one scene where
23 the patrol car was and then there was multiple scenes established, but there was
24 probably more than 20 other patrol cars that were there by the time I arrived.

25 Q Okay. A lot of Metro personnel out there.

1 A That's correct.

2 Q And what is your role -- or was your role in this particular investigation?

3 A I was the case agent on this or the project manager. My role is to

4 manage the tasks that all need to be done and then combined everything into one

5 report.

6 Q Are you familiar with the term a walk-around, as it relates to this

7 particular case?

8 A A walk-around or a walk-through?

9 Q A walk-through, I'm sorry.

10 A Yes, I am.

11 Q Okay. What is a walk-through?

12 A A walk-through is after there's an officer-involved shooting then we take

13 the officer that was involved in the shooting and we have him walk us through his

14 steps, so we know where any evidence may be.

15 Q And in this particular case that was Officer Ryan McNabb, correct?

16 A That's correct.

17 Q And did you do the walk-through with Officer McNabb?

18 A In this case it was a very long scene. It was over a few miles, so we

19 actually had him in a car where he had us drive his same route until we got to where

20 the pursuit ended and then we had him walk us through that portion.

21 Q So the area -- it was sort of a drive-through --

22 A And it turned into a walk-through.

23 Q -- to a walk-through.

24 A That's correct.

25 Q Okay. And so did it start at Walnut and Lake Mead, in that vicinity?

1 A That's correct.

2 Q And then it went up Walnut to Carey and across to Dolly?

3 A That's correct.

4 Q Now at the -- for that particular walk-through, was there crime scene
5 analysts also present for that?

6 A There was.

7 Q And you were present for that?

8 A I was.

9 Q You were -- did you become aware that there was a body camera on
10 Officer McNabb during the incident?

11 A Yes, I was.

12 Q Did you have occasion to review that body camera video that night on
13 scene?

14 A We did.

15 Q And how -- how did you -- how were you able to do that?

16 A I'm not a tech guy, but each patrol car has a laptop computer inside the
17 patrol car and the body worn cameras are able to pair with that computer and you
18 can watch the footage on that computer screen.

19 Q Did you also do a kind of a walk-around of the crime scene?

20 A I did.

21 Q And what is that? How is that different than that walk-through?

22 A The walk-through is directed by the officer that fired the shots. The
23 walk-around is done by me just to make sure nothing gets missed.

24 Q And obviously you're not alone in that, correct?

25 A That's correct.

1 Q There are crime scene analysts that assist in that?

2 A That's correct.

3 Q Anyone else?

4 A We have -- we work in pairs. For this one, Detective Gillis was with me
5 and then we also would have the crime scene analyst supervisor that normally
6 works with us. It's just -- it's better having multiple sets of eyes looking at each
7 scene so nothing gets missed.

8 Q I'm going to show you a couple of exhibits.

9 [Colloquy between Counsel]

10 MR. FATTIG: Your Honor, I believe the parties are stipulating to the
11 admittance of 14.

12 MS. NGUYEN: That's correct.

13 THE COURT: It'll be admitted.

14 [STATE'S EXHIBIT 14 ADMITTED]

15 BY MR. FATTIG:

16 Q I'm going to start, Detective, show you here with State's 12. Do you
17 recognize this picture?

18 A I do.

19 Q This would be Dolly running across, correct?

20 A That's correct.

21 Q Carey, El Tovar. Can you describe generally where you and the other
22 crime scene analysts that were doing the walk-around were looking and what are
23 you attempting to locate?

24 A This is where the pursuit terminated so when he walked this area, the
25 big -- do you guys have a screen?

1 Q You can touch the --

2 THE COURT: You can actually touch the screen.

3 BY MR. FATTIG:

4 Q -- screen and then it will show up on the TV.

5 A Okay. We searched around this patrol car for any cart casings from
6 McNabb. We searched around this vehicle here for any cart casings that would
7 have been fired by the suspect.

8 Q I didn't see a mark when you said this vehicle here. Can you -- okay.
9 Your --

10 A Is the mark up there?

11 Q It just did it, yes.

12 A We searched this entire desert lot down here for any impacts from
13 Officer McNabb. We also searched all the way down Dolly this way for any impacts.
14 We searched from the suspect vehicle up west.

15 Q That would be northwest?

16 A Up northwest for any impacts. And we also searched the backyard of
17 the residence right -- is it working? Of the residence here on El Tovar.

18 Q And are you trying to indicate the second --

19 A That's correct.

20 Q -- yard to the west --

21 A West.

22 Q -- of Dolly?

23 A Yes.

24 Q It's on El Tovar.

25 A And then we -- we also searched and we located a bullet-proof vest and

1 a handgun underneath this white Nissan pickup parked right here on El Tovar.

2 Q Okay. Now there were some aerial -- these aerial photographs were
3 actually taken on the morning -- early morning of June 27th, correct?

4 A Yes, we went up in the LVMPD helicopter and these are aerials that
5 were taken the next morning just so we could get a Birdseye view of the crime
6 scene.

7 Q And that was before things were disturbed. In other words, the maroon
8 Intrepid was -- remained there, correct?

9 A That's correct.

10 Q And the patrol car remained there?

11 A That's correct.

12 Q And --

13 A If you look on El Tovar you can still see the crime scene tape up that's
14 across the road protecting the -- where the handgun and the bullet-proof vest was
15 located.

16 Q And State's 13 shows that as well, --

17 A That's correct.

18 Q -- correct?

19 A That's correct.

20 Q State's 14 is kind of an aerial straight above the scene on Carey and
21 Dolly?

22 A That's correct.

23 Q And if I zoom in here it looks like there's some items spray painted on
24 the street; numbers?

25 A That's correct.

1 Q It looks like in that particular zoom-in off of State's 14 we see the
2 numbers 6, 7, and 8, correct?

3 A That's correct.

4 Q And those were various -- the items -- where various items of evidence
5 were located from the crime scene diagram, they were -- the same number was
6 actually painted on the ground, correct?

7 A That's correct.

8 Q Okay. Again, all of this occurred that morning of June 27th?

9 A That's correct.

10 Q Showing you --

11 MR. FATTIG: Your Honor, my understanding is pursuant to stipulation,
12 State's 3, 4, 8, 9, 10, and 11 are being admitted.

13 MS. NGUYEN: That's correct.

14 THE COURT: They'll be admitted.

15 **[STATE'S EXHIBITS 3, 4, 8, 9, 10, and 11 ADMITTED]**

16 BY MR. FATTIG:

17 Q And those aerial maps, Detective, actually were taken of the entire area
18 from the area of Walnut and Lake Mead which is what we're seeing here on State's
19 Number 3. North Walnut, across Carey, et cetera, all the way over to what we've
20 just saw?

21 A That's correct.

22 Q Okay. So State's 4 is kind of an area showing Judson and Walnut with
23 Carey at the top and you might recognize a landmark of a church on the west side,
24 North Walnut?

25 A That's correct.

1 Q Okay. State's Number 9 kind of shows a view of Lamb, Carey as it runs
2 down with El Tovar here on the upper right, correct?

3 A That's correct.

4 Q State's 10 is kind of a close-up of more with El Tovar here and Carey
5 and et cetera?

6 A That's correct.

7 Q So during the walk-through you're looking for any cartridge casings,
8 bullet strikes, bullets, et cetera?

9 A That's correct.

10 Q Did you find anything of note in any of those of areas that you
11 searched?

12 A We found cart casings -- or cartridge casings.

13 Q And those were the casings in the area of the intersection there,
14 correct?

15 A That's correct.

16 Q You also found some cartridges, unfired --

17 A At Dolly and Carey.

18 Q Yes.

19 A That's correct.

20 Q In and around -- or you didn't search inside the car at the scene,
21 correct?

22 A Not at the scene, no.

23 Q Not the Dodge Intrepid I'm talking about.

24 A That's correct.

25 Q But you found two near that car?

1 A We found two on the ground towards the rear driver's side of the car.

2 Q You found one on the sidewalk across -- near the lamp post?

3 A One live round, yes.

4 Q Yes, yes.

5 A Yes.

6 Q And that was all documented by the crime scene analyst, correct?

7 A That's correct.

8 Q Now by the time you arrived was there a suspect in custody?

9 A There was.

10 MR. FATTIG: May I approach the witness, Your Honor?

11 THE COURT: Yes.

12 BY MR. FATTIG:

13 Q Showing you what's been marked as State's 204 and 205. Do you
14 recognize these?

15 A I do.

16 Q And what is 204?

17 A 204 is a picture of a fluorescent yellow shirt that was worn by MR.
18 Bacharach.

19 Q And 205, is that a picture of the man in custody that was identified as
20 Joshua Bacharach?

21 A Yes, it is.

22 Q And that's a facial shot of generally what he looked as of June 26th of
23 2014?

24 A That's correct.

25 MR. FATTIG: Move to admit 204 and 205.

1 MS. NGUYEN: No objection.

2 THE COURT: It'll be admitted.

3 [STATE'S EXHIBITS 204 & 205 ADMITTED]

4 BY MR. FATTIG:

5 Q 205 is Mr. Bacharach. He had long hair that evening, correct?

6 A That's correct.

7 Q 204 is the shirt that he was wearing when you saw him in police
8 custody?

9 A That's correct.

10 Q And fair to say it's kind of a neon greenish-yellowish type shirt?

11 A That's correct.

12 Q And there's some dirt on it as well?

13 A Yes.

14 Q Was there any attempt to obtain any gunshot residue from Mr.
15 Bacharach?

16 A There was not.

17 Q And why is that?

18 A Gunshot residue just isn't reliable. I've been a detective almost ten
19 years now. I don't think I've ever collected gunshot residue because it's just so
20 erratic. It can be transferred really easy and it's just not really reliable.

21 Q Okay. Major contamination issues?

22 A Yes.

23 Q There can be false positives even if you get a positive?

24 A There can be. The way police officers qualify with their weapons they
25 normally stand shoulder to shoulder at a firing range and a bunch of them shoot at

1 the same time and that gunshot residue spreads in the air. It can get on their
2 equipment, it can get on their hands, it can get on their clothes, and as soon as
3 someone's touched that residue, it is passed. So it's just -- it's just not reliable and
4 it's just not something that's used.

5 Q So in this particular case you had a situation where officers obviously
6 had their weapons out, correct?

7 A That's correct.

8 Q While they were looking for a suspect in a dark backyard?

9 A That's correct.

10 Q They knew he had been shooting at a fellow officer?

11 A That's correct.

12 Q They ended up taking him into custody, correct?

13 A That's correct.

14 Q And they did so at gunpoint?

15 A That's correct.

16 Q and officers that were handcuffing the suspect obviously were just in
17 contact with firearms that were loaded?

18 A True.

19 Q Was the -- do you see Joshua Bacharach here in court today?

20 A I do.

21 Q Could you please point to him and identify a piece of clothing he's
22 wearing?

23 A He has the brown tie and the grayish colored shirt on.

24 THE COURT: The record will reflect he's identified Mr. Bacharach.

25 BY MR. FATTIG:

1 Q Was the Defendant sent to the hospital for treatment regarding his dog
2 bite?

3 A He was.

4 Q Now you already indicate that you became aware of other crime scenes
5 where this began. Specifically, let's go back to Walnut and Lake Mead, correct?

6 A That's correct.

7 Q And you also became aware of where the pursuit went, correct?

8 A That's correct.

9 Q I'm going to show State's Number 2. Walnut and Lake Mead is down
10 here in the left corner, correct?

11 A That's correct.

12 Q Up to Carey. You became aware that there was some cartridge
13 casings that were found on the roadway, correct?

14 A That's correct.

15 Q One was located at 2354 North Walnut, which is indicated at this point
16 on State's 2, correct?

17 A That's correct.

18 Q And that's near that church, which is right near this -- near -- across the
19 other side of the street?

20 A Yes.

21 Q And that was in the northbound lane of that?

22 A That's correct.

23 Q One was located just to the east of the residence at 3945 East Carey?

24 A That's correct.

25 Q There was a third -- and this street here would be Gateway, correct?

1 A That's correct.

2 Q That's the first street west -- excuse me, east of Walnut?

3 A That's correct.

4 Q One was located just before Gateway, correct?

5 A That's correct.

6 Q And one was located a little bit after Gateway?

7 A Yes. East and west of Gateway.

8 Q But both well before Lamb Boulevard?

9 A That's correct.

10 Q The third casing was located in the extreme farther -- northern gutter of

11 that traffic lane?

12 A Yes. Which would be the westbound lanes of Carey.

13 Q Correct. There was no indication in looking at the body cam video or

14 any of the other evidence you had that the pur -- that the Dodge Intrepid actually

15 was driving down the wrong side of the road at that particular point in --

16 A There was not.

17 Q Okay. But the casing ended up over there?

18 A Casings end up in strange places. That's where we located the casing.

19 Q The -- we've had some testimony from the firearms examiner about

20 casings, they generally --

21 MS. NGUYEN: Objection, Your Honor, leading.

22 THE COURT: Sustained.

23 BY MR. FATTIG:

24 Q In your experience, they get ejected --

25 MS. NGUYEN: Objection, Your Honor, leading.

1 THE COURT: He didn't ask the question.

2 BY MR. FATTIG:

3 Q In your experience with firearms, where can the casings end up?

4 A Casings are really unpredictable. Just picture the way most people
5 hold a handgun. If they're holding a handgun perfectly straight up and down, the
6 casing should go up and to the right. But as soon as you throw a motion in there, if
7 you [indiscernible] the gun this way they're going straight back. If you're leaning this
8 way, the casings are going over here. If you throw movement in there, if you throw
9 different surfaces that the casings hit.

10 On this case they were on a freeway that hadn't been shut down yet, so
11 cars are coming by and moving the cart casings. Cart casing are very random on
12 where you find them.

13 Q So obviously you were involved in speaking with Officer McNabb about
14 how many shots were fired, correct?

15 A That's correct.

16 Q And the general locations of the shots?

17 A That's correct.

18 Q Now during the pursuit, how many shots did he indicate occurred from
19 the Dodge Intrepid during the pursuit?

20 A Six.

21 Q Now let me -- perhaps that was a poorly worded question. How many
22 shots were fired while the suspect was actually in the car during the pursuit?

23 A One, when he went to stop him.

24 Q On Walnut.

25 A On Walnut. And then five during the pursuit.

1 Q All the way through Carey and Dolly?

2 A That's correct.

3 Q Okay. So is it fair to say that in this particular part of town, Carey itself

4 would be a busier street than a lot of these other side streets?

5 A Carey is a major east-west thoroughfare.

6 Q Yeah. Just like Lamb Boulevard would be?

7 A It would be a north-south, that's correct.

8 Q Yes. And Lake Mead, obviously. That's one of the main streets here.

9 A That's correct.

10 Q So the majority of the shots occurred on or near Carey, fair to say?

11 A That's correct.

12 Q Know -- you're aware that Officer McNabb indicated as he went through

13 Lamb there were two additional shots on East Carey, east of Lamb?

14 A That's correct.

15 Q No casings were found in that area, correct?

16 A We did not recover any.

17 Q There were a number of cars that would have traversed that area

18 before it was cordoned off?

19 A We had a lot of citizen traffic through there and the majority of the traffic

20 was responding officers that arrived to the call on Carey.

21 Q You're familiar with the surveillance video taken from the Wagner

22 residence on East Carey just south of where the patrol car ended up?

23 A That's correct.

24 Q And that video confirms a lot of that, correct?

25 A It does.

1 Q In terms of civilian cars going back and forth on Carey, both east and
2 west, right around the time of this?

3 A That's correct.

4 Q The area didn't get cordoned off right away?

5 A It wasn't.

6 Q So are you surprised that two casings were not found in that part of
7 Carey?

8 A Not at all.

9 Q Based upon what you've testified to?

10 A That's correct.

11 Q Now the same questions I have regarding the shot at the actual
12 intersection. Showing you 173, the crime scene diagram which is the blowup of
13 Carey and Dolly. Now in this particular crime scene Officer McNabb indicated that
14 there was one shot after the suspect exited the vehicle at him when he was near this
15 location in the patrol car, correct?

16 A That's correct.

17 Q You did not find a cartridge casing similar to the three that were on the
18 roadway that were recovered on this -- in this crime scene?

19 A We did not.

20 Q Clearly there was a number of cars that traversed on Carey through
21 Dolly, fair to say?

22 A That's correct.

23 Q I'm sure it was extensively searched however?

24 A It -- I mean, I walked the entire crime scene from the termination point
25 all the way to the -- where the pursuit started. I mean, we -- the casings that we

1 found we collected.

2 Q Yeah. You personally walked from Walnut/Lake Mead area up --

3 A I did.

4 Q -- through all the way over to El Tovar area?

5 A I did.

6 Q Okay. About how long was that in terms of --

7 A It's over a mile. I don't know the exact distance.

8 Q It took a little while obviously?

9 A I mean, worked the scene into the next day. We didn't get to process
10 the car until that -- the next evening. So we were probably on the scene 14 or 15
11 hours.

12 Q You were?

13 A Yes.

14 Q Now we talked a little bit about the firearm that was recovered
15 underneath the white truck. Showing you State's 105. This is the firearm we're
16 talking about, correct?

17 A That's correct.

18 Q It's a Colt .45 caliber. The magazine for this particular Colt carried a
19 capacity to hold ten different cartridges, correct?

20 A That's correct.

21 Q And in theory, if you kept the gun with one in the chamber that would
22 mean 11, correct?

23 A That's correct.

24 Q So on the roadway, three were recovered, correct?

25 A Yes.

1 Q Two shots from East Carey were not recovered, correct?

2 A Correct.

3 Q One from the corner at Dolly and Carey was not recovered, correct?

4 A Correct.

5 Q That would be six. Full cartridges were recovered outside the car,

6 Items 11 and 12 on the crime scene diagram, correct?

7 A Live rounds, correct.

8 Q Live rounds, .45 cartridges, same head stamp as the cartridges from

9 the street?

10 A That's correct.

11 Q So we're up to seven and eight, correct?

12 A That's correct.

13 Q And I know I'm jumping a little bit ahead of the story, but eventually you

14 look inside that car, the Dodge Intrepid, correct?

15 A We do, under the direction of a search warrant, we search the vehicle.

16 Q And we'll get into those details, but during that search you found two

17 live cartridges, .45 caliber on the floorboard by the driver's seat.

18 A That's correct.

19 Q That would get us to ten, correct?

20 A Correct.

21 Q Across the street, Item 10 on the crime scene diagram, State's 173, is

22 another .45 cartridge unfired, correct?

23 A Live round, that's correct.

24 Q Live round. Now that one is the only one that has a different head

25 stamp?

1 A It does.

2 Q Winchester.

3 A That's correct.

4 Q Okay. If that is associated with the gun that would get us to 11,
5 correct?

6 A That's correct.

7 Q You're familiar with the vest that the gun was laying on top of?

8 A I am. It's an American Body Armor, Threat Level II-A, as in Adam.

9 Q What does that mean, Threat Level II-A?

10 A Each vest is rated at different threat levels. The rating basically says
11 what kind of round that vest will stop. There's really no difference from this vest to a
12 vest that any of the officers working the street are wearing. Most of the officers that
13 are working the streets, their vests are also Threat Level II-A's.

14 Q That particular Dodge Intrepid that was registered to Eufrosia Nazaroff,
15 correct?

16 A That's correct.

17 Q And that turned out to be the mother of the Defendant's children?

18 A That's correct.

19 Q Did you do a records check to see if that Dodge Intrepid had been
20 reported stolen on or near that date?

21 A I did.

22 Q And was it reported stolen?

23 A It was not.

24 Q At the scene did you notice some damage to the driver's side of that
25 vehicle?

1 A I did.

2 Q And was that inspected a little bit closer after the vehicle was taken to
3 the lab?

4 A At the scene the vehicle was sealed, it was put on a flatbed trailer, and I
5 actually followed it back to the sterile environment of the lab where we could actually
6 work on it, so we could open up the traffic lanes. There was bullet impacts to the
7 driver's side rear of the vehicle.

8 Q Now you said a flatbed truck, so you're talking about the Dodge Intrepid
9 was literally put on all four wheels onto a truck?

10 A It is. The flatbed tow truck has a bed that tips up and then comes back
11 and they use a wench to pull the car up onto the truck and then the whole vehicle is
12 riding on top of the tow truck.

13 Q At the scene the back passenger tire appeared to be fully inflated,
14 opearationable.

15 A It was.

16 Q Now after the car was towed you did some examination and a search
17 you said of the Dodge Intrepid?

18 A We did.

19 Q And was that the evening of June 27th?

20 A It would have been that evening, yes.

21 Q And that was pursuant to a search warrant, correct?

22 A It was.

23 Q You received court authorization to do that?

24 A That's correct.

25 Q And that's when you actually examined the interior of the car?

1 A We did.

2 Q And the damage to the driver's side that you already mentioned?

3 A We did.

4 Q At the lab you noticed that the back passenger tire was in a different
5 condition?

6 A It was flat.

7 Q Now we don't know what caused that?

8 A We -- I don't.

9 Q Could have been a slow leak?

10 A Could have.

11 Q Showing you State's 165. Does this show generally the locations of
12 some of that damage that our observed?

13 A It does.

14 Q And you worked with a crime scene analyst in terms of documenting
15 and using a trajectory rod?

16 A I did.

17 Q And based upon your examination of the car, how many different areas
18 of damage were consistent with bullets to that side of the car, the driver's side?

19 A This is the rear passenger door, just to -- so you guys know what you're
20 looking at.

21 Q You just passenger door. Is this the passenger --

22 A It's rear driver's side door.

23 Q Okay.

24 A There's -- the first impact -- it's not showing on there.

25 Q And when you use the term first, there's no way to know in time which

1 impact happened, correct?

2 A The succession of these, we have no idea that order.

3 Q Yeah. You're just using first from driver to the rear?

4 A That's correct.

5 Q In terms of physical location. Okay.

6 A That's the first impact, this would be another impact, here would be the
7 third impact, and then this one -- this impact and that impact are all associated. So
8 there would be a total of four impacts.

9 Q Okay. And those were labeled A, B, C, D, correct?

10 A That's correct.

11 Q And can you talk a little bit about the angle of those impressions that
12 you witnessed?

13 A If you zoom in and look at the impact that's closest to the front -- and
14 let's see if it'll focus.

15 Q Let me get the actual closer photograph.

16 A If you picture throwing a tennis ball or the way a tennis ball bounces,
17 the greater the angle the higher the bounce that you will get from the ball. These
18 are coming at an angle where they're just touch the car and then continued on.

19 Q We can go out now because we have the better photograph here. And
20 this is State's 157 and it's marked A-0.

21 A This is the one closest the front of the car -- the impact. You can
22 actually see the kind of rounded edge with the front of the impact and you can see
23 that it's on the same plane as the vehicle and it just brushes by. It hit -- that's
24 actually the window, so it scrapes the window enough to not break it but to leave the
25 mark.

1 Q And were all four of these markings, were they consistent with an object
2 going from the front of the car towards the back of the car?

3 A That's correct.

4 Q In the front passenger floorboard do you remember that there was a
5 black bag?

6 A There was.

7 Q And in that bag you found a Colt .25?

8 A It was a .25 caliber semi-automatic handgun, that's correct.

9 Q And fair to say there was no serial number on that gun?

10 A The serial number had been ground off -- or where the serial number
11 should be, it was ground off.

12 Q Throughout the car you found -- is it fair to say the car was full of a lot of
13 different items?

14 A That's correct.

15 Q A lot of paperwork?

16 A There was, yes.

17 Q You found paperwork throughout the car in the name of Joshua
18 Bacharach?

19 A We did.

20 Q You found paperwork in the name of his son?

21 A We did.

22 Q You found paperwork in the name of Eufrasia Nazaroff?

23 A We did.

24 Q And you found paperwork in the name of Susanna Bacharach?

25 A We did.

1 Q Did a crime scene analyst at the garage there, after you towed the car
2 and you were examining it, collect DNA from various spots in the car?

3 A We collected DNA, yes

4 Q And one of those was the steering wheel cover or was the steering
5 wheel cover recovered off of the car?

6 A It was.

7 Q So later the DNA analyst could look at it?

8 A It was swabbed and then removed.

9 Q And that would have been impounded under the same event number?

10 A That's correct.

11 Q On the night of the 26th and the early morning of the 27th, was Officer
12 McNabb's firearm taken from him?

13 A It was. A countdown was done, his overall condition was
14 photographed, the equipment on his belt was photographed, his firearm was
15 photographed and collected.

16 Q And that's standard for officer-involved shootings, correct?

17 A That's per LVMP policies.

18 Q And that's so we could later do some testing ballistically?

19 A That's correct.

20 MR. FATTIG: The parties I believe are stipulating to the admission of 206 and
21 207.

22 MS. NGUYEN: That's correct.

23 THE COURT: They'll be admitted.

24 **[STATE'S EXHIBITS 206 & 207 ADMITTED]**

25 BY MR. FATTIG:

1 Q You're familiar with the area obviously where this occurred in terms of is
2 it introduction he county or is it in the city?

3 A It's actually in the county.

4 Q In the county, okay. I'm going to show you a map, 207. And this would
5 be a map of the city, correct, which indicates kind of the boundaries of the city, of
6 the county, and populated areas and what not?

7 A I believe the City of Las Vegas area is kind of in the gray and then the
8 Clark County is shown with a kind of yellowish color.

9 Q So the -- and there's another -- 17 -- I'm sorry, 206 has a key to what
10 the colors mean. County portion of illegal -- there we go. County portion of illegal
11 discharge -- illegal firearm discharge area, correct?

12 A That's correct.

13 Q Okay. This particular incident was in an -- a populated area, correct?

14 A That's correct.

15 Q You had occasion to listen to some jail calls of Mr. Bacharach --

16 A I --

17 Q -- after he was arrested, correct?

18 A I did.

19 Q And they were close in time to the arrest, correct?

20 A They were.

21 MS. NGUYEN: And Your Honor, I would just object again, pursuant to our
22 previous --

23 THE COURT: You've made the objections and it's noted for the record.

24 BY MR. FATTIG:

25 Q Can you explain how the system works and the Clark County Detention

1 Center in terms of when an inmate wants to make a call?

2 A When an inmate calls out, he's assigned --

3 Q To a non-attorney, for the record.

4 A He's assigned a number and then with that number there's a voice
5 recognition system where they have to speak their name. So someone can't type in
6 someone else's number, they actually have to speak their name. And there's -- the
7 way the system works it's -- it recognizes your voice; your pitch, rate, and cadence
8 of the way you say your name. And then when that matches up it identifies the
9 person making the call and they're allowed to make the call.

10 Q I'm going to play three calls. These have been marked as Proposed
11 202. And you're familiar with the calls?

12 A I am.

13 MR. FATTIG: We would move to admit State's 202 at this time, Your Honor.

14 THE COURT: It'll be admitted over -- the prior objection is noted.

15 **[STATE'S EXHIBITS 202 ADMITTED]**

16 BY MR. FATTIG:

17 Q And the first call we're going to listen to, is this a call that was placed on
18 July 1st of 2014?

19 A It was.

20 Q And this is between Mr. Bacharach and Eufrosia Nazaroff?

21 A That's correct.

22 Q And both parties -- there's a standard recording that gets played to -- so
23 both parties understand that the call is being recorded, correct?

24 A Yes, there is.

25 [July 1, 2014 Jail Phone Call Played]

1 THE COURT: Please turn your phone in the jury.

2 [July 1, 2014 Jail Phone Call Continues Playing]

3 BY MR. FATTIG:

4 Q You're familiar another call that he placed to Eufrasia on July 12th of
5 '14?

6 A That's correct.

7 Q And we'll listen to that one.

8 [July 12, 2014 Jail Phone Call Played]

9 BY MR. FATTIG:

10 Q There is also a third call that was placed on July 7th and in that call Mr.
11 Bacharach spoke to Marisala Tarango?

12 A That's correct.

13 Q And in that call there was a point in time where Mr. Bacharach indicated
14 he received a visit from a person named Bonnie Polley. That's an actual minister at
15 CCDC, correct?

16 A That's correct.

17 Q We're not going to play that call, but the jury will be able to listen to it in
18 the interest of time. We'll let them do that if they choose to.

19 Now, in your experience, Detective, officers usually qualify with their
20 own duty weapons, is that fair to say?

21 A That's correct.

22 Q Were you aware if the Defendant was a police officer or a security
23 officer?

24 A He was a police officer.

25 Q I'm sorry, the Defendant, Joshua Bacharach?

1 A Oh, no, he was not.

2 Q Okay. What you were referring to is Ryan McNabb?

3 A That's correct.

4 Q Okay. Did you do anything with regards to attempting to ascertain
5 whether or not any casings might have ended up in any tires of patrol cars or law
6 enforcement personnel vehicles?

7 A We did. It's my theory that the casings that we couldn't find were stuck
8 in the treads on the tires of a patrol car or in someone's boots. They're kind of like
9 rocks and sometimes you get a rock stuck in the tread of your shoe. We sent out a
10 message to all the patrol guys that responded at Northeast Area Command to check
11 their car tires to see if there was any casings there and to check their boots when
12 they got back in to see if there was any shell casings stuck in them and we didn't
13 recover anymore.

14 Q Or it could have ended up in a tire that you didn't have access to, non-
15 Metro?

16 A That's correct.

17 Q You had mentioned regarding Carey, I think you mentioned -- you
18 called it a freeway at one point, it's --

19 A It's a major thoroughfare.

20 Q A street, as opposed to a freeway, fair to say?

21 A That's correct.

22 Q Okay.

23 MR. FATTIG: I have no other questions at this time.

24 **CROSS-EXAMINATION**

25 BY MS. NGUYEN:

1 Q You said you were there 15 hours, is that correct?

2 A That's correct.

3 Q Okay. And it was dark when you first arrived?

4 A It was.

5 Q How soon after getting the call did you arrive at the scene?

6 A It would have been travel time, so I'm sure once I got the text that I
7 needed to respond within a half hour.

8 Q It's fair to say that people arrived on this scene pretty quickly, is that
9 correct?

10 A That's correct.

11 Q Okay. And is that because of the nature of the call involving an officer-
12 involved shooting?

13 A That's correct.

14 Q Okay. And you had indicated that you saw at least 20 or so patrol cars,
15 is that correct?

16 A People would kind of respond in waves. The first wave would have
17 been all the first responders, all the patrol guys. I'm one of the last people to
18 actually arrive.

19 Q And we heard previously that this was kind of in between the time of
20 swing and graveyard shift, is that correct?

21 A It was when there would be double coverage for patrol.

22 Q Okay. And you said that you were part of the force investigation team
23 or the FIT team -- or FIT, is that correct?

24 A That's correct.

25 Q And you had been doing that for two years?

1 A That's correct.

2 Q Okay.

3 A Well not while I've been doing it at the time it was -- I've been assigned
4 to it since its inception, but it was a fairly new then so a few months then.

5 Q Is your focus, when you arrive on a scene such as this, to focus on the
6 officers involved or are you the lead on the entire case or how does that work?

7 A We are the lead on the entire case.

8 Q So you are the head of the whole thing, is that correct?

9 A That's correct.

10 Q Okay. And so you're the one directing the other detectives and the
11 officers and the other administrators to the scene?

12 A Well by head of the whole thing -- the whole investigation is mine to --

13 Q Okay.

14 A -- orchestrate.

15 Q So you're the one that puts together the complete report, is that
16 correct?

17 A That's correct.

18 Q You -- I think you described yourself as a case agent or a manager?

19 A The project manager. I mean, we call it the case agent, but I guess a
20 more civilian term would be the project manager.

21 Q Okay. You would take all the individual reports, is that correct?

22 A That's correct.

23 Q You would take and review all of those?

24 A I don't know if reviews the right word. But we would direct someone to
25 conduct and interview. When that interview is done I would listen to that interview

1 and then do the typing for the report.

2 Q Is it fair to say that no one is interviewing anyone without you directing
3 them to go do that interview?

4 A Well or -- or me knowing about it, that's correct.

5 Q So if there were civilian witnesses, how would you learn about them?

6 A We have different areas that we split up into. The case agent is mainly
7 responsible for the scene and then the other detectives that arrive do witness
8 canvas or someone goes to the hospital. If you're assigned to do the witness
9 canvas -- if you are known of a witness or you just do the interview then and then
10 you let the case agent know the people that you interviewed later?

11 Q So if there were other officers or detectives that did interviews, they
12 would conduct those interviews, possibly, and then provide you with the information
13 from those interviews?

14 A That's correct.

15 Q So for example, if there was a civilian that had video surveillance from
16 their home, you would -- if someone obtained that information, you would be notified
17 of that, is that correct?

18 A That's correct.

19 Q In this case there was video surveillance from a home, is that correct?

20 A There was.

21 Q And you had an opportunity to review that?

22 A I did.

23 Q The body cam video -- this was the first officer-involved incident with a
24 body camera, is that correct?

25 A Well, I don't know about the first, but the body-worn camera program

1 was in its infancy and I believe this is one of the first actual officer-involved
2 shootings captured. I wouldn't have the exact number, but it's --

3 Q Okay. Was it one of the first that you had worked on --

4 A One of the first that I had I worked.

5 Q -- in your capacity on FIT?

6 A That's correct.

7 Q Okay. And you said that you reviewed that body camera video within
8 the patrol car of Officer McNabb, is that correct?

9 A It wasn't McNabb's patrol car. I believe it was one of the responding
10 supervisor's car that I was in.

11 Q Okay. Can you review those body camera videos on any computer?

12 A I don't know about any computer. I think it has to have a department
13 gateway to the computer. I'm not a tech guy. It has to be a Metro computer.

14 Q Okay. But you were able to view it on the scene?

15 A Yes.

16 Q Did you watch it multiple times there at the scene?

17 A I did.

18 Q Okay. And you did that to kind of confirm your interview with Officer
19 McNabb, is that correct?

20 A That's correct.

21 Q Okay. And it's important to aid your investigation to obtain all of the
22 different perspectives, is that correct?

23 A We need to know where to look for evidence. So anything that could
24 help us, we review.

25 Q Okay. And so you got that from speaking with lay witnesses?

1 A That's correct.

2 Q And you got that from speaking with Officer McNabb?

3 A That's correct.

4 Q And you received that from corresponding video from the body camera
5 as well as the civilian?

6 A That's correct.

7 Q Was there any other information that you used to aid in your
8 investigation?

9 A We did. I mean, we had -- DNA was done, latent prints was done.

10 Q Determination on prints and DNA, was that done at your direction?

11 A It was.

12 Q Okay. So if you -- if evidence was collected, it was your determination
13 on whether or not it was going to be processed further, is that correct?

14 A That's correct.

15 Q Did you direct the CSAs that arrived on the scene to collect?

16 A To collect?

17 Q Any evidence?

18 A It -- I guess, yes, but the CSAs know what they need to collect. I didn't
19 stand over them and say pick up this casing, pick up that casing. We've worked
20 together for a couple years, so we all have an understanding of what needs to get
21 picked up.

22 Q And so you -- they did their own self-directed investigation, as well as
23 were pointed in direction of things that had already been previously --

24 A Yes, yes.

25 Q -- located?

1 A Yes.

2 Q Is that fair to say?

3 A Yes.

4 Q There were several items of evidence that were either tested for
5 fingerprints or DNA later. Is -- was that done at your direction?

6 A That would have been done at my direction, yes.

7 Q You had indicated that you did not feel that gun residue was an
8 effective or accurate --

9 A Gunshot residue, that's correct.

10 Q Gunshot residue, I'm sorry.

11 A That's correct.

12 Q Okay. There are officers or detectives that do choose to use that, is
13 that correct?

14 A I don't know any detectives that have used it for -- in the last several
15 years.

16 Q Okay. Certain types of gunshot residue testing is done at the lab, is
17 that correct?

18 A I don't think they do it at our lab. I think they actually have to send it out
19 and have -- there's only a few vendors that do it yet, so it would have to be sent out
20 from our lab.

21 Q Okay.

22 A I don't think they even do it at our lab.

23 Q But it's not something that you choose to use?

24 A No.

25 Q And it's not something that ordered in this particular case?

1 A It was not.

2 Q Okay. We saw a picture of a shirt here that was recovered. Did you
3 recover that shirt?

4 A I did not.

5 Q Okay. Did you arrive at the hospital to speak with the suspect or to
6 collect -- direct the collection of this shirt at the hospital?

7 A I did not. We had other detectives from the force investigation team
8 that responded to the hospital.

9 Q But this -- you were aware that this had been collected?

10 A That's correct.

11 Q Okay. And it was collected at the hospital, is that correct?

12 A It was.

13 Q Oh. This shirt. Is that correct?

14 A Yes. I saw it when it was -- you --

15 Q Sorry. I don't even care for that.

16 You said that you had done a walk-through of that area and you
17 physically started at Walnut and walked those streets approximately a mile or so, is
18 that correct?

19 A I did.

20 Q But you weren't the only one that did that, is that correct?

21 A No.

22 Q In fact, there were probably several CSAs that walked that area?

23 A There -- each spot where we found a shell casing was cordoned off and
24 kind of established as a crime scene. So we had patrol officers on each spot. Once
25 everything was collected a group of us walked from the end all the way to the

1 beginning just to make sure that nothing got missed.

2 Q Okay. And was that done during at night or during the daytime?

3 A It was daylight by that time.

4 Q Okay. We heard from some other -- the crime scene analysts that they
5 were there into the morning hours when there was daylight. Is that the same for
6 you?

7 A Well into the morning hours, into the afternoon hours.

8 Q This area was -- you learned very quickly of where this stop or incident
9 began, is that correct?

10 A I did.

11 Q Okay. In addition to speaking with Officer McNabb, you also have --
12 there are other ways that you track officers in the field, is that correct?

13 A Track officers in the -- I would have no way to track officers in the field.

14 Q When an officer is making a stop they usually call in --

15 A Oh, through radio track.

16 Q -- to dispatch, is that correct?

17 A Yes. I could order the radio traffic that they broadcast.

18 Q Okay. And did you do that in this case as well?

19 A I did.

20 Q And that radio traffic, can you describe to the jury what that means and
21 what's included in that document or that log?

22 A As far as -- meaning --

23 Q What's included in the catalog?

24 A Well the CAD is the computer-automated dispatch. It helps our
25 dispatchers keep track. When they assign an officer to a call there's one line put the

1 time that he's assigned to the call and then there will be another line that's in-route
2 time, and then another line to show his arrival time. And then within that call it will
3 also show all the other officers that arrived on it.

4 Q Okay. And that's so you're able to determine what time an incident
5 perhaps started or was called in?

6 A That's correct.

7 Q Or in this case, when a traffic stop was going to be initiated?

8 A That's correct.

9 Q If an officer heard shots, would that be logged into this log?

10 A If they're able to broadcast it. For the most part when an officer hears
11 shots, they will get right on the radio and broadcast that they've heard shots.

12 Q Okay. And that -- getting on the radio to dispatch, that's kind of how
13 other officers are signaled to get to that scene at ultimately where everyone ended
14 up, is that correct?

15 A That's correct.

16 Q Is there any additional investigation that you do as part of FIT?

17 A As far as? I mean, there --

18 Q Would you go out to another scene involving a shooting that maybe an
19 officer wasn't involved in?

20 A Yes.

21 Q Okay. Are -- the force investigation team, does that have to do
22 specifically with officer-involved shootings or is that any shooting?

23 A Not any shooting. We handle all officer-involved shootings of course or
24 any major -- or any uses of force resulting in major injury. We also respond when
25 police officers are victims of crimes.

1 Q So if a K9 Unit was deployed or was released in this case, would this be
2 a situation where you would also be involved?

3 A A standard K9 deployment, the dog goes, bites someone, they go to the
4 hospital and get stitched up, we would not get sent on it. That same dog bites
5 someone in the neck and they almost die or they lose fingers or lose an eye or
6 something, we would get sent on.

7 Q So stitches, no. Loss of --

8 A Serious injury is the way it's worded.

9 Q And stitches would not be considered serious?

10 A No.

11 Q In this case were you aware if there were any serious injuries as a
12 result of the dog bite?

13 A Not life threatening injuries. He did receive -- I don't have the stuff but
14 he had pretty good bites on his leg.

15 Q Okay. Were stitches required to your knowledge?

16 A Oh, for sure.

17 Q Okay.

18 MS. NGUYEN: Court's indulgence just for a moment.

19 [Colloquy between Counsel and the Defendant]

20 BY MS. NGUYEN:

21 Q You had indicated that the scene in your opinion perhaps could have
22 been disrupted because of car traffic by civilians off of those major roads?

23 A It was. I mean, by the time the scene -- the incident happened, the first
24 wave of first responders get there. Once he was taken into custody then patrol
25 worried about shutting down all the surrounding roads. So for sure the scene was

1 disrupted.

2 Q Okay. In the area there was like a dirt lot kind of over to the -- I guess if
3 you're asking me cardinal direct --

4 A Southeast corner.

5 Q -- south. That's correct. But you said that you did thoroughly check
6 that area?

7 A We did. We checked that area. That was the direction that Officer
8 McNabb was hooting in. We were kind of hoping to find some impacts or even
9 some projectiles in that lot, but we weren't -- we were unable to.

10 Q And had you been informed that he felt he had been shot at in that
11 general area?

12 A That's correct.

13 Q From that general area?

14 A We also went to the northwest, which would be kind of behind where
15 Officer McNabb was because that was the area he felt that rounds were coming at
16 him. There was a bunch of buildings there that we scoured for any impacts and we
17 did not find any.

18 Q And you didn't find any impacts from his discharged firearm or the
19 alleged discharged from the suspect, is that correct?

20 A The only impacts we found from the suspect was on his car.

21 Q And the shell casings, were you the one that located any of those shell
22 casings that were on --

23 A I didn't locate any of them.

24 Q -- on Carey?

25 A There was the first wave of responding officers that actually found most

1 of them. And then we confirmed the areas where to look during the drive-through or
2 walk-through with McNabb.

3 Q As far as the shell casings from Officer McNabb's firearm, you were
4 able to locate all of those, is that correct?

5 A I believe all but one.

6 Q So your recollection was all but one?

7 A I would have to look at the report. I think it's all but one.

8 Q Do you have your report with you or --

9 A I don't.

10 Q Okay. But those were recovered on the scene, is that correct?

11 A They were.

12 Q Okay.

13 A And his were a little bit easier to find because there was just two groups
14 of his.

15 Q Okay. But you weren't able to locate any other shell casings from any
16 other firearms in that area at Dolly and El Tovar?

17 A And by -- like cart casings -- like expended rounds?

18 Q Expended rounds.

19 A We only found 9 mm from Officer McNabb at the area of Carey and El
20 Tovar there.

21 Q And you thoroughly searched that area?

22 A We did.

23 Q Okay.

24 MS. NGUYEN: Nothing further.

25 **REDIRECT EXAMINATION**

1 BY MR. FATTIG:

2 Q There were no other suspects found in the area besides MR.
3 Bacharach, correct?

4 A No. After he was taken into custody the Air Unit was broadcast, patrol
5 had a really tight perimeter. Basically a perimeter they just go every hundred yards
6 or so and they set a car and they make a circle around the last area. They had K9
7 search the area and the Air Unit search the area with the FLIR which looking for any
8 heat traces and no other people were located.

9 Q And no other items of evidence --

10 A That's correct.

11 Q -- as well, other than the ones we've been talking about?

12 A That's correct.

13 MR. FATTIG: No other questions.

14 MS. NGUYEN: Nothing further.

15 THE COURT: The jury have any questions of this officer? Seeing no hands.
16 You're free to go.

17 THE WITNESS: Thank you.

18 THE COURT: Call your next witness.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. FATTIG: Marnie Carter.

22 **MARNIE CARTER**

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

24 THE CLERK: Thank you. Please be seated. State your full name, spelling
25 your first and last name for the record, please.

1 THE WITNESS: My name is Marnie Carter. M-A-R-N-I-E, C-A-R-T-E-R.

2 **DIRECT EXAMINATION**

3 BY MR. FATTIG:

4 Q Good afternoon to you.

5 A Good afternoon.

6 Q How are you employed?

7 A I am a forensic scientist in the latent print detail of the Las Vegas
8 Metropolitan Police Department's Forensic Laboratory.

9 Q And what do you do specifically in that laboratory?

10 A As a forensic scientist in the latent print detail I -- in some cases I get
11 evidence from a crime scene and process those at -- that evidence. Some
12 instances the evidence has already been processed and we get the latent prints to
13 compare. Ultimately my job is to try to either recover latent prints or use those latent
14 prints to compare to the late -- the known prints of listed subjects or any unidentified
15 prints will be searched through our AFIS database.

16 Q And how long have you been employed as a fingerprint examiner?

17 A I've been a fingerprint examiner almost nine years.

18 Q How long have you been with Metro?

19 A Almost 12.

20 Q What -- could you briefly explain your education and training in order to
21 become employed as a fingerprint examiner?

22 A Sure. I have a Bachelor's degree with a double major in Biology and
23 Chemistry. In 2003 I was hired on with Metro as a crime scene analyst. In that
24 capacity, about three and a half years doing that, I got quite a bit of experience in
25 fingerprint processing, recovery, photography, evidence collection and preservation.

1 In 2 -- in March of 2007 I tested and promoted into the laboratory as a forensic
2 scientist trainee in the latent print detail and went through an 18-month formal
3 rigorous training program to qualify me to do independent case work in latent prints.

4 In December of 2009 when I had enough experience as a bench
5 analyst I went through the process to test and apply for certification. So I am a
6 certified latent print examiner with the IAI, which is the International Association for
7 Identification. I am a member of the Nevada State IAI, also the IAI -- the
8 international IAI. I have presented latent print related material to my own
9 department, the crime scene analysts, also in Phoenix and in Utah.

10 In January of 2013 I co-authored an article in the Forensic
11 Encyclopedia of Forensic Sciences called *Palm Prints*. And I'm also proficiency
12 tested annually.

13 Q And have you previously testified in court as an expert in the area of
14 fingerprints identification?

15 A Yes, I have.

16 Q About how many times?

17 A This is the 13th in District Court.

18 Q What is a fingerprint?

19 A A fingerprint. So on our fingers and the palms on our hands, also on
20 the toes and the soles of our feet, we have specialized skin called friction ridge skin.
21 It's different than any other skin on our bodies. So if, similar to an ink stamp, if I
22 were to take an ink stamp and put it in ink and put it on a piece of paper I'm going to
23 leave an impression of that stamp -- that ink.

24 So our friction ridge skin has ridges, it has details, it has lots of
25 characteristics in it that make us unique. If I -- with the matrix which is that residue

1 that's on our skin, similar to that ink, if I touch that res -- if I get residue on my fingers
2 and I touch a surface I will possibly leaven an impression of that skin. That is what
3 we call a latent print.

4 So we have ink prints. If you were ever fingerprinted for a job, for
5 instance, those are known recordings. Those are ink prints. That's what we actually
6 use to compare. And the latent prints are those prints that are left kind of
7 unbeknownst to you leaving it. Latent, by definition means present but not readily
8 visible.

9 So we can go through processes to develop that latent print and allow
10 us to see it. It might be a powder processing technique. We have different kind of
11 chemical processes we can do to allow us to visualize it so that we can see it.
12 Ultimately we need to see it to render any sort of comparison.

13 Q One of those processes would involve a superglue type process?

14 A Yes.

15 Q How do you go about the process of comparing a print, either lifted off
16 of a particular item or taken from scene to a known print?

17 A Sure. We have kind of a framework system that we go through that we
18 call ACE-V. The analysis -- A just stands for analysis, that's when we actually look
19 at that latent print. We actually look at our known prints too. The known prints have
20 to have enough information also. But we look and we just gather data in that latent
21 print. Is it enough for me to render a reliable conclusion? Is there enough detail in
22 these ridges and in the -- in that impression for me to do something with?

23 So we go through the analysis, I determine that I have good detail in
24 there for me to look for. So -- and then in the comparison phase, once I know
25 that -- maybe that area of skin I might be able to tell right off that it's a fingerprint. I

1 might be thinking maybe it's a palm. I may be unsure. But once I've made that
2 determination that I know where in that source skin that I'm going to look, I can do a
3 comparison.

4 And then the comparison entails the known prints of a person and I do
5 a side-by-side literally looking for the detail in my latent print to the detail in my
6 known print. And I'm looking for either agreement or disagreement to make a
7 conclusion of possibly identification or maybe exclusion and there's different
8 degrees of inconclusive in there. But that's the comparison phase.

9 The E stands for evaluation and that's based on the analysis and the
10 comparison, I render a conclusion and my evaluation. And verif -- the V stands for
11 verification. Any conclusions that we make goes to a second qualified examiner and
12 they go through that process to see if they reach the same conclusions.

13 Q Are each person's fingerprints different than everyone else's?

14 A Yes, that we know of.

15 Q Is it possible for someone to touch an object or a surface like I'm
16 touching this pedestal here and not be able to come over, even if I was trying to
17 perhaps leave a fingerprint, not be able to actually recover my fingerprint from that
18 pedestal?

19 A Yes, it is possible.

20 Q Are there -- describe that. Why is that possible?

21 A Sure. There's -- there's actually quite a few factors that come into play
22 whether we will actually leave a fingerprint or not. So to start kind of on the basic
23 level with the skin first. If you have -- some people's skin based on maybe their
24 occupations or maybe just on genetics have poor friction ridge skin. They might be
25 very faint or very soft and not very robust.

1 So if you are a brick-layer or a construction worker or even people who
2 work with paper a lot, those friction ridges actually get kind of worn down and they
3 won't -- you won't have really thick ridges. So -- or if you cover the skin with fabric
4 or gloves or something like that. Or even just barring some kind of injury or disease
5 that damages that. So the skin has to be in good enough condition to leave an
6 impression.

7 Then there's the -- that substrate -- that matrix that we call -- that's on
8 the skin. So if I am very, very sweaty or oily or I just finished eating a bunch of
9 french fries, I can actually have too much residue on my fingers and it might blur the
10 impression. So again, kind of going back to that ink analogy, if I took an ink stamp
11 and I rubbed it in the ink and I kind of really rubbed it really hard and I got it all
12 gooey and then I put it on the paper and pressed really hard, I can actually deform
13 that impression and not be able to read the stamp properly. So that comes into
14 play -- that residue.

15 How we touch it. Again, similar to the ink stamp if I press too hard. If I
16 press too lightly I won't leave an impression properly. If I press too hard I can
17 obscure those ridges. Sometimes sliding, twisting, dragging, different things. Our
18 skin is very flexible so it's pliable and those ridges can move. They can move
19 amongst themselves like an accordion sort of. So how I touch that skin can certainly
20 affect the impression that's left or not left.

21 And then the environmental factors that go into play. How much time
22 has passed? What the object -- what has actually been touched, if it's surface
23 conducive to latent prints or not. If I touch, you know, a nice smooth desk top that's
24 clean I would expect to leave an impression. If I touch, you know, this foamy
25 microphone I would not necessarily expect to leave an impression. So the surface

1 certainly comes into play.

2 And then again, like I said, how much time has passed, whether it's
3 been wiped off or rubbed off or left out in the sun or the dirt or the rain. All those
4 different things can affect whether a latent print is even left for -- or recovered.

5 Q Many, many factors.

6 A Yes.

7 Q What about firearms in general? Can you speak to being able to get
8 fingerprints off of firearms?

9 A Sure. Firearms in general are poor surfaces. Based on some studies
10 that we've done internally in our laboratory, also a study that I know about from the
11 ATF and an agency, Minneapolis Police Department did some firearms testing. So,
12 firearms, based on the materials that the guns themselves are made out of,
13 sometimes they're nice smooth metals. Oftentimes they're not. They're polymers,
14 they're plastics, they're different things. They might be textured.

15 In a conventional way that you handle a gun you will holding it, you
16 know, generally in a place that's going to be textured in some kind of way because
17 you don't -- the firearms are manufactured so you don't drop them. They have some
18 areas of grip, you know, for you to hold on to. So the grips are generally textured,
19 the trigger might even have some sort of texture to it where you would move -- you
20 know, move the slide might have some texturing on it.

21 They're often coated with different things that resist rust. So if they're
22 resisting rust, usually they resist some sort of moisture. So they're resisting
23 fingerprints. So our studies -- we did a two year study over -- from 2008 to 2009 we
24 looked at all the firearms evidence that we had processed in the laboratory and we
25 had a recovery rate of 13 percent on fire -- on just pistols, about 14 percent on

1 magazines, the ATFs was about 10 percent across the board, and Minneapolis was
2 12 percent. So it's not very high in general on firearms evidence.

3 Q Were you asked to do some comparisons in relating to Las Vegas
4 Metropolitan Police Event Number 140626-4091?

5 A Yes.

6 Q And what specifically were you given to look at?

7 A I was given photographs of latent prints.

8 Q In this particular case you weren't given actual items of evidence, fair to
9 say?

10 A Correct, yes.

11 Q And a crime scene analyst took the photographs of the fingerprints?

12 A Correct.

13 Q Okay. Showing you 177. Do you recognize -- let me zoom out. Do you
14 recognize this?

15 A Actually I do not.

16 Q Okay. You were given some photographs -- is it fair to say you were
17 given several photographs relating to two different items of evidence that the crime
18 scene analyst processed?

19 A That's correct.

20 Q Okay. 178. Do you recognize that photograph?

21 A That does look more familiar, yes.

22 Q Okay. And this was identified as coming from Item 28 from the crime
23 scene analyst?

24 A That I don't know from looking at that. I'm --

25 Q Would you be to tell by looking at your report?

1 A Honestly, I --

2 Q Or your notes?

3 A -- I -- just -- so the latent print card is all -- I mean, the photograph is all I

4 get hat has a label on it.

5 Q Okay.

6 A Oftentimes -- I mean, without being able to tell if that's the label that

7 was in -- the label that I looked at. Do you understand what I'm saying?

8 Q Yes.

9 A So --

10 Q In other words, would it help to look at the -- I know it was a little blurry.

11 Would it help to look at the picture perhaps?

12 A It might. Does he have an actual identifica -- identifier on there is what

13 he called the latent print that he marked?

14 Q I don't know.

15 A Okay. Yeah.

16 MR. FATTIG: Can I approach?

17 THE COURT: Yeah. Show her.

18 THE WITNESS: Sorry, I just --

19 THE COURT: That's all right.

20 BY MR. FATTIG:

21 A Because he -- sometimes he may have taken more than the pictures

22 that I looked at. So -- okay, so the little LP2 looks like -- yes, it was LP2 that he had

23 marked. Yes.

24 Q Okay.

25 A I see that now.

1 Q What does that mean, LP2, to you?

2 A To me I would assumed that that was the second latent print that he

3 had photographed. That's what it means in our lab.

4 Q Okay. And are you able to tell if that came off of his Item 28?

5 A That I --

6 Q LP2?

7 A Just based on the lift card that would have said that. I never did see the

8 item. So.

9 Q That's fine. But you're familiar with this -- this would be a latent

10 fingerprint that he developed?

11 A That photograph, yes.

12 Q Okay. A photograph of the fingerprint, fair to say?

13 A Correct.

14 Q And again, you received several photographs. This is just one of them?

15 A Correct.

16 Q And you compared those to an individual identified as Joshua

17 Bacharach, correct?

18 A Yes.

19 Q You were asked -- and Mr. Bacharach had an ID number of 1900105,

20 correct?

21 A Without looking at my report --

22 Q Yes. Would looking at your report refresh your recollection?

23 A For that number, yes.

24 Q Yes, please.

25 A Okay. Thank you.

1 Q Please do so. And again, I'm -- why question went to the known prints
2 you were comparing against.

3 A Yes. And do you want me to repeat that ID number or --

4 Q Yes.

5 A Okay. So 1900105. Yes.

6 Q And Mr. Bacharach's prints were kept in the ordinary course of the Las
7 Vegas Metropolitan Police Department, correct?

8 A That's correct.

9 Q And the Metropolitan Police Department has literally thousands of
10 different people's prints? Tens of thousands probably?

11 A I think we have over a million records actually.

12 Q Okay.

13 A Yes.

14 Q Over a million. And they're kept for all sorts of reasons. People getting
15 employment. My fingerprints would be in there, correct?

16 A They could be. Mine are.

17 Q They are.

18 A Yes.

19 Q I can tell you.

20 A Okay.

21 Q Yours are.

22 A Yes.

23 Q Many people. Okay. When you examined this particular fingerprint,
24 what did you find?

25 A For LP2 there were no suitable prints for me to compare.

1 Q So when you say no suitable prints, what are you talking about?
2 Because I see some detail in the photograph.

3 A Correct. So that would be during my analysis phase where I'm actually
4 looking at the information in that latent print. Is there enough for me to render a
5 reliable conclusion? Could I say that that appears to be a fingerprint? Yes. Is there
6 enough information -- enough detail in that for me to say I can make a conclusion
7 that someone did leave this print or someone did not leave this print; that did not
8 have that information in it? So we call that not suitable for comparison.

9 Q You couldn't include Mr. Bacharach, you couldn't exclude MR.
10 Bacharach.

11 A I would not have been able to, so I did not even compare it to MR.
12 Bacharach.

13 Q Because there's not enough ridge detail there.

14 A That's correct.

15 Q Okay. Is that unusual for you to get some ridge detail from a crime
16 scene analyst but then when you look at it, you're not able to make any conclusions
17 from it?

18 A No, that's not unusual at all.

19 Q Regarding, I believe, LP1, showing you State's 175, this is another
20 photograph that you examined?

21 A Yes. Or -- that area is the photograph that I examined. I never got that
22 entire picture.

23 Q Okay. You received a more close-up picture -- and showing you 176?

24 A Yes.

25 Q Is that one of the pictures you looked at?

1 A That's correct.

2 Q And that appears to be similar to an area on 191b towards the base of
3 the magazine, correct?

4 A I would not be able to say for sure that it's that magazine, but --

5 Q Yes.

6 A But --

7 Q That was a different -- that was the crime scene analyst, correct?

8 A Correct, yes.

9 Q But it's similar?

10 A Sure.

11 Q Now did you compare this particular fingerprint?

12 A Yes, I did.

13 Q And did you reach any conclusions regarding this fingerprint?

14 A I did.

15 Q What was that conclusion?

16 A That conclusion was that fingerprint is -- belongs to the left thumb of
17 Joshua Bacharach.

18 MR. FATTIG: I have no other questions.

19 MS. NGUYEN: No questions.

20 THE COURT: The jury have any questions of this witness? Seeing no
21 hands. You're free to go. Thanks.

22 THE WITNESS: Okay. Thank you.

23 THE COURT: Call your next witness, State.

24 MR. FATTIG: The State would rest at this point.

25 THE COURT: Okay. With the admission of all of the evidence the State has

1 moved into evidence, the State rests.

2 We're going to take our lunch break. Be back at 3:00.

3 During the recess you're admonished not to talk or converse among
4 yourselves or with anyone else on any subject connected with this trial. Or read or
5 watch or listen to any report of or commentary on the trial or any person connected
6 with this trial by any medium of information including, without limitation, newspapers,
7 television, the radio, or the internet. Or form or express an opinion on any subject
8 connected with the trial until the case is finally submitted to you.

9 See you back here at 3:00.

10 [Outside the presence of the jury]

11 THE COURT: See you guys at 3:00.

12 MS. NGUYEN: Your Honor, do you want to canvas my client?

13 THE COURT: Oh, yes, I got to -- let me read this again to you Mr. Bacharach.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Under the Constitution of the United States and under the
16 Constitution of the State of Nevada, you cannot be compelled to testify in this case,
17 do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You may, at your own request, give up that right and take the
20 stand and testify. If you do, you'll be subject to cross-examination by the Deputy
21 District Attorneys and anything you may say, be it on direct or cross-examination,
22 will be the subject of fair comment when the Deputy District Attorneys speak to the
23 jury in their final argument, do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: If you choose not to testify, the Court will not permit the Deputy

1 District Attorneys to make any comments to the jury because you have not testified,
2 do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: If you elect not to testify and if your attorney specifically
5 requests, this jury instruction will be given, quote: The law does not compel a
6 Defendant in a criminal case to take the stand and testify. And no presumption may
7 be raised and no inference of any kind may be drawn from the failure of a Defendant
8 to testify.

9 Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And then if -- do you have any questions about your rights?

12 THE DEFENDANT: No, sir. I understand.

13 THE COURT: What do you want to do?

14 THE DEFENDANT: I'm going to not testify.

15 THE COURT: Okay.

16 THE DEFENDANT: All right. Thank you.

17 THE COURT: All right.

18 MS. NGUYEN: And, Your Honor, we would like that instruction given.

19 THE COURT: All right. That instruction I think is Jury Instruction 27.

20 MS. NGUYEN: And Your Honor, did you want to address the instruction that
21 you were taking under advisement regarding the prior inconsistent statement?

22 THE COURT: Yeah.

23 MS. THOMSON: And Judge, it's our position that now that the detective has
24 testified, Detective Hodson, those statements which were inconsistent have been
25 admitted both for impeachment purposes and substantively and I think the jury's

1 entitled to that.

2 MS. NGUYEN: And Your Honor, again, I would object. I think it's covered by
3 the credibility of the witnesses instruction. I think that they can take that into
4 consideration in determining whether or not -- I think it is -- shifts the burden or does
5 definitively say that there was prior inconsistent statements and I think that's in the
6 province of the jury to decide.

7 THE COURT: Well, as we've talked before, I think that there was some
8 with -- is to do with the vest. There was some inconsistent statements made and
9 over your opposition, I'm going to allow that in.

10 MS. THOMSON: Thank you, Your Honor.

11 THE COURT: Okay. See you guys at 3:00. Make sure your --

12 MR. FATTIG: Do we have the -- a copy of instructions yet or --

13 THE COURT: Yeah, they're right there.

14 MR. FATTIG: Oh, cool.

15 THE COURT: Jill, do you want to give them copies? Give two to Ms.
16 Nguyen. And Tom will put them out on the chairs.

17 THE CLERK: Do you have any exhibits?

18 THE COURT: And then if --

19 MR. FATTIG: Do we have any exhibits?

20 MS. THOMSON: No.

21 MR. FATTIG: I don't think we do.

22 THE COURT: You got everything?

23 THE CLERK: It'll take a while for me to figure it out. I don't have --

24 THE COURT: Yeah, make sure you don't have any exhibits with you.

25 THE CLERK: I'm just looking for the one -- just now.

1 MS. THOMSON: I would check towards the back of the stack.

2 THE CLERK: Okay.

3 [Recess taken at 1:57 p.m.]

4 [Trial resumed at 3:03 p.m.]

5 [Outside the presence of the jury]

6 THE COURT: Are you guys ready?

7 MS. NGUYEN: Yes.

8 THE COURT: You ready?

9 MS. THOMSON: Uh-huh.

10 THE COURT: They're ready. Bring them in.

11 [In the presence of the jury]

12 THE MARSHAL: All rise, please.

13 And be seated.

14 THE COURT: Stipulate to the presence of the jury.

15 MS. NGUYEN: Yes, Your Honor.

16 MS. THOMSON: Yes, Your Honor.

17 THE COURT: Thanks for being prompt. Ladies and gentlemen, I'm going to
18 now read to you the jury instructions. You have a copy of them. At the back you'll
19 have --

20 MR. FATTIG: Your Honor --

21 THE COURT: Oh, yes. Sorry. Did you rest?

22 MS. NGUYEN: Oh. Yes, Your Honor, we would rest.

23 THE COURT: All right. You'll have the verdict form. What you should do is
24 your jury foreperson will mark the jury -- the verdict form and you just have to check
25 the boxes. You'll get -- this is the official one. That's the one that's attached to the

1 back. Make notes as you read -- as I read these to you. Follow along. If you think
2 it's important you can set it aside and when you get back to the jury room you can
3 discuss it.

4 This is District Court, Clark County, Nevada, State of Nevada versus
5 Joshua Bacharach, Case C299425, Department VIII, Instructions to the Jury.

6 Instruction Number 1: Members of the jury it is now my duty as judge to
7 instruct you in the law that applies to this case. It is your duty as jurors to follow
8 these instructions and to apply the rules of law to the facts as you find them from the
9 evidence.

10 You must not be concerned with the wisdom of any rule of law stated in
11 these instructions. Regardless of any opinion you may have as to what the law
12 ought to be, it would be a violation of your oath to base a verdict upon any other
13 view of the law than that given in the instructions of the Court.

14 Instruction Number 2: If, in these instructions, any rule, direction, or
15 idea is repeated -- excuse me -- or stated in different ways, no emphasis thereon is
16 intended by me and none may be inferred by you. For that reason, you are to
17 single -- you are not to single out any certain sentence or any individual point or
18 instruction and ignore the others, but you are to consider all the instructions as a
19 whole and regard each in the light of the others.

20 The order in which the instructions are given has no significance as to
21 their relative importance.

22 Instruction Number 3 is about three or four pages of the indictment.
23 The stipulation between the parties is that I didn't -- I would not read that to you. You
24 can read it if you -- when you go back. It's the same thing that the clerk read to you
25 on Monday or Tuesday.

1 Instruction Number 4: To constitute the crime charged, there must exist
2 a union or joint operation of an act forbidden by law and an intent to do the act.

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

5 Do not confuse intent with motive. Motive is what prompts a person to
6 act. Intent refers only to the state of mind with which the act is done.

7 Motive is not an element of the crime charged and the State is not
8 required to prove a motive on the part of the Defendant in order to convict.
9 However, you may consider evidence of motive or lack of notice as a circumstance
10 in the case.

11 Instruction 5: The Defendant is presumed innocent unless the contrary
12 is proved. This presumption places upon the State the burden of proving beyond a
13 reasonable doubt every element of the crime charged and that the Defendant is the
14 person who committed the offense.

15 A reasonable doubt is one based on reason. It is not mere possible
16 doubt but is such a doubt as would govern or control a person in the more weighty
17 affairs of life. If the minds of the jurors, after the entire comparison and
18 consideration of all the evidence, are in such a condition that they can say they feel
19 an abiding conviction of the truth of the charge, there is not a reasonable doubt.
20 Doubt to be reasonable must be actual, not mere possibility or speculation.

21 If you have a reasonable doubt as to the guilt of the Defendant, he is
22 entitled to a verdict of not guilty.

23 Instruction 6: You are here to determine whether or not the State has
24 proven each of the charges beyond a reasonable doubt from the evidence in the
25 case. You are not called upon to return a verdict as to the guilt of any other person.

1 So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt
2 of the Defendant, you should so find, even though you may believe one or more
3 persons are also guilty.

4 Instruction 7: The evidence which you are to consider in this case
5 consists of the testimony of the witnesses, the exhibits, and any facts admitted or
6 agreed to by Counsel.

7 There are two types of evidence; direct and circumstantial. Direct
8 evidence is the testimony of a person who claims to have personal knowledge of the
9 commission of the crime which has been charged, such as an eyewitness.
10 Circumstantial evidence is the proof of a chain of facts and circumstances which
11 tend to show whether the Defendant is guilty or not guilty.

12 The law makes no distinction between the weight to be given either
13 direct or circumstantial evidence. Therefore, all of the evidence in the case,
14 including the circumstantial evidence, should be considered by you in arriving at
15 your verdict.

16 Statements, arguments and opinions of Counsel are not evidence --
17 excuse me -- in the case. However, if the attorneys stipulate to the existence of a
18 fact, you must accept the stipulation as evidence and regard that fact as proved.

19 You must not speculate to be true any insinuations suggested by a
20 question asked a witness. A question is not evidence and may be considered only
21 as it supplies meaning to the answer.

22 You must disregard any evidence to which an objection was sustained
23 by the Court and any evidence ordered stricken by the Court.

24 Anything you may have seen or heard outside the courtroom is not
25 evidence and must also be disregarded.

1 Instruction 8: The credibility or believability of a witness should be
2 determined by his manner upon the stand, his relationship to the parties, his fears,
3 motives, interests or feelings, his opportunity to have observed the matter to which
4 he testified, the reasonableness of his statements and the strength or weakness of
5 his recollections.

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

9 Instruction 9: A witness who has special knowledge, skill, experience,
10 training or education in a particular science, profession or occupation is an expert
11 witness. An expert witness may give his opinion as to any matter in which he is
12 skilled.

13 You should consider such an expert opinion and weight the reasons, if
14 any, given for it. You are not bound, however, by such an opinion. Give it the
15 weight to which you deem it entitled, whether that be great or slight, and you may
16 reject it, if, in your judgment, the reasons given for it are unsound.

17 Instruction 10: Attempted murder is the performance of an act or acts
18 which tend, but fail, to kill a human being, when such acts are done with express
19 malice, namely, with the deliberate intention unlawfully to kill.

20 11: Malice aforethought, as used in the definition of Attempted Murder,
21 means the intention to kill another human being without any legal cause, legal
22 excuse or what the law considers adequate provocation. The condition -- excuse
23 me -- of mind described as malice aforethought may rise, not alone from anger,
24 hatred, revenge or particular ill will, spite, or grudge toward the person killed, but
25 may result from unjustifiable or unlawful motive or purpose to injure another which

1 proceeds from a heart fatally bent on mischief or with reckless disregard of
2 consequences and social duty.

3 Malice aforethought does not imply deliberation or the lapse of any
4 considerable time between the malicious intention, but denotes rather an unlawful
5 purpose and design in contradiction to accident and mischance.

6 Instruction 12: It is not necessary to prove the elements of
7 premeditation and deliberation in order to prove attempt murder.

8 Instruction 13: The elements of an attempt to commit a crime are: 1)
9 the intent to commit the crime; 2) performance of some act towards its commission;
10 and 3) failure to consummate its commission.

11 In determining whether or not such an act was done, it is necessary to
12 distinguish between mere preparation, on the one hand, and the actual
13 commencement of the doing of the criminal deed, on the other. Mere preparation,
14 which may consist of planning the offense or of devising, obtaining or arranging the
15 means of its commission, is not sufficient to constitute an attempt; but acts of a
16 person who intends to commit a crime will constitute an attempt where they
17 themselves clearly indicate a certain, unambiguous intent to commit that specific
18 crime, and, in themselves, are an immediate step in the present execution of the
19 criminal design, the process -- excuse me -- the progress of which should be
20 contemplated unless -- completed unless interrupted by some circumstance not
21 intended in the original design.

22 Instruction 14: If you find the Defendant guilty of Attempt Murder, you
23 must also determine whether or not a deadly weapon was used in the commission
24 of this crime.

25 Instruction 15: Deadly weapon means any instrument which, if used in

1 the ordinary manner contemplated by its design and construction, will or is likely to
2 cause substantial bodily harm or death; any weapon, device, instrument, material, or
3 substance which, under the circumstance in which it is used, attempted to be used
4 or threatened to be used, is readily capable of causing substantial bodily harm or
5 death; or a dangerous or deadly weapon specifically described as a gun, pistol,
6 spring pistol, revolver, or other firearm.

7 You are instructed that a firearm is a deadly weapon.

8 Instruction 16: If you find beyond a reasonable doubt that a defendant
9 committed Attempt Murder with the Use of a Deadly Weapon, then you are
10 instructed that the verdict of Attempt Murder with the Use of a Deadly Weapon is the
11 appropriate verdict.

12 If, however, you find that a deadly weapon was not used in the
13 commission of the Attempt Murder, but you do find that an Attempt Murder was
14 committed, then you are instructed that the verdict of Attempt Murder without the
15 Use of a Deadly Weapon is the appropriate verdict.

16 You are instructed that you cannot return a verdict of both Attempt
17 Murder with the Use of a Deadly Weapon and Attempt Murder without the Use of a
18 Deadly Weapon.

19 Instruction 17: A person who is in or under a structure or vehicle and
20 who maliciously or wantonly discharges or maliciously or wantonly causes to be
21 discharged a firearm within or from the structure or vehicle while the structure or
22 vehicle is within an area designated by city or county ordinance as a populated area
23 for the purpose of prohibiting the discharge of weapons is guilty of Discharging a
24 Firearm from or within a Structure or Vehicle.

25 Instruction 18: It shall be unlawful within the City limits, except in a

1 regular licensed shooting gallery to willfully discharge any pistol, firearm, air gun,
2 musket, or instrument of any kind, character, or description which throws a bullet or
3 missiles for any distance by means of the elastic force of air or any explosive
4 substance.

5 Instruction 19: It is unlawful to willfully discharge any pistol, firearm, air
6 gun, musket or instrument of any kind, character or description which throws a bullet
7 or missile of any kind for any distance by means of an elastic force or an air or any
8 explosive substance -- excuse me -- within the County except at shooting ranges, or
9 a sanctioned event by federal, state, county or an incorporated city currently
10 licensed to -- by business license.

11 The areas addressed within this case are within the County.

12 Instruction 20: Assault means: 1) Unlawfully attempting to use physical
13 force against another person; or 2) Intentionally placing another person in
14 reasonable apprehension of immediate bodily harm.

15 Instruction 21: You are instructed that if you find a defendant guilty of
16 Assault, you must also determine whether or not a deadly weapon was used in the
17 commission of this crime.

18 Instruction 22: If you find beyond a reasonable doubt that a defendant
19 committed Assault With the Use of a Deadly Weapon, then you are instructed that
20 the verdict of Assault With the Use of a Deadly Weapon is the appropriate verdict.

21 If, however, you find that a deadly weapon was not used in the
22 commission of the Assault, but you do find that an Assault was committed, then you
23 should -- are instructed that the verdict of Assault is the appropriate verdict.

24 You are instructed that you cannot return a verdict of both Assault With
25 a Deadly Weapon and Assault.

1 Instruction 23: A driver of a motor vehicle who willfully fails or refuses
2 to bring the vehicle to a stop, or who otherwise flees or attempts to elude a peace
3 officer in a readily identifiable vehicle of any police department or regulatory agency,
4 when given a signal to bring the vehicle to a stop is guilty of evading where the
5 driver operates the motor vehicle in a manner which endangers or is likely to
6 endanger any other person or the property of any other person.

7 The signal by the peace officer must be by flashing red lamp and siren.

8 Instruction 24: A person who, in any case or under any circumstances
9 not otherwise specially provided for, willfully resists, delays, or obstructs a public
10 officer in discharging or attempting to discharge any legal duty of his or her office
11 with use of a firearm in the course of such resistance, obstructing or delay is guilty of
12 Resisting Public Officer with Use of a Firearm.

13 Metropolitan Police Department Police Officers are public officers.

14 Instruction 25: A person shall not knowingly possess a firearm on
15 which the serial number has been intentionally changed, altered, removed or
16 obliterated.

17 Instruction 26: The law recognizes two kinds of possession: Actual
18 possession and constructive possession. A person who knowingly has direct
19 physical control over a thing, at a given time, is then in actual possession of it.

20 A person who, although not in actual possession, knowingly has both
21 the power and the intention, at a given time, to exercise dominion or control over a
22 thing, either directly or through another person or persons, is then in constructive
23 possession of it.

24 The law recognizes also that possession may be sole or joint. If one
25 person alone has actual or constructive possession of a thing, possession is sole. If

1 two or more persons share actual or constructive possession of a thing, possession
2 is joint.

3 You may find that the element of possession as that term is used in
4 these instructions is present if you find beyond a reasonable doubt that a defendant
5 had actual or constructive possession, either along or jointly with others.

6 An act or a failure to act is knowingly done, if done voluntarily and
7 intentionally, and not because of mistake or accident or other innocent reason.

8 Instruction 27: The flight of a person immediately after the commission
9 of a crime, or after he is accused of a crime, is not sufficient in itself to establish his
10 guilt, but is a fact which, if proved, may be considered by you in light of all other
11 proved facts in deciding the question of his guilt or innocence. Whether or not
12 evidence of flight shows a consciousness of guilt and the significance to be attached
13 to such a circumstance are matters for your deliberation.

14 Instruction 28: Mere presence at the scene of a crime or knowledge
15 that a crime is being committed is not sufficient to establish that a defendant is guilty
16 of an offense, unless you find beyond a reasonable doubt that the defendant was a
17 participant and not merely a knowing spectator.

18 However, the presence of a person at the scene of a crime and
19 companionship with another person engaged in the commission of the crime and a
20 course of conduct before and after the offense are circumstances which may be
21 considered in determining whether such person aided and abetted the commission
22 of that crime.

23 Instruction 29: If necessary to prevent escape, an officer may, after
24 giving warning, if feasible, use deadly force to effect the arrest of a person only if
25 there is probable cause to believe that the person: 1) Has committed a felony which

1 involves the infliction or threat of serious bodily harm or the use of deadly force; or 2)
2 Poses a threat of serious bodily harm to the officer or to others.

3 Instruction 30: You have heard evidence of prior inconsistent
4 statements. You may consider those for purposes of impeachment or as
5 substantive evidence, at your discretion.

6 Instruction 31: It is a constitutional right of a defendant in a criminal trial
7 that he may not be compelled to testify. Thus, the decision as to whether he should
8 testify is left to the defendant on the advice and counsel of his attorney. You must
9 not draw any inference of guilt from the fact that he does not testify, nor should this
10 fact be discussed by you or enter into your deliberations in any way.

11 Instruction 32: Although you are to consider only the evidence in the
12 case in reaching a verdict, you must bring to the consideration of the evidence your
13 everyday common sense and judgment as reasonable men and women. Thus, you
14 are not limited solely to what you see and hear as the witnesses testify. You may
15 draw reasonable inferences from the evidence which you feel are justified in the light
16 of common experience, keeping in mind that such inferences should not be based
17 on speculation or guess.

18 A verdict may never be influenced by sympathy, prejudice, or public
19 opinion. Your decision should be the product of sincere judgment and sound
20 discretion in accordance with these rules of law.

21 Instruction 33: In your deliberation you may not discuss or consider the
22 subject of punishment, as that is a matter which lies solely with the court. Your duty
23 is confined to the determination of the guilt or innocence of the Defendant.

24 Instruction 34: When you retire to consider your verdict, you must
25 select one of your members to act as foreperson who will preside over your

1 deliberation and will be your spokesman -- or spokesperson here in court.

2 During your deliberation, you will have all the exhibits which were
3 admitted into evidence, these written instructions and forms of verdict which have
4 been prepared for your convenience.

5 Your verdict must be unanimous. As soon as you have agreed upon a
6 verdict, have it signed and dated by your foreperson and then return with it to this
7 room.

8 Instruction 35: If, during your deliberation, you should desire to be
9 further informed on any point of law or hear again portions of the testimony, you
10 must reduce your request to writing signed by the foreperson. The officer will then
11 return you to court where the information sought will be given you in the presence
12 of, and after notice to, the District Attorney and the Defendant and his counsel.

13 Playbacks of testimony are time-consuming and are not encouraged
14 unless you deem it a necessity. Should you require a playback, you must carefully
15 describe the testimony to be played back so that the court recorder can arrange her
16 notes. Remember, the court is not at liberty to supplement the evidence.

17 Instruction 36: Now you will listen to the arguments of Counsel who will
18 endeavor to aid you to reach a proper verdict by refreshing in your minds the
19 evidence and by showing the application thereof to the law; but, whatever Counsel
20 may say, you will bear in mind that it is your duty to be governed in your deliberation
21 by the evidence as you understand it and remember it to be and by the law as given
22 to you in these instructions, with the sole, fixed, and steadfast purpose of doing
23 equal and exact justice between the Defendant and the State of Nevada.

24 Given by District Court Judge, Douglas E. Smith.

25 You ready?

1 MS. THOMSON: Yes, Your Honor.

2 THE COURT: Go.

3 MS. THOMSON: Can we switch over?

4 **CLOSING ARGUMENT BY THE STATE**

5 BY MS. THOMSON:

6 It's been a relatively short trial compared to many of them, but you've
7 received a lot of evidence, heard a lot of testimony and you'll have a lot of exhibits to
8 go over in the deliberation room.

9 As in every criminal case across the country, the State has the burden
10 to prove the case beyond a reasonable doubt. And that means that we must prove
11 every element of the offenses charged. Every element of the offenses, not every
12 fact that could be brought up. The element of the offenses are as -- they are
13 outlined within your packet and you have the instructions as to what constitutes
14 each of the offenses.

15 It doesn't mean we have to prove beyond a reasonable doubt that that
16 shirt is highlighter yellow or highlighter green. That's not an element of the offense.
17 The elements are outlined in the packet. Your -- our --

18 THE COURT: [Indiscernible].

19 MS. THOMSON: I'm sorry. Oh.

20 THE COURT: I'm just making sure she can hear you because you're away
21 from the podium. That's okay. No, don't. You can hear her okay?

22 THE COURT RECORDER: Yeah.

23 THE COURT: Okay. Sorry.

24 MS. THOMSON: I'll talk louder too. Sorry.

25 BY MS. THOMSON:

1 Reasonable doubt is not beyond all doubt. It is reasonable doubt, not
2 based on speculation, not based on mere possibility. Consider that. Keep that in
3 mind when you're deliberating.

4 So, we are proving beyond a reasonable doubt both that crimes were
5 committed and that it's the Defendant who committed these crimes. So let's talk first
6 about what you're here to determine. You're not here to determine whether or not
7 the officer made the right decision in shooting. You're not here to determine
8 whether or not there was someone else involved. Your determination is strictly
9 based on whether or not that man committed each of the crimes that are charged
10 within the indictment and listed out on, I think it's Instruction 3 of your packet.

11 There are 13 charges within those and I'm going to go through -- and
12 we'll go through sort of as a group. I won't talk about each one separately but we'll
13 go through each of the different charges. Defendant; how do we know that he's one
14 who is involved in all of this? That he's the person who was driving that car on
15 Walnut that Officer McNabb tried to stop to issue a citation or warning for bright
16 headlights?

17 Well, first of all it's the car that we heard Eufasia say that she gave to
18 him that night. It's the same car that she owned. He is the father of her children,
19 there is relationship there. This isn't a random person who owns this vehicle. It
20 makes sense that he'd have this vehicle. And we've heard testimony specifically
21 that he would have -- did have the vehicle.

22 He's ultimately taken into custody two houses in from where that
23 vehicle was located, one house behind from where that vehicle is left. There is his
24 fingerprint on the magazine of the gun that is right outside the house where he's
25 taken into custody. That gun is with the bullet-proof vest that he's seen wearing.

1 You've heard several people describe that he's wearing a white shirt -- the person
2 who commits -- committed all these crimes is wearing a white shirt. We had that
3 white bullet-proof vest that would have covered that bright shirt that he's ultimately
4 taken into custody wearing.

5 We have the casings along the route, the casings that match back to
6 that gun that has his fingerprint on the magazine. The fact that that vest is found --
7 the gun is found underneath that truck is such close proximity to where he's taken
8 into custody. The fact that he's identified by Officer McNabb and Ricardo Quezada
9 Robles as being the same individual that they say. There's no appreciable loss of
10 sight between the time that Officer McNabb tries to stop the vehicle on Walnut, to
11 the time that the Defendant goes into the backyard on El Tovar.

12 That course of conduct -- if he committed one of those crimes, he
13 committed all of those crimes. It's not that one person could have committed the
14 initial discharging from a vehicle and then there's a different person who's
15 committing the assault with deadly weapon at the corner of Carey and Dolly. If he's
16 guilty of one, he's guilty of all in the sense of proof that it is him in identity; not saying
17 that we have necessarily met all of the elements. We're going to discuss that
18 separately -- consider each of the charges separately.

19 But, if we've proven beyond a reasonable doubt that he committed one
20 of them then it must be his identity as to all of them. And we have. These factors all
21 come in together and show that there is no one else. There was no one else found
22 in the area. A perimeter was set up. They used, you heard from Detective Jaeger,
23 something -- and I can't remember the name of it, but that showed the heat and that
24 there were no other people. This is not an area where they went ah, we don't see
25 anyone and go. They're out there for several hours. It sounded like more than 12

1 and nearly a day.

2 Most, if not all the charges involve use of a deadly weapon. You have
3 the instruction a firearm is a deadly weapon. There is no doubt that this is a firearm.
4 This is the firearm that was used. We know because it matches the casings along
5 the path where Officer McNabb was following the Defendant in that vehicle, the
6 Intrepid.

7 So, first count, attempt murder with used of a deadly weapon. We'll just
8 talk about the attempt murder portion because the deadly weapon portion -- we
9 know it's a deadly weapon. Attempt murder is conduct which tends but fails to kill
10 human being, done with express malice, namely with the deliberate intention
11 unlawfully to kill. That has to be without legal cause, reason, meaning it's not an
12 attempt murder if someone comes into your home, they have a weapon, you protect
13 yourself, you shoot at them. No, you have -- you're justified, you're in your home,
14 you're protecting yourself. That's reasonable. That wouldn't count as malice.

15 Also it can't be an accident or a mischance. The -- bad example, but
16 the example, cleaning the gun, going to take it apart, accidentally shoot, it goes past
17 someone's head. Not an attempt murder, it's an accident. Here we know that those
18 justification and mistake are not in existence, though totality of the circumstances
19 demonstrate for us that this was in fact an attempt to kill Officer McNabb that failed.

20 We have the trajectory of the injuries to the vehicle. While we can't say
21 when those got there, it's reasonable, using our common sense that the totality of
22 circumstances, the description given by Officer McNabb of one in the air and four
23 fired back -- and reasonably one would expect it to be fired this way, not try and turn
24 your hand as you're driving along. Four fired back and there are four independent
25 lines of where a bullet would hit.

1 Looking at the C and D, I believe were the labels -- and you'll have the
2 closer exhibits in the back. They have something of a straight line; however, if you
3 look at C, that's not a hole. That is a divot. For it to be a divot, the bullet must have
4 hit and reasonably had some turn rather than going straight. Therefore C and D
5 arguably cannot be from the same bullet.

6 At very minimum, there are three for sure separate -- State's position
7 that there's four. You heard testimony from the CSA that it was consistent with four
8 different strikes, four different bullets. Consistent with what Officer McNabb testified
9 was shot at him. Four attempts to hit him and kill him

10 The Defendant's intent is not something that we're ever going to have
11 or at least in very, very rare circumstances will we ever have a verbalized, I'm going
12 to go kill an officer, or written out, or any of those things. We, by the nature of our
13 actions, can tell each other's intents by what we've done, what we're doing, and
14 what we're going to do.

15 We look at the totality of circumstances; preparation, what -- how we've
16 behaved, our reactions to determine what we're thinking, how we interact with each
17 other. We do it on a daily basis. All of us have the ability to judge what someone
18 else is thinking and react, otherwise we'd have a completely dysfunctional society.
19 We wouldn't be able to walk down hallways without bumping into each other.

20 Looking at the Defendant's actions that night, we know his intent. He
21 goes out with three guns, all with ammunition in that vehicle, wearing a bullet-proof
22 vest on the outside of his clothing. He's ready to go. He is looking for an
23 altercation. He goes out with his high beams on and when the officer attempts to
24 stop him, he does not do what driver's do. He does not pull over, he does not slow
25 down. He shoots in the air.

1 He's demonstrated his intent that night to get into an altercation and
2 then he demonstrated his intent to end that altercation with a loss of life. He shoots
3 in the air and when Officer McNabb doesn't respond to that warning shot, he starts
4 shooting at Officer McNabb. He shoots five shots at Officer McNabb. He may not
5 be a good shot, but he attempts to hit Officer McNabb five separate times with his
6 weapon. And we have all ten of the bullets that would fit into his magazine
7 accounted for.

8 When you go through the evidence we have the five that are shot from
9 the vehicle. The bullet that is shot from the car, as testified by Officer McNabb, in
10 the trunk of the car. We have the other five casings and then we have the final
11 casing that could be the 11th if it was in the chamber, the Winchester that is over by
12 the street light. Now, interesting that we have ten that are Speers and one
13 Winchester. But arguably that Winchester is associated to this both because it is of
14 the correct caliber for that firearm.

15 And if we think about sort of how we would naturally use our weapons,
16 reload our weapons. Weapon is getting low, you reload it. Do you take out the one
17 bullet left in the magazine and reload it with the new ones and put the old one on
18 top. This isn't like yogurt in the refrigerator. It's not the like the bullet is going to go
19 bad. You leave the old bullet in the bottom and you refill. So the last bullet that
20 would have come out of that gun is going to be that last -- the first one loaded into
21 the magazine, it makes sense that that would be the one that's a different caliber
22 and that's consistent with the movement of that firearm along the scene of the
23 crimes.

24 We have the Defendant aiming directly at the officer not just in the
25 vehicle but when he gets out of the vehicle at the corner of Dolly and Carey. He

1 stands at that trunk of the car, he waits. He waits for the officer to arrive and aims
2 his gun and he shoots his gun from the trunk of the car. He goes over to the street
3 light, he again aims at the officer. And then when he's at the Nissan where, given
4 totality of circumstances, he realizes that his gun is empty and he needs to run. He
5 sits at the Nissan and he has that gun aimed, based on the testimony of Norayama
6 and the Quezadas.

7 Looking at the video from the Wagner's home, we can see his intent
8 because of the time. We see brake lights as he's slowing to go make that turn at
9 21:53 and 23 seconds. 23 seconds being the important part. At 21:53 and 52
10 seconds, the officer is just out of his vehicle and running after. That is 30 seconds.
11 From the overhead shot, reasonably we know that it would not take 30 seconds to
12 get from approximately there -- given that this is in the center of the camera shot, it
13 would not get -- take 30 seconds for a vehicle that's going 80 but braking, to get
14 from here to there.

15 That is not a 30 second travel. He should long since be either across
16 the street or down the street by the time the officer comes to a stop. He's staying,
17 he's waiting. He's now no longer in a moving vehicle, no longer having to deal with
18 a moving target and making sure he doesn't hit something. Now he can stay
19 standing and shoot at the officer who is forced to come directly at him. And attempt
20 murder.

21 He misses and then something goes wrong with the gun. We don't
22 know what. The gun was operable when it was reloaded by the firearm's examiner.
23 Operable -- functioned properly. But she also testified that there are times that guns
24 jam, things go wrong, it happens. Don't know what went wrong but we know that
25 something did go wrong because he quit firing and he was manipulating the firearm.

1 We know that something went wrong because we have the casing -- I'm
2 sorry, not casing. The cartridge that's outside the vehicle that was expelled from
3 that gun having been -- having worked through the firearm, not just taken out. We
4 know that it has the markings that show that that firearm had it come up in to the
5 chamber and then expelled from the top of the chamber.

6 When you're watching the video, look very closely, you'll be able to --
7 on the disc, put it on a slower play. Obviously that's not the benefit that Officer
8 McNabb had in real life. You can't press pause, you can't slow down the situation.
9 But you'll be able to and when you do so, you'll be able to watch and look closely,
10 you can actually see him as he's by the vehicle, waiting for Officer McNabb to pull
11 up.

12 You can see the movement there. It's difficult because there are
13 reflections. It's difficult because it's nighttime. And we know that the camera is not
14 as good as one's eye, obviously. But you still have video evidence of what
15 happened at that corner, as he lie in wait, waiting for Officer McNabb to be closer, to
16 be a sitting duck as they say.

17 An attempt would be completed unless interrupted by some
18 circumstance not intended in the original design. If we look at the totality of what we
19 know in this case, he goes out with a bullet-proof vest, three weapons with plenty of
20 ammunition to do what he wants to do; get in an altercation and take someone out.
21 Why are the two weapons left in the vehicle? Because it's going differently than he
22 planned. He's fired four shots, they haven't hit. The officer's still behind him.

23 Remember, when he gets out of that vehicle, the gun's still working. He
24 still gets off a shot outside the vehicle. And by the time he realizes that there's
25 something wrong, it's too late to get back in the vehicle and get those other two

1 weapons. It's too late to load the rifle. Because now the officer is stopped, is there,
2 and is not hurt. He has to get out of there. He's guilty of the attempt murder with
3 use of a deadly weapon.

4 Next ten counts, five are assault with deadly weapon and five are
5 discharging from a vehicle. We'll go through all of the assaults instead of switching
6 back and forth. Assault is unlawfully attempting to use physical force against
7 another person or intentionally placing another person in reasonable apprehension
8 of immediate bodily harm.

9 So, the five assault with deadly weapon counts that you have -- excuse
10 me -- for your deliberation associate to three, sort of individual locations; individual
11 situations. First, the fact that he's waiting until the patrol car is facing straight on
12 Carey to shoot those two rounds, Counts 3 and 5, at the patrol car.

13 He shoots a shot into the air on Walnut. That's not an assault with
14 deadly weapon because he's not intentionally placing the officer in reasonable
15 apprehension of immediate bodily harm. The shot's in the air. There's no
16 reasonable apprehension that that shots going to go up in the air, change direction
17 and come back at the officer. He obviously is not attempting to use physical force
18 on Officer McNabb because, again, the shot's in the air.

19 But we know that he is attempting to use physical force against Officer
20 McNabb and Officer McNabb is in reasonable apprehension of that force when he
21 hears a bullet go by his ear as he's on Carey, as he has now turned directly, and the
22 Defendant has a good aim at the vehicle being completely straightened out behind
23 him.

24 The Defendant again shot twice after he ran the red at Lamb. That's
25 Counts 7 and 9. Again, these shots are coming back at the officer and they're not in

1 the air. We can't see them on the video. Absolutely true. But we do have that side
2 of the vehicle that shows us where those bullets were going and that they were
3 going backwards towards the officer, not in the air, not in some other direction.

4 He aimed directly at the officer's car as Officer McNabb pulls up to Dolly
5 and that's where he shoots. That's Count 11. And we know that that's his intent
6 based on the fact that he waited, based upon the fact that he is located where he is
7 instead of already being down Dolly or going out to the dirt lot; that he is there
8 waiting. We have David Wagner who testified that the first shots came from the
9 direction of Dolly; that those were dir -- fired in the area of Dolly, coming back
10 towards the direction of the officer.

11 As I mentioned, again, the vehicle corroborates the fact that we know
12 that those bullets are coming back at Officer McNabb. He fires the warning shot.
13 That is sort of that first step to put Officer McNabb in fear, get him off your tail, get
14 away, or started. Officer McNabb does his job. He doesn't say, oh, you fired a gun,
15 sorry, I'll be over here. He goes after the vehicle. He hears the bullet as it's going
16 by and they're not in the air. He's guilty of assault with deadly weapon for each of
17 those five shots that he fired at Officer McNabb.

18 Here we have where -- on the video when you slow it down you'll be
19 able to see -- and the first few times you watch it, it may be difficult because sort of
20 getting used to it, looking for what you're looking for. But we can see as he's
21 standing on the corner. And the initial thought is it's grainy, can we tell which
22 direction he's facing? But what we know about him is he has long, dark hair.

23 When you look closely at that, you'll see that you cannot see that long,
24 dark hair described by some witnesses as in a ponytail, down the center of that
25 figure. He's standing, facing Officer McNabb, waiting for Officer McNabb. He

1 shoots from the car, comes across the street, aims again, and that's where
2 something goes wrong with the gun. He can't shoot again. We know because we
3 have the cartridge out on the street underneath the street lamp, right in that area
4 incidentally.

5 There we have where Officer McNabb is shooting and he's moving, so
6 he's more of a blur. He's starting to move, go down Dolly. He is guilty for all of
7 those five times that he stopped, got, and pointed the weapon at Officer McNabb
8 and shot at Officer McNabb.

9 Discharging firearm from a vehicle, cut it down. He's in the vehicle. He
10 intentionally discharges that gun, it's not an accident. It is out of the vehicle. And
11 he's in a populated area. Obviously there's houses everywhere, you have the
12 overhead. This is a deserted area. This is not urban. We're talk -- not rural. This is
13 not rural. We're talking about a populated area.

14 Count 2 is the shot that he shoots up in the air on Walnut. Counts 4
15 and 6 are the two shots he shoots on Carey, just after the turn from Walnut. And
16 Counts 8 and 9 are the two shots he shoots right after he goes through the stoplight
17 at Lamb and Carey. Obviously he's in the vehicle, that's not a question. He's
18 intentionally doing it. Obviously you have to point the gun outside the vehicle to
19 shoot from the vehicle in the way that he did. There's physical evidence all over the
20 place that supports these counts.

21 Looking at the map that you have and the testimony that was elicited
22 from the CSA, we had the casing that was located at 2354 North Walnut, consistent
23 with the shot up in the air. The casing -- and these are approximate locations,
24 obviously. The 3945 East Carey and the 4060 East Carey. We did not have any
25 casings that were located at Lamb and Carey, but the totality of circumstances

1 demonstrates to us that that is not because the shots were not fired.

2 It's because when the officers arrived on scene and there is a person
3 who is armed, at least to the extent that they're aware because they haven't found
4 the gun yet, who's willing to shoot not just at a police officer but in areas where we
5 know there's houses, we know there's other cars; willing, really, to put the entirety of
6 that neighborhood in danger, they're not going to stop and say wait, let's make sure
7 that the evidence is protected before we find this guy.

8 We know that there were cars that are coming through Carey. We can
9 see on the Wagner video, in fact that 18-wheeler that comes through. That's a
10 whole lot of wheels to be picking up cartridges. There's other vehicles that come
11 through there. We know Metro did what they could to preserve the scene as soon
12 as it was safe to do so. They get him in custody and then they start shutting things
13 down.

14 They walked that area. Multiple people walked a pretty significant
15 distance to attempt to locate. They checked their boots. They checked the car tires
16 of the vehicles that they reasonably could. It's not reasonable to expect them to
17 check every car tire that could have been in that area that night. They did the best
18 they could to find the evidence that physically supported and they in fact did find
19 three cartridges in a very significant, frankly, distance to be looking for something
20 that big. Much like the old adage, needle in a haystack, and they found three of
21 them.

22 The testimony you heard from Maurine Palmer who lives -- lived at
23 2409 Walnut Road further corroborates that there was the discharging from the
24 vehicle. She talked about seeing the taillights. She talked about having heard the
25 three sets of pops. She also talked about having heard an argument. Reasonably

1 speaking, given everything we know, that argument is not associated to our incident.
2 It was two things happening, incidentally, at the same time, but not related.

3 She also told us the last pop that she heard, it was further up Carey,
4 she thought it was close to her sister's apartment or sister's home and that here
5 sister lived at 4080. We know that that third casing was located at 4060. Everything
6 that she said is corroborated here by testimony of other witnesses, by the test -- or
7 by the physical evidence. This all comes back and corroborates Officer McNabb's
8 rendition of what occurred in those two or so minutes from the time that he tried to
9 stop the car, to the time that the Defendant was hiding in the backyard.

10 Stop required on signal of a police officer is when a driver intentionally
11 refuses to stop the vehicle, flees or attempts to allude the police officer in a notable
12 vehicle. I'm not going to spend any time on that, obviously it's a patrol car. He's
13 given the signal to stop the vehicle and he operates the vehicle in a way that is likely
14 to endanger himself or others. I'm sorry. Is likely to endanger others, being
15 other -- being people or people's property.

16 Clearly he knew Officer McNabb was trying to stop him. The vehicle in
17 between Officer McNabb and the Defendant's vehicle pulled over without an issue.
18 It knew. There's no reason to believe that the Defendant did not know that those
19 lights were intended for him. And in fact, his conduct shows us that he knew that
20 they were intended for him; his shooting of the single shot out of the window, his
21 speeding up, his running the stop sign, his running the red light.

22 All of those things show us that he knew what was going on. It's not
23 normal behavior for someone just driving down the street, even here in Las Vegas.
24 There were other cars on the road, he's putting those people in danger as he's
25 running the stop sign, as he's running the red light. Neighborhood's -- granted it's

1 10:45 at night, but we also know based on the testimony of all the witnesses, there's
2 still people out, there's still children playing outside in this neighborhood, at that time
3 of night. Driving 80 miles per hour down a residential. Even if a main thoroughfare
4 in that residential area, is putting people in danger.

5 Now the stop required on signal of an officer does delineate that that
6 signal is a red flashing light and sirens. We know from the video that the siren was
7 put on just before Lamb, but there is no distance requirement. There's nowhere in
8 that rendition of elements that says for at least 50 feet, or must happen over a mile.
9 What we know is that after that lights and sirens are put on, he's still going
10 approximately 80 miles per hour, he in fact crashes the vehicle that belongs to
11 Eufasia, and it's residential and we know that from the Wagner video; from the front
12 of their house it actually watches him fly by. He is guilty of stop required on signal of
13 an officer.

14 Resisting with a firearm is a person who willfully resists, delays, or
15 obstructs a police officer from doing his job with the use of a firearm. Officer
16 attempted to stop for the brights, the officer then had probable cause and reason to
17 stop him for the assault with deadly weapon, for the discharging of the firearm out of
18 the vehicle. When the Defendant got out of his vehicle, pointed the firearm at
19 Officer McNabb and refused to stop, refused to comply with what was clearly the
20 officer trying to stop him, he resisted with use of firearm.

21 He continued to run, he continued to obstruct. There's no question that
22 he knew that what he -- was expected of him at that point was to stop. He avoided
23 being put into cust -- well he didn't avoid it, but he delayed it. He delayed being put
24 into custody with the use of that firearm, by running and by not complying with
25 officer's lights, sirens, and clear expectation that he stop.

1 Altered or obliterated serial number. We know from the testimony of
2 Anya Lester that the firearm, the .25 that was -- caliber that was in the vehicle had
3 the serial number obliterated. How do we know that he knew that it was obliterated?
4 Well there was the question from the jurors, was this firearm was registered. As we
5 know there has to be a serial number to register a firearm. Reasonably speaking he
6 was in possession of the firearm. It was the magazine that went to the rifle. There's
7 plenty to show that he knew that this was in the vehicle and to know that he
8 possessed it.

9 Going to the issue of possession. The gun does not belong to Eufrasia.
10 You heard her testimony, she's got kiddos in the house, she doesn't want guns in
11 the house, she doesn't like guns. She doesn't have them in the car. She didn't own
12 guns. She also told us that the Defendant was in her vehicle, that she had given her
13 vehicle to the Defendant, that he had been looking a few days earlier to find a place
14 to put these guns and she said no, not in my apartment.

15 MS. NGUYEN: Objection, Your Honor, stating facts not in evidence.

16 THE COURT: Just remember Jury Instruction Number 7 and 37, I think -- or
17 36, tells you that what the attorneys say is not evidence.

18 MS. THOMSON: Thank you.

19 THE COURT: Go ahead.

20 BY MS. THOMSON:

21 We know that the gun is loaded which means obviously it's been
22 handled, it's not a brand new weapon as we can say by its condition in the
23 photographs provided by Anya Lester when she did the examination. And we know
24 that he's had it for a while. The testimony from Ms. Nazaroff was that it had been
25 years since she'd seen him with it, but we also have her statement to the detective

1 that it'd been just a few days.

2 The credibility or believability of a witness is determined by you. You
3 judge the reasonableness of what they're saying, their opportunity to have seen it,
4 how they respond on the stand, and questions, how they react. And you get to
5 decide what they are being truthful about, what they're accurate on, and what
6 they're not being truthful and what they're not accurate about. If you believe that
7 someone has lied, you may disregard any of their testimony if it is not basically
8 corroborated by other evidence.

9 Now there's a difference between a lie and a mistake. We make
10 mistakes as human beings often, some people lie often, and you get to decide if it's
11 a lie or a mistake. The difference is lie is that malicious kind of misleading. And
12 mistake is generally speaking honest. We had several situations in which we had
13 differing evidence that you'll have to decide if the people were telling the truth, if they
14 were lying, if they were mistaken.

15 For example, the testimony regarding shots fired at the front of the
16 white Nissan. We had Jose and Norayama testify that they heard, they saw the
17 Defendant fire the shots, I believe the testimony was three, at the front of the white
18 Nissan. We had Ricardo say no, he just pointed, he didn't fire any shots. Physical
19 evidence would tend to suggest that he did not fire shots at the front of the Nissan.

20 Does this mean that Norayama and Jose are lying? Well first, there's
21 no indication that they know each other so there wouldn't have been an opportunity
22 to get together and say hey, what are you going to say; I'll say this; let's make this
23 up. So, what can we reasonably deduce from the facts as we know them? Officer
24 McNabb comes up to the end of Dolly, he fires three shots at the silhouette that he
25 sees at the end of El Tovar.

1 IS it possible, particularly given what we know about the timeline in the
2 body cam that the memories are mistaken? They hear the three shots, that they
3 see him at the front of the car, and whether he's already at the front of the car when
4 those three shots are fired and they misassociate it, or it all smushes together in
5 their mind when they're retelling it later and they associate those three shots to the
6 man that they see with the gun, which is reasonable. Are they lying or did they just
7 misperceive what was going on?

8 David Wagner, another example of is he lying or does he misperceive
9 or misremember? He indicated that he heard several shots from the .45. We know
10 that only one shot was fired from the .45 that would have made any sound at the
11 corner of Dolly and Carey. Does he misremember? Is he bolstering himself, oh, I
12 know a lot about guns? We know that there is a sound that is associated to a .45
13 that would have occurred at the corner of Dolly and Carey. Is he lying to you or
14 does he misremember?

15 Eufrasia Nazaroff talking about the bullet-proof vest, she testified here
16 that she didn't say anything about a bullet-proof vest. I believe that her statements
17 were she knew nothing about the bullet-proof vest. You heard from Detective
18 Hodson that in fact she had made statements about seeing him wearing it over his
19 shirt the night before.

20 You get to judge the reasons someone might state what they're stating.
21 With the exception of Eufrasia and arguable Officer McNabb, no one else who
22 testified has any interest in what happens. They're people who live on a street.
23 They're CSAs who go out to every crime scene that they're called to. They have no
24 particular interest in this case, they have no dog in the fight. The reasons that she
25 might have -- for testifying in a certain way, what she might think is helpful to one

1 side or another, you can consider that.

2 Another example is Officer Ferranti who indicated that he had trained
3 Officer McNabb in the body cam. Officer McNabb, being the one who actually got
4 the body cam, it's reasonable that he would remember having been trained. Officer
5 Ferranti who trains all of the people who have body cam -- and I think the testimony
6 was there's nearly 175 on the streets.

7 The idea that he has filled in that gap in his memory, I train everyone
8 who has body cam and therefore I trained Officer McNabb, versus Officer McNabb
9 who says no, I was there, I didn't get trained. Is he wrong? Is he lying?
10 Reasonably speaking we can use totality of circumstances to help determine when
11 there is a maliciousness in the statement that's made; an intent to mislead.

12 There are two different kinds of witnesses in this case. There are the
13 law enforcement witnesses and there are the citizen witnesses. Quite a few
14 witnesses all together. But all of those witnesses ultimately corroborate what Officer
15 McNabb said happened that night. McNabb's description of the event is
16 corroborated by the physical evidence. We have the casings along Walnut, along
17 Carey. We have the cartridges that are found at Dolly and Carey. The cartridges
18 that would be associated to his manipulation -- not Officer McNabb's -- the Defense
19 manipulation of the firearm when something's not just going right.

20 We have the body cam that supports his rendition of events. And
21 consider the things that he says on that body cam when he's talking to dispatch. He
22 doesn't know how this is going to end. He would not be in the position, nor did he
23 really have the time to come up with some sort of story or event, to tell lies about
24 what was going on at that moment.

25 Maurine Palmer, the Wagners, the video that they have, the testimony

1 from Ms. Palmer who has no relationship to any of the parties all corroborate what
2 he says happened. The Quezadas who have had the interesting and unique
3 perspective of being able to watch the Defendant when no one else could see
4 him -- Norayama could see him, but they had the virtually directly across the street
5 ability to watch what he was doing as he's setting up and waiting for Officer McNabb
6 to come around the corner, to take him out; the last and final attempt that turned out
7 to not work out because he was out of bullets. Gloria Guillen who testified that the
8 man was in the back; he looked scary, he looked desperate. And Norayama, I
9 already did.

10 Additionally, there are quite a few pieces of evidence that support
11 Officer McNabb's identification of the Defendant as the individual who was involved
12 in this. The fact that the Defendant had Ms. Nazaroff's car, that she had seen him
13 with the gun before; specifically the one that was used to shoot at Officer McNabb.
14 The fact that he's wearing -- that he describes the Defendant's wearing the bullet-
15 proof vest, that he describes, more specifically, the Defendant as wearing all white.
16 He sees white, he calls out white.

17 In fact what we end up finding out is that he did have what appeared to
18 be a full white outfit. The khakis in the dark would look white. The white bullet-proof
19 vest is the to -- the majority of his body. The fact that you have this lime or
20 highlighter color on the arms, what's going to stick is the white that is called out by
21 Officer McNabb. The fact that we have the Defendant hiding in the backyard with no
22 one else and the ID's by Ricardo and Norayama. Officer McNabb's version of
23 events is corroborated over and over and over along that path where the Defendant
24 attempted to kill him.

25 To believe the Defendant did not commit these crimes you have to

1 believe that someone, either he gave or they stole the car that he had just been
2 given by his children's mother, that they took the keys, and that they had his guns in
3 the car, and you have to believe, at least with regard to the shooting weapon that it
4 is believe the thumbprint that is on the magazine, or they separately stole the
5 magazine and put it into the gun.

6 That he happened to be approximately ten miles from where he
7 got that car when this person took the car, started this altercation with Officer
8 McNabb, that that individual then hid the tools of the crime, being the vest and the
9 gun, feet from where the Defendant happened to end being -- hiding. That he was
10 hiding from some introduce reason unassociated to these crimes; that he either
11 didn't hear or this innocent reason was enough for him not to respond to the police
12 officers who are there saying we will bite you with our dog.

13 And you heard quite a few questions that sort of elicited that's not a
14 pleasant experience. I don't think any of us would think that being bitten by a dog is
15 a pleasant experience. And that this person who either stole his car, set him up with
16 the bullet-proof vest and the gun also just happened to match his pretty unique
17 description. It's unreasonable.

18 I told you, you can watch the body camera in the back and I'll have you
19 watch just the period of time as Officer McNabb comes up to the corner and as he
20 goes down the corner to El Tovar.

21 [Colloquy between Counsel]

22 [Body cam video playing]

23 BY MS. THOMSON:

24 And I have the sound off because it sounds really quite strange on the
25 slower speed.

1 [Body cam video continues playing]

2 BY MS. THOMSON:

3 But looking at the time, it'll be about 1:11 that he stops the vehicle up at
4 the corner of Dolly.

5 [Body cam video continues playing]

6 BY MS. THOMSON:

7 And as you watch the corner of Dolly, watch the Defendant's vehicle,
8 and you can see as he is by his vehicle, Officer McNabb is getting out of the car and
9 preparing to pull his firearm as the Defendant is walk -- running across the street.
10 So we can't see him run across the street but then we do see him again on the
11 corner of Dolly and Carey and we see the front of him as we saw in the stills earlier.

12 [Body cam video continues playing]

13 BY MS. THOMSON:

14 Coming up where the car is stopped.

15 [Body cam video continues playing]

16 BY MS. THOMSON:

17 The lime colored shirt.

18 [Body cam video continues playing]

19 BY MS. THOMSON:

20 Officer McNabb is now getting out of his vehicle and we lose sight of
21 the corner as he does so. But as he turns, gets out his weapon, he sees the
22 Defendant. As the officer is shooting we can see him running down the street.

23 You will have the ability to watch this play slowly in the back. Right
24 click and there is a banner that comes up and it is video speed and you can set it
25 back to -- I think at this point we're at .25, instead full speed.

1 [Body cam video continues playing]

2 BY MS. THOMSON:

3 To further corroborate that the Defendant was staying at the car,
4 waiting for Officer McNabb to arrive, we actually have the time that's spent here.
5 And we know that Officer McNabb is not running full speed as he's coming up to that
6 corner because it would not be wise, he's coming into a blind corner . Even with
7 that, it takes him 10, 15 seconds to go the distance of his car to this corner and
8 that's I think it over estimate -- estimation you'll have the timeline and the video in
9 the back to look more specifically.

10 But the distance from his car to the corner is certainly shorter than the
11 distance from the Intrepid across the street to Dolly -- or across the street on Dolly

12 [Body cam video continues playing]

13 BY MS. THOMSON:

14 We see the brights that are the cause for this stop and the car as he
15 looks at it -- as he checks and ensures that there's not someone else in the car; the
16 fact that we really only have one person in that car. Only one person who's guilty of
17 all these crimes.

18 [Body cam video continues playing]

19 BY MS. THOMSON:

20 We also at the slower speed have the benefit of seeing that there is in
21 fact a street light at the corner of El Tovar and Dolly. And while it is dark on El
22 Tovar, it is not pitch black; that there are street lights working both on the
23 apartments and street lights on the street.

24 [Body cam video continues playing]

25 BY MS. THOMSON:

1 And as he comes around the corner -- as he's inching around the
2 corner as he described in his testimony so that he has an opportunity to get back
3 behind cover if the Defendant's waiting on the other side.

4 [Body cam video continues playing]

5 BY MS. THOMSON:

6 We also know that this camera is a night vision. It's not completely
7 [indiscernible] -- we can see -- it seems a lot darker when it's moving at full speed,
8 but as we go into the slower speeds we can see that he can actually see the officer.

9 [Body cam video continues playing]

10 BY MS. THOMSON:

11 As he's checking and then waiting for backup. As you're watching the
12 video also note as it goes further down the line of the video, how many patrol cars
13 are actually on scene. There are several sets of light and they're hard to see when
14 you pause the video, but you can see that there are innumerable different vehicles
15 actually just on El Tovar and we know that El Tovar is a cul-de-sac, meaning that
16 those vehicles had to have come in off of Dolly.

17 You're instructed that you must use your everyday common sense in your
18 consideration of this case. And this sort of brings in the need when we talk about
19 direct evidence and circumstantial evidence. Circumstantial evidence being that
20 evidence where you use your common sense; A, plus B, must equal C. However,
21 common sense isn't speculation or a guess. You don't get to guess if this or guess
22 if that. You can make reasonable deductions based on what we already know.

23 For example, situations where you will need to use your common
24 sense. There are three casings Officer McNabb talked about, six shots. We know
25 that there were more than six shots fired from the surrounding testimony, what other

1 individuals heard, and from what Officer McNabb is saying as he's following the
2 Defendant's car down the street. Reasonably speaking what does common sense
3 tell us? These are busy roads, we know that only is there the traditional traffic on
4 these roads but also the influx of police cars to respond to this incredibly during
5 emergency.

6 The Defendant's intent, as I said, not something where you have him
7 saying this is my plan. You get to use your common sense, looking at his behaviors,
8 looking at his preparation, looking at what he did that night to be able to deduce that
9 his intent was to kill Officer McNabb.

10 The fact that the shots are aimed at the officer. Officer McNabb
11 testified he couldn't see the muzzle flash from the gun, other than the one that was
12 fired up directly into the air and the one that was fired at him at the corner of Carey
13 and Dolly; that that one was just a circle. But we know, because of the
14 circumstantial evidence that those shots were fired at Officer McNabb from the
15 vehicle. The fact of the trajectory, the fact that he heard the bullet go by his ear,
16 you can use your common sense and make the deduction that the gun is in fact
17 aimed back at Officer McNabb.

18 The totality of the evidence, after your consideration and deliberation
19 will show and has shown beyond a reasonable doubt that the Defendant is guilty of
20 all 13 counts charged against him; of the attempt murder with use of a deadly
21 weapon, all five of the discharging from the vehicle, all five of the assault with deadly
22 weapon, resisting with firearm, and possession of firearm with altered *[sic]* --
23 altered or obliterated serial number. And we'd ask that you find him guilty of all 13
24 counts. Thank you.

25 THE COURT: Thank you. Counsel.

1 MS. NGUYEN: I'm ready.

2 [Rubbing hands together], sorry. I'm a little cold.

3 **CLOSING ARGUMENT FOR THE DEFENSE**

4 BY MS. NGUYEN:

5 You heard the State talk about kind of the long standing principle of our
6 country, of our system of justice that all citizens accused of a crime are guilty until
7 proven innocent. When I thought was interesting is when the State --

8 THE COURT: Wait.

9 MS. NGUYEN: Oh.

10 THE COURT: They're all innocent until proven guilty.

11 MS. NGUYEN: I'm sorry. Innocent until proven guilty. Sorry. Everyone
12 caught me. See, everyone knows.

13 BY MS. NGUYEN:

14 One of the things that I thought was interesting is the State indicated if
15 you find him guilty of this, you find him guilty of everything and that is exactly what
16 you will not be able to do. Your job is to look at each one of these counts
17 individually. It's your job not to just blanket over everything with either a guilt or
18 innocence. You must look at each one of these charges individually to determine
19 whether or not the evidence, the testimony, and everything that you heard today
20 gave you enough to show -- the State gave you enough to show each one of those
21 elements of each one of those crimes.

22 In this case, the State has a lot of power. With that burden to prove
23 beyond a reasonable doubt someone's guilt, they also have in their discretion what
24 charges they are going to bring against every individual. In this case they've chose
25 to bring the charges that were brought on here and I encourage you to look at each

1 one of those individually during your deliberation.

2 You saw there was a lot of focus on forensic testimony and I think that's
3 important and I think that it's important to corroborate human testimony and human
4 observance. You saw right away that humans are human. They are nervous, they
5 are excited, there's adrenaline rushing, and especially in a circumstance like this
6 there is excitement, there's lots of things that could cloud your memory or your
7 perception of an event.

8 I think of even Officer McNabb, at one point, he had thought he had
9 fired so many rounds off of his gun that he actually unloaded his clip and reloaded
10 his clip when it turns out he didn't need to do that but he thought he had shot so
11 many rounds out of his gun that that was his perception at the time. He had fired so
12 much that he had to reload and shoot some more.

13 Was he lying about that? No. I don't think it was intentional. Just like
14 had the State had mentioned, you know, are these misunderstandings? Are these
15 misconceptions? Are they exaggerated? Are people bolstering to make themselves
16 seem braver or strong? You know, there are a lot of different circumstances and I
17 don't think they're malicious.

18 We heard testimony, like the State had mentioned from several lay
19 witnesses that had indicated that there were shots fired on El Tovar behind the
20 Nissan -- the truck -- the white truck. Even the State contends that there were no
21 shots fired in that area and we know that there was no shell casings or anything
22 from a Colt .45, the gun that was located under that car, anywhere in and around
23 that neighborhood.

24 But obviously that was the testimony and that was the perception of
25 those individuals that said they were watching that. Were they lying? No, I don't

1 think that they intentionally lying or intentionally being misleading. But that's just the
2 nature of being human beings I think is that sometimes we're fallible to, you know,
3 the excitement, the adrenaline, the fear, the excitement of a circumstance or a
4 situation that we find our self in.

5 I think that's important because in this case we're very lucky because
6 we have other forensic evidence that isn't fallible to some of those same problems
7 like fear, and emotions, and adrenaline. We have shell casings, we have a body
8 camera video, we have a video from a -- surveillance from a citizen's house. We
9 have some other things that can help corroborate and come help like explain the
10 story and fill in those gaps, clarify people's human perception, and I think that's
11 important.

12 A lot of times we heard things about how the camera on a body camera
13 isn't necessarily as clear as like the human eye and that may be true, you may have
14 more than eight megapixels in your own eyes when you're observing things and you
15 might have not as much glare or you might have more glare if you're wearing
16 glasses like Officer McNabb. Or you might have some other things like the
17 adrenaline, the fear, the excitement of a situation. So in that respect the body
18 camera might actually be a better indication of what actually occurred.

19 What I would encourage everyone to do is to watch that body camera
20 because I think it is important. And I think it's important not just to watch it from the
21 end where you see they come to a stop there at Carey and Dolly, but also from the
22 beginning when that first -- he first taps on the camera, including the 30 seconds
23 before that when you don't hear any audio, but that's the back capture. I don't know
24 if you recall that, they said on the body camera, it'll capture the 30 seconds before
25 he actually turned it on. I think it's important to listen to that and watch that with your

1 own eyes because that's going to corroborate his thing.

2 In combination with that, we heard testimony of the extensive police
3 response to this situation. We had swing shift police officers, we had graveyard
4 officers that all responded to this unit. We had administrators, we had a sergeant
5 from the body cam, we had someone from -- a FIT detective, we had lots of
6 individuals that all came to this scene. Quarantined -- blocked off this entire like
7 mile and a half period. Didn't allow cars in and out when they finally were able to
8 block off that area. Canvassed and scoured that area.

9 We heard from the CSA Rebecca, she indicated that she -- or Brenda
10 who had gone through herself and had walked from Walnut all the way down to the
11 Lamb location herself and scoured that area. You heard the detective talk about
12 how he actually walked that entire area with a team, I think he said of four people,
13 and they covered that whole area at night when it first occurred and also during the
14 daylight hours so they could see better. He had indicated that in all the areas they
15 went to look for strike shots where bullets may have landed and they weren't able to
16 find anything.

17 What they were able to find though was three casings and then they
18 were able to find all of the casings that Officer McNabb made. So in all of this the
19 State indicates that there were cars traveling through and they probably got into a
20 car tread and drove away. Well it's interesting that the only ones that didn't drive
21 away were all of the ones that were shot by Officer McNabb and I think that's
22 important because like I said, we can't just paint a, you know, paintbrush over the
23 entire thing and say well, if we found guilty on one, we're going to find guilty on all of
24 these charges. I think it's important to find where things are corroborated.

25 I'm going to start with Count 1 and just -- not to belabor and go over all

1 of the elements, and of all of the cases, and of all of the charges, but I think looking
2 at Count 1, the attempt murder with the use of a deadly weapon, if you go to
3 Instruction Number 10, I think it's important to look at that instruction because as the
4 State pointed out they have to show intention. And as of yet we can't get in people's
5 minds and determine what their intent was or what's going on in their mind and we
6 do look at the circumstances.

7 But in this case I believe that the State has not shown you beyond a
8 reasonable doubt that Joshua intended to kill Ryan McNabb. I don't believe that this
9 is a case that we have someone, as they portrayed him, lying in wait. I don't think
10 this is a situation where we had someone who was acting as a sniper, attempting to
11 kill an individual. If anything it sounds like the shooting or discharging the firearm
12 was done, at best, in a reckless manner.

13 We heard that there was testimony that a shot went up into the air and
14 we heard testimony from Officer McNabb and you can see from the video that he
15 never actually saw any weapon being pointed out of a car at him. And I encourage
16 you to review that video, along with your memory and your notes of the testimony of
17 Officer McNabb regarding any shots that were fired along Walnut, on to Carey, and
18 then ultimately where it ended.

19 I think it's also important to look at the assault with use of a deadly
20 weapon charges. You'll see for the first shot that the State alleges occurred on
21 Walnut, they don't charge an assault with a deadly weapon. And as you heard the
22 District Attorney said the reason they didn't was because there was no reasonable
23 apprehension of fear, the shot was up in the air, you know, Officer McNabb didn't
24 think it was going to come down and fall on him and so they did not charge that
25 charge.

1 However, they did charge for several other charges that they are
2 alleging occurred along with a discharge of a firearm, even though there isn't any
3 evidence that any firearm was pointed at them. And if anything it was -- I think you
4 heard testimony that one shot -- he heard shots and one shot he felt or heard -- or
5 felt something go by the side of his car. And so I don't think the State has been able
6 to show that.

7 With respect to the Counts 8, 9, 10 and 11, if you look at Jury
8 Instruction, I think it's 2 -- 3. 3 -- Instruction 3. You'll see all of the listed charges on
9 Instruction 3, which is those three -- four pages there. And if you look at Counts 8,
10 9, and 10, these are the shots that Officer McNabb indicated occurred in the area of
11 Carey and Lamb.

12 And if you recall that is also the same area and the same place where
13 Officer McNabb said that he actually lose the suspect vehicle because the vehicle
14 went through the red stop sign there and he was forced to slow down to make sure
15 that there were no cars that were impeding his ability. And that probably accounts
16 for the 30 second or so delay you see towards the end of this where Officer McNabb
17 comes into the picture later.

18 In that case, again, there are no shell casings in that area that were
19 ever recovered regarding any shots that were fired at that time. Again, there's --
20 there was some testimony by Officer McNabb and I would say that his memory is a
21 little bit similar to the lay witnesses that testified that there were shots fired on El
22 Tovar.

23 I think the State conceded that there were no shots fired at El Tovar
24 and Dolly and I think that Officer McNabb is mistaken that there was any shots fired
25 right here on Dolly and Carey. And that's where the vehicle came to a stop. That's

1 where we were able to see three bullets that had been possibly expended from a
2 firearm but were not actually shot and I think that's important.

3 And again, I don't think that has anything to do with anyone intentionally
4 lying or anything. I just think that it's important to match up the human testimony
5 and the human experience and combine that with the forensic science that doesn't
6 have that emotional involvement in a case.

7 THE COURT: Counsel, just cautionary. What we think doesn't matter.

8 MS. NGUYEN: Okay.

9 THE COURT: You're saying I think, I think and I haven't stopped you, I let
10 you go, but what you think doesn't matter.

11 MS. NGUYEN: What you think matters.

12 THE COURT: Stick to the evidence. Thanks.

13 BY MS. NGUYEN:

14 With respect to the last charge, the possession of a firearm with an
15 altered or obliterated serial number, this is related to the Colt .25. This isn't related
16 to the Colt .45 that was located under the Nissan truck. This is related to the gun
17 that was located in a vehicle owned by Eufrosia Nazaroff.

18 We heard testimony that that firearm was located inside a black bag
19 within that vehicle. We heard testimony that there was no positive fingerprints on
20 that firearm. We heard that there was DNA that came back to put my client or
21 anyone with that firearm. So I don't believe the State -- I don't believe. The State
22 has not proved beyond a reasonable doubt that charge in this case.

23 Again, we're all human beings. We are all influenced in our perception
24 and our memories are all influence by real human behavior, real human emotions,
25 both biologically and emotionally, and I think -- and that is what happened in this

1 case and that is what you have heard in this case and that is what you have heard
2 through the human testimony.

3 Please review the forensic testimony that was presented to you in this
4 case. Please review the forensic evidence that was collected at the scene so
5 thoroughly. Please review those videos and after you do that I believe you will come
6 back with not guilty verdicts.

7 **REBUTTAL CLOSING ARGUMENT BY THE STATE**

8 BY MR. FATTIG:

9 Good afternoon. I know it's been a long three days. It's kind of chilly in
10 here. Normally I like it cold.

11 Judge Smith, the other day, on Monday when we were doing the voir
12 dire said something I fully agree with. He talked about the jury system and the
13 American criminal justice system and how it's the best on earth. And I think the
14 reason for that is the jury system. We take 12 individuals, 12 people who indicate
15 they can be fair, who all take an oath to follow the law, and we ask you to work as a
16 team.

17 And when we do that we recognize in the law there's a series of stock
18 instructions. They're given to every criminal jury. And one of those stock
19 instructions, we -- the lawyers call a common sense instruction and it's Instruction
20 Number 32 and I think it basically recognizes --

21 THE COURT: I'd just remind you, it doesn't matter what you think.

22 MR. FATTIG: I apologize.

23 THE COURT: It's all right.

24 BY MR. FATTIG:

25 It recognizes that each one of you has lived a full life. Each one of you

1 comes into this room on Monday with a lot of intelligence, a lot of common
2 experiences in life. And the system doesn't tell you to forget about that. In fact the
3 system says you must bring to the consideration your everyday common sense
4 when you came into this room on Monday. You draw reasonable inferences from
5 the evidence using that common sense.

6 So when you do that, what do you find? Well let's take a look at a
7 couple pieces of evidence. First of all, State's 203. It's a *Facebook*, granted I think
8 it's less than eight megapixels on this particular camera. Not a great picture, but it's
9 a picture of a gun posted on a *Facebook* account belonging I would submit, using
10 your common sense, to Joshua Bacharach.

11 The evidence was that Joshua Bacharach had photos of himself on the
12 this same account and Joshua Bacharach made a posting, I would submit, on June
13 21st of 2013, .45, big bro, next to this picture of a firearm. State's 109 shows the -- I
14 would submit, that same firearm; the weapon used by Joshua Bacharach in his
15 attempt to murder Officer Ryan McNabb.

16 Is this not the same gun? Well, maybe not, right? We don't know that
17 serial number on it. Who would have the motivation though to place -- to set up
18 Joshua Bacharach the year before? Joshua Bacharach made that posting. That
19 was his gun, ladies and gentlemen. Fingerprint on the magazine, left thumbprint,
20 corroborative, additional evidence, along with everything else.

21 Ms. Nguyen commented about some of Ms. Thomson's argument when
22 she said -- and she certainly wasn't trying to suggest if he's guilty of one, he's
23 automatically guilty of all. What she was arguing was, this is not an ID case in that.
24 There aren't multiple suspects here. You find that Joshua Bacharach was that
25 person, then that person is responsible for each of these. This isn't two different

1 people. Clearly by the timeline, by the other evidence, the body camera, there's
2 only one person responsible.

3 And I would certainly suggest that this is not an identity case. That his
4 case involves around intent. This case, Joshua Bacharach was driving that car.
5 Joshua Bacharach was in that vest. Joshua Bacharach had that gun, fired it. The
6 issues you need to consider, I would to submit to you, involve around what he was
7 trying to do with his actions.

8 Defense Counsel indicates he's not lying in wait. Okay. What is he
9 trying to do? Let's consider these questions in light of Instruction Number 5, defines
10 for you reasonable doubt: Reasonable doubt is one based on reason. It is not mere
11 possible doubt.

12 And then at the bottom of that same paragraph: Doubt, to be
13 reasonable, must be actual, not mere possibility or speculation.

14 Is there a reasonable doubt that Joshua Bacharach was trying to kill
15 Officer Ryan McNabb? Or did we prove beyond a reasonable doubt that that was
16 his intent? We have a shot as Officer McNabb goes around the corner on Walnut
17 on to Carey. We have the first shot around the corner, buzzes past his ear. You
18 can in the body came video he keeps his -- he kept his window halfway down and
19 he testified about that.

20 This is the summer but he wants -- he's been trained to keep the
21 windows down so he can be more aware of his surroundings. The bullet flies right
22 past his left ear. There's a second shot right after that. And I know you -- everyone
23 here has been very observant of the courtroom. I'm sure you've observed Joshua
24 Bacharach this week. There's been various times he's been writing. I would submit
25 the same hand he's uses to right was the same hand --

1 MS. NGUYEN: Objection, Your Honor.

2 MR. FATTIG: -- he shot.

3 THE COURT: I -- okay. I just remind you what you remember the evidence
4 to be, Jury Instruction 7 and I think 36 tell you that what the lawyers in arguments
5 are not evidence.

6 MS. NGUYEN: And Your Honor, I would just say that it's a comment on his
7 constitutional rights.

8 THE COURT: Okay.

9 MR. FATTIG: His constitutional right to write? They can observe on that.

10 BY MR. FATTIG:

11 The right hand, I would submit, using your common sense, was used by
12 Joshua Bacharach to shoot out the driver's side window of his car at Officer
13 McNabb.

14 Okay. Is he successful? No, obviously, right? We have Officer
15 McNabb with no wounds, thankfully. But look at the intent, okay? Do you acquit
16 Joshua Bacharach because he's a bad shot? I would submit, no when the evidence
17 proves intent, intent to kill when Joshua Bacharach is repeatedly firing a gun out that
18 driver's side window behind him towards Officer McNabb he is attempting to kill
19 Officer McNabb. And we know four shots went down that driver's side, from front to
20 back. And we know from the video Officer McNabb is following him.

21 These aren't shots up in the air like Walnut. And I know Counsel
22 comments that, you know, the first Walnut shot we don't fire -- we don't charge
23 assault with a deadly weapon. It's true. But we do charge it on the other shots
24 because there's corroborative evidence. Officer McNabb is close enough on Walnut
25 to see the shot going up into the air, okay? Later on there's some distance there. In

1 fact, after -- when he's over on Lamb he has to stop because there's citizens in cars.

2 So, obviously, Joshua Bacharach who didn't stop, who sailed right
3 through a solid right light of our community, Joshua Bacharach gets some space on
4 him. He doesn't see where those shots are coming. We have to look at the
5 corroborative physical evidence. And there is four different ones on the side of that
6 car; four different sets of markings. That's assault with a deadly weapon.

7 Officer McNabb of course is in reasonable apprehension of bodily harm
8 at that point. He's just had moments before a bullet whizz by his left ear. He knows
9 this guy is shooting at him and he hears more shots. He doesn't have to see the
10 gun pointed out at him during that time period in order to not be placed in
11 reasonable apprehension of bodily harm. And the side damage to Joshua
12 Bacharach's vehicle that he was -- Eufrosia's vehicle but Joshua was driving it
13 shows that the bullets were coming out, towards Officer McNabb, not into the air at
14 that point.

15 Counsel talks about the body camera and of course it corroborates
16 Officer McNabb, but of course it doesn't corroborates Officer McNabb in its entirety.
17 You've heard that and your common sense tells you that. The human ear is better
18 than the microphone on top of the camera as it's pointed to the top of the patrol car's
19 ceiling. The human eyes are better than an eight megapixel tiny little camera. The
20 human head -- the range of motion can move and observe, as opposed to a little
21 camera that is affixed via magnet to his shirt collar.

22 And as Officer McNabb pulls up on the corner of Dolly and Carey,
23 Defense suggests that he is mistaken about what happened there because we don't
24 have a casing. I would submit when Joshua Bacharach is pointing that gun
25 gangster style, as described by Ryan McNabb, the casing can fly up and back and

1 end up we don't know where. Does that indicate that Officer McNabb didn't see
2 what he saw?

3 Officer McNabb is pulling up to a situation, a car that is gaining on him,
4 now suddenly has pulled over, the guy has gotten out, and Officer McNabb comes
5 up and he sees the man, gangster style pointed at him and he sees a muzzle flash
6 and he notes it's pointed at him. Do you think that's a memory that Officer McNabb
7 would be mistaken about? Do you think that that might just be a little bit engrained
8 in his memory? In his soul?

9 Life changing, even if he wasn't struck by the bullet. He's not mistaken
10 about that. Look through your instructions. If there's an instruction in there that
11 says if a count isn't supported by forensic evidence, if you don't find the casing, then
12 you must acquit, then go back there and talk about that, come out here and tell him
13 he's innocent. But guess what? When you look at all those instructions, you're not
14 going to find that instruction, because it doesn't exist. That's not the law.

15 Use the law that actually exists and apply it to the evidence. There's no
16 fingerprints, there's no DNA on the gun in the car in that black bag. So clearly he's
17 not in possession of an obliterated serial number with a firearm. Acquit him. That's
18 what they want. How does the gun into that bag? What does the evidence show?
19 Is that Eufrosia's gun? Doesn't she have every incentive to come in here and take
20 the fall? What are her motivations? She doesn't do that. They're not her guns.
21 They're Joshua Bacharach's guns.

22 When Joshua Bacharach repeatedly fired that gun, his intent when he
23 shot was to kill. He pulled his car over at Dolly and Carey. He made that decision.
24 I would note when he made that decision he's gaining ground on Officer McNabb
25 because of the stoplight. He could have continued to flee, right?

1 He could have done a lot of things. He could have driven in a side
2 neighborhood, park the car, ditched it, gone into a backyard. He could have
3 attempted to just continue driving. He was gaining distance. What did he do? I
4 would certainly submit that he lied in wait and it was because of his intent. His intent
5 to kill.

6 It's a conscious decision. You see the Wagner video -- the surveillance
7 video. He's applying his brakes. He immediately hops out of that car, around the
8 back with the same weapon he had been using and now there's certainly some
9 issues going on. There's two cartridges that end up on the floorboard, there's two
10 cartridges that end up in the desert, right by the car, but he gets off a sixth shot.

11 Officer McNabb sees him, he testifies he believed it was about 35 to 40
12 yards away. Now when you look at the crime scene diagram I think you're going to
13 see maybe it was a little bit farther, about 45 yards, give or take. McNabb sees at
14 him -- shoot at him. And what does the Defendant do? He then moves towards
15 the -- behind the white pole. He's facing Officer McNabb.

16 At this point Officer McNabb is able to get out of the car and react. And
17 the Defendant hightails it out of there, dropping another casing -- not a casing, a full
18 cartridge, unfired. Running to the corner at El Tovar, getting behind the white truck,
19 and we have multiple witnesses indicating he posted up yet again. Yet again lying
20 in wait. Attempted murder. Of course he's got a problem at this point. There's no
21 ammunition.

22 I have an item here that's going to link me to the attempted murder of a
23 police officer. I'm wearing a white bullet-proof vest, I'm on a darkened cul-de-sac
24 with no weapons. Get rid of it. This doesn't serve me any good anymore. This
25 incriminates me to extremely serious crimes. So does the vest, I would submit.

1 Change your description, change your clothing. Dump the vest, dump the gun right
2 where you are, tuck it underneath, I got to get out of here. You go where you can.
3 The darkened backyard. And you lay there and you hope to God you're not found.
4 Because if you are one day you just might be held accountable.

5 I would submit, ladies and gentlemen, there's overwhelming evidence
6 he was trying to kill Officer Ryan McNabb. Beyond a reasonable doubt. Doubt must
7 be actual. Is there reasonable doubt? I would submit to you, ladies and gentlemen,
8 this is the same standard. It is not an unreachable burden. It's the same standard
9 used in every criminal case here in Nevada. It doesn't matter if the case is as minor
10 as operating a car with high beams on it or as serious as the attempted murder of a
11 police officer. Judges and juries find it's satisfied all the time.

12 I want to talk a little bit about the calls you heard and I certainly
13 recognize that at times it sounds like a Peanuts episode. So I ask that you listen to
14 them more carefully in a better environment in the deliberation room when you can
15 hear them. But the July 12th call to Eufasia, the Defendant talks with her about if
16 she's going to show up to testify and she says, you know, I've been subpoenaed to
17 testify.

18 And the Defendant makes some statements if she shows up to testify
19 that she would be incriminating it. And the Defendant of course knows in his mind
20 that if he's found in the car that means he is the guy that ran from the police at high
21 speeds while shooting at the officer. So the Defendant in that call I would
22 submit -- and listen to it -- tried to deny something that Eufasia knows is true. And
23 that is that he was driving the Dodge Intrepid on June 26th.

24 Defendant at one point says, quote: I don't know who had my car.

25 And he calls it my car.

1 Eufrasia responds, quote: You had my car, you asshole, end quote.

2 Defendant responds: No, I didn't.

3 Eufrasia: You didn't have any car?

4 Defendant: Somebody, I don't know -- somebody else must have been
5 driving it.

6 And how does Eufrasia respond to that?

7 Oh, my God. She knows. She knows he knows.

8 But the Defendant says well, quote: Because they didn't find me in no
9 car, stupid ass. You're supposed to be innocent until you're proven guilty.

10 He wasn't found in that car. Does that mean he wasn't driving that car?

11 There's a tremendous responsibility being in my position. The person
12 speaking last. Speaking last for the State, for the community, and trying to convince
13 you to find the Defendant guilty beyond a reasonable doubt and trying to convince
14 you. It's a tremendous responsibility and weight until you realize that each one of
15 you has taken an oath to do equal and exact justice between the State, between the
16 community, and the Defendant.

17 Each one of you wants to do the right thing and that relieves a great
18 amount of responsibility on me because I trust in you. And I trust in you partly
19 because during voir dire we had a packed house and not everyone made it up here,
20 but everyone that made it up here, all of you, were asked ad nauseam by myself
21 and my co-counsel some pretty much standard questions. We want to know if you
22 can be fair and each one of you said you would be.

23 We want to know if you'd follow the law. Each one of you said you
24 would, even if you personally disagreed with it. It was hypothetical because you
25 didn't know the law at the time. Now you do. You have it. And we wanted to know

1 whether or not, if we proved our case beyond a reasonable doubt you would be able
2 to find Joshua Bacharach guilty of these crimes. Each one of you assured us that
3 you could fulfill those duties. And if you didn't, you wouldn't have been on this jury.

4 And now you're going to be asked to go into that back room and
5 deliberate. As we've been sitting here for the last three days, I would submit to you
6 that one person in this room has known he's guilty of all these crimes.

7 MS. NGUYEN: Objection, Your Honor.

8 MR. FATTIG: I ask that you --

9 THE COURT: I'll sustain the objection. Disregard that comment.

10 BY MR. FATTIG:

11 I ask that you go back into that room and you deliberate and you come
12 out here and you tell the Defendant you know he's guilty.

13 THE COURT: All right. Swear the officers in, please.

14 [The Clerk swore in the officers to take charge of jury during deliberations]

15 THE COURT: All right. Ms. Sankovich, you're the alternate and that doesn't
16 mean you've wasted your time, I want you to know. We need you -- but we need
17 you within 15 or 20 minutes of the courthouse. If you'll go with Susanne. Take all of
18 your personal belongings.

19 MS. NGUYEN: Your Honor, may we approach?

20 THE COURT: Yeah.

21 [Bench Conference Begins]

22 MS. NGUYEN: I just wanted to remind you if they convict of anything we still
23 have the ex-felon charges that --

24 THE COURT: Yeah.

25 MS. NGUYEN: So I don't know if they want to deliberate for a little while or

1 just have them come back tomorrow.

2 THE COURT: Just a minute

3 [Bench Conference Concludes]

4 THE COURT: Okay. The rest of you will go with Tom and he'll take you back
5 to the jury room.

6 [The jury retired to deliberate at 4:58 p.m.]

7 [Outside the presence of they jury]

8 THE COURT: Maybe we'll go an hour.

9 MS. THOMSON: And then back tomorrow or just --

10 THE COURT: Yeah.

11 MS. THOMSON: Okay.

12 THE COURT: Maybe I'll give them the option once they pick a jury
13 foreperson. Do you want to deliberate tonight or do you want to come back
14 tomorrow? It was a long day.

15 MR. FATTIG: I know.

16 MS. THOMSON: [Indiscernible].

17 THE COURT: Yeah should we just have them come tomorrow?

18 MS. THOMSON: I don't know that the second part's going to take all that
19 long, but --

20 MS. NGUYEN: Yeah.

21 THE COURT: You'll be ready in the morning to -- we won't go tonight.


22 MS. THOMSON: Yeah.

23 MS. NGUYEN: I've seen enough --

24 THE COURT: Let me go talk to Tom.

25 MS. NGUYEN: I've seen enough jury's --

1 MR. FATTIG: Let them pick a foreperson.
2 THE COURT: I'll have them pick a foreperson and come back tomorrow.
3 MR. FATTIG: Okay.
4 MS. THOMSON: Thank you.
5 MS. NGUYEN: I'm fine waiting. I just wanted to throw that out there.
6 THE COURT: Just wait. Everybody just stand at ease for a minute.
7 [Pause in proceedings]
8 THE COURT: Apparently they have three people that need a ride and their
9 ride's coming for them. So they will pick the foreperson and then go home. So you
10 guys can go.
11 MS. NGUYEN: Okay.
12 MR. FATTIG: Okay.
13 MS. THOMSON: Thank you.
14 THE COURT: See you in the morning at 9:00.
15 Have him dressed out and be downstairs. We'll call you when we need
16 you.
17 [Evening recess at 5:00 p.m.]
18
19
20
21 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
22 acknowledge that this is a rough draft transcript, expeditiously prepared, not
23 proofread, corrected, or certified to be an accurate transcript.
24
25



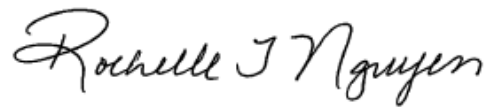
Brittany Mangelson
Independent Transcriber

CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on June 08, 2016, an electronic copy of the foregoing APPELLANT’S FAST TRACK APPENDIX VOLUME VI was sent via the master transmission list with the Nevada Supreme Court to the following:

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A handwritten signature in cursive script that reads "Rochelle T. Nguyen".

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