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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF NEVADA,)
)
 Respondent.)
)

No. 72829/75911
Electronically Filed
Oct 23 2018 09:07 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX VOLUME VIII PAGES 1464-1699

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Clark County Public Defender
309 South Third Street
Las Vegas, Nevada 89155-2610
Attorney for Appellant

STEVE WOLFSON
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Case No. 72829

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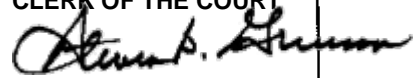
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1 MOT
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 3710
6 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
7 NEVADA BAR NO. 11635
8 **PUBLIC DEFENDERS OFFICE**
9 309 South Third Street, Suite 226
10 Las Vegas, Nevada 89155
11 Telephone: (702) 455-4588
12 Facsimile: (702) 383-2849
13 *Attorneys for Defendant*

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)

Plaintiff,)

v.)

ALFRED C. HARVEY,)

Defendant,)

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/16/18

TIME: 8:00 AM

**DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD AND
MOTION ASKING TRIAL JUDGE TO MAKE
A DECISION IN THIS MATTER**

COMES NOW, the Defendant, Alfred Harvey, by and through his attorneys, JASMIN SPELLS and SHARON G. DICKINSON, Deputy Public Defenders, and respectfully moves this Honorable court to direct this motion be heard by the trial judge, Judge Bixler, to reconstruct the record regarding the jury note found in the District Court Evidence Vault. This Motion is made and based

1 upon all the papers and pleadings on file herein, the attached Declarations of
2 Counsel, and oral argument at the time set for hearing this Motion.

3 DATED this 5 day of April, 2018.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6 By: /s/ Sharon G. Dickinson
7 SHARON G. DICKINSON, #3710
8 Chief Deputy Public Defender

9 PHILIP J. KOHN
10 ~~CLARK COUNTY PUBLIC DEFENDER~~

11 By: /s/ Jasmin D. Spells
12 JASMIN D. SPELLS, #11635
13 Chief Deputy Public Defender
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POINTS AND AUTHORITIES

I.

FACTS

1
2
3 On November 18, 2016, the jury returned a guilty verdict against Alfred
4 Harvey for the crime of robbery. Exhibit A. The Judgment of Conviction was filed
5 on March 17, 2017. Exhibit B. Alfred filed a notice of appeal on April 10, 2017.
6

7 During the appellate process, on November 15, 2017, Appellate Counsel
8 discovered a jury note within the court exhibits that was not discussed on the
9 record. Exhibit F. The jury note said "Can we have elaboration on the definition
10 by means of force or violence or fear of injury. Michelle Moline." Exhibit C. At
11 the top of the note, was a typed response: "The Court is not at liberty to
12 supplement the evidence." Exhibit C.
13
14

15 Appellate Counsel contacted the trial attorneys and learned that neither had
16 any knowledge of the note. Exhibits D and E. While in the process of investigating
17 the note and the reasons why the trial attorneys never saw the jury note, another
18 attorney substituted in on behalf of Alfred Harvey. Exhibit F.
19
20

21 On or about February 21, 2018, the Public Defender's Office was reassigned
22 to represent Alfred Harvey when his prior counsel withdrew. Exhibit F. The lead
23 trial attorney, Jasmine Spells was out of the office until March 26, 2018. Upon her
24 return to the office, this motion was put together for court's consideration. Exhibit
25 F.
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II.

**RECONSTRUCTION OR CLARIFICATION OF THE
RECORD.**

District Courts in Nevada are public courts of record. NRS 1.020; NRS 1.090. Based on this mandate, at a criminal trial, the court reporter or recorder shall "take down" or record "...all the testimony, the objections made, the rulings of the court, the exceptions taken..." NRS 3.320, NRS 3.380. ABA standards note that: "The trial judge has the duty to see that the reporter makes a true, complete, and accurate record of all the proceedings." ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-17 (3rd Ed. 2000).

The importance of making an accurate record ensures that justice is provided for a defendant on appeal.

When something is missing from the record, the parties have an obligation to reconstruct or clarify the record. If an objection or argument or exhibit is not recorded or not made part of the record or if the transcript is incomplete, the Nevada Supreme Court allows for reconstruction of the record. See *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction when a portion of the testimony was missing). Reconstruction not only applies to what is said during the trial but may also be used to describe what was viewed in the courtroom. Accordingly, in *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989), the court suggested that appellate counsel could put together a statement regarding the race

1 of the prospective jurors when there was an issue regarding a *Batson* claim but the
2 record did not include any reference to the race of the prospective jurors.
3 Additionally, in *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009), the Court
4 held that the trial record could be modified or corrected when inaccuracies in the
5 interpreter's translations of the defendant's testimony were verified during the
6 appellate process. The *Quanbengboune* Court held that the defendant could bring
7 a motion in district court pursuant to NRAP 10 (c) to correct the record.
8

9
10 The basis for a motion for reconstruction as found within NRAP 10(c)
11 provides that:
12

13
14 if any difference arises as to whether the trial court
15 record truly discloses what occurred in the district
16 court, the difference shall be submitted to and settled by
17 that court and the trial court record made to conform to
the truth. (Emphasis added)

18 In view of this, the district court has the authority to reconstruct off the record
19 discussions or missing objections and arguments and to clarify the rulings in order
20 to protect Mr. Harvey's right to due process on appeal and to ensure that he is
21 given the correct standard of review on appeal.
22

23 In this case, the trial record contains no information on Court Exhibit1.
24 Alfred Harvey's trial attorneys have no knowledge of the jury note or the process
25 undertaken to give a typed message to the jury. This information is important for
26 his direct appeal regarding the issue involving the jury note that he intends to raise.
27
28

1 Here, although the jury requested clarification on a legal matter, the trial
2 court told them: “The Court is not at liberty to supplement the evidence.” *Exhibit*
3 *C*. However, the content and the process of the court giving a written response are
4 not within the record. The content and process used conflicts with NRS 175.451.

5
6 The Legislature enacted NRS 175.451 to allow the jury to receive additional
7 information on the law if confused. Accordingly, in *Gonzales v. State*, 366 P.3d
8 680, 682 (Nev. 2015), the Nevada Supreme Court held: [W]here a jury’s question
9 during deliberations suggests confusion or lack of understanding of a significant
10 element of the applicable law, the court has a duty to give additional instructions
11 on the law to adequately clarify the jury’s doubt or confusion.” However, no error
12 occurs if the Defense does not provide the court with proffered instructions to
13 clarify the jury’s doubt or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev.
14 2017), *reh'g denied* (Sept. 29, 2017)

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18 Additionally, a bailiff’s improper ex parte contact with the jury after
19 receiving a jury note may also be newly discovered evidence warranting a new
20 trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, the trial judge left for
21 the day, leaving the bailiff and another judge to handle the deliberating jury. When
22 the jury sent a note, the bailiff did not inform anyone, taking it upon himself to
23 respond by telling the jurors to read the jury instructions. The bailiff’s actions
24 were in direct violation of NRS 175.391 and NRS 175.451. Defense learned of the
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1 bailiff's actions during the penalty hearing of the case and moved for a new trial.
2 The trial court held an evidentiary hearing and denied the motion, finding the ex
3 parte communication to be innocuous and not likely to impact the jury
4 deliberations.
5

6 In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court
7 found constitutional error violating due process when a trial court failed to notify
8 and seek input from the parties after receiving a note from the jury that it was
9 deadlocked. The *Manning* Court held:
10

11 [W]e believe that due process gives a defendant the right to be present
12 when a judge communicates to the jury (whether directly or via his or
13 her marshal or other staff). A defendant also has the right to have his
14 or her attorney present to provide input in crafting the court's
15 response to a jury's inquiry. Accordingly, we hold that the court
16 violates a defendant's due process rights when it fails to notify and
17 confer with the parties after receiving a note from the jury... *Id.* at
18 1019.

19 However, the *Manning* Court found the error harmless beyond a reasonable doubt
20 because the trial court did not give the jury any legal instructions and merely
21 excused them for the day, telling them to return the next day for further
22 deliberations. The *Manning* Court found the trial court did not abuse its discretion
23 in denying the motion for a new trial.
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1 Because Alfred intends to argue that reversible error occurred by court
2 instructing the jury without giving his attorney's input, he seeks an evidentiary
3 hearing to reconstruct the trial record.
4

5 **III. CONCLUSION**

6
7 In view of the above, Alfred Harvey asks this court to grant his motion and
8 reconstruct the record of his trial so that he has a record as to what occurred with
9 the jury note.
10

11 DATED this 5 day of April, 2018.

12
13 PHILIP J. KOHN
14 CLARK COUNTY PUBLIC DEFENDER

15 By: /s/ Sharon G. Dickinson
16 SHARON G. DICKINSON, #3710
17 Chief Deputy Public Defender

18 PHILIP J. KOHN
19 CLARK COUNTY PUBLIC DEFENDER

20 By: /s/ Jasmin D. Spells
21 JASMIN D. SPELLS, #11635
22 Chief Deputy Public Defender

23
24
25
26
27 PHILIP J. KOHN

1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

3 YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office
4 will bring the above and foregoing MOTION on for hearing before the Court on
5 the 16th of April, 2018, at 8:00 AM

6 DATED this 5th day of April, 2018.

7
8 PHILIP J. KOHN
9 CLARK COUNTY PUBLIC DEFENDER

10 By: /s/ Sharon G. Dickinson
11 SHARON G. DICKINSON, #3710
12 Chief Deputy Public Defender

13 PHILIP J. KOHN
14 CLARK COUNTY PUBLIC DEFENDER

15 By: /s/ Jasmin D. Spells
16 JASMIN D. SPELLS, #11635
17 Chief Deputy Public Defender

18
19
20 **CERTIFICATE OF ELECTRONIC SERVICE**

21 I hereby certify that service of the above and forgoing MOTION was
22 served via electronic e-filing to the Clark County District Attorney's Office at
23 motions@clarkcountyda.com on this 5 day of April, 2018.

24 By: /s/Carrie M. Connolly
25 An employee of the
26 Clark County Public Defender's Office
27

EXHIBIT A

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VER

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 18 2016

DISTRICT COURT
CLARK COUNTY, NEVADA

BY 
~~PHYLLIS IRBY, DEPUTY~~

THE STATE OF NEVADA,

Plaintiff,

Case No: C-16-314260-1

ALFRED C. HARVEY,

Defendant,

Dept No: VIII

VERDICT

We, the jury in the above entitled case, find the Defendant ALFRED C. HARVEY, as follows:

(please check the appropriate box, select only one)

- Not Guilty
 Guilty of Robbery
 Guilty of Robbery with use of a Deadly Weapon

DATED this 18 day of November, 2016


FOREPERSON

C-16-314260-1
VER
Verdict
4800417



1474

EXHIBIT B

Alma L. Johnson
CLERK OF THE COURT

JOC

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED C. HARVEY
#7013098

Defendant.

CASE NO. C314260-1
DEPT. NO. VIII

JUDGMENT OF CONVICTION
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of ROBBERY (Category B Felony) in violation of NRS 200.380; thereafter, on the 8th day of March, 2017, the Defendant was present in court for sentencing with counsel JASMIN SPELLS, Deputy Public Defender, and good cause appearing;

<input checked="" type="checkbox"/> No. 2 Plea/Judgment	<input type="checkbox"/> Bench (Non-Jury) Trial
<input type="checkbox"/> Defendant Plea/ Judgment	<input type="checkbox"/> Jury Trial
<input type="checkbox"/> State Plea/Judgment	<input type="checkbox"/> Jury Trial with Sent. (during trial)
<input type="checkbox"/> Trial by Jury (during trial)	<input type="checkbox"/> Disposition
<input type="checkbox"/> Other Method of Judgment	

spg

1 THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in
2 the jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee, \$250.00
3 Indigent Defense Civil Assessment Fee and \$150.00 DNA Analysis Fee including
4 testing to determine genetic markers plus \$3.00 DNA Collection Fee, the Defendant is
5 SENTENCED as follows: a MAXIMUM of ONE HUNDRED FORTY-FOUR (144)
6 MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS in the
7 Nevada Department of Corrections (NDC), with THREE HUNDRED FORTY-FOUR
8 (344) DAYS credit for time served.

9
10
11 Ms. Spells advised that the November 30, 2016, Presentence Investigation (PSI)
12 report indicates on page 3 that the Deft. is a confirmed active member of the "Blood,
13 456 Pomona Island Piru" street gang; however, Defendant has denied any gang
14 membership; colloquy. COURT ORDERED that the following shall be added to the
15 Judgment of Conviction and noted for the PSI.

16 **CORRECTIONS TO THE PRESENTENCE INVESTIGATION (PSI) REPORT:**
17 the Defendant, at this point, disavows any gang affiliation.

18 DATED this 17 day of March, 2017

19
20
21 
22 _____
23 DOUGLAS E. SMITH
24 DISTRICT COURT JUDGE
25
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EXHIBIT C

The Court is not at liberty to supplement the evidence.

Can we have
abduction on the
definition, by
means of force or
violence or fear of
injury.

Michelle Moline

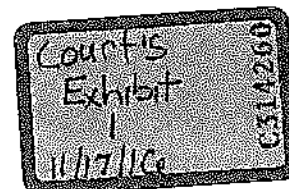


EXHIBIT D

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AFFIDAVIT

KELLEY JONES makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender who assisted in representing the Defendant in the instant matter.

2. The criminal prosecution of *State of Nevada v. Alfred C. Harvey*, case #C-16-314260-1, was in the Eighth Judicial District Court, Clark County, Nevada, which is a court of record in this State. The Defendant, Alfred C. Harvey, was accused and charged with the offense of robbery with a deadly weapon.

3. I was informed a jury question was located in the post-conviction file. The juror's question asked for elaboration of "by means of force or fear of injury."

4. To my knowledge, this question was never presented to the defense.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 5th day of December, 2017.

COUNTY OF CLARK
STATE OF NEVADA

Kelley R Jones
KELLEY R. JONES

SUBSCRIBED and SWORN to before me
this 5th day of December, 2017.

Jacqueline Kay Vance
NOTARY PUBLIC

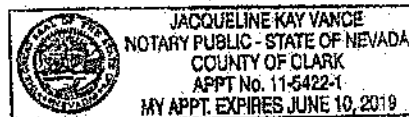


EXHIBIT E

AFFIDAVIT

JASMIN D. SPELLS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Chief Deputy Public Defender assigned to handle the case of *State of Nevada v. Alfred C. Harvey*. I was the lead attorney for Mr. Harvey's trial.

2. The criminal prosecution of *State of Nevada v. Alfred C. Harvey*, case #C-16-314260-1, was in the Eighth Judicial District Court, Clark County, Nevada, which is a court of record in this State. The Defendant, Alfred C. Harvey, was accused and charged with the offense of robbery with a deadly weapon. The jury found Mr. Harvey guilty of robbery.

3. After filing a notice of appeal, Appellate counsel informed me that the jury foreman submitted a question during deliberations, asking for an elaboration on the definition of "by means of force or violence or fear of injury" during jury deliberations. Exhibit C.

4. I was not informed of this question during the trial. Appellate counsel notified me of the question after verdict and sentencing.

5. Upon information and belief, Appellate counsel discovered the jury question in the district court evidence vault, labelled as a court exhibit.

6. Counsel believes that this question is very significant because the question goes to the very crux of the defense: that the defendant did not have a weapon and that the State did not prove robbery beyond a reasonable doubt because there was no force, violence or fear of injury.

7. Had I been aware of this question during jury deliberations, I would have done a number of things. I would have objected to the court responding that the evidence could not be supplemented. See Exhibit C, because the jury question did not ask for a playback/readback or for additional evidence. The jury question asked for clarification on a point of law.

8. Specifically, I would have requested that the Court direct the jury to jury instructions 6, 11 and 12. Exhibit H. Jury instructions 6 and 11 instruct the jury that force or fear "must be used to either: (1) obtain or retain possession of taken property, (2) prevent or overcome resistance to the taking of property, or (3) to facilitate escape with the property." Jury instruction 12 further instructs the jury that in order for there to be a robbery, "the taking must be

1 accomplished by force or intimidation." These instructions are important because they direct the
2 jury to focus on examples of force and fear and how/when force or fear was used if at all.

3 9. Pursuant to instruction 23, Exhibit H, I also would have also requested
4 the Court supplement the jury instruction packet with the jury instructions contained on pages 7
5 and 10 of the *Proposed Jury Instructions Not Used at Trial*, Exhibit I. The instruction on page 7
6 reminds the jury that the State has the burden of proof and again details the three ways in which
7 force or fear must be used for a robbery to be committed. The instruction on page 10 is a lesser
8 instruction which informs the jury that if they are not convinced beyond a reasonable doubt that a
9 robbery occurred, then they may find the defendant guilty of the lesser included offense of petit
10 larceny.

11 10. I would have also request that the court give the jury the *Crane* jury
12 instruction Exhibit J, which instructs the jury how to proceed when there are two reasonable
13 interpretations, one pointing to guilt and not. *Crane v. State* 88 Nev. 684, 504 P.2d 12 (1972).
14 Given the jury's question, its arguable the jury found two reasonable interpretations of the facts of
15 the case.

16 11. Additionally, I would have requested that the Court give the legal
17 definitions of force, fear and violence as defined in Black's Law Dictionary, as these terms are
18 legal terms, which are to counsel's knowledge are not defined by Nevada statutes. Specifically
19 these definitions are:

20 *Actual force*- force consisting in physical act, esp. a violent act directed against a
21 victim.

22 *Fear*- the strong, negative feeling that a person experiences when anticipating
23 danger or harm.

24 *Violence*- the use of physical force, usu. Accompanied by fury, vehemence, or
25 outrage; especially physical force unlawfully exercised with the intent to harm.

26 Black's Law Dictionary (10th ed. 2014). These definitions directly answer the jury's question. Jury
27 instruction 23, which the court gave informed the jury that should they have a question, the
28 information sought would be given.

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12. I was informed of the jury question on or about late November, 2018. Counsel was out of the office from early December 2017 to the end of March 2018. I reviewed the instant case and prepared this affidavit upon my return.

13. I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 3rd day of April, 2018.

JASMIN D. SPELLS

County of Clark
State of Nevada

SUBSCRIBED and SWORN to before me this 3rd day of April, 2018.

NOTARY PUBLIC

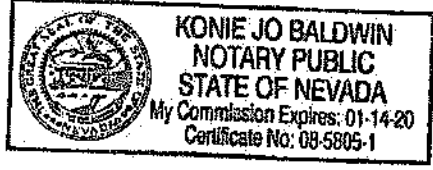


EXHIBIT F

DECLARATION OF SHARON G. DICKINSON

1. I am an attorney licensed to practice law in the State of Nevada; I am a deputy public defender assigned to handle the appeal of this matter; I am familiar with the procedural history of this case.

2. Our office filed the Notice of Appeal in this matter on April 10, 2017.

3. On November 15, 2017, while working on Alfred Harvey's appeal of this case, I found Court Exhibit 1 which is a note from the jury asking clarification of the definition of "by means of force or violence or fear of injury." Exhibit C. I did not find this document discussed in the trial transcripts.

4. On November 15, 2017, I contacted the trial attorney, Ms. Spells, and she told me she did not know about the jury note. Subsequently, her co-counsel, Ms. Jones agreed that she had never seen the jury note.

5. On November 15, 2017, another attorney filed a substitution of attorney motion with the Nevada Supreme Court; and, our office was removed from Alfred Harvey's appeal on December 4, 2017. On January 2, 2018, the new attorney filed a motion to withdraw. The Nevada Supreme Court granted his motion on January 25, 2018, and remanded the case to district court for appointment of counsel.

6. On or about February 14, 2018, the Clark County Public Defender's Office was reappointed. On March 5, 2018, I was reassigned to handle Albert Harvey's appeal.

7. Because Ms. Spells was out of the office until March 26, 2018, I was unable to meet with her before that date. Ms. Spells met with me on March 30, 2018, and subsequently prepared an affidavit for this motion.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 2nd April, 2018.

By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON

EXHIBIT G

1 deliberate, we ordered you guys some lunch about an hour ago. So you can have
2 some food.

3 **CLOSING ARGUMENT BY THE DEFENSE**

4 MS. SPELLS: Good afternoon, ladies and gentlemen of the jury. I want to
5 thank you for being attentive throughout this time, for bearing with us, and just
6 listening to all of the evidence. Now, is the time for our closing argument, after I
7 make argument, the State will have another opportunity to speak with you. During
8 that time period we just want to remind you that what you decide is the fact -- are the
9 facts in evidence in the case, that's your decisions.

10 So perception is not reality, everybody has different perception and our
11 perception is our point of view. Everyone has a point of view based on what their
12 story is, the way it happened according to you. Sometimes that is based on just
13 who you are as a person. Perception and memory go hand in hand. The way you
14 perceive something is going to be the way that you tell the story and that is going to
15 also come into play with your memory. I want you guys to remember when you are
16 thinking about all of the different witnesses and what they have said to you and all of
17 the different evidence that came from the stand, that memory is not a tape recorder,
18 you don't get to press pause, come back and resume like a movie. It's just not the
19 way it works. But our memory is definitely influenced by perception.

20 I don't know if you guys recall this or if you saw it or if you are a big avid
21 Facebook users or what have you, but this is a just an illustration as perception.
22 This is a picture of the exact same dress. Some people saw this dress as being
23 gold and white, other people saw this dress as being blue and black. Again,
24 perception and what you see, what occurs, is going to be based on the person that
25 you are and then when you get to tell your side of the story what you saw, what you

1 heard, that's going to be based upon your perception.

2 Let's talk about some of the things that affect your memory. Obviously,
3 we know this, this is just common experience, some of the things that would affect
4 your memory are stress, adrenaline, your emotions. Those are some of the things
5 that we have in this case, with the interactions of the different individuals. Now, you
6 heard from Julian Munoz, who got on the stand, and he told you that he's been
7 employed in loss prevention for approximately five years. But that each time he has
8 interaction with someone he still feels nervous. He still has some of that stress. So
9 that's going to be one of the factors that affect his memory, affect his perception of
10 what's going on.

11 Now, in my opinion this is a classic movie, it may not be a classic movie
12 for everyone, but I want to use this just as an illustration as perception and memory
13 and how things come and tie together. So you're looking at the case of Forrest
14 Gump, you have a lot of different players, and it's very important to note where does
15 the story start, who are the players, and what their story is. So, for instance, for
16 Forrest's mother, the story to her may be about Forrest breaking out of his braces
17 and learning how to run and that's a very significant story. It talks about tenacity and
18 things that are going on there. For Jenny, however, the story is completely different.
19 For her, her story, her perception, her memory is going to be about a childhood
20 relationship, being in love with someone and that love growing into adulthood. Now,
21 if you take Lieutenant Dan, his story is about friendship, about actions that
22 happened in the war. And if these individuals were to come into court and to testify
23 about things that happened, they're going to recount their story in a different way.
24 Some of them may be able to tell the story in a very linear fashion. Forrest's mom
25 being able to talk about tenacity and she can tell you the beginning to the end.

1 Other people may be coming in at the middle, they don't necessarily see the entire
2 incident so they can't tell you a very linear story, their story starts at a different time,
3 ends at a different time. Jenny may be able to give you her highlights. Her favorite
4 experiences. She may not tell you the full story. And Lieutenant Dan, well, if he
5 was telling a story, maybe he would use flashback, maybe he would tell you what
6 was the most important thing in flashback to other things that he found important.

7 Each witness in this case their story starts at a different time period,
8 they have their own point of view, their memory is going to be different as well.
9 We've talked about this, factors that are at play in our case, the adrenaline, common
10 sense, stress, and also training because we had a number of individuals who came
11 and talked to you about some training that they had, how they write reports, how
12 they are quote/unquote experts in a certain area, they at least have a lot of
13 experience, they have accustom of doing things and they're been taught and trained
14 that that's the best way to do it, and they -- there are reasons that they conduct
15 certain actions.

16 So let's talk about Julian Munoz. He is kind of the lead of this story. He
17 gives you a story about his employment with T.J. Maxx and he came and he told
18 you that he would consider T.J. Maxx a clothing store. He was an individual who in
19 telling you his story he wasn't very detail oriented. He said maybe two wallets,
20 maybe three wallets, at one point, during questioning on the stand, he indicated that
21 possibly there were up to four wallets that Mr. Harvey either concealed or stolen or
22 took. But when we talked about that he brought up his report and kind of went back
23 and forth.

24 He does not speak to Mr. Bramble, this is his co-worker, and he says
25 that he left outside of the store and Mr. Bramble was doing video surveillance and

1 mentioned some, like through a telephone call or what have you, that there were
2 additional items concealed, possibly taken. But before he goes to write his report,
3 which he indicated that he would look at, it would go to his upper management in the
4 store, it could possibly be used at a trial in a case, other people would be looking at
5 it. He didn't take the time to go speak to Mr. Bramble about other things that had
6 occurred, to finish documenting, and to be as detailed oriented as possible in his
7 reporting.

8 He talks to you about his boundaries and that's important because
9 that's his company policy and that ties into a person's motives and a person's
10 recollection of what they did, what they said, how they reacted.

11 Now, let's talk about the knife. And for Mr. Munoz it's unclear whether
12 we get the entire story for him. I would submit that to you. He came and he testified
13 and he said that he stopped short and the State, just in their closing argument,
14 indicated, that, you know, he retreated. He didn't continue to follow him. But we
15 heard from Mr. Appel that there were -- there was more than one person taking
16 pictures. You also heard from Mr. Munoz that he told the 9-1-1 operator, and you
17 guys heard the 9-1-1 phone call for yourself, information about the individual and
18 about the vehicle.

19 And I submit to you that you're not going to be able to see the vehicle
20 parked and the license plate of the vehicle parked in front of a Dollar Tree store, if
21 you're retreating back to the T.J. Maxx. And we showed you the map on a number
22 of different occasions and just the difference between those two stores would have
23 required some further advancement.

24 In looking at and weighing his testimony, I'd ask you to consider his
25 perception and his memory, the fact that he was anxious, he told you that on the

1 stand that he was nervous, whether or not he was compliant with his company
2 policy when he indicated that he was not supposed to pursue someone outside of
3 those boundaries, the width of T.J. Maxx and to the sidewalk, and his comments
4 about time and waiting. He doesn't necessarily like to wait for the police. It takes a
5 couple of hours unless it's something significant, something significant here like the
6 report of a knife being present.

7 Now, when considering the testimony of Mr. Bramble we get his story
8 and it's important to note that he didn't see anything. I mean, we've talked a lot
9 about his actions and some of the other people's actions, but what it boils down to
10 what you are all here to decide is whether or not Mr. Alfred Harvey is guilty of
11 robbery with use of a deadly weapon. Mr. Bramble didn't see anything. With regard
12 to that interaction he wasn't able to tell you that he saw a weapon. In fact, he didn't
13 see a weapon. He indicated that his role was very limited. He didn't share his
14 knowledge or the fact that he was taking photographs with officers. He didn't show
15 those photographs to Mr. Munoz.

16 He said Julian looked shocked. He didn't tell you that Julian looked
17 scared or frightful or in fear for his life. He said Julian looked shocked, like maybe
18 something had occurred that wasn't part of the ordinary. Now, I would submit to you
19 that there are a number of different reasons that a person looks shocked and we
20 talked about this. We talked about this when we were discussing circumstantial
21 evidence during our jury selection where the State submitted to you that if you were
22 in your home late at night, you'd gone to the bed, and before you went to bed there
23 was no water on the ground, you come outside and you see water on the ground,
24 would you conclude that it has been raining? And we talked about, okay, that may
25 be one conclusion, but there are a number of different conclusions that you could

1 come to. In fact, one of you indicated that maybe there was a movie set there and
2 they were filming a portion of the movie with rain and so they had water there to
3 make it appear that it was raining but it had not actually rained.

4 So here there are a number of different things. What we do know is
5 that Mr. Munoz asked Mr. Harvey to come back into the store with him and he
6 refused, okay, that's something that's a little different than the ordinary when he told
7 you normally, just come back, I fill out some paperwork, that's it.

8 With regard to Mr. Bramble's perception, his memory, and we've
9 discussed that he wasn't there. He didn't have much investment in this interaction,
10 in this case, because he works for organized retail crime. So this wasn't something
11 that was really something he did on his day-to-day job. He was trying to assist
12 Mr. Munoz to a certain degree but didn't have much investment. He told you that it's
13 not part of his job or company policy, his job description to apprehend someone, so
14 it's not something that he was going to be doing here. His actions weren't going to
15 be with regard to that. And that's important to note as well because you have the
16 interaction between Mr. Munoz and Mr. Bramble and Mr. Bramble coming out to
17 help Mr. Munoz and what are Mr. Munoz' thoughts and perceptions about his
18 actions and how Mr. Bramble may view those actions.

19 We heard from Mr. Appel. Now, I would agree with the State that
20 Mr. Appel indicated that he was happy to be a part of it. He was the Good
21 Samaritan. He wanted to be helpful. He was coming to the aid and to the rescue
22 and he follows the van. Now, when we're thinking about his perception and his
23 memory, I submit to you, listen to the 9-1-1 phone call, what we get from Mr. Appel
24 is that although he's trying to be helpful, he gives a lot of information that he really
25 has no ability to give. He says, oh, someone just pulled a knife out on these people.

1 He wasn't there. He didn't see it. He's in the parking lot in his vehicle. We don't
2 know where the knife is. Well, that's true he doesn't know where the knife is. But
3 the reality of the situation is that his story starts at the end of the story, that's
4 important as to whether or not a robbery with use of a deadly weapon occurred
5 because he's coming in after that. He didn't see any of the interactions with
6 Mr. Munoz and Mr. Harvey.

7 And there's a very significant difference of hearing something versus
8 seeing something. You hear something from a person, you tell another person, they
9 hear it, and by the time they retell the story there's going to be some things that may
10 be a little bit different, may sound a little bit different, somethings may be
11 emphasized, somethings may be de-emphasized. There is a huge difference when
12 you are viewing something firsthand or where you're hearing something from
13 another individual. And the perception of Mr. Appel is that he knew everything about
14 the case, he was able to give all the information that he was asked of.

15 We heard from Officer Nelson and Officer Humpherys, their story is that
16 they're trained officers, they've been working for the Metropolitan Police Department
17 for quite some time, they did a thorough investigation here, they told you that there
18 was also air traffic patrol involved, and they told you that, you know, you didn't hear
19 any stories of any issues. They conducted searches. Officers came and tell you
20 that Mr. Harvey consented to them going into his pockets, to doing the search, and
21 all of that. He was cooperative with that search. And upon finishing the search, not
22 only of Mr. Harvey, of his person, but also of this vehicle, they didn't find any knife.
23 What they did find was T.J. Maxx property. Their perception and their memory, they
24 indicated that they were concerned about officer safety, safety of others because
25 there had been a phone call out that maybe a knife was involved. So they wanted to

1 make sure that other people weren't going to be harmed.

2 Now, we heard from Officer Humpherys and he told you clear as day,
3 without any type of hesitation, that sometimes witnesses are mistaken in what they
4 speak, they don't always get it right. He told you that. He said here there was not a
5 knife found.

6 So we briefly heard from Mrs. Harvey. In considering her testimony,
7 you can consider the fact that she is married to Alfred Harvey. She was the
8 passenger in this vehicle and she told you that she was nervous. She was nervous
9 then, on that date, it was an unfamiliar situation for her, and she was nervous
10 coming here to testify to you guys. She indicates that she was the passenger in the
11 car, that there were two individuals taking photos. She saw two of them walk right
12 up to that vehicle and take photos with their cell phones, and that's not the same
13 story that we got from Mr. Munoz because he says he never took any photographs.
14 He didn't go up to that U-Haul vehicle.

15 She told you that Mr. Harvey is right-handed. We're going to discuss
16 that a little bit. She told you there was never a knife and that Mr. Harvey doesn't
17 generally carry a knife. Again, there was no knife found. She told you also that
18 when they were going to that school her daughter needed to use the restroom.
19 They were stopping at the school, this is not the situation where the cops are pulling
20 the individual over and stopped them at that school. They stopped at that school
21 and the cops then met them there.

22 Now, I submit to you, ladies and gentlemen of the jury, Mr. Harvey is
23 not guilty of robbery with use of a deadly weapon. The State -- it's kind of like
24 spaghetti, they're trying to throw a whole bunch of stuff at you guys to make some
25 things stick. We had a lot of different information that came back that really is just a

1 distraction as to what this case is about. There was a lot of different indications
2 about kids being present, where they were, what they were doing, different
3 merchandise in the car, driving, how an individual was driving, how Mr. Harvey was
4 driving, they questioned both Mr. Appel as well as Mrs. Harvey with about that, and
5 we spent a lot of time about the path taken to get to this school, what happened at
6 the school, what side people were at the school, nothing but distractions. What
7 does that have to do with the robbery with use of a deadly weapon?

8 So, let's look at the Information, you guys have that in your packet,
9 that's instruction number three, and it tells that you that an Information is but a
10 formal method of accusing a person of a crime. So this is what the State has
11 charged Mr. Harvey with and they lay it out for you. And they say that -- we're not
12 going to read it through its entirety, we're going to skip down to line 13, it says,
13 Alfred C. Harvey did willfully, unlawfully, and feloniously take personal property,
14 to-wit: miscellaneous clothing items, from the person of Julian Munoz, or in his
15 presence, by means of force or violence, or fear of injury to, and without the consent
16 and against the will of Julian Munoz, with the use of a deadly weapon, to-wit: a
17 knife. They go on to say, Defendant using force or fear to obtain or retain
18 possession of the property, to prevent or overcome resistance to the taking of the
19 property, and/or to facilitate escape. That's what they've charged Mr. Harvey with,
20 that's what's important in this case.

21 So, we know that there's absolutely no miscellaneous clothing items. It
22 can characterize T.J. Maxx as being a clothing store all they want to, the items in
23 this case have nothing to do with clothing.

24 We know that there's no knife, there's no weapon ever found. I submit
25 to you there was no fear, there's no violence. What really occurred here is that

1 Alfred Harvey stole some items but theft is not robbery.

2 Mr. Munoz on the stand said T.J. Maxx is a clothing store. When I went
3 back and said, well, don't they sell water and food and accessories and all these
4 other items. He said, oh, yes, it's a department store. I agree with you.

5 The one piece of clothing item that was kind of thrown out there was
6 this blue shirt. So we see Mr. Harvey in the store, he's wearing, what I submit to
7 you is two different blue shirts, one light, one dark blue, very similar to the blue shirt
8 that was shown to you guys later as a piece of evidence. These are not clothing
9 items, these are the items that were taken, wallets, some type of hand or face
10 cream, and perfume.

11 So let's go on to this knife. Absolutely no witness, outside of
12 Mr. Munoz, testifies that there was a knife here involved. Now, let's think about this,
13 Mr. Munoz came on the stand and he told you that he was standing on Mr. Harvey's
14 right-hand side. He told you that Mr. Harvey reached into his left pocket with his
15 left-hand and pulled out the knife and held it above his head with the left-hand. We
16 know from the video surveillance, as well as Mr. Munoz' testimony, that what was in
17 the left pocket was the face cream or the hand cream, the cream that had been
18 taken from the store. We also know that there are wallets tucked into this left-hand
19 side. This is the surveillance video and the photographs that you were shown
20 yesterday with regard when the State was stating that the items were concealed, the
21 wallets were concealed in the jacket. And unfortunately we didn't get to see that
22 jacket, that blue shirt thing. We don't know necessarily what does it look like? Are
23 we dealing with inside pockets here? Are we dealing with him concealing things
24 under the arm like this, into the arm of the shirt, just underneath here? What are we
25 dealing with? We don't know. But it is significant because the items are going into

1 the left-hand side.

2 I want to talk to you guys about a timeline here, and you guys have the
3 9-1-1 phone call, you can listen to the call again, it gives you the date and the time
4 at the beginning of the phone call. First call comes in at 16:34, that would be 4:34
5 p.m., that call is by Mr. Julian Munoz. At 16:38 we have Mr. Appel calling and he is
6 informing the 9-1-1 operators he's following the guys, already in motion, following
7 these individuals. And then just before three minutes into that phone call, you guys
8 heard it, you listened to it, you can check my timeline if you like, he says, Appel
9 says, the suspects are in custody. So we're talking about a total of approximately
10 seven to eight minutes.

11 From all the testimony that we've heard we know that Mr. Munoz goes
12 outside, he's talking to Mr. Harvey. Mr. Bramble told you that within approximately
13 30 seconds he's outside. He said he had to get through some people, he arrived
14 outside approximately 30 seconds later, and saw both Mr. Harvey and Mr. Munoz
15 but he doesn't see a knife.

16 We know that at that point Mr. Bramble and Mr. Munoz are going
17 towards the vehicles. We know that because Mr. Munoz is calling in the 9-1-1
18 phone call.

19 MR. SCHWARTZ: Your Honor, I hate to interrupt. Could we please
20 approach?

21 THE COURT: Sure.

22 [Bench conference begins]

23 MR. SCHWARTZ: Sorry, I didn't want to interrupt. I just have a concern that
24 with the redacted version of the 9-1-1 call it might have a difference because the
25 CAD doesn't seem to indicate the three minutes from when Errol calls the

1 Defendant's in custody. So if I could just make that clear in my closing, I mean,
2 rebuttal. I don't know how much more we're going into it.

3 THE COURT: I don't see any problem with that. Okay. If you want me to, I
4 can say there might be a slight discrepancy because I reviewed -- the Court had
5 redacted irrelevant material. So if there's a discrepancy, it's understandable. Do
6 you think that's going to be a big issue point?

7 MR. SCHWARTZ: If you can just move on at this point from this argument,
8 we could. It's not a big deal.

9 THE COURT: Well, because if there is going to be a discrepancy because of
10 the timeline because of the redaction then don't emphasize the discrepancy.

11 MS. SPELLS: I'll just move on, I guess.

12 THE COURT: Okay.

13 MS. SPELLS: At least it would be appropriate for us to notate the redaction.
14 And looking at the CAD what is the difference, a minute?

15 THE COURT: Then avoid the issue but just don't --

16 MS. SPELLS: I'll move on.

17 THE COURT: -- don't bring up there's a discrepancy.

18 MR. SCHWARTZ: Okay. Thank you.

19 MS. SPELLS: All right. Thank you.

20 [Bench conference concludes]

21 MS. SPELLS: So let's talk about what we know, okay. We know that
22 Mr. Bramble tells you he's outside within approximately 30 seconds, from there
23 Mr. Munoz is calling 9-1-1, he is approaching this vehicle, getting the license plate
24 information. We know that Mr. Appel is on scene before this U-Haul takes off, he
25 tries to block the U-Haul. We know that air unit traffic control is somewhere in here.

1 We didn't get to hear from them but we know that they were out there; right? We
2 know that the cops are trained, they're trained to search for things, they're trained to
3 look for things, not only did they search the car, they searched Mr. Harvey.

4 Now, we had an indication yesterday about well maybe the knife was
5 dumped. So we talked about what exactly was communicated and the specific line
6 that Officer Humpherys testified to, subject possibly just dumped property, and that's
7 coming at the school. Well, we know that these trained officers searched these
8 locations, no knife ever found. Officer Humpherys testified to you all that sometimes
9 witnesses do misunderstand, they don't see what they thought they saw.

10 So let's talk about a few of Mr. Munoz' [indiscernible]. And, again,
11 understand that he's nervous. He indicates with every stop he's nervous. So we
12 need to talk about his perception and his memory. But he testifies that there were
13 two wallets, there were three wallets, there were four wallets, now there were three.
14 And then when I questioned him about his report, what did you write in your report?
15 He comes back, yeah, there were two wallets written in the report.

16 The license plate number, and the State went over this with you just
17 briefly, that he came back, had to clarify with regard to what the actual license plate
18 number was. There was some misunderstanding about the streets, which directions
19 they went, where this car was traveling. There's no follow-up with his co-worker to
20 conduct his report. He says that he never took any photographs, but, again, we
21 have Mr. Appel and Mrs. Harvey testifying there were two people out there taking
22 photographs. Who else is out there? We know it's only Munoz and Mr. Bramble.
23 Mr. Bramble told you he took photos.

24 When the State carries the burden of proving to you beyond a
25 reasonable doubt that this knife was used in the commission of the crime that being

1 robbery with use of a deadly weapon.

2 I wanted to talk to you all about credibility, and that's your instruction
3 number ten, and I'm not going to belabor the point and read it all to you because the
4 State did a lot about credibility. So I think everyone clearly understands what
5 credibility is. I want to submit to you, however, that consistency is not necessarily
6 indicative of credibility especially in cases where people have written reports
7 because you're going to testify consistently with your reports, you're going to review
8 them before you come and testify. Additionally, when you make up a story about
9 something, you tell the story, you're going to be consistent in that. So consistency
10 by itself is not necessarily indicative of honesty or credibility.

11 When you consider all of the factors and all of the things here what you
12 have is the fact that Mr. Harvey's vehicle never out of sight. Mr. Appel immediately
13 blocks it in, he's following the vehicle the entire time period, tells you he wanted to
14 know where it goes. We have the air traffic unit control there and then we have the
15 police immediately arriving, okay. As Mr. Harvey is walking to this vehicle we have
16 Mr. Bramble and Mr. Munoz going towards the vehicle, getting the information. We
17 heard yesterday that in Mr. Appel's statement he said three people were running
18 towards this car taking photographs. Where was the opportunity for Mr. Harvey to
19 ditch this alleged knife? If it's ditched on the way to the vehicle, then we have
20 Mr. Munoz and Mr. Bramble following him to the vehicle, they would have seen it on
21 the ground. If it's ditched on the way to the school, we have the air traffic control.
22 We have Mr. Appel following this car the entire time period and he wanted to be
23 helpful. He was giving up all types of information that he did not even have the
24 answer to. If he would have seen anything, if this knife would have been ditched
25 somewhere, we would have heard some indication of that but we didn't hear

1 anything because there was not a knife.

2 There was also no fear, no force, or nor violence. Kind of rewind, go
3 back to the interaction between Mr. Munoz and Mr. Harvey, and we hear that
4 Mr. Munoz asked Mr. Harvey for the wallets. He freely gave them back. He's not
5 screaming at him. He's not pushing him. He's not throwing those wallets at him.
6 He just gave him the wallets back. Mr. Munoz testified there's no yelling, there's no
7 body contact, there's no force or fear of violence in that interaction. He says at that
8 point Mr. Harvey refuses to turn back to the store.

9 So I submit to you there's absolutely no knife, there's no knife found,
10 there's no indication that Mr. Munoz actually saw a knife. We have the officer saying
11 that people are mistaken a lot of times in what they see, what is actually occurring.
12 So at that point we have a hand-up, possibly some hand cream in this hand, coming
13 out of the left pocket. Is that force or violence? Does that put you in fear? Again,
14 perception is not reality.

15 Let's talk about the actions of Mr. Alfred Harvey. He stole merchandise
16 from T.J. Maxx. Mr. Munoz told you that it was less than \$500. He didn't have a
17 weapon. He's not being forceful in giving back those wallets. He's not being
18 threatening. At the end of the day, he's thief, not a violent robber. I'm not saying he
19 didn't do anything; yes, he absolutely went into that T.J. Maxx store, concealed
20 items, left the store with items that did not belong to him. He stole items from T.J.
21 Maxx. There's no option for that in your verdict form.

22 The State is the person who charged him, you saw that in the
23 Information, and they have the burden of proving to you beyond a reasonable doubt
24 the charge that they've submitted to you, robbery with use of a deadly weapon.

25 I submit to you that snapshots, highlights don't work, and we see that

1 with the story and the illustration with Forrest Gump, because if you just get one
2 person's snapshot or one person's highlight you don't know the full story.

3 Perception drives memory but your perception is not reality. What color
4 is that dress? We don't know. What are some of the things that influences memory,
5 again, adrenaline, bias, emotions.

6 So you're the trier of facts and you have to put this story together using
7 credibility, common sense, analyzing the evidence with regard to perception and
8 memory.

9 So as I said, the State will get to speak to you again because they do
10 have the burden of proof here. So there were just a few final things I wanted to go
11 over with you all.

12 Court's indulgence.

13 The State spoke to you a little bit at length about this knife and the fact
14 that they don't have to show you that it was recovered. I submit to you that's the
15 law, they don't have to actually have the knife here for you today for you to find that
16 a knife was utilized. I submit to you there was absolutely no knife. When we're
17 talking about memory and perception, it is important to consider the fact that you
18 guys don't have the knife because there's no one else to tell you that they saw a
19 knife. There's the brief testimony that it's four inches. We don't know any of that.
20 The facts instead show that there was not a weapon, that Mr. Munoz was just
21 mistaken.

22 And, lastly, I want to draw your attention to your jury instruction number
23 six. It says, if you are not convinced beyond a reasonable doubt that the Defendant
24 used a deadly weapon in the commission of an unlawful taking of personal property
25 from the person of another -- again, here the State has charged miscellaneous

1 clothing items -- or in his presence, by means of force or violence or fear of injury,
2 immediate or future, to his person or property and that such force was used to
3 obtain or retain possession of the property, prevent or overcome resistance to the
4 taking of the property, or to facilitate escape with the property you must find the
5 Defendant not guilty of robbery with use of a deadly weapon. And I submit to you
6 that here Mr. Harvey is not guilty of robbery with use of a deadly weapon but he's
7 also not guilty of robbery because he didn't use force or violence here. He stole
8 items and refused to come back into the store. Mr. Harvey is also not guilty of
9 robbery. We'd ask that the appropriate verdict here and we're confident that once
10 you've analyzed all of the evidence you will find Mr. Harvey not guilty.

11 Thank you.

12 THE COURT: Thank you, counsel.

13 How long do you think your last portion is going to take?

14 MR. SCHWARTZ: Ten, fifteen minutes.

15 THE COURT: You guys want to stay or you want to take a little break?

16 UNKNOWN JUROR: Stay.

17 THE COURT: You want to get it over with?

18 UNKNOWN JUROR: Yes.

19 MR. SCHWARTZ: If you could switch over back to our computer, please.

20 Is it okay if I move this, Your Honor?

21 THE COURT: Sure.

22 MR. SCHWARTZ: May I proceed, Your Honor?

23 THE COURT: Yes, please.

24 **[REBUTTAL CLOSING ARGUMENT BY THE STATE]**

25 MR. SCHWARTZ: The State's whole case is a distraction; right? That's what

EXHIBIT H

ORIGINAL

1 INST

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 17 2016

BY *Carol Donahoo*
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 ALFRED C. HARVEY,

11 Defendant.

CASE NO: C-16-314260-1

DEPT NO: VIII

12 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

13 MEMBERS OF THE JURY:

14 It is now my duty as judge to instruct you in the law that applies to this case. It is
15 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
16 you find them from the evidence.

17 You must not be concerned with the wisdom of any rule of law stated in these
18 instructions. Regardless of any opinion you may have as to what the law ought to be, it
19 would be a violation of your oath to base a verdict upon any other view of the law than that
20 given in the instructions of the Court.
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22 C-16-314260-1
23 INST
24 Instructions to the Jury
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If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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2 An Information is but a formal method of accusing a person of a crime and is not of
3 itself any evidence of his guilt.

4 In this case, it is charged in an Information that on or about the 30th day of March,
5 2016, the Defendant committed the offense of ROBBERY WITH USE OF A DEADLY
6 WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138).

7 It is the duty of the jury to apply the rules of law contained in these instructions to the
8 facts of the case and determine whether or not the Defendant is guilty of the offense charged.

9 COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony
10 - NRS 200.380, 193.165 - NOC 50138), on or about the 30th day of March, 2016, within the
11 County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such
12 cases made and provided, and against the peace and dignity of the State of Nevada,
13 ALFRED C. HARVEY did willfully, unlawfully, and feloniously take personal property, to-
14 wit: miscellaneous clothing items, from the person of JULIAN MUNOZ, or in his presence,
15 by means of force or violence, or fear of injury to, and without the consent and against the
16 will of JULIAN MUNOZ, with use of a deadly weapon, to-wit: a knife, defendant using
17 force or fear to obtain or retain possession of the property, to prevent or overcome resistance
18 to the taking of the property, and/or to facilitate escape.

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To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

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The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

1
2 If you are not convinced beyond a reasonable doubt that the defendant used a deadly
3 weapon in the commission of an unlawful taking of personal property from the person of
4 another, or in his presence, against his will, by means of force or violence or fear of injury,
5 immediate or future, to his person or property and that such force was used to:
6

7 (1) Obtain or retain possession of the property,

8 (2) To prevent or overcome resistance to the taking of the property, or

9 (3) To facilitate escape with the property,

10 you must find the defendant not guilty of Robbery with use of a Deadly Weapon.
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2 You are here to determine whether the defendant is not guilty or guilty from the evidence
3 in the case. You are not called upon to return a verdict as to the guilt of any other person. So, if
4 the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant,
5 you should so find, even though you may believe one or more persons are also guilty.
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2 The evidence which you are to consider in this case consists of the testimony of the
3 witnesses, the exhibits, and any facts admitted or agreed to by counsel.

4 There are two types of evidence; direct and circumstantial. Direct evidence is the
5 testimony of a person who claims to have personal knowledge of the commission of the
6 crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof
7 of a chain of facts and circumstances which tend to show whether the Defendant is guilty or
8 not guilty. The law makes no distinction between the weight to be given either direct or
9 circumstantial evidence. Therefore, all of the evidence in the case, including the
10 circumstantial evidence, should be considered by you in arriving at your verdict.

11 Statements, arguments and opinions of counsel are not evidence in the case.
12 However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation
13 as evidence and regard that fact as proved.

14 You must not speculate to be true any insinuations suggested by a question asked a
15 witness. A question is not evidence and may be considered only as it supplies meaning to
16 the answer.

17 You must disregard any evidence to which an objection was sustained by the court
18 and any evidence ordered stricken by the court.

19 Anything you may have seen or heard outside the courtroom is not evidence and must
20 also be disregarded.

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2 Before you may rely on circumstantial evidence to conclude that fact necessary to find
3 the defendant guilty has been proved, you must be convinced that the State has proved each fact
4 essential to that conclusion beyond a reasonable doubt.

5 Also before you may rely on circumstantial evidence to find the defendant guilty, you
6 must be convinced that the only reasonable conclusion supported by the circumstantial evidence
7 is that the defendant is guilty. If you can draw two or more reasonable conclusions from the
8 circumstantial evidence and one of those reasonable conclusions points to innocence and another
9 to guilt, you must accept the one that points to innocence. However, when considering
10 circumstantial evidence, you must accept only reasonable conclusions and reject any that are
11 unreasonable.
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2 The credibility or believability of a witness should be determined by his or her
3 manner upon the stand, his or her relationship to the parties, his or her fears, motives,
4 interests or feelings, his or her opportunity to have observed the matter to which he or she
5 testified, the reasonableness of his or her statements and the strength or weakness of his or
6 her recollections.

7 If you believe that a witness has lied about any material fact in the case, you may
8 disregard the entire testimony of that witness or any portion of his or her testimony which is
9 not proved by other evidence.

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2 Robbery is the unlawful taking of personal property from the person of another, or in
3 his presence, against his will, by means of force or violence or fear of injury, immediate or
4 future, to his person or property. Such force or fear must be used to:

- 5 (1) Obtain or retain possession of the property,
6 (2) To prevent or overcome resistance to the taking of the property, or
7 (3) To facilitate escape with the property.

8 In any case the degree of force is immaterial if used to compel acquiescence to the
9 taking of or escaping with the property.

10 The value of property or money taken is not an element of the crime of robbery, and it
11 is only necessary that the State prove the taking of some property or money.

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2 It is unnecessary to prove both violence and intimidation. If the fact be attended with
3 circumstances of terror, such threatening word or gesture as in common experience is likely to
4 create an apprehension of danger and induce a man to part with his property for the safety of his
5 person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such
6 case.

7
8 In order to constitute robbery, the taking must be accomplished either by force or
9 intimidation, this element being the gist and distinguishing characteristic of the offense; but there
10 need not be force and intimidation, either being sufficient without the other.

INSTRUCTION NO. 13

1
2 You are instructed that if you find a defendant guilty of Robbery, you must also
3 determine whether or not a deadly weapon was used in the commission of this crime.

4 If you find beyond a reasonable doubt that a defendant committed Robbery with the
5 use of a deadly weapon, then you are instructed that the verdict of Robbery With the Use of a
6 Deadly Weapon is the appropriate verdict.

7 If, however, you find that a deadly weapon was not used in the commission of the
8 Robbery, but you do find beyond a reasonable doubt that the Robbery was committed, then
9 you are instructed that the verdict of Robbery is the appropriate verdict.

10 You are instructed that you cannot return a verdict of both Robbery With the Use of a
11 Deadly Weapon and Robbery.

As used in these instructions, a "deadly weapon" means:

(1) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

OR

(2) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

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As used in these instructions, "substantial bodily harm" means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
2. Prolonged physical pain.

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The State is not required to have recovered the deadly weapon used in an alleged crime, or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

However, you must still find beyond a reasonable doubt that a deadly weapon was used in the commission of the robbery.

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In order to "use" a deadly weapon, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime;

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The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence.

The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

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Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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2 In your deliberation you may not discuss or consider the subject of punishment, as
3 that is a matter which lies solely with the court. Your duty is confined to the determination
4 of whether the Defendant is guilty or not guilty.
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During the course of this trial, and your deliberations, you are not to:

- (1) communicate with anyone in any way regarding this case or its merits-either by phone, text, Internet, or other means;
- (2) read, watch, or listen to any news or media accounts or commentary about the case;
- (3) do any research, such as consulting dictionaries, using the Internet, or using reference materials;
- (4) make any investigation, test a theory of the case, re-create any aspect of the case, or in any other way investigate or learn about the case on your own.

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It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

1
2 If, during your deliberation, you should desire to be further informed on any point of
3 law or hear again portions of the testimony, you must reduce your request to writing signed
4 by the foreperson. The officer will then return you to court where the information sought
5 will be given you in the presence of, and after notice to, the district attorney and the
6 Defendant and his counsel.

7 Playbacks of testimony are time-consuming and are not encouraged unless you deem
8 it a necessity. Should you require a playback, you must carefully describe the testimony to
9 be played back so that the court recorder can arrange her notes. Remember, the court is not
10 at liberty to supplement the evidence.

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When you retire to consider your verdict, you must select one of your member to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

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Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

November 17, 2016

GIVEN:

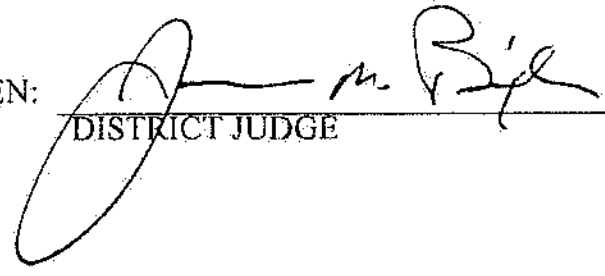

DISTRICT JUDGE

EXHIBIT I

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 17 2016

DISTRICT COURT
CLARK COUNTY, NEVADA

BY: Carol Donahoo
CAROL DONAHO, DEPUTY

THE STATE OF NEVADA,

Plaintiff,

CASE NO. C314260

-vs-

DEPT. NO. VIII

ALFRED C. HARVEY,

Defendant.

PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL

Attached hereto are the Defendant's Proposed Jury Instructions which were offered to the Court, but not submitted to the Jury in the above entitled action.

DATED: This 17th day of November 2016.

Steven D. Grierson, Clerk of the Court

By: Carol Donahoo

Carol Donahoo, Deputy Clerk

C-18-314260-1
PINU
Proposed Jury Instructions Not Used At Tri:
4800889



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2 In deciding the facts of this case you may have to decide which witnesses to believe and
3 which witnesses not to believe. You may believe everything a witness says, only part of it or
4 none of it.

5 In considering the weight or value of the testimony of any witness you may consider the
6 appearance, attitude and behavior of the witness when testifying and a number of other things
7 including:

- 8 1. The witnesses ability to see or hear or know of the things the witness testifies;
- 9 2. The quality of the witness's memory;
- 10 3. The inclination of the witness to speak truthfully;
- 11 4. Whether or not the witness has any interest in the outcome of the case or any motive,
12 bias or prejudice;
- 13 5. Whether the witness is contradicted by anything the witness said or wrote before trial;
14 and
- 15 6. How reasonable is the witness's testimony when considered with other evidence
16 which you believe.

17 In deciding whether or not to believe a witness, keep in mind people sometimes forget
18 things. You need to consider whether a contradiction is an innocent lapse of memory or an
19 intentional falsehood, and that may depend on whether it has to do with an important fact or with
20 only a small detail.

21 The weight or value of evidence does not necessarily depend on the number of witnesses
22 testifying for one side. You must consider all the evidence and you may decide the testimony of
23 a smaller number of witnesses on one side has more weight or value than that presented by the
24 larger number of witnesses on the other side.
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2 Every person charged with the commission of a crime shall be presumed innocent unless
3 the contrary is proved by competent evidence beyond a reasonable doubt.

4 The burden is on the State to prove beyond a reasonable doubt that the defendant
5 committed an unlawful taking of personal property to wit: miscellaneous clothing items from the
6 person of another, or in his presence, against his will, by means of force or violence or fear of
7 injury, immediate or future, to his person or property and that such force was used to:

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9 (1) Obtain or retain possession of the property;
10 (2) To prevent or overcome resistance to the taking of the property, or
11 (3) To facilitate escape with the property.
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Petit larceny is the intentional stealing, taking, carrying away or driving away personal goods with a value of less than \$650, with the specific intent to permanently deprive the owner of said property.

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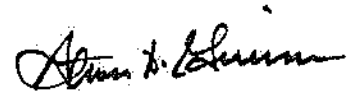
When a person is accused of committing a particular crime and at the same time and by the same conduct may have committed another offense of lesser grade or degree, the latter is with respect to the former, a lesser included offense.

If you are not convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, he may, however be found guilty of any lesser included offense, if the evidence is sufficient to establish guilty beyond a reasonable doubt of the lesser included offense.

The offense of Robbery necessarily includes the lesser offense of petit larceny. You are instructed that if you are not convinced beyond a reasonable doubt that the defendant is guilty of Robbery, you may find the defendant guilty of Robbery, if you so find beyond a reasonable doubt.

You are instructed that you may only mark one box on the verdict form.

EXHIBIT J


CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
2 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
3 **PUBLIC DEFENDERS OFFICE**
309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
Telephone: (702) 455-4685
5 Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 v.)

12 ALFRED C. HARVEY,)

13 Defendant,)

CASE NO. C-16-314260-1

DEPT. NO. VIII

14
15 **DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM**

16 COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN
17 D. SPELLS, Deputy Public Defender and hereby submits his proposed jury instructions.

18 DATED this 16th day of November, 2016:

19 PHILIP J. KOHN
20 CLARK COUNTY PUBLIC DEFENDER

21
22 By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
23 Deputy Public Defender
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You are here to determine whether the defendant is not guilty or guilty from the evidence in the case. You are not called upon to return a verdict as to the guilt of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

1
2 In deciding the facts of this case you may have to decide which witnesses to believe and
3 which witnesses not to believe. You may believe everything a witness says, only part of it or
4 none of it.

5 In considering the weight or value of the testimony of any witness you may consider the
6 appearance, attitude and behavior of the witness when testifying and a number of other things
7 including:

- 8 1. The witnesses ability to see or hear or know of the things the witness testifies;
- 9 2. The quality of the witness's memory;
- 10 3. The inclination of the witness to speak truthfully;
- 11 4. Whether or not the witness has any interest in the outcome of the case or any motive,
12 bias or prejudice;
- 13 5. Whether the witness is contradicted by anything the witness said or wrote before trial;
14 and
- 15 6. How reasonable is the witness's testimony when considered with other evidence
16 which you believe.

17 In deciding whether or not to believe a witness, keep in mind people sometimes forget
18 things. You need to consider whether a contradiction is an innocent lapse of memory or an
19 intentional falsehood, and that may depend on whether it has to do with an important fact or with
20 only a small detail.

21 The weight or value of evidence does not necessarily depend on the number of witnesses
22 testifying for one side. You must consider all the evidence and you may decide the testimony of
23 a smaller number of witnesses on one side has more weight or value than that presented by the
24 larger number of witnesses on the other side.
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It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

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The flight, or absence of flight, of a person immediately after the alleged commission of a crime is not in itself sufficient to establish guilt or lack of guilt; it is however, a circumstance which may be considered in reaching your verdict. The weight which should be placed on this circumstance is left entirely to the jury.

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It is unnecessary to prove both violence and intimidation. If the fact be attended with circumstances of terror, such threatening word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with his property for the safety of his person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such case.

In order to constitute robbery, the taking must be accomplished either by force or intimidation, this element being the gist and distinguishing characteristic of the offense; but there need not be force and intimidation, either being sufficient without the other.

1
2 Every person charged with the commission of a crime shall be presumed innocent unless
3 the contrary is proved by competent evidence beyond a reasonable doubt.

4 The burden is on the State to prove beyond a reasonable doubt that the defendant
5 committed an unlawful taking of personal property "specifically, miscellaneous clothing items"
6 from the person of another, or in his presence, against his will, by means of force or violence or
7 fear of injury, immediate or future, to his person or property and that such force was used to:

8 (1) Obtain or retain possession of the property,
9

10 (2) To prevent or overcome resistance to the taking of the property, or

11 (3) To facilitate escape with the property,

12 you must find the defendant not guilty of Robbery.
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2 If you are not convinced beyond a reasonable doubt that the defendant used a deadly
3 weapon in the commission of an unlawful taking of personal property "specifically,
4 miscellaneous clothing items" from the person of another, or in his presence, against his will, by
5 means of force or violence or fear of injury, immediate or future, to his person or property and
6 that such force was used to:

7 (1) Obtain or retain possession of the property,

8 (2) To prevent or overcome resistance to the taking of the property, or

9 (3) To facilitate escape with the property,

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11 you must find the defendant not guilty of Robbery with use of a Deadly Weapon.
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Petit larceny is the intentional stealing, taking, carrying away or driving away personal goods with a value of less than \$650, with the specific intent to permanently deprive the owner of said property.

1
2 When a person is accused of committing a particular crime and at the same time and by
3 the same conduct may have committed another offense of lesser grade or degree, the latter is
4 with respect to the former, a lesser included offense.

5 If you are not convinced beyond a reasonable doubt that the defendant is guilty of the
6 offense charged, he may, however be found guilty of any lesser included offense, if the evidence
7 is sufficient to establish guilty beyond a reasonable doubt of the lesser included offense.
8

9 The offense of Robbery necessarily includes the lesser offense of petit larceny. You are
10 instructed that if you are not convinced beyond a reasonable doubt that the defendant is guilty of
11 Robbery, you may find the defendant guilty of Robbery, if you so find beyond a reasonable
12 doubt.

13 You are instructed that you may only mark one box on the verdict form.
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1 Human memory is not foolproof. Research has revealed that human memory is not like a
2 video recording that a witness need only replay to remember what happened. Memory is far
3 more complex. The process of remembering consists of three stages: acquisition – the
4 perception of the original event; retention – the period of time that passes between the event and
5 the eventual recollection of a piece of information; and retrieval –the stage during which a
6 person recalls stored information. At each of these stages, memory can be affected by a variety
7 of factors.
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If the evidence permits two reasonable interpretations, one of which points to the Defendant's guilt and the other to the Defendant being not guilty, you must adopt the interpretation that points to the Defendant being not guilty, and reject that interpretation that points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

1
2 Before you may rely on circumstantial evidence to conclude that fact necessary to find
3 the defendant guilty has been proved, you must be convinced that the State has proved each fact
4 essential to that conclusion beyond a reasonable doubt.

5 Also before you may rely on circumstantial evidence to find the defendant guilty, you
6 must be convinced that the only reasonable conclusion supported by the circumstantial evidence
7 is that the defendant is guilty. If you can draw two or more reasonable conclusions from the
8 circumstantial evidence and one of those reasonable conclusions points to innocence and another
9 to guilt, you must accept the one that points to innocence. However, when considering
10 circumstantial evidence, you must accept only reasonable conclusions and reject any that are
11 unreasonable.
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4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
6

7
8 THE STATE OF NEVADA,

9 Plaintiff,

Case No: C-16-314260-1

10 ALFRED C. HARVEY,

11 Defendant,
12

Dept No: VIII

13 VERDICT
14

15 We, the jury in the above entitled case, find the Defendant ALFRED C. HARVEY, as
16 follows:

17 *(please check the appropriate box, select only one)*

- 18 Not Guilty
19 Guilty of Robbery with use of a deadly weapon
20 Guilty of Robbery
21 Guilty of Petit Larceny
22

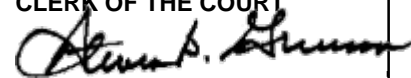
23 DATED this _____ day of November, 2016
24

25 _____
FOREPERSON
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CERTIFICATE OF ELECTRONIC SERVICE

1
2 A copy of the above and foregoing DEFENDANT'S PURPOSED JURY
3 INSTRUCTIONS AND VERDICT FORM was served via electronic e-filing to the District
4 Attorney's Office at Motions@clarkcountyda.com on this 16th day of November, 2016.
5
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7 By: /s/ Kristina Byrd
8 Secretary, Clark County Public Defender
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1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ALFRED C. HARVEY,
13 #7013098

14 Defendant.

CASE NO: C-16-314260-1

DEPT NO: VIII

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSTRUCT THE**
16 **RECORD**

17 DATE OF HEARING: APRIL 30, 2018
18 TIME OF HEARING: 8:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through BRYAN SCHWARTZ, Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Defendant's Motion to
22 Reconstruct the Record.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //
27 //
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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On April 1, 2016, the State filed a Criminal Complaint against Alfred C. Harvey
4 (hereinafter "Defendant") charging him with Robbery with use of a Deadly Weapon. On April
5 18, 2016, the preliminary hearing was held in justice court. At the conclusion, the justice court
6 held Defendant to answer the above charges in district court.

7 On April 20, 2016, Defendant was arraigned in District Court on the above count.
8 Defendant subsequently pled not guilty. On November 15, 2016, the jury trial began. On
9 November 18, 2016, the jury found Defendant guilty of Robbery. On March 8, 2017, the
10 Court sentenced Defendant to a minimum of 36 months and a maximum of 144 months in the
11 Nevada Department of Corrections. His Judgment of Conviction was subsequently filed on
12 March 17, 2018.

13 On April 10, 2018, Defendant filed a Notice of Appeal. The case was subsequently
14 remanded for defense counsel to withdraw and the public defender was appointed.¹ On April
15 5, Defendant filed the instant Motion for New Trial. The State opposes as follows.

16 **STATEMENT OF THE FACTS**

17 On March 30, 2016, Defendant entered T.J. Maxx with his two children, stole various
18 items, and left the store. Loss prevention officer Julian Munoz observed Defendant picking
19 up items and concealing them on his person; Defendant's actions were also captured on video
20 by the T.J. Maxx surveillance system. Transcript of Proceedings, Jury Trial – Day 2, 11/16/16,
21 pg. 14-31 (attached as "Exhibit 1"). After Defendant and his two children exited the store
22 without paying for the items, Munoz approached Defendant, identified himself, and asked for
23 the merchandise back. Id. at 36. In response, Defendant stated that he put the merchandise
24 back in the store. Id. at 37. Munoz responded that he wanted the wallets out of his coat, which
25 Defendant handed over. Id. Munoz then asked Defendant to step back in the store with him.
26 Id. However, Defendant refuses. Id. Munoz again asks him to step inside the store. Id. at
27 39. Defendant then reached into his pocket and pulled out a knife, raised it above his head,
28

¹The public defender was trial counsel, however Defendant retained different counsel initially for his appeal.

1 and stated, "We're not doing anything today." Id. Once Defendant pulled out the knife,
2 Munoz stopped, retreated back towards the store, and called the police. Id. at 41. Defendant
3 then got into a U-Haul with his children, and fled from the area. Id. at 41-43. Munoz was able
4 to maintain a visual on the U-Haul as Defendant backed out of the parking lot, and provided
5 the police with the Defendant's license plate number. Id. at 43. As Defendant is fleeing,
6 Shaun Bramble, a fellow loss prevention officer, responded to assist Munoz. Id. at 42. Munoz
7 immediately told Shaun that Defendant has a knife. Id.

8 Errol Appel was in the same shopping center that day. Id. at 128. He observed Munoz
9 and Bramble outside the store, and further observed Defendant and his children running
10 toward a U-Haul van. Id. at 129-31. Appel approached Munoz and Bramble in his vehicle
11 and asked what was going on. Id. at 130. Munoz told him that he had just been held up at
12 knife point, indicating toward the Defendant and the U-Haul van. Id. In response, Appel
13 followed the U-Haul van. Id. at 131. During the pursuit, Appel called the police and updated
14 them on his location and what was happening. Id. at 132. Appel described Defendant driving
15 "[v]ery recklessly and very disregard for a lot of people." Id. at 133. Appel continued
16 following Defendant until he came to a stop, a few miles away, in front of a school. Id. at 137.
17 Appel observed the Defendant exit the vehicle, and run toward the school, however the front
18 doors were locked, so he ran back to the U-Haul. Id. at 137-38. At that point, the police had
19 arrived. Id. at 138.

20 At this point, officers arrived and arrested the Defendant. Id. at 174. Subsequently,
21 several items were recovered from the U-Haul van. Id. at 166-67. Many of the items were
22 merchandise that Munoz had observed Defendant steal from T.J. Maxx that day. Id.

23 Defendant's wife subsequently testified and acknowledged that she, the Defendant, and
24 her children had driven to T.J. Maxx in a U-Haul truck that day. Id. at 204. She testified that
25 she stayed in the van while Defendant and her children had gone inside. Id. at 205. She further
26 testified that she observed loss prevention officers running after Defendant as he entered the
27 van after leaving the store. Id. at 211.

28

ARGUMENT

I. THIS COURT SHOULD DENY DEFENDANT’S MOTION FOR NEW TRIAL

Defendant requests a new trial because of a jury question regarding the definition of “Robbery.”

Pursuant to NRS 176.515(3), “a motion for new trial based on newly discovered evidence may be made within 2 years after the verdict or finding of guilty.” The Nevada Supreme Court set forth additional requirements for a new trial based on newly discovered evidence: “the evidence must be (1) newly discovered, (2) material to Defendant’s defense, (3) such that it could not with reasonable diligence have been discovered and produced for the trial, (4) not cumulative, (5) such as to render a different result probable upon retrial, (6) that it does not attempt only to contradict a former witness or impeach or discredit him, unless the witness to be impeached is so important that a different result must follow, and (7) that these facts be shown by the best evidence the case admits.” McLemore v. State, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978).

Defendant fails to demonstrate the above requirements as set forth by the Nevada Supreme Court. Most importantly, Defendant fails to show that this newly discovered “evidence” would render a different result probable upon retrial. Defendant merely claims that it is probable that he would have been found not guilty because defense counsel would have requested numerous additional instructions be given to the jury. To start, the court has wide discretion in responding to questions from the jury and properly instructed the jury that it “is not at liberty to supplement the evidence.” Defense Exhibit C. More importantly, Defendant fails to show a probability of a different result at a retrial because there is no new evidence to be presented to the jury. This new “evidence” has nothing to do with the actual evidence presented at trial, including (1) the video surveillance showing Defendant stealing merchandise inside T.J. Maxx, (2) the victim identifying Defendant as stealing property inside the store, leaving without paying, then pulling out and raising a knife at him when he approached the Defendant, (3) the witness who followed the Defendant as the Defendant fled in a U-Haul van, or (4) the officers who apprehended Defendant in the U-Haul van and

1 recovered T.J. Maxx merchandise from inside. The mere fact that defense counsel would have
2 suggested instructions and definitions does not make a different result probable at trial.

3 **CONCLUSION**

4 Therefore, the State requests that the Court DENY Defendant's Motion for New Trial
5 and Evidentiary Hearing.

6
7 DATED this _____ day of April, 2018.

8 Respectfully submitted,

9 STEVEN B. WOLFSON
10 Clark County District Attorney
11 Nevada Bar #001565


12 BY 

13 BRYAN SCHWARTZ
14 Deputy District Attorney
15 Nevada Bar #013244

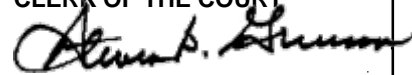
16 **CERTIFICATE OF ELECTRONIC FILING**

17 I hereby certify that service of State's Opposition to Defendant's Motion To Reconstruct
18 the Record, was made this 17th day of April, 2018, by Electronic Filing to:

19 Kelli DeVaney-Sauter, Deputy Public Defender
20 Kelli.DeVaney-Sauter@ClarkCountyNV.gov

21 
22 M. HERNANDEZ
23 Secretary for the District Attorney's Office

24
25
26
27
28 BS/mah/L1



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ALFRED C. HARVEY,
13 #7013098

14 Defendant.

CASE NO: C-16-314260-1

DEPT NO: VIII

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSTRUCT THE**
16 **RECORD**

17 DATE OF HEARING: APRIL 30, 2018
18 TIME OF HEARING: 8:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through BRYAN SCHWARTZ, Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Defendant's Motion To
22 Reconstruct The Record.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //
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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

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4 (hereinafter "Defendant") charging him with Robbery with use of a Deadly Weapon. On April
5 18, 2016, the preliminary hearing was held in justice court. At the conclusion, the justice court
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7 On April 20, 2016, Defendant was arraigned in District Court on the above count.
8 Defendant subsequently pled not guilty. On November 15, 2016, the jury trial began. On
9 November 18, 2016, the jury found Defendant guilty of Robbery. On March 8, 2017, the
10 Court sentenced Defendant to a minimum of 36 months and a maximum of 144 months in the
11 Nevada Department of Corrections. His Judgment of Conviction was subsequently filed on
12 March 17, 2018.

13 On April 10, 2018, Defendant filed a Notice of Appeal. The case was subsequently
14 remanded for defense counsel to withdraw and the public defender was appointed.¹ On April
15 5, Defendant filed the instant Motion to Reconstruct the Record. The State opposes as follows.

16 ARGUMENT

17 **I. THE COURT SHOULD DENY DEFENDANT'S MOTION TO**
18 **RECONSTRUCT THE RECORD**

19 "The trial court record consists of the papers and exhibits filed in the district court, the
20 transcripts of the proceedings, if any, the district court minutes, and the docket entries made
21 by the district court clerk." Nevada Rules of Appellate Procedure (NRAP) Rule 10(a). To be
22 appropriately included in the record on appeal "[a]ll documents ... shall bear the file-stamp of
23 the district court clerk, clearly showing the date the document was filed in the proceeding
24 below." NRAP 30(c)(1). Further, appellate courts may not consider matters outside the
25 record. Carson Ready Mix, Inc. v. First National Bank of Nevada, 97 Nev. 474, 476, 635 P.2d
26 276, 277 (1981) ("We have no power to look outside of the record of a case. We have
27 consistently recognized this limitation.") (quotation marks and internal citations omitted).

28 _____
¹The public defender was trial counsel, however Defendant retained different counsel initially for his appeal.

1 The Nevada Supreme Court has previously addressed situations when it may be
2 appropriate to reconstruct or modify the record.² For instance, when the trial proceedings are
3 not preserved or recorded, reconstruction may be appropriate. Lopez v. State, 105 Nev. 68,
4 85, 769 P.2d 1276, 1287 (1989); Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383
5 (1989). Additionally, correcting and modifying a trial record may be necessary if it appears
6 that the record includes an inaccurate translations. Ouanbengboune v. State, 125 Nev. 763,
7 770-71, 220 P.3d 1122, 1126-27 (2009).

8 Here, Defendant requests that this Court order a reconstruction of the record regarding
9 the jury instruction. However, this would be inappropriate because there was no hearing to
10 reconstruct. In fact, Defendant is asking this Court to create a record of something that did
11 not happen. The record is what it is – if something did not occur, then there is no record of it.
12 As it stands now, there is nothing inaccurate about the record that needs to be modified or
13 corrected.

14 **CONCLUSION**

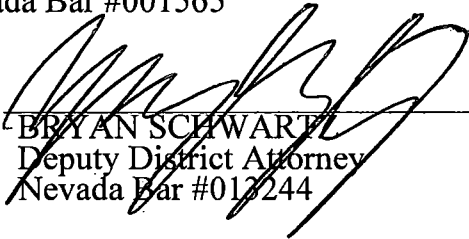
15 Therefore, the State requests this Court DENY Defendant's Motion to Reconstruct the
16 Record.

17
18 DATED this 2nd day of May, 2018.

19 Respectfully submitted,

20 STEVEN B. WOLFSON
21 Clark County District Attorney
22 Nevada Bar #001565

23 BY


24 BRYAN SCHWARTZ
25 Deputy District Attorney
26 Nevada Bar #012244

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28 _____
²Defendant relies on this case law to suggest to this Court that reconstruction is appropriate in this case, however the
cited case law does not refer to a situation with similar facts to the present case.

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CERTIFICATE OF ELECTRONIC FILING

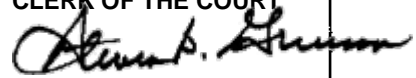
I hereby certify that service of State's Opposition to Defendant's Motion to Reconstruct the Record, was made this 2nd day of May, 2018, by Electronic Filing to:

Jasmin D. Spells, Deputy Public Defender
Lillyjd@clarkcountynv.gov



M. HERNANDEZ
Secretary for the District Attorney's Office

BS/mah/L1



1 RPLY
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 3710
6 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
7 NEVADA BAR NO. 11635
8 **PUBLIC DEFENDERS OFFICE**
9 309 South Third Street, Suite 226
10 Las Vegas, Nevada 89155
11 Telephone: (702) 455-4588
12 Facsimile: (702) 383-2849
13 *Attorneys for Defendant*

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/30/18

TIME: 08:00 a.m.

**DEFENDANT'S REPLY TO STATE'S OPPOSITION TO DEFENDANT'S
MOTION TO RECONSTRUCT THE RECORD AND MOTION ASKING
TRIAL JUDGE TO MAKE A DECISION IN THIS MATTER**

COMES NOW, the Defendant, Alfred Harvey, by and through his attorneys, JASMIN SPELLS and SHARON G. DICKINSON, Deputy Public Defenders, and respectfully files this Reply asking this Honorable court to direct this motion be heard by the trial judge, Judge Bixler, to reconstruct the record regarding the jury note found in the District Court Evidence Vault and asks for an Evidentiary Hearing. This Motion is made and based upon all the papers and

1 pleadings on file herein, the attached Declarations of Counsel, and oral argument at
2 the time set for hearing this Motion.

3 DATED this 23rd day of April, 2018.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6
7 By: /s/ Sharon G. Dickinson
8 SHARON G. DICKINSON, #3710
9 Chief Deputy Public Defender

10 PHILIP J. KOHN
11 CLARK COUNTY PUBLIC DEFENDER

12 By: /s/ Jasmin D. Spells
13 JASMIN D. SPELLS, #11635
14 Chief Deputy Public Defender
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POINTS AND AUTHORITIES

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3 State contends there is no hearing, no record, nor something happening to
4 reconstruct.

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6 However, State is incorrect because there is something to reconstruct: the
7 trial record contains no information on how Court Exhibit 1 became Court Exhibit
8 1. Alfred Harvey's trial attorneys have no knowledge of the jury note or the
9 process undertaken that allowed the deliberating jury to receive the response typed
10 on the top of the note. State appears also to have no knowledge of Court Exhibit 1.
11 Therefore, there is something to reconstruct because Court Exhibit 1 did not
12 become part of the district court record miraculously – someone put it there and
13 something occurred for it to become Court Exhibit 1.
14
15

16 NRAP 10(c) provides that:

17
18 if any difference arises as to **whether the trial court**
19 **record truly discloses what occurred in the district**
20 **court**, the difference shall be submitted to and settled by
21 that court and the trial court record made to conform to
22 the truth. (Emphasis added)

23 In view of this, the district court has the authority to reconstruct the record to
24 explain how Court Exhibit 1 became part of the district court record.
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1 At the hearing on April 16, 2018, district court told the parties that he had
2 spoken to the trial judge, Judge Bixler, and Judge Bixler did not remember
3 anything about Court Exhibit 1.
4

5 **In light of Judge Bixler not remembering the jury note, Alfred Harvey**
6 **asks for an evidentiary hearing to determine how the jury note was made part**
7 **of the district court file.**
8

9 Accordingly, Alfred asks the court to hold an evidentiary hearing and allow
10 testimony from court staffs present during time the jury was deliberating:
11

- 12 1. Court Marshall, Tom
- 13 2. Court Clerk, Phyllis Irby
- 14 3. Court Clerk, Carol Donahoo
- 15 4. Court Recorder, Jill Jacoby
- 16 5. Any other person involved with the jury note
17

18 *See Exhibit K:* Court minutes for November 17 and November 18, 2016; *Exhibit*
19 *L:* November 17, 2016, transcript; *Exhibit M:* November 18, 2016, transcript.
20

21 An evidentiary hearing is necessary for Alfred to proceed with his case in
22 the Nevada Supreme Court because how the bailiff and court staff interacted with
23 the deliberating jury may warrant a new trial and may be an issue on appeal
24 warranting reversal. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, when the
25 jury sent a note, the bailiff did not inform anyone, taking it upon himself to
26
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1 respond by telling the jurors to read the jury instructions. The bailiff's actions
2 were in direct violation of NRS 175.391 and NRS 175.451.

3 In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court
4 found constitutional error violating due process when a trial court failed to notify
5 and seek input from the parties after receiving a note from the jury that it was
6 deadlocked.
7

8
9 Because Alfred intends to argue that reversible error occurred by court
10 instructing the jury without giving his attorney's input, he seeks an evidentiary
11 hearing to reconstruct the trial record.
12

13 In view of the above, Alfred Harvey asks this court to grant his motion and
14 reconstruct the record of his trial so that he has a record as to what occurred with
15 the jury note.
16

17 DATED this 23rd day of April, 2018.
18

19 PHILIP J. KOHN
20 CLARK COUNTY PUBLIC DEFENDER

21 By: /s/ Sharon G. Dickinson
22 SHARON G. DICKINSON, #3710
23 Chief Deputy Public Defender

24 PHILIP J. KOHN
25 CLARK COUNTY PUBLIC DEFENDER

26 By: /s/ Jasmin D. Spells
27 JASMIN D. SPELLS, #11635
28 Chief Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 23 day of April, 2018.

By: /s/Carrie M. Connolly

An employee of the
Clark County Public Defender's Office

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EXHIBIT K

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

November 17, 2016

C-16-314260-1 State of Nevada
 vs
 Alfred Harvey

November 17, 2016 10:00 AM Jury Trial

HEARD BY: Bixler, James

COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Jill Jacoby

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- Steve Rose, Dep DA, and Bryan Schwartz, Dep DA, present on behalf of the State; Jasmin Spells, Dep PD, and Kelley Jones, Dep PD, present on behalf of Deft. Harvey, who is also present.

10:00 a.m. OUTSIDE THE PRESENCE OF JURY: Jury Instructions and Verdict form settled on the record.

JURY PRESENT: Court instructed the Jury. Closing arguments by Mr. Rose and Ms. Spells; rebuttal by Mr. Schwartz. At the hour of 12:42 p.m., the Jury retired to deliberate; Court thanked and excused the alternates.

For the record, Court noted that if the Jury has not reached a Verdict by 5:00 p.m., the Court will ask the Marshall to inquire as to whether the Jury is making progress or would prefer to take a break and return in the morning.

///

C-16-314260-1

5:00 p.m. The Jury elected to recess and return in the morning at 9:30 a.m. to continue their deliberations. Therefore, COURT ORDERED, Jury Trial CONTINUED.

CUSTODY

CONTINUED TO: 11/18/16 9:30 AM

PRINT DATE: 12/20/2016

Page 2 of 2

Minutes Date: November 17, 2016

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

November 18, 2016

C-16-314260-1 State of Nevada
 vs
 ALFRED HARVEY

November 18, 2016 9:30 AM Jury Trial

HEARD BY: Bixler, James

COURTROOM: RJC Courtroom 11B

COURT CLERK: Phyllis Irby

RECORDER: Jill Jacoby

REPORTER:

PARTIES

PRESENT:	HARVEY, ALFRED C	Defendant
	Jones, Kelley R.	Attorney for the Deft
	Rose, Robert E.	Attorney for the State
	Schwartz, Bryan A.	Attorney for the State
	Spells, Jasmin	Attorney for the Deft
	State of Nevada	Plaintiff

JOURNAL ENTRIES

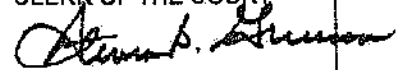
- JURY PRESENT. Verdict reached at the hour of 11:10 am. The Court thanked and excused the jury. OUTSIDE THE PRESENCE OF THE JURY. The Defense requested to have Judge Bixler do the sentencing. The State will provide PowerPoint as exhibit. COURT ORDERED, DEFT HELD WITHOUT BAIL. SENTENCING SET.

CUSTODY

1-04-17 8:00 AM SENTENCING (DEPT. VIII)

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EXHIBIT L



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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ALFRED HARVEY,

Defendant.

CASE NO. C314260

DEPT. VIII

BEFORE THE HONORABLE JAMES M. BIXLER, SENIOR DISTRICT COURT JUDGE
THURSDAY, NOVEMBER 17, 2016

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 3

APPEARANCES:

For the State:

BRYAN S. SCHWARTZ, ESQ.
STEVEN ROSE, ESQ.
Deputy District Attorneys

For the Defendant:

JASMIN D. SPELLS, ESQ.
KELLEY R. JONES, ESQ.
Deputy Public Defenders

RECORDED BY: JILL JACOBY, COURT RECORDER

1 THURSDAY, NOVEMBER 17, 2016 AT 10:01 A.M.

2
3 [Outside the presence of the jury panel]

4 THE COURT: We are on the record in the State of Nevada versus Alfred
5 Harvey.

6 All right. We're in the process of settling instructions, defense has
7 some proposed instructions that they want inserted into the instruction package.

8 Do you want to start with number seven?

9 MS. SPELLS: Yes, Your Honor.

10 THE COURT: All right. Number seven, proposed instruction, I mean page
11 seven, from the defense proposed instructions, every person charged with the
12 commission of a crime shall be presumed innocent unless the contrary is proved by
13 competent evidence beyond a reasonable doubt.

14 Doesn't the State -- don't we have almost the identical --

15 MR. ROSE: We have one that's very similar, Your Honor.

16 The State's issue with this one actually comes on line five. It says
17 that we have the burden of proving beyond a reasonable doubt that the Defendant
18 committed an unlawful taking of personal property to wit: miscellaneous clothing
19 items, and it's really that portion of to wit: miscellaneous clothing items. Because
20 what this particular instruction is doing is defining the commission of the crime of
21 robbery, and I think that it should be constrained to the elements of the crime of
22 robbery. We already have in the charging document what personal property we
23 think has been taken or we're alleging has been taken. I don't think that it's
24 appropriate to insert that as if it were an element of this particular offense given
25

1 that the offense itself is simply defined as the taking of personal property from
2 another person in their presence and so on and so forth.

3 MS. SPELLS: And, Your Honor, this is not a misstatement with regard to this.
4 It's a negatively phrased jury instruction which we would present to the Court that we
5 are entitled to under *Crawford* and it also goes to our theory of the case here. It's
6 what the State has alleged. We used their exact language out of the information
7 that they wrote, to wit, and what followed from there so. We would submit to the
8 Court that we should be entitled to this.

9 MR. ROSE: Your Honor, I think page eight is actually the negatively worded
10 one. If you are not convinced beyond a reasonable doubt, et cetera. Moreover, I
11 think, you know, under *Crawford* it says that, you know, you are not supposed to
12 infer from the various instructions what the theory of defense is or what the
13 argument of defense is. But that if the rest of the instructions do cover it, if it is
14 contained within the rest of the instructions, it is not required to give that it inverse,
15 whether the negatively worded portion of it.

16 And, again, I still think that with, especially with seven in particular, that
17 by defining the offense and including a portion of the specific allegations as an
18 element of the offense it does misstate the law because the law itself is simply
19 personal property. So we think that the State's version, which just has the elements
20 of the offense in the definition of -- in the instruction which defines the offense as the
21 more appropriate version particularly given the fact that they are receiving the
22 information as stated in instruction two or three, which then sets out the specific
23 factual allegations.

24 MS. SPELLS: Your Honor, the defense disagrees. What we're basically
25 telling the jury here is that the State does have the burden to prove the allegations

1 that they have charged, which are alleged in the information of the case here.

2 THE COURT: Well, I don't know that it's -- I don't know that it's -- I don't know
3 that this is a necessary definitive on your theory of the case. It's not an inverse
4 instruction. I'd have to agree. I think that probably the proposed instruction on page
5 eight is more of an inverse instruction, if you are not convinced beyond a reasonable
6 doubt. I don't have any problem putting that instruction on page eight, inserting that
7 in right after the State's reasonable doubt instruction.

8 MR. ROSE: And, Your Honor, our primary objection to eight is simply the fact
9 that it also still includes that language in the portion of this -- the instruction, which is
10 defining the elements of the offense and because the elements of the offense is not
11 included in miscellaneous clothing items the element of the offense is personal
12 property. We think that that has the tendency to confuse the jury as to that point
13 and it misstates the law as the law comes to the definition of the term itself.

14 THE COURT: Well, what's important is that the concept that crime and
15 bodies as an element, the taking of personal property, that's what the crime of
16 robbery is. It's not -- it doesn't have anything to do with whether it's clothing items or
17 anything else. It's just personal property, that's the way the statute defines it.

18 MR. ROSE: That's correct, Your Honor. And that's why we would prefer the
19 State's version, which leaves it at personal property.

20 MS. SPELLS: And, Your Honor, we would submit all of our earlier arguments
21 with regard to this. Again, it is a negatively phrased inverse with regard to our
22 theory of the defense and with regard to what the State has charged here and they
23 do have the burden of proof with regard to proven what they have charged. So we
24 didn't add any additional language, we didn't make up any additional language, we
25 simply put what they wrote in their information.

1 MR. ROSE: And, Your Honor, we would have no objection to giving this
2 instruction if it were to exclude the words, to wit: miscellaneous clothing items and
3 keep it as a, you know, reverse *Crawford* instruction or inverse instruction. It's just
4 our big issue with it is that, our fear is that it redefines the actual elements of the
5 crime itself.

6 THE COURT: Well, I mean, it's kind of difficult to strike out the exact
7 language that's contained in the Information even though it's not definitive of the
8 crime. It's exactly the language that's in the Information.

9 MR. ROSE: And it is, Your Honor. Again, our concern is just that because of
10 the rest of the instruction as it is, is a definition or is an inversed, I guess, including
11 the definition.

12 THE COURT: Well, you --

13 MR. SCHWARTZ: No other piece of the allegation is defined. The person,
14 Julian Munoz, is in the Information. He's not in this instruction. The only thing that
15 we're including is now this definition of personal property, which is in the Information.
16 They're free to argue all day about it. That information is there. That's the charging
17 document.

18 THE COURT: Here's what we're going to do. I'm not going to insert it. I'm
19 going to -- I will massage this on page eight, this adverse instruction regarding
20 reasonable doubt. I don't have any trouble putting that in. And you can argue
21 anything you want to argue in regards to the personal property aspect of the crime
22 and the miscellaneous clothing items is certainly open for your version of your
23 defense.

24 MS. SPELLS: So the Court is not admitting it at eight at all?

25 THE COURT: No, eight I'm letting in.

1 MS. SPELLS: Oh, okay.

2 THE COURT: I'm going to -- I don't have any problem with that. It's an
3 adverse, if you fail to --

4 MS. SPELLS: Okay.

5 THE COURT: -- be convinced beyond a reasonable doubt. And we'll put it
6 after five, that will become six, and then we'll just renumber the rest of them.

7 MR. ROSE: So is it coming in as written, Your Honor or?

8 THE COURT: Yeah.

9 MR. SCHWARTZ: I thought you had said you would strike the miscellaneous
10 clothing item portion because that was what they were going --

11 THE COURT: No, I'm striking the miscellaneous clothing. I'm not even -- I'm
12 not inserting -- their page seven, I'm not inserting at all.

13 MR. SCHWARTZ: And we're talking about page eight has that same
14 language.

15 MR. ROSE: Page eight has that same language.

16 THE COURT: Oh, it does?

17 MR. ROSE: Yes.

18 MR. SCHWARTZ: That was our issue.

19 THE COURT: Oh, okay. I see what you're talking about.

20 MR. SCHWARTZ: And we're fine with eight if we just strike that, to wit:
21 miscellaneous clothing items and keep it consistent with the law as stated.

22 THE COURT: Okay. I agree with it you completely.

23 MR. SCHWARTZ: Okay.

24 THE COURT: It's just going to be taking of personal property from the person
25 of another, strike that part out, and then it's an adverse reasonable doubt instruction.

1 So somebody's going to have to fix that.

2 MR. ROSE: Yes, Your Honor.

3 THE COURT: So what will be stricken out is the words, of an unlawful taking
4 of personal property, and then we'll strike out, to wit: miscellaneous clothing items,
5 and so it will read personal property from the person of another. And that is going to
6 be instruction six.

7 Okay. Now, this petty larceny concept. I have heartburn over this
8 because petty larceny as opposed to grand larceny involves the value of property
9 and nobody has even, with the exception of the price tags on a couple of those
10 items, nobody has ever even mentioned value.

11 MS. SPELLS: Your Honor, actually we did. I questioned Mr. Munoz on the
12 stand yesterday with regard to the total of all of the items taken. And I actually
13 approached the witness with his report and asked him whether or not he had listed
14 prices on his T.J. Maxx incident report. And the testimony that went forth was that --
15 let's see. I wrote it down. But he said less than an amount. And I don't know if we
16 went high and I asked him less than \$500 or -- but he did make a statement with
17 regard to value.

18 THE COURT: Well, if I remember his testimony, he only identified a portion of
19 the property that was taken because some of the items were taken by the Defendant
20 allegedly after he had left the room with the screen and --

21 MR. ROSE: And, Your Honor, I think the testimony was asked, you know, as
22 to all of the items if they'd be less than \$500, and I think he did answer affirmatively
23 to that it would be. However, the State's position is that larceny, be it petty larceny
24 or grand larceny, is not a lesser included offense. There's actually a Court of
25 Appeals case from July 27th of this year, that's *Naylor v State*, N-A-Y-L-O-R, v

1 State, Docket Number 69571. It's actually a relatively brief opinion. I have multiple
2 copies of it with me. And in there the appellate court stated as follows: we conclude
3 the District Court did not abuse its discretion. Robbery is a general intent crime that
4 requires an element of force or intimidation in taking property from a person or
5 taking property in the presence of a person, whereas larceny is a specific intent
6 crime that does not require force or the presence of that person. Thus, as *Naylor's*
7 counsel acknowledged at trial larceny is not a lesser included offense of robbery.
8 Because robbery is not a lesser included offense of robbery we would ask that this
9 not be given because this along with the one after it, which involves the lesser
10 included offenses is simply an aggregate because it's not a lesser included offense.

11 Moreover, under *Peck v State*, W16 Nevada 840, a lesser related
12 offense need not be instructed. Moreover, we would object to the instruction on any
13 lesser related offenses, because the State has had no -- or has not wanted to nor
14 tried to nor attempted to prove any of these other lesser related offenses. We could
15 have done so. We specifically choose not to. And we would ask that because this
16 not a lesser included at best it's a lesser related that this instruction not be given. I
17 have copies of that case for both defense counsel and Your Honor.

18 MS. SPELLS: Your Honor, our position would be that it does conform with the
19 testimony that has gone forth. It is something that we would be arguing in our
20 closing arguments. And with regard to the case the Court has the decision to make
21 whether it's a lesser related or whether it's a lesser included the Court still has the
22 authority to allow for this jury instruction to go forth. If the State has an issue, and is
23 indicating that they believe it to be a lesser related, then we would withdraw jury
24 instruction number ten. However, jury instruction number nine would still be on.

25 THE COURT: Page nine?

1 MS. SPELLS: Yes, page nine, I apologize, versus jury instruction of defense
2 proposed page ten.

3 THE COURT: Okay. Here's what we're going to do. I'm not -- I had
4 heartburn when I just read it because it's a completely different type of offense
5 between larceny and petty larceny and robbery. You can certainly argue that this is
6 nothing more than a petty larceny and but -- and you can say, and if you find that it's
7 petty larceny and not anything else, then you just got to find the Defendant not
8 guilty.

9 MS. SPELLS: Your Honor, the --

10 THE COURT: If that's all the evidence indicates to the jury, that there was a
11 theft of a property but there was no force or intimidation utilized, it would amount to
12 a petty larceny. But he's not charged with petty larceny so you've got to find him
13 innocent.

14 MS. SPELLS: Your Honor, the issue with that is that the jury is not going to
15 know the definition of petty larceny. This particular jury instruction only gives them
16 the definition of petty larceny so we can't very well --

17 THE COURT: You can argue it.

18 MS. SPELLS: -- argue --

19 THE COURT: You can argue it all you want.

20 MS. SPELLS: -- without them knowing value.

21 THE COURT: You can argue it all you want. I mean, apparently everybody
22 acknowledges the only testimony in regarding value would make it a petty larceny
23 not even a grand larceny. And you can argue that but we're not going to confuse
24 them by putting this in. It's not a lessor included. I guess, it's a lessor vaguely
25 related. I'm not putting it in.

1 What about the -- when a person has committed, under page ten.
2 You've got three other -- no, two other pages.

3 MS. SPELLS: Well, considering the Court's ruling with regard to our page
4 nine, we would have to just submit it to the Court.

5 THE COURT: Okay. And we don't use ten either then.

6 And your circumstantial one on page 11, is there anything that -- it
7 seemed to me like we already have an instruction, don't we?

8 MR. ROSE: Your Honor, this one -- so this one the State would acknowledge
9 is an accurate statement of the law under *Supranovich*. However, the Court has
10 made it clear that this is one that is discretionary on the Court. It is neither an abuse
11 of discretion to give it or to decline to give it. The State's preference would be that
12 we not give it. The State's concern is that although it has been approved of in one
13 particular case that it still has a tendency to confuse the jury, in that it can invite the
14 jury fairly easily to look at any one piece of evidence and decide does that one piece
15 of evidence have multiple inferences that be drawn from it, and then looking at that
16 piece of evidence in solo decide, oh, well, because one of those pieces of
17 evidence -- or one of those inferences points towards acquittal and not towards guilt,
18 we'll assume that piece of evidence tends towards guilt although -- or, sorry, tends
19 towards acquittal even though when you look at all of the evidence together, which
20 is what they're supposed to do, it makes the multiple inferences that might be drawn
21 from one piece of evidence more or less reasonable. And that standing alone one
22 might have two, equally reasonable inferences. But the in combination with
23 everything else it makes some of those inferences more or less reasonable. And we
24 just think that the instruction as written, although, again, an accurate statement of
25 the law and not an abuse of discretion to give is also not an abuse of discretion not.

1 to give it. We would prefer that not be given due to the tendency to or the concern
2 to confuse the jury as to how they're to look at each piece of evidence both solo and
3 altogether.

4 MS. SPELLS: Your Honor, we --

5 THE COURT: I'm given it. I don't think there's anything wrong with it. It's
6 accurate. We're going to put it in after proposed seven, between seven and eight.
7 Seven is the one that, the evidence which you are you to consider consists of the
8 testimony blah, blah, blah, blah, blah. And it touches upon direct and circumstantial
9 evidence and it would be appropriate to insert this instruction right after that.

10 So, now, we're going to have go back and actually put ink on these
11 instructions.

12 MS. SPELLS: Your Honor, we did submit a verdict form.

13 THE COURT: Your verdict?

14 MS. SPELLS: It's an inverse of what the State had. We also included the
15 guilty of petty larceny, but I do understand the Court's ruling with regards to that.

16 THE COURT: Okay. We went through it -- do you have any objections to
17 their verdict form? Without the -- without the --

18 MR. ROSE: Your Honor, the State's position is we would prefer to use our
19 verdict form; really the only difference between the two is the ordering of it. And I
20 believe that given the fact that the State does have that burden of proof, we do have
21 to prove all of the elements they will be instructed. And it will be argued to them
22 repeatedly about that burden of proof that going from not guilty to guilty of robbery
23 with use then to guilty of robbery doesn't make as much sense as just following right
24 down the line with the burden of proof.

25 THE COURT: Here's how we're going to do it. I don't have any -- here's how

1 we're going to do it. It's going to say, count one, robbery with use of a deadly
2 weapon. The first choice is going to be not guilty, the second choice is going to be
3 guilty of robbery, the third choice is going to be guilty of robbery with use of a deadly
4 weapon. It's just going to go right down from not guilty, in terms of seriousness, and
5 the third choice is going to be robbery with use of a deadly weapon. So somebody's
6 going to have to redo those.

7 MS. SPELLS: Your Honor, if I may just briefly put on the record the few
8 things that we had prior to going on the record.

9 THE COURT: Sure.

10 MS. SPELLS: And, I believe, that our proposed jury instructions were actually
11 filed so that they would become a part of the record should it --

12 THE COURT: They will be in just a second. When we -- I'm going to go
13 through and we're going -- I don't even know how many there are. We're going to
14 make copies and we're going to put numbers on them. So it's one, two -- the sixth
15 instruction somebody's going to have to redo and take that language out.

16 MR. ROSE: I'm working on that now, Your Honor. I'll e-mail it to the Court in
17 just a moment.

18 THE COURT: 25 instructions, well under my 39 limit, and then there's going
19 to be a revised verdict form.

20 MR. ROSE: Yes, Your Honor. I've made the alterations to instruction
21 number -- I think it's six and to the verdict form. I'll be e-mailing that to the Court in
22 just one moment.

23 THE COURT: Okay, excellent.

24 [Colloquy between District Attorney and Defense Counsel]

25 MS. SPELLS: Your Honor, so just briefly a few things. We did speak with

1 Mr. Harvey and he's fine with us adding the jury instruction that's already apart of
2 the packet indicating that whether or not he testifies is not an area for the jury to
3 comment on.

4 Before going on the record, we did discuss a few jury instructions. We
5 discussed defense proposed jury instruction, which was on page three of that
6 packet, it was an instruction with regard to credibility. We just submitted ours and
7 the State also submitted there's and the Court preferred the shorter version, which is
8 going to be given in the packet.

9 Additionally, the defense proposed an alternative -- or I apologize -- the
10 defense did not propose an alternative to the State's, in order to use the deadly
11 weapon there need not to be conduct which actually produces harm but only
12 conduct which produces a fear of harm or force by means or display of the deadly
13 weapon in aiding in the commission of the crime. Our position was that the *Allen*
14 case was not good case law, that we believe this came out of head note two and
15 that we believe that that head note was actually overturned. We also indicated to
16 the Court that these cases were decided before the legislature enacted NRS
17 193.165, which defines the deadly weapon statute. We indicated to the Court that
18 we thought that this was duplicitous and not necessary given that we were having a
19 jury instruction which did define the deadly weapon statute. And the Court heard
20 argument and decided to include that in the packet that's being given.

21 Additionally, the defense proposed an alternative to the State's flight
22 instruction. Our main concern was with regard to the last paragraph. We made
23 argument to the Court that it was our position that that was instructing on kind of the
24 jury's province and that they had the, as being the trier of facts, it was their
25 determination as to -- make a determination as to what they believed the reason of

1 the flight was, what weight to be given, and how it should be considered in light of
2 the other factors of the case. The Court heard argument on that.

3 We also indicated that many of the cases that were cited by the State in
4 their proposed jury instruction, which is being given mirrored the language that we
5 had in ours and so we did prefer ours, which is being, I believe, made a part of the
6 record as a proposed but not admitted jury instruction.

7 THE COURT: Kind of going about that kind of half-ass backwards. I'm
8 supposed to ask you -- let me get these numbered.

9 Are all our jurors here? Even --

10 THE MARSHAL: There's a note there for you.

11 THE COURT: Perfect. Our juror in the number nine spot found a babysitter.
12 She did not bring her kids to court. So we dodged a bullet.

13 MR. SCHWARTZ: She didn't trust us with her kids, I guess.

14 THE COURT: Apparently not.

15 MR. ROSE: And I've just sent the instructions to, I think it's the JEA maybe,
16 Ms. Walsh?

17 THE COURT CLERK: [indiscernible]

18 MR. ROSE: Okay. And also to defense counsel and to Mr. Schwartz as well,
19 that's only the two that were amended. It's not the whole packet.

20 THE COURT: Okay.

21 MR. ROSE: I can do that if we need to.

22 And if it looks sketchy, that is a personal e-mail account.

23 MS. JONES: It's okay you're not running for president.

24 MR. ROSE: No, not any time soon.

25 MS. SPELLS: And, Your Honor, while you're numbering, can we just put

1 something on the record.

2 THE COURT: Certainly.

3 MS. SPELLS: The parties talked about this last night. At this point we don't
4 have a lot of information but we did just want a complete record of some of the
5 things that did occur. We were informed last night that Mr. Appel was approaching
6 other witnesses, giving out his business card, things of that nature. Obviously the
7 admonishment from the Court is not to discuss your testimony. So at this point we
8 don't know the specific natures of those conversations. All we know is that business
9 cards were handed out. So we just want the record to show that we were informed
10 of that. We're not requesting that the Court do anything at this particular time.

11 And the other thing that I did just want to put on the record is that as the
12 jury was exiting the courtroom yesterday, and I don't believe Mr. Schwartz is still in
13 the building. I don't know if Mr. Rose was a part of that conversation but we did
14 discuss that one of the jurors was, in our opinion, waving to the attorneys at the
15 State's table. If the Court would just, you know, admonish the jurors again that it is
16 not appropriate to make hand gestures to either side. We just wanted to put that on
17 the record --

18 THE COURT: All right.

19 MS. SPELLS: -- as far as --

20 MR. ROSE: And, Your Honor, just--

21 THE COURT: At this point I don't think there's anything that I can do about it.
22 I would love to be able to do something about it. But I think that's pretty offensive
23 and totally out of line.

24 MR. ROSE: And, Your Honor, I think Mr. Schwartz is coming back in right
25 now. I think he actually had the chance to talk to Mr. Appel briefly about trying to get

1 some more information about what was happening. Because the information that
2 we had at the time was not clear as to when the discussion occurred if it was before
3 or after the testimony of any of the individual parties, et cetera, or what was
4 discussed.

5 And, then, we did speak very briefly about the actions of that particular
6 juror. I believe, it was, you know, a general wave towards the parties. I don't know
7 if it was directed at anybody in particular. I don't think any parties responded to it,
8 nobody returned a wave, nobody really did anything else. It might be she just was
9 simply trying to be friendly. None of us know her, none us have spoken with her.
10 So that's just kind of our point of view on that one.

11 I don't know if Mr. Schwartz had the chance to actually talk with Errol
12 about his testimony or his -- not testimony -- his discussions or interactions with any
13 other witnesses before or after his testimony.

14 MR. SCHWARTZ: I did. I called him this morning and I just mentioned that
15 he was not to be talking about the case with anybody until the case was over, even
16 the other witnesses. And he said specifically that he did talk with some of the other
17 witnesses outside and that he was simply just having chitchat with them about his
18 job and nothing at all related to case.

19 THE COURT: Okay.

20 MS. SPELLS: Your Honor, if we can identify that juror, it was Melissa Svejda.

21 MR. ROSE: That's correct. I don't remember what --

22 MR. SCHWARTZ: It's Ms. Svejda.

23 [Colloquy between District Attorney and Defense Counsel]

24 THE COURT: All right. I have 25 instructions. Paula is going to take the
25 pencil marks off. I've got 25 instructions, plus the revised verdict form.

1 MR. SCHWARTZ: Are we still on the record, Your Honor?

2 THE COURT: Yes, we are.

3 MR. SCHWARTZ: Just for the record, it was juror number ten, Melissa
4 Svedja.

5 MS. SPELLS: Thank you.

6 MR. ROSE: Just because nobody can pronounce her last name.

7 THE COURT: Okay. So do you want to wait until the copies are all made
8 before -- I mean, there's 25 instructions, you know which the ones the Court's
9 improving. Does the defense have any specific objections, other than what you've
10 already specified as to those 25 instructions?

11 MS. SPELLS: No, Your Honor.

12 THE COURT: I have in front of me instruction, on page three of your
13 proposed instruction, page nine, page ten, page seven, page eight, page nine of the
14 defense proposed instructions that were not given. Do you have any other
15 proposed instructions that were not given?

16 MS. SPELLS: Can you go over those numbers with me again, please.

17 THE COURT: Well, I'm using the page numbers.

18 MS. SPELLS: Sure.

19 THE COURT: Page three.

20 MS. SPELLS: Yes.

21 THE COURT: Page seven.

22 MS. SPELLS: Yes.

23 THE COURT: Page eight and page nine. Excuse me, seven, nine, and ten.

24 MS. SPELLS: That's correct.

25 THE COURT: Okay. Any other instructions, proposed instructions, that were

1 offered and not given?

2 MS. SPELLS: No, Your Honor.

3 THE COURT: Okay. And have you seen the revised form of verdict, the one
4 that goes guilty -- I mean, not guilty, guilty of robbery, guilty of robbery with use of a
5 deadly weapon?

6 MS. SPELLS: I have not seen it but we've discussed it, Your Honor.

7 THE COURT: Okay. So you're familiar with it?

8 MS. SPELLS: Yes.

9 THE COURT: Do you have any objections to it?

10 MS. SPELLS: No.

11 THE COURT: Okay. As far as the State's concerned, the 25 instructions, do
12 you have any objections to those 25?

13 MR. SCHWARTZ: No, Your Honor.

14 MR. ROSE: No, Your Honor.

15 THE COURT: I have an instruction that's not on a page. It was originally
16 pencil marked as State's Proposed 14, prolonged physical pain necessarily
17 encompasses some physical suffering, that's the instruction that the State offered
18 that I declined to give, include. Do you have any other proposed instructions that
19 were offered and not given?

20 MR. ROSE: I -- no, I believe any others that we had initially submitted were
21 then withdrawn by consent of the parties.

22 THE COURT: Okay. And you're familiar with the form of verdict?

23 MR. ROSE: We are.

24 THE COURT: Any objection to it?

25 MR. ROSE: None, other than what was stated previously.

1 THE COURT: Okay. All right. So consider the instructions and the form of
2 verdict settled.

3 Can we start this trial?

4 MR. ROSE: I think we're almost done.

5 MR. SCHWARTZ: Perhaps when Ms. Jones gets back we'll be ready to roll.

6 THE COURT: Okay. We have -- all of your jurors are here, right?

7 [Colloquy between the Court and the Court Clerk]

8 [Brief pause in proceeding]

9 THE COURT: Are there going to be any additional defense witnesses?

10 MS. SPELLS: Your Honor, we are not going to call any additional witnesses.

11 THE COURT: Okay. Paula is making the instructions, so in that case then
12 we're just going to go right into the instructions and closing.

13 MR. ROSE: Yes, Your Honor.

14 Do we need to have the defense rest on the record?

15 MS. SPELLS: Yes.

16 THE COURT: Is that correct, the defense rests?

17 MS. SPELLS: Yes, but I do think we would need to do that in the presence of
18 the jury.

19 THE COURT: We'll do it in front of the jury.

20 MR. ROSE: Thank you, Your Honor.

21 THE COURT: I will announce that the defense has announced that they have
22 rested, and I'll have you verify that.

23 MS. SPELLS: Thank you.

24 THE COURT: All right. And as soon as we get the copies done we're ready
25 to wrap this up.

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[Recess taken at 10:40 a.m.]

[Trial resumed at 11:00 a.m.]

[In the presence of the jury panel]

THE MARSHAL: All rise, please.

And be seated.

THE COURT: Will the parties stipulate to the presence of the jury.

MS. SPELLS: Yes, Your Honor.

MS. JONES: Yes, Your Honor.

MR. SCHWARTZ: Yes, Your Honor.

MR. ROSE: Yes, Your Honor.

THE COURT: All right. Good morning.

THE JURY PANEL: Good morning.

THE COURT: Sorry about that little delay. The defense has announced that they are resting, that they've concluded their witnesses; is that correct?

MS. SPELLS: Yes, Your Honor.

THE COURT: Okay. So what we're going to do now is wrap this up. I'm going to read you the instructions on law and you each have a copy of these instructions. I urge you to follow along. It'll be nice to do it kind of informally but this is real important and I need to read this to you word for word. All right. When I get done going through the instructions with you we're going to have closing arguments. What to expect, the State goes first, they make the initial closing argument, followed by the defense closing argument, and lastly, because the State has the burden of proof, they get the last portion of closing arguments, then you'll start the deliberation process.

So, again, I think I've told you this several times. When they start going

1 through their closing arguments, a good portion of the closing arguments are going
2 to refer to these instructions. So do not hesitate to make notes, if you feel it's a
3 necessity. Write on your copy of the instructions because you'll be able to take
4 those instructions back into the deliberation room with you, okay.

5 All right. So here we go.

6 [Court reads jury instructions]

7 THE COURT: All right. Counsel, ready to go?

8 MR. ROSE: Yes, Your Honor.

9 THE COURT: All right.

10 MR. ROSE: Judge, may I proceed?

11 THE COURT: Yes.

12 MR. ROSE: Thank you.

13 Can you guys see the TV okay? Would it be better if we moved that
14 over?

15 Tom, can we move that a little bit closer?

16 THE MARSHAL: Is that better?

17 MR. ROSE: Thank you.

18 **CLOSING ARGUMENT BY THE STATE**

19 MR. ROSE: Good morning ladies and gentlemen.

20 THE JURY: Good morning.

21 MR. ROSE: We're getting there, I promise. Yesterday Ms. Jones stood up
22 and gave you her opening statement, and there were a number of things in there
23 that were interesting, that kind of caught my ear. And one of those was the fact that
24 she said this case was a simple case. And to a certain extent, I agree. There are
25 actually a number of facts in this case that aren't in serious dispute by the parties,

1 the fact that the Defendant, Alfred Harvey, went to the T.J. Maxx on March 30th,
2 2016, he enters the store, selected a number of miscellaneous items, put some of
3 those in his jacket or in his pockets, and he left the store without paying for those
4 items. He came into contact with Julian Munoz outside, he handed back two of the
5 wallets, and nothing else, but there's some other interaction there, he then returns to
6 the U-Haul and drove off. He ended up stopping that U-Haul a little while later, he
7 was contacted by the police, and in the U-Haul they found a number of other
8 miscellaneous items still with the T.J. Maxx stickers on them. Those facts aren't
9 really in serious contention at this point.

10 So really what we're looking at, the crux of this case, the heart of it,
11 comes down to the Defendant's actions and choices during his interaction with
12 Julian Munoz. I submit to you, ladies and gentlemen, that when we look at all of the
13 evidence, when we consider all the testimony, those actions and those choices and
14 what actually occurred there will become clear, that you will find that the appropriate
15 verdict is guilty of robbery with use of a deadly weapon.

16 Now, in every criminal case, from the simplest trespass to first degree
17 murder, there are two essential things that the State has to prove every time. The
18 first, the number of crimes that we've charged were actually committed, and,
19 second, that the Defendant is the person who actually committed those crimes. So I
20 actually kind of want to touch on the second one of those first, I think we can get that
21 out of the way, that the Defendant is the one who committed the crimes. Well, what
22 evidence do we have of that? The first thing we heard was from Julian Munoz, the
23 loss prevention officer, the victim here. He testified that he interacted with the
24 Defendant. He was within arm's reach of him. He identified him here in court. He
25 gave a description at that point of the Defendant. And you'll have the video which

1 you can go and compare the description to. You also heard from Shaun Bramble,
2 the other loss prevention officer, who, he told you when the Defendant was in the
3 store for the most part he wasn't really paying attention. He wasn't one of the
4 people that Shaun was focused on, that that after Julian left that Shaun took over
5 controlling the cameras and he was the one, you can watch as the camera zooms in
6 and pans and follows, he's the one now paying attention to the Defendant, then
7 Shaun left and went outside and saw the rest of the interaction outside.

8 Now, you also heard from Errol Appel, I'm sure you all remember him,
9 and he told you that although he didn't see the incident itself, he was still in his car at
10 that point, he heard the immediate after effects of the incident, and he ended up
11 following the Defendant. He followed that U-Haul and he told you that the same
12 person who got into the U-Haul, in the driver's seat, was the same person that he
13 saw get out of the U-Haul and get taken into custody by the police and that person
14 was the Defendant. The Defendant was that person taken into custody, you heard
15 that Julian -- or that Errol followed that U-Haul the whole way, didn't see any other
16 U-Hauls, kind of a distinctive vehicle, and he managed to follow it from point A to
17 point B. You also heard about the license plates, you could hear that Julian gave
18 the license plate to the 9-1-1 operator, at one point had to correct the 9-1-1 operator
19 as to, was it a T or a G that was the second letter of that license plate. And then you
20 heard that when they got to the end of it there's a U-Haul there and the plates
21 matched. And then after the Defendant was taken into custody at the scene, they
22 found the stolen items, the same things that you can see on the video, and I
23 encourage you to go back and watch the video, the same things that you can see
24 being taken on the video are the things that were taken and found in the U-Haul and
25 they still have the T.J. Maxx stickers on them.

1 Now, if that's not enough, you also heard from Tara Harvey, the
2 Defendant's wife, that she identified for you that the person on that video, the person
3 that you see there, was the Defendant. She also testified that the Defendant was
4 the one driving the U-Haul. He was the only one driving. Then, lastly, if you don't
5 want to believe any of the people and what they said, you can go back and you can
6 look at the video yourself. You can compare the video to the testimony and use that
7 to kind of determine how much weight you want to give to the spoken testimony.
8 You can look for yourself, the Defendant is sitting right there, you can compare what
9 you see in the video to the Defendant to determine for yourself whether or not that is
10 the same person.

11 And remember how I mentioned that we had the description of Julian,
12 what he said, I want you to listen to the description that he gave and determine
13 whether or not you think he was accurate.

14 **[State's Exhibit 39 played]**

15 You can listen for yourself. Was he talking about the same person?
16 And you can also listen, because you'll have the 9-1-1 calls, and you can listen to
17 them however much you want to, you'll get to hear what Errol had to say. Was it the
18 same person that he saw that was being taken into custody?

19 Now, we'll go back. We had those two things that we needed to prove.
20 One, that the crimes were committed, and two, that the Defendant was the person
21 who committed the crimes. And I suggest to you, ladies and gentlemen, that we
22 have presented to you sufficient evidence to find that the Defendant committed the
23 crimes.

24 So, we'll move on now -- I have my checkmarks mixed up. We'll move
25 on now to whether or not the crimes themselves were committed. What is a

1 robbery? You've heard the term a lot, you've heard it on CSI or Law and Order, you
2 actually have an instruction, it's instruction number 11 in your packets, it actually
3 defines the elements of robbery. It defines them this way, it's unlawfully takes
4 personal property from another, or in his presence, against his will, and with force or
5 fear of force or violence, that's what the elements of a robbery are. And you can find
6 those again, it's instruction 11. I urge you to look at it. Just kind of walk through
7 these and kind of discuss a little bit more about some of them. Now, it has to
8 include the element of force or fear of force. With that, force can be used in a
9 couple of different ways, you have an instruction on this as well, it's part of that
10 instruction, you can either use the force to take or keep possessions of property, you
11 can use the force to overcome resistance to the taking of the property, or you use it
12 to help you get away, to facilitate an escape.

13 Now, if you are ensuring that, if you're overcoming resistance to the
14 property or to the taking of the property or if you're trying to get away, the amount of
15 force that is used doesn't matter. Also keep in mind that the value of the items, that
16 doesn't matter either, it's not an element. So even though we're dealing here with a
17 couple of wallets, some moisturizer, some face cream, some perfume it doesn't
18 matter, not an element of the crime.

19 Now, part of that fear, part of what happens to a person, often
20 somebody will actually be afraid, sometimes that person happens to be superman,
21 they're not afraid. But the law will also tell you, and you'll have the instruction in
22 there, that if the circumstances of the robbery are such that you would put an
23 ordinary person in fear for their safety, such that that person would give up their
24 property to ensure their own safety, it's still a robbery. You don't have to prove
25 actual fear because in that circumstance the law will presume it. So even superman

1 can be robbed as odd as that might sound.

2 So we go back to our elements. Unlawfully takes personal property
3 from another, or in his presence, against his will, and with the use of force or fear of
4 force or violence. We're going to walk through these and through the various
5 elements and we can talk about what evidence we have which proves up these
6 elements. So, the first one, the unlawful taking of personal property, well, as you
7 see here, and you'll have this picture, you can take a look at it, we've discussed it
8 probably ad nauseam, you're probably getting sick of it, but the items that we're
9 talking about here the wallet, the Chloe perfume or fragrance, the moisturizer, and
10 facial cream. Now, you heard that two of the wallets were given back but that the
11 fragrances, the cream, the moisturizer, and that other wallet everything you see in
12 that picture were all found at the scene. Now, you also heard testimony that, and
13 you saw the video where the Defendant was concealing these items in his pockets,
14 that he walked out without paying, that he kept those items, they were unlawfully
15 taken, from the person of another or in his presence. Well, this occurred just outside
16 of T.J. Maxx, and Julian was still within arm's reach, remember he had to receive
17 those two wallets back, he's still within his presence and still on the curb within that
18 perimeter. Remember Julian told you he's not allowed to try to make an arrest or try
19 to get the property back once it breeches that parameter, which is the width of the
20 store and out to the edge of the curb, so all of this is still occurring in close proximity,
21 both to the T.J. Maxx and more specifically to Julian himself and against his will.
22 Well, Julian asked for the items back. He might not have known exactly what things
23 were still there but he asked for the rest of the items. He even said, hey, let's go
24 inside. Let's not do this out here in front of everybody. He wanted those items back.
25 The Defendant refused.

1 Now, you have the force or fear of force or violence, again, kind of the
2 crux of the robbery portion of this, what distinguishes it from simply, you know, some
3 kind of theft. Well, you heard testimony that the Defendant pulled out a knife, you
4 heard Julian say that he could here that knife blade click into place, you heard -- he
5 described it as approximately four inches long and looked kind of like a black blade.
6 He was able to give you size and color and you heard that it was a consistent
7 description between when he gave it then and when he gave it now.

8 Now, you also heard that Shaun came out and saw Julian shortly after
9 this happened, and although he couldn't really describe it perfectly why he said
10 shocked, he said that Julian looked shocked. One of those things where you look at
11 the person their eyes are wide and they look shocked. And then finally Julian called
12 9-1-1. You heard Julian testified he doesn't really like to wait around for two or three
13 hours before Metro will arrive on a theft like this, where it's only a couple of items,
14 it's not a ton of money. He could walk back into the store and simply write up his
15 report and go about the rest of his day but this was something that was important
16 enough, that was significant enough to him that he called 9-1-1. You remember,
17 you'll have these 9-1-1 calls, you'll have both of them, you can play them and listen
18 to them if you want.

19 **[State's Exhibit 39 played]**

20 First thing he says, went out to stop a shoplifter and he pulled a knife on
21 me. Now, you can also look at, when we're talking about the fear and the force or
22 violence, look at how they reacted. They reacted the way you would expect
23 somebody to react if that person was placed with this threatening situation. Well,
24 you heard the 9-1-1 call, you'll get to hear the rest of it, listen to the tone of it, listen
25 to how he speaks. At one point he can't even remember the address of the store.

1 He gets it backwards. He has trouble remembering everything immediately because
2 he's still in that excited state. Listen to the tone of his voice, you could hear him on
3 the stand today, when he's not faced with a knife, and you can hear him in the 9-1-1
4 call. Ask you to compare the two of them in your own minds and determine is there
5 a change there, and if there is a change in the tone, why? What would be the cause
6 of that? Is it perhaps the fact that he's not faced with a knife when he was testifying
7 in front of you yesterday?

8 Now, remember his initial reaction was to stop -- he told you he stopped
9 dead in his tracks. He'd been following the Defendant the whole time. He'd been
10 walking along trying to reposition himself in front of him and then all of a sudden he's
11 going to stop dead in his tracks. Now, he could have gone after him to observe. He
12 can, you know, kind of go past that parameter to observe and maybe take down the
13 license plate or do something else. But he doesn't, instead he stops his pursuit, he
14 gives up right then, stops dead in his tracks. Now, what's the first thing he says to
15 Shaun, when Shaun comes out, and he couldn't remember the exact words, but it
16 was something to the effect of, he just pulled a knife on me, that's the first reaction
17 he had. And consider the reaction to Errol, when he pulls up and he says, hey guys,
18 what's going on? The statement that one of the two of them made to him was
19 something to effect of, we just got held up at knife point or we just got robbed at
20 knife point. The reactions at every step of the way are consistent with somebody
21 who has just been put into a threatening situation, who fears for their own safety.

22 And you can also look at some of the Defendant's reactions, and you'll
23 have the instruction here about flight. Now, remember flight by itself is not
24 conclusive evidence of guilt. However, it's one of many circumstances that you can
25 consider when you're determining whether or not the person is -- it has been proven

1 guilty or not. It's up to you to determine how much weight you're going to do give to
2 that.

3 Now, I've asked you to consider the Defendant's reactions, getting into
4 that U-Haul, actually being boxed in by Errol, as Mrs. Harvey testified to, getting out
5 and around Errol, driving off, as Errol told you, kind of weaving through the streets,
6 getting into the Desert Torah Academy, getting out of the van, running to the school,
7 either getting in or just getting to the doors before heading back to the van. Are
8 those actions -- are those reactions consistent with somebody who thinks that
9 maybe they've done something wrong and they need to flee?

10 Now, we've also alleged specifically that this robbery occurred with a
11 deadly weapon, with the use of a deadly weapon. Although we might have different
12 personal opinions by what we mean by deadly weapon, the law actually gives us a
13 very specific definition, and this definition is also in your packet. It means one of two
14 things, it's either any instrument, which as it's normally designed is readily capable
15 of causing death or substantial bodily harm, or it's any instrument which, even
16 though maybe the way it's designed to be used, might not be doing that in the
17 manner in which it's used or threatened to be used is readily capable of causing
18 death or substantial bodily harm.

19 And forgive me, this might get a little tedious, we've got a lot of
20 definitions here, this is the law, but what do we must mean by substantial bodily
21 harm? That's something else that, again, could be used commonly but we have a
22 specific legal definition of it. It means several different things. That it creates a
23 substantial risk of death or serious permanent disfigurement or a protracted loss of
24 the use of part of your body or there's a whole separate portion of it, which is
25 prolonged physical pain. So what do we have at the end of it is any instrument

1 where in the manner that you actually use it or that you threaten to use it is readily
2 capable of causing prolonged physical pain. And I submit to you, ladies and
3 gentlemen, that the knife that was used was a deadly weapon, that four inch blade
4 that snaps into place, sufficient to cause fear in Mr. Munoz, that is a deadly weapon,
5 that four inch blade, in a manner which it's either used or threatened to be used can
6 cause substantial bodily harm. It can cause serious injury or just prolonged physical
7 pain. And why do we say that? Because of the reactions to it, the descriptions, and
8 the reactions to it.

9 And I've already covered this. So I'm not going to take up anymore of
10 your time with that.

11 Now, we told you -- I told you during opening statements that you're not
12 going to see the knife, the knife was never recovered, witnesses testified, officers
13 testified, they never recovered the knife. They looked around, they looked in the
14 van, they looked in the area, they never recovered the knife. Errol told you he never
15 saw a knife. He doesn't know what happened to it, you heard him on the 9-1-1 call,
16 you know, oh, so you don't know where the knife is? No, ma'am, we sure don't.
17 Mr. Munoz and Mr. Bramble they don't know where that knife went either. That the
18 law will also tell you that the State is not required to prove or to show that knife,
19 bring that knife to you, we still have to prove that it was there, that it was used, but
20 we don't have to actually show you the knife, we don't have to recover it. Why is
21 that? Well, you heard, from the officers, both of them, they weren't surprised that it
22 wasn't found. It didn't shock them. Why? Because there's substantial amount of
23 time and distance between where the incident occurred and the school where he
24 was actually apprehended. That it was even brought up during cross and then
25 redirect of one of the, I believe it was Officer Humpherys, that even notes in the

1 CAD, that it looks as if the Defendant may have discarded some property. It doesn't
2 say exactly what but may have discarded some property.

3 Now, we're asking you to listen to a whole number of people and
4 determine who to believe and what to believe and how much credibility you want to
5 give to each person. This is something that we do in our everyday lives. It's not
6 something that's new to us. It's a law specifically points out a number of things that
7 you can use to kind of help you in determining how much weight you are going to
8 give to that individual in their testimony. Their manner on the stand, relationship to
9 the parties, motives and fears, feelings and interests, opportunity to observe the
10 matters, the reasonableness of what that person says, and then the strength or
11 weakness of their recollection.

12 Let's talk for a couple of minutes about who said what from these
13 various factors. We heard from Julian, you heard from him that he went outside, he
14 talked to the Defendant, he asked for the wallets back, he knew that he wanted
15 those wallets, he saw those wallets being taken, he asked for those back, and he
16 got two back. And he said, I can still see other things that were on in, and I asked
17 him for the rest of the merchandise, and I asked him, hey, let's step back inside.
18 That's when the knife got pulled, that's when he immediately stops what he was
19 doing because he was shocked. Well, you got to see him on the stand, you got to
20 see how he interacted, how he responded to all of the questions.

21 Now, with the relationship to the parties, obviously, he's the victim here.
22 He probably got a bit of an interest in it. What are his motivations and fears? Is he
23 going to be required to pay you for those items? What -- does the outcome of this,
24 you know, matter to him? What are his motivations and how he testifies? Look at
25 how he testified yesterday compared to what he said in the 9-1-1 call and what he

1 said throughout the time between then and then -- then and now, excuse me. Does
2 he have a reason to try and blame somebody else for taking these items? Again, he
3 could have just gone in and written them off. He said, yeah, the guy broke
4 parameter. He couldn't grab him, couldn't arrest him. Why go to the extent of
5 claiming that the knife was pulled? What about his opportunity to observe matters?
6 Who could have possibly had a better view than he did? He was within arm's reach
7 at that point, nobody in between them. Was what he said reasonable? You have an
8 instruction in your packets on commonsense, that basically says when you come in
9 here we ask you just to look at the evidence from this case but the lens through
10 which you look at it includes your commonsense. You don't have to leave it outside
11 the courtroom. Using your common sense, were his statements reasonable? Were
12 his reactions reasonable? What he told you he did and fought and felt was that all
13 reasonable? And, finally, the strength of his recollection, was he somebody who
14 could barely remember bits and pieces of it? He only remembered the parts that
15 really helped him and he forgot the rest of the parts or was he somebody who was
16 able to give you a fairly consistent and thorough testimony, understanding the fact
17 that this occurred at the end of March.

18 Now, and I go through this with every single witness, what he was
19 seeing things with Mr. Bramble. What were his motives and interests here? What
20 are his relationships to the parties? None of them knew the Defendant, there's no
21 indication he had a grudge against him. As the defense pointed out, Shaun and
22 Julian, they're not best friends, they're not hanging out after work every day, they'll
23 have an eight-hour shift or two together, but it's not as if they're, you know, close
24 buddies. What about his statements? Were they reasonable? Did he remember
25 things appropriately?

1 And Errol, what are his motives? I mean, maybe he wanted to be a
2 bit of a hero, you know, he seemed like he was excited to be part of this.

3 You also heard from the officer that in cases like this, and calls like this,
4 about 50 percent of the time you'll have a civilian or somebody else unrelated to the
5 scene who will follow and try and help out at least for a portion of the time. So it's
6 not that Mr. Errol or that Mr. Appel was, you know, acting unusual. He was just
7 trying to help. He didn't know Julian. He didn't know Shaun. Doesn't know the
8 Defendant. He has no real relationship to them other than the fact he happened to
9 be outside of his wife's store that afternoon. What about his recollections? Did he
10 remember things well?

11 So we have all of that. We have all of how you look at the people and
12 how you determine, based on what they've said, how much weight you want to give
13 their testimony. But fortunately you don't have only the testimony itself, you have
14 other things which you can use to corroborate it, you have the 9-1-1 call and the
15 reaction to the events. Those first initial thoughts and feelings before they've had
16 time to think about it, before they've had time to come back into court and testify in
17 front of you, before they've had time to review their own reports, just their first, initial
18 thoughts and feelings and reactions documented and you can listen to them.

19 There's a video from inside the store, does their testimony about what
20 happened match up with the video? That video doesn't lie. It has no motivation. It
21 has no feelings. It has no relationships to anybody else. Now, what does that video
22 show? That video clearly shows the Defendant taking miscellaneous items from
23 around that store and putting them into his jacket.

24 The Defendant's behavior, what does his behavior say about what the
25 testimony you heard was? Does his behavior indicate to you that -- does it match

1 up with what they're saying he was doing and how he would be thinking at that point
2 in time. Then we have those items that were found in the U-Haul, those items still
3 had that T.J. Maxx sticker on them, did they match the items that you can see and
4 you've heard testimony that he was taking?

5 Ladies and gentlemen, this was a robbery. Remember the value is not
6 an element of this. He's not charged with the theft itself. Remember that actual fear
7 doesn't need to be shown, the circumstance -- of what a normal circumstance is
8 would put a person in fear such as they would give up that property. So even
9 though Julian testified that he was afraid for his own safety, that he looked shocked,
10 if that doesn't convince you, if that has a kind of circumstance that would put an
11 ordinary person, not superman, in fear for their own safety, it's still a robbery.

12 We go back to our elements, unlawfully takes personal property from
13 another or in his presence against his will, with force, or fear of force or violence. I
14 submit to you, ladies and gentlemen, that the evidence which you heard clearly
15 establishes each and every one of these elements.

16 At the end of the day, this is your verdict form, this is how you
17 determine the facts, you tell the Court how you've determined those facts and
18 applied them to the law. You'll see that you have three options: not guilty, guilty of
19 robbery, and guilty of robbery with use of a deadly weapon. I submit to you, ladies
20 and gentlemen, that it's not, not guilty. Not guilty is not the appropriate response
21 because if you look at all of the evidence that we've had, you consider all the
22 testimony, you weigh it, and you find all of the facts that you find, you'll find beyond a
23 reasonable doubt that the Defendant took personal property from another, or in his
24 presence, against his will, with the use of force or fear of force or violence.
25 Remember that force or fear of force doesn't have to be actual touching. It doesn't

1 have to be harm actually made. As long as it would cause a person to give up their
2 items. It can be used to overcome resistance to the taking of property, hey, let's go
3 back inside, give me the rest of the stuff or to facilitate escape, to get away.

4 So we're left with robbery and robbery with a deadly weapon. I submit
5 to you that the appropriate verdict is also not guilty of robbery. You had that
6 testimony about that knife, that four inch blade, it's black, you heard it click into
7 place, and all of the reactions of every individual involved with this were consistent
8 with the use of a knife. You know, we don't have it, we can't put it in front of you,
9 can't take it back into the deliberation with you, but the law says that we don't have
10 to, and the officers explained, it's not uncommon, not unusual.

11 So I suggest to you, ladies and gentlemen, that after you weigh all of
12 the evidence, you'll determine that the appropriate verdict is guilty of robbery with
13 use of a deadly weapon.

14 At the beginning of this case, when I first got up here, I told you this
15 case is about choices, the Defendant's choices. What I'm going to ask you to do
16 today is to find the facts as you do from the evidence, keeping these instructions in
17 mind, apply those facts to the law as provided to you by the judge, that you'll hold
18 the Defendant accountable for his choices. Every choice that we make in life has
19 consequences, and I'm asking you to hold him accountable for his actions. I'm
20 asking you to find him guilty of robbery with use of a deadly weapon.

21 Thank you very much.

22 THE COURT: Thank you, counsel.

23 Ready?

24 MS. SPELLS: Court's brief indulgence.

25 THE COURT: Just so the jurors are mentally prepared, when you start to

1 deliberate, we ordered you guys some lunch about an hour ago. So you can have
2 some food.

3 CLOSING ARGUMENT BY THE DEFENSE

4 MS. SPELLS: Good afternoon, ladies and gentlemen of the jury. I want to
5 thank you for being attentive throughout this time, for bearing with us, and just
6 listening to all of the evidence. Now, is the time for our closing argument, after I
7 make argument, the State will have another opportunity to speak with you. During
8 that time period we just want to remind you that what you decide is the fact -- are the
9 facts in evidence in the case, that's your decisions.

10 So perception is not reality, everybody has different perception and our
11 perception is our point of view. Everyone has a point of view based on what their
12 story is, the way it happened according to you. Sometimes that is based on just
13 who you are as a person. Perception and memory go hand in hand. The way you
14 perceive something is going to be the way that you tell the story and that is going to
15 also come into play with your memory. I want you guys to remember when you are
16 thinking about all of the different witnesses and what they have said to you and all of
17 the different evidence that came from the stand, that memory is not a tape recorder,
18 you don't get to press pause, come back and resume like a movie. It's just not the
19 way it works. But our memory is definitely influenced by perception.

20 I don't know if you guys recall this or if you saw it or if you are a big avid
21 Facebook users or what have you, but this is a just an illustration as perception.
22 This is a picture of the exact same dress. Some people saw this dress as being
23 gold and white, other people saw this dress as being blue and black. Again,
24 perception and what you see, what occurs, is going to be based on the person that
25 you are and then when you get to tell your side of the story what you saw, what you

1 heard, that's going to be based upon your perception.

2 Let's talk about some of the things that affect your memory. Obviously,
3 we know this, this is just common experience, some of the things that would affect
4 your memory are stress, adrenaline, your emotions. Those are some of the things
5 that we have in this case, with the interactions of the different individuals. Now, you
6 heard from Julian Munoz, who got on the stand, and he told you that he's been
7 employed in loss prevention for approximately five years. But that each time he has
8 interaction with someone he still feels nervous. He still has some of that stress. So
9 that's going to be one of the factors that affect his memory, affect his perception of
10 what's going on.

11 Now, in my opinion this is a classic movie, it may not be a classic movie
12 for everyone, but I want to use this just as an illustration as perception and memory
13 and how things come and tie together. So you're looking at the case of Forrest
14 Gump, you have a lot of different players, and it's very important to note where does
15 the story start, who are the players, and what their story is. So, for instance, for
16 Forrest's mother, the story to her may be about Forrest breaking out of his braces
17 and learning how to run and that's a very significant story. It talks about tenacity and
18 things that are going on there. For Jenny, however, the story is completely different.
19 For her, her story, her perception, her memory is going to be about a childhood
20 relationship, being in love with someone and that love growing into adulthood. Now,
21 if you take Lieutenant Dan, his story is about friendship, about actions that
22 happened in the war. And if these individuals were to come into court and to testify
23 about things that happened, they're going to recount their story in a different way.
24 Some of them may be able to tell the story in a very linear fashion. Forrest's mom
25 being able to talk about tenacity and she can tell you the beginning to the end.

1 Other people may be coming in at the middle, they don't necessarily see the entire
2 incident so they can't tell you a very linear story, their story starts at a different time,
3 ends at a different time. Jenny may be able to give you her highlights. Her favorite
4 experiences. She may not tell you the full story. And Lieutenant Dan, well, if he
5 was telling a story, maybe he would use flashback, maybe he would tell you what
6 was the most important thing in flashback to other things that he found important.

7 Each witness in this case their story starts at a different time period,
8 they have their own point of view, their memory is going to be different as well.
9 We've talked about this, factors that are at play in our case, the adrenaline, common
10 sense, stress, and also training because we had a number of individuals who came
11 and talked to you about some training that they had, how they write reports, how
12 they are quote/unquote experts in a certain area, they at least have a lot of
13 experience, they have accustom of doing things and they're been taught and trained
14 that that's the best way to do it, and they -- there are reasons that they conduct
15 certain actions.

16 So let's talk about Julian Munoz. He is kind of the lead of this story. He
17 gives you a story about his employment with T.J. Maxx and he came and he told
18 you that he would consider T.J. Maxx a clothing store. He was an individual who in
19 telling you his story he wasn't very detail oriented. He said maybe two wallets,
20 maybe three wallets, at one point, during questioning on the stand, he indicated that
21 possibly there were up to four wallets that Mr. Harvey either concealed or stolen or
22 took. But when we talked about that he brought up his report and kind of went back
23 and forth.

24 He does not speak to Mr. Bramble, this is his co-worker, and he says
25 that he left outside of the store and Mr. Bramble was doing video surveillance and

1 mentioned some, like through a telephone call or what have you, that there were
2 additional items concealed, possibly taken. But before he goes to write his report,
3 which he indicated that he would look at, it would go to his upper management in the
4 store, it could possibly be used at a trial in a case, other people would be looking at
5 it. He didn't take the time to go speak to Mr. Bramble about other things that had
6 occurred, to finish documenting, and to be as detailed oriented as possible in his
7 reporting.

8 He talks to you about his boundaries and that's important because
9 that's his company policy and that ties into a person's motives and a person's
10 recollection of what they did, what they said, how they reacted.

11 Now, let's talk about the knife. And for Mr. Munoz it's unclear whether
12 we get the entire story for him. I would submit that to you. He came and he testified
13 and he said that he stopped short and the State, just in their closing argument,
14 indicated, that, you know, he retreated. He didn't continue to follow him. But we
15 heard from Mr. Appel that there were -- there was more than one person taking
16 pictures. You also heard from Mr. Munoz that he told the 9-1-1 operator, and you
17 guys heard the 9-1-1 phone call for yourself, information about the individual and
18 about the vehicle.

19 And I submit to you that you're not going to be able to see the vehicle
20 parked and the license plate of the vehicle parked in front of a Dollar Tree store, if
21 you're retreating back to the T.J. Maxx. And we showed you the map on a number
22 of different occasions and just the difference between those two stores would have
23 required some further advancement.

24 In looking at and weighing his testimony, I'd ask you to consider his
25 perception and his memory, the fact that he was anxious, he told you that on the

1 stand that he was nervous, whether or not he was compliant with his company
2 policy when he indicated that he was not supposed to pursue someone outside of
3 those boundaries, the width of T.J. Maxx and to the sidewalk, and his comments
4 about time and waiting. He doesn't necessarily like to wait for the police. It takes a
5 couple of hours unless it's something significant, something significant here like the
6 report of a knife being present.

7 Now, when considering the testimony of Mr. Bramble we get his story
8 and it's important to note that he didn't see anything. I mean, we've talked a lot
9 about his actions and some of the other people's actions, but what it boils down to
10 what you are all here to decide is whether or not Mr. Alfred Harvey is guilty of
11 robbery with use of a deadly weapon. Mr. Bramble didn't see anything. With regard
12 to that interaction he wasn't able to tell you that he saw a weapon. In fact, he didn't
13 see a weapon. He indicated that his role was very limited. He didn't share his
14 knowledge or the fact that he was taking photographs with officers. He didn't show
15 those photographs to Mr. Munoz.

16 He said Julian looked shocked. He didn't tell you that Julian looked
17 scared or frightful or in fear for his life. He said Julian looked shocked, like maybe
18 something had occurred that wasn't part of the ordinary. Now, I would submit to you
19 that there are a number of different reasons that a person looks shocked and we
20 talked about this. We talked about this when we were discussing circumstantial
21 evidence during our jury selection where the State submitted to you that if you were
22 in your home late at night, you'd gone to the bed, and before you went to bed there
23 was no water on the ground, you come outside and you see water on the ground,
24 would you conclude that it has been raining? And we talked about, okay, that may
25 be one conclusion, but there are a number of different conclusions that you could

1 come to. In fact, one of you indicated that maybe there was a movie set there and
2 they were filming a portion of the movie with rain and so they had water there to
3 make it appear that it was raining but it had not actually rained.

4 So here there are a number of different things. What we do know is
5 that Mr. Munoz asked Mr. Harvey to come back into the store with him and he
6 refused, okay, that's something that's a little different than the ordinary when he told
7 you normally, just come back, I fill out some paperwork, that's it.

8 With regard to Mr. Bramble's perception, his memory, and we've
9 discussed that he wasn't there. He didn't have much investment in this interaction,
10 in this case, because he works for organized retail crime. So this wasn't something
11 that was really something he did on his day-to-day job. He was trying to assist
12 Mr. Munoz to a certain degree but didn't have much investment. He told you that it's
13 not part of his job or company policy, his job description to apprehend someone, so
14 it's not something that he was going to be doing here. His actions weren't going to
15 be with regard to that. And that's important to note as well because you have the
16 interaction between Mr. Munoz and Mr. Bramble and Mr. Bramble coming out to
17 help Mr. Munoz and what are Mr. Munoz' thoughts and perceptions about his
18 actions and how Mr. Bramble may view those actions.

19 We heard from Mr. Appel. Now, I would agree with the State that
20 Mr. Appel indicated that he was happy to be a part of it. He was the Good
21 Samaritan. He wanted to be helpful. He was coming to the aid and to the rescue
22 and he follows the van. Now, when we're thinking about his perception and his
23 memory, I submit to you, listen to the 9-1-1 phone call, what we get from Mr. Appel
24 is that although he's trying to be helpful, he gives a lot of information that he really
25 has no ability to give. He says, oh, someone just pulled a knife out on these people.

1 He wasn't there. He didn't see it. He's in the parking lot in his vehicle. We don't
2 know where the knife is. Well, that's true he doesn't know where the knife is. But
3 the reality of the situation is that his story starts at the end of the story, that's
4 important as to whether or not a robbery with use of a deadly weapon occurred
5 because he's coming in after that. He didn't see any of the interactions with
6 Mr. Munoz and Mr. Harvey.

7 And there's a very significant difference of hearing something versus
8 seeing something. You hear something from a person, you tell another person, they
9 hear it, and by the time they retell the story there's going to be some things that may
10 be a little bit different, may sound a little bit different, somethings may be
11 emphasized, somethings may be de-emphasized. There is a huge difference when
12 you are viewing something firsthand or where you're hearing something from
13 another individual. And the perception of Mr. Appel is that he knew everything about
14 the case, he was able to give all the information that he was asked of.

15 We heard from Officer Nelson and Officer Humpherys, their story is that
16 they're trained officers, they've been working for the Metropolitan Police Department
17 for quite some time, they did a thorough investigation here, they told you that there
18 was also air traffic patrol involved, and they told you that, you know, you didn't hear
19 any stories of any issues. They conducted searches. Officers came and tell you
20 that Mr. Harvey consented to them going into his pockets, to doing the search, and
21 all of that. He was cooperative with that search. And upon finishing the search, not
22 only of Mr. Harvey, of his person, but also of this vehicle, they didn't find any knife.
23 What they did find was T.J. Maxx property. Their perception and their memory, they
24 indicated that they were concerned about officer safety, safety of others because
25 there had been a phone call out that maybe a knife was involved. So they wanted to

1 make sure that other people weren't going to be harmed.

2 Now, we heard from Officer Humpherys and he told you clear as day,
3 without any type of hesitation, that sometimes witnesses are mistaken in what they
4 speak, they don't always get it right. He told you that. He said here there was not a
5 knife found.

6 So we briefly heard from Mrs. Harvey. In considering her testimony,
7 you can consider the fact that she is married to Alfred Harvey. She was the
8 passenger in this vehicle and she told you that she was nervous. She was nervous
9 then, on that date, it was an unfamiliar situation for her, and she was nervous
10 coming here to testify to you guys. She indicates that she was the passenger in the
11 car, that there were two individuals taking photos. She saw two of them walk right
12 up to that vehicle and take photos with their cell phones, and that's not the same
13 story that we got from Mr. Munoz because he says he never took any photographs.
14 He didn't go up to that U-Haul vehicle.

15 She told you that Mr. Harvey is right-handed. We're going to discuss
16 that a little bit. She told you there was never a knife and that Mr. Harvey doesn't
17 generally carry a knife. Again, there was no knife found. She told you also that
18 when they were going to that school her daughter needed to use the restroom.
19 They were stopping at the school, this is not the situation where the cops are pulling
20 the individual over and stopped them at that school. They stopped at that school
21 and the cops then met them there.

22 Now, I submit to you, ladies and gentlemen of the jury, Mr. Harvey is
23 not guilty of robbery with use of a deadly weapon. The State -- it's kind of like
24 spaghetti, they're trying to throw a whole bunch of stuff at you guys to make some
25 things stick. We had a lot of different information that came back that really is just a

1 distraction as to what this case is about. There was a lot of different indications
2 about kids being present, where they were, what they were doing, different
3 merchandise in the car, driving, how an individual was driving, how Mr. Harvey was
4 driving, they questioned both Mr. Appel as well as Mrs. Harvey with about that, and
5 we spent a lot of time about the path taken to get to this school, what happened at
6 the school, what side people were at the school, nothing but distractions. What
7 does that have to do with the robbery with use of a deadly weapon?

8 So, let's look at the Information, you guys have that in your packet,
9 that's instruction number three, and it tells that you that an Information is but a
10 formal method of accusing a person of a crime. So this is what the State has
11 charged Mr. Harvey with and they lay it out for you. And they say that -- we're not
12 going to read it through its entirety, we're going to skip down to line 13, it says,
13 Alfred C. Harvey did willfully, unlawfully, and feloniously take personal property,
14 to-wit: miscellaneous clothing items, from the person of Julian Munoz, or in his
15 presence, by means of force or violence, or fear of injury to, and without the consent
16 and against the will of Julian Munoz, with the use of a deadly weapon, to-wit: a
17 knife. They go on to say, Defendant using force or fear to obtain or retain
18 possession of the property, to prevent or overcome resistance to the taking of the
19 property, and/or to facilitate escape. That's what they've charged Mr. Harvey with,
20 that's what's important in this case.

21 So, we know that there's absolutely no miscellaneous clothing items. It
22 can characterize T.J. Maxx as being a clothing store all they want to, the items in
23 this case have nothing to do with clothing.

24 We know that there's no knife, there's no weapon ever found. I submit
25 to you there was no fear, there's no violence. What really occurred here is that

1 Alfred Harvey stole some items but theft is not robbery.

2 Mr. Munoz on the stand said T.J. Maxx is a clothing store. When I went
3 back and said, well, don't they sell water and food and accessories and all these
4 other items. He said, oh, yes, it's a department store. I agree with you.

5 The one piece of clothing item that was kind of thrown out there was
6 this blue shirt. So we see Mr. Harvey in the store, he's wearing, what I submit to
7 you is two different blue shirts, one light, one dark blue, very similar to the blue shirt
8 that was shown to you guys later as a piece of evidence. These are not clothing
9 items, these are the items that were taken, wallets, some type of hand or face
10 cream, and perfume.

11 So let's go on to this knife. Absolutely no witness, outside of
12 Mr. Munoz, testifies that there was a knife here involved. Now, let's think about this,
13 Mr. Munoz came on the stand and he told you that he was standing on Mr. Harvey's
14 right-hand side. He told you that Mr. Harvey reached into his left pocket with his
15 left-hand and pulled out the knife and held it above his head with the left-hand. We
16 know from the video surveillance, as well as Mr. Munoz' testimony, that what was in
17 the left pocket was the face cream or the hand cream, the cream that had been
18 taken from the store. We also know that there are wallets tucked into this left-hand
19 side. This is the surveillance video and the photographs that you were shown
20 yesterday with regard when the State was stating that the items were concealed, the
21 wallets were concealed in the jacket. And unfortunately we didn't get to see that
22 jacket, that blue shirt thing. We don't know necessarily what does it look like? Are
23 we dealing with inside pockets here? Are we dealing with him concealing things
24 under the arm like this, into the arm of the shirt, just underneath here? What are we
25 dealing with? We don't know. But it is significant because the items are going into

1 the left-hand side.

2 I want to talk to you guys about a timeline here, and you guys have the
3 9-1-1 phone call, you can listen to the call again, it gives you the date and the time
4 at the beginning of the phone call. First call comes in at 16:34, that would be 4:34
5 p.m., that call is by Mr. Julian Munoz. At 16:38 we have Mr. Appel calling and he is
6 informing the 9-1-1 operators he's following the guys, already in motion, following
7 these individuals. And then just before three minutes into that phone call, you guys
8 heard it, you listened to it, you can check my timeline if you like, he says, Appel
9 says, the suspects are in custody. So we're talking about a total of approximately
10 seven to eight minutes.

11 From all the testimony that we've heard we know that Mr. Munoz goes
12 outside, he's talking to Mr. Harvey. Mr. Bramble told you that within approximately
13 30 seconds he's outside. He said he had to get through some people, he arrived
14 outside approximately 30 seconds later, and saw both Mr. Harvey and Mr. Munoz
15 but he doesn't see a knife.

16 We know that at that point Mr. Bramble and Mr. Munoz are going
17 towards the vehicles. We know that because Mr. Munoz is calling in the 9-1-1
18 phone call.

19 MR. SCHWARTZ: Your Honor, I hate to interrupt. Could we please
20 approach?

21 THE COURT: Sure.

22 [Bench conference begins]

23 MR. SCHWARTZ: Sorry, I didn't want to interrupt. I just have a concern that
24 with the redacted version of the 9-1-1 call it might have a difference because the
25 CAD doesn't seem to indicate the three minutes from when Errol calls the

1 Defendant's in custody. So if I could just make that clear in my closing, I mean,
2 rebuttal. I don't know how much more we're going into it.

3 THE COURT: I don't see any problem with that. Okay. If you want me to, I
4 can say there might be a slight discrepancy because I reviewed -- the Court had
5 redacted irrelevant material. So if there's a discrepancy, it's understandable. Do
6 you think that's going to be a big issue point?

7 MR. SCHWARTZ: If you can just move on at this point from this argument,
8 we could. It's not a big deal.

9 THE COURT: Well, because if there is going to be a discrepancy because of
10 the timeline because of the redaction then don't emphasize the discrepancy.

11 MS. SPELLS: I'll just move on, I guess.

12 THE COURT: Okay.

13 MS. SPELLS: At least it would be appropriate for us to notate the redaction.
14 And looking at the CAD what is the difference, a minute?

15 THE COURT: Then avoid the issue but just don't --

16 MS. SPELLS: I'll move on.

17 THE COURT: -- don't bring up there's a discrepancy.

18 MR. SCHWARTZ: Okay. Thank you.

19 MS. SPELLS: All right. Thank you.

20 [Bench conference concludes]

21 MS. SPELLS: So let's talk about what we know, okay. We know that
22 Mr. Bramble tells you he's outside within approximately 30 seconds, from there
23 Mr. Munoz is calling 9-1-1, he is approaching this vehicle, getting the license plate
24 information. We know that Mr. Appel is on scene before this U-Haul takes off, he
25 tries to block the U-Haul. We know that air unit traffic control is somewhere in here.

1 We didn't get to hear from them but we know that they were out there; right? We
2 know that the cops are trained, they're trained to search for things, they're trained to
3 look for things, not only did they search the car, they searched Mr. Harvey.

4 Now, we had an indication yesterday about well maybe the knife was
5 dumped. So we talked about what exactly was communicated and the specific line
6 that Officer Humpherys testified to, subject possibly just dumped property, and that's
7 coming at the school. Well, we know that these trained officers searched these
8 locations, no knife ever found. Officer Humpherys testified to you all that sometimes
9 witnesses do misunderstand, they don't see what they thought they saw.

10 So let's talk about a few of Mr. Munoz' [indiscernible]. And, again,
11 understand that he's nervous. He indicates with every stop he's nervous. So we
12 need to talk about his perception and his memory. But he testifies that there were
13 two wallets, there were three wallets, there were four wallets, now there were three.
14 And then when I questioned him about his report, what did you write in your report?
15 He comes back, yeah, there were two wallets written in the report.

16 The license plate number, and the State went over this with you just
17 briefly, that he came back, had to clarify with regard to what the actual license plate
18 number was. There was some misunderstanding about the streets, which directions
19 they went, where this car was traveling. There's no follow-up with his co-worker to
20 conduct his report. He says that he never took any photographs, but, again, we
21 have Mr. Appel and Mrs. Harvey testifying there were two people out there taking
22 photographs. Who else is out there? We know it's only Munoz and Mr. Bramble.
23 Mr. Bramble told you he took photos.

24 When the State carries the burden of proving to you beyond a
25 reasonable doubt that this knife was used in the commission of the crime that being

1 robbery with use of a deadly weapon.

2 I wanted to talk to you all about credibility, and that's your instruction
3 number ten, and I'm not going to belabor the point and read it all to you because the
4 State did a lot about credibility. So I think everyone clearly understands what
5 credibility is. I want to submit to you, however, that consistency is not necessarily
6 indicative of credibility especially in cases where people have written reports
7 because you're going to testify consistently with your reports, you're going to review
8 them before you come and testify. Additionally, when you make up a story about
9 something, you tell the story, you're going to be consistent in that. So consistency
10 by itself is not necessarily indicative of honesty or credibility.

11 When you consider all of the factors and all of the things here what you
12 have is the fact that Mr. Harvey's vehicle never out of sight. Mr. Appel immediately
13 blocks it in, he's following the vehicle the entire time period, tells you he wanted to
14 know where it goes. We have the air traffic unit control there and then we have the
15 police immediately arriving, okay. As Mr. Harvey is walking to this vehicle we have
16 Mr. Bramble and Mr. Munoz going towards the vehicle, getting the information. We
17 heard yesterday that in Mr. Appel's statement he said three people were running
18 towards this car taking photographs. Where was the opportunity for Mr. Harvey to
19 ditch this alleged knife? If it's ditched on the way to the vehicle, then we have
20 Mr. Munoz and Mr. Bramble following him to the vehicle, they would have seen it on
21 the ground. If it's ditched on the way to the school, we have the air traffic control.
22 We have Mr. Appel following this car the entire time period and he wanted to be
23 helpful. He was giving up all types of information that he did not even have the
24 answer to. If he would have seen anything, if this knife would have been ditched
25 somewhere, we would have heard some indication of that but we didn't hear

1 anything because there was not a knife.

2 There was also no fear, no force, or nor violence. Kind of rewind, go
3 back to the interaction between Mr. Munoz and Mr. Harvey, and we hear that
4 Mr. Munoz asked Mr. Harvey for the wallets. He freely gave them back. He's not
5 screaming at him. He's not pushing him. He's not throwing those wallets at him.
6 He just gave him the wallets back. Mr. Munoz testified there's no yelling, there's no
7 body contact, there's no force or fear of violence in that interaction. He says at that
8 point Mr. Harvey refuses to turn back to the store.

9 So I submit to you there's absolutely no knife, there's no knife found,
10 there's no indication that Mr. Munoz actually saw a knife. We have the officer saying
11 that people are mistaken a lot of times in what they see, what is actually occurring.
12 So at that point we have a hand-up, possibly some hand cream in this hand, coming
13 out of the left pocket. Is that force or violence? Does that put you in fear? Again,
14 perception is not reality.

15 Let's talk about the actions of Mr. Alfred Harvey. He stole merchandise
16 from T.J. Maxx. Mr. Munoz told you that it was less than \$500. He didn't have a
17 weapon. He's not being forceful in giving back those wallets. He's not being
18 threatening. At the end of the day, he's thief, not a violent robber. I'm not saying he
19 didn't do anything; yes, he absolutely went into that T.J. Maxx store, concealed
20 items, left the store with items that did not belong to him. He stole items from T.J.
21 Maxx. There's no option for that in your verdict form.

22 The State is the person who charged him, you saw that in the
23 information, and they have the burden of proving to you beyond a reasonable doubt
24 the charge that they've submitted to you, robbery with use of a deadly weapon.

25 I submit to you that snapshots, highlights don't work, and we see that

1 with the story and the illustration with Forrest Gump, because if you just get one
2 person's snapshot or one person's highlight you don't know the full story.

3 Perception drives memory but your perception is not reality. What color
4 is that dress? We don't know. What are some of the things that influences memory,
5 again, adrenaline, bias, emotions.

6 So you're the trier of facts and you have to put this story together using
7 credibility, common sense, analyzing the evidence with regard to perception and
8 memory.

9 So as I said, the State will get to speak to you again because they do
10 have the burden of proof here. So there were just a few final things I wanted to go
11 over with you all.

12 Court's indulgence.

13 The State spoke to you a little bit at length about this knife and the fact
14 that they don't have to show you that it was recovered. I submit to you that's the
15 law, they don't have to actually have the knife here for you today for you to find that
16 a knife was utilized. I submit to you there was absolutely no knife. When we're
17 talking about memory and perception, it is important to consider the fact that you
18 guys don't have the knife because there's no one else to tell you that they saw a
19 knife. There's the brief testimony that it's four inches. We don't know any of that.
20 The facts instead show that there was not a weapon, that Mr. Munoz was just
21 mistaken.

22 And, lastly, I want to draw your attention to your jury instruction number
23 six. It says, if you are not convinced beyond a reasonable doubt that the Defendant
24 used a deadly weapon in the commission of an unlawful taking of personal property
25 from the person of another -- again, here the State has charged miscellaneous

1 clothing items -- or in his presence, by means of force or violence or fear of injury,
2 immediate or future, to his person or property and that such force was used to
3 obtain or retain possession of the property, prevent or overcome resistance to the
4 taking of the property, or to facilitate escape with the property you must find the
5 Defendant not guilty of robbery with use of a deadly weapon. And I submit to you
6 that here Mr. Harvey is not guilty of robbery with use of a deadly weapon but he's
7 also not guilty of robbery because he didn't use force or violence here. He stole
8 items and refused to come back into the store. Mr. Harvey is also not guilty of
9 robbery. We'd ask that the appropriate verdict here and we're confident that once
10 you've analyzed all of the evidence you will find Mr. Harvey not guilty.

11 Thank you.

12 THE COURT: Thank you, counsel.

13 How long do you think your last portion is going to take?

14 MR. SCHWARTZ: Ten, fifteen minutes.

15 THE COURT: You guys want to stay or you want to take a little break?

16 UNKNOWN JUROR: Stay.

17 THE COURT: You want to get it over with?

18 UNKNOWN JUROR: Yes.

19 MR. SCHWARTZ: If you could switch over back to our computer, please.

20 Is it okay if I move this, Your Honor?

21 THE COURT: Sure.

22 MR. SCHWARTZ: May I proceed, Your Honor?

23 THE COURT: Yes, please.

24 **[REBUTTAL CLOSING ARGUMENT BY THE STATE]**

25 MR. SCHWARTZ: The State's whole case is a distraction; right? That's what

1 she said. We threw a bunch of spaghetti up for you guys to watch this whole week;
2 right? All a distraction, huh? When she gets up here, the defense, and they talk
3 about miscellaneous clothing items, they're talking about the fact that there's a
4 Facebook dress, you can look at one way or another, talking about Forrest Gump.
5 Let's talk about the case. Let's talk about the facts. Let's talk about the law that you
6 guys have right there, okay. I want to be clear, ladies and gentlemen, I didn't ask
7 you to sit here all week for this trial so you could go back and talk about clothing
8 items, Forrest Gump, and dresses, okay. You have the law, I want you to look at
9 the law and apply the facts. In jury selection you guys talked about, you look at the
10 facts, right? You look at the facts and how it applies to the law and the law in this
11 case has to do with robbery, taking of personal property from another with force or
12 threat of force. It's that simple, that's the law, that's what the State's proven and
13 that's why he's guilty.

14 Now, in particular Ms. Spells did address this information that we talked
15 about. It's the charging document, it has the robbery, what he's charged with, it's
16 instruction number three, the first line, this is it not evidence of anything, this is not
17 evidence of anything, this is just a piece of paper that says he's charged with
18 robbery with a deadly weapon, okay, that's all it is. And the personal property, this
19 miscellaneous items that we've alleged, the wallet, the cream, the lotion, whatever,
20 from a clothing store, that's what it is, personal property that was stolen, okay. And
21 they admitted he stole it, right? She said he's a thief. You saw the surveillance, you
22 heard what she said, she admitted, okay, there's no -- that's not in dispute that he
23 took those items.

24 The Defendant -- the defense has led you around with this -- the only
25 thing I can think of is this distractions; right? We're going off in Forrest Gump land

1 but let's focus, okay, focus on the law, it's right in front of you, and the facts, okay,
2 that's all we need to talk about.

3 Now, the defense made this huge, huge deal about perception and
4 memory and, you know, everyone is just wrong, I guess, everyone is just wrong. It
5 wasn't a knife it was the lotion that he was threatening him with. We're not doing
6 this today, with the lotion. Come on now. Mr. Munoz got up on the stand and he
7 told you he was in fear for his life. He saw the four inch blade. He heard the snap.
8 Last time I checked lotion doesn't snap when you take it out of your pocket, fair? He
9 wasn't mistaken about the knife, okay. He described it for you as a black, four inch
10 blade, raised above your head. Why is the Defendant going to raise lotion over his
11 head? And why is Mr. Munoz going to step back scared? No, it was the knife. It all
12 makes sense. It all adds up, okay.

13 And now we got Mr. Bramble, he didn't see anything, right? Well, he
14 saw something pretty important. He saw the reaction on Mr. Munoz' face right after
15 this incident happened. He said he was shocked. Mr. Munoz has dealt with
16 numerous shoplifters. It doesn't matter to him if they run, if he gets the property
17 back, he's going to go out, he's going to try to get them to come back in, and if they
18 don't, he's going to go back inside and write his report. But when someone pulls a
19 knife on you that changes things, that's what he said; right? This was something
20 different this was not a normal interaction.

21 And some more distractions from the defense, we're talking about.
22 Mr. Munoz said three to four wallets, he didn't know -- he mistaken north for south,
23 east for west. He said that there was a G instead of a T in the license plate. What
24 does that have to do with the fact that this was a robbery? Nothing. He was -- you
25 heard the 9-1-1 call, he was scared. He corrected himself on all of those things,

1 You didn't hear his voice falter at all though when he said he was robbed with a
2 knife; right? That's the first thing he told Julian -- or Shaun when he arrived. He
3 didn't say anything else about all these other confusing distractions. He said that he
4 got robbed that's what happened.

5 And I don't know what else we want from Mr. Appel, right, this guy is
6 just visiting his wife at Ross, he happens to see a situation, he offers to help, he
7 calls -- he does everything right. He does everything right. And he told you up front,
8 yeah, I didn't see it, all I did was follow him, so I know exactly where this man drove
9 and exactly where he stopped, that's all we asked him to say.

10 So when the defense gets up and says, well, you can't trust any of
11 these people's memories, right, because they're seeing something different than
12 what they're saying. There's no evidence of that. Never once did Mr. Bramble,
13 Mr. Munoz, Mr. Appel say that the stress of the situation was so much that they're
14 not sure what happened; right? They just told you exactly what happened, that's all
15 they did, that's all we ever asked them to do.

16 And, now, Ms. Harvey, you know, she came and she said what she
17 said. She said two people were taking photos or maybe only one was. Well, we
18 know Julian was on the phone because you have the 9-1-1 call, okay, so here's one
19 person, that's what he's doing. And the other person said he was taking photos,
20 okay. At the end of the day, who cares, fair? Who cares?

21 And the whole reason for stopping at the school for the daughter to go
22 to the restroom, okay, you saw the surveillance video, Mr. Harvey goes into the
23 bathroom with the children. He went to the restroom. We watched the surveillance
24 video, there was a couple of minutes while we didn't see anything happen because
25 they were in the restroom.

1 And --

2 MS. SPELLS: Your Honor, that misstates the testimony.

3 THE COURT: I'm sorry?

4 MS. SPELLS: That misstates the testimony.

5 THE COURT: Let me just make a comment real quick. When there's a
6 dispute as to how somebody remembers what the testimony is, that the State may
7 have one -- out of what they think the testimony is, the defense may have it -- it
8 doesn't really make any difference if they disagree on what the testimony is because
9 it's your recollection of what you believe the testimony to be is the only thing that
10 counts, okay.

11 Go ahead.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 You can watch the surveillance video for yourself, that's all I'm talking
14 about.

15 Ms. Spells also said that the State hasn't proven that Mr. Munoz was in
16 fear. He told you he was in fear, there's that. Mr. Rose told you that it doesn't even
17 matter what he says, would a reasonable person be in fear. Would a reasonable
18 person be in fear when a knife's above their head, we're not doing this today, click,
19 snap, knife.

20 Use your common sense, ladies and gentlemen, please, and there's an
21 instruction on common sense, it's number 19, and it tells you you can use your
22 everyday common sense, you don't have to check it at the door so to speak, you
23 can use your common use and you can figure out what happened.

24 And, lastly, defense said, there's no knife because we didn't find a knife.
25 We told you from the beginning we didn't find a knife; right? Mr. Rose got up and he

1 said there was no knife found. But think about this, ladies and gentlemen, the
2 Defendants going to take the knife that he just threatened Mr. Munoz with. He's
3 going to take it with him in his car. He's going to drive erratically throughout the
4 streets, although according to Ms. Harvey it was 30 miles an hour, drive erratically
5 through the streets, and then he's going to hang on to the knife. What do you
6 expect? You expect him to put it in a little Ziploc baggie and give it to the police
7 officers? No, he's going to ditch the knife, you heard the officer. I mean, the only
8 thing the defense remembered the officer said was that sometimes witnesses are
9 mistaken. But he said, they often times ditch the weapon. He knows. He's in a lot
10 more trouble if there's a weapon; right? He ditched it while he was driving from point
11 A to point B erratically trying to lose Errol, trying to lose the helicopter that
12 Ms. Harvey said she knew was following them. Of course he's going to get rid of the
13 knife. No surprise that we didn't find a knife here. That doesn't mean that a knife
14 didn't exist. We've got Munoz who saw the knife with his own eyes, Bramble saw
15 the reaction consistent with a knife being pulled on someone, and their reactions to
16 call 9-1-1 immediately, yell out for help, all consistent with a knife being put into play,
17 not a lotion being put into play.

18 Elements of the crime, ladies and gentlemen, that's what we've got to
19 prove, that's what -- that's what we've got to prove as the State and that's what
20 we've proven to you today.

21 As I said, common sense, please use it, every day common sense and
22 judgment. You can figure out what happened based on your common sense.

23 Think of the idea of flight. If he didn't have a knife, if all he did was take
24 some items, why does he need to drive like a maniac away from the scene? Why?
25 He didn't want to give back the rest of the items, I guess. But the idea of flight it

1 embodies the idea of deliberately going away with consciousness of guilt. He knew
2 what he did. He knew what he did was wrong. He made a choice to pull a knife on
3 Mr. Munoz and he tried to [indiscernible].

4 Reasonable doubt, you have an instruction, I encourage you to look at
5 the instruction, you do not need to rely on my power point here, instruction number
6 five, not mere possibility or speculation must be actual doubt.

7 Now, ladies and gentlemen, the Defendant made a choice, he made a
8 choice to change this from a simple theft that they just admitted he did, to change
9 this to a robbery with a deadly weapon. When he pulled the knife on Mr. Munoz and
10 threatened him, we're not doing this today.

11 Ladies and gentlemen, today you're going to do it. You're going to find
12 him guilty, please, of robbery with a deadly weapon.

13 Thank you.

14 THE COURT: Thank you, counsel.

15 Ladies and gentlemen, you're about to begin the process of
16 deliberation. In order to accomplish deliberate -- a jury deliberating, you have to be
17 under the charge of somebody to ensure that nobody interferes with the process
18 and that thing -- Tom is -- the marshal is going to take charge of the jury during their
19 deliberations, and in order to accomplish that he has to be sworn in to promise to do
20 just that. So the very first thing we're going to do right now is swear Tom in as --

21 MS. SPELLS: Your Honor, can we have the monitors taken off?

22 THE COURT: I'm sorry?

23 MS. SPELLS: Can we have the monitors taken off, please?

24 ///

25 ///

1 [The Court Clerk swore in the Court Marshal to take charge of the jury during
2 deliberations]

3 THE COURT: Very good, all right.

4 We've got all the exhibits, and you guys are going -- are we using the
5 deliberation room down --

6 THE MARSHAL: No, down here, they just finished.

7 THE COURT: All right. So we've got a deliberation room right here. So you
8 guys go with Tom, everybody except the two alternates, Marlene and Danielle, you
9 guys stay right there, everybody else go with Tom. I have special instructions for
10 the two of you.

11 UNKNOWN JUROR: Us?

12 THE MARSHAL: Yes, you two are going to stay here and you're eventually
13 going to go with Paula and I'll meet you in a few minutes.

14 The rest of you bring everything with you, personal property, your note
15 books, everything, let's go back this way.

16 THE JUDICIAL EXECUTIVE ASSISTANT: Tom, the jury room this way is
17 open.

18 THE MARSHAL: Yeah.

19 THE COURT: Yeah, he knows.

20 And the lunch is here?

21 THE JUDICIAL EXECUTIVE ASSISTANT: It is.

22 THE COURT: Okay. Ms. Mecall, your initial perception as to who was going
23 to be the alternates was accurate --

24 JUROR NUMBER 13: I was hoping.

25 THE COURT: -- but you were --

1 JUROR NUMBER 13: I've done this before. It's okay.

2 THE COURT: -- you were very accurate but we don't announce that just
3 because we like to keep everybody on the same level of alertness during the course
4 of the trial.

5 So here's what happens at this point, you guys are still on this jury,
6 because if something was to happen to anybody, you guys would be called into
7 replace them and substitute in place if something happens to somebody. So, you
8 need to stay in contact and you need to also be careful and be aware that the
9 admonishment about not discussing the case still applies until you've been actually
10 released off of your jury duty. So one of two things is going to happen, Paula is
11 going to call you and say somebody is off the jury, we need you to come down and
12 replace them, or she's going to call you and say the jury reached a verdict and
13 you're off jury duty. If you guys are still -- you don't have to stay here, you don't
14 have to stay in the building, don't leave town, so be someplace where you can get
15 back. And if you're still in the area, Paula will call you if the jury deliberation reaches
16 a verdict, she'll call you and tell you that and you're certainly invited to come back
17 and sit in your chairs while the verdict is read. So it's up to you. The main thing is
18 just until you are either serving with the jurors as they deliberate or discharged off
19 your jury duty, don't talk about the case. It's the same admonishments that you've
20 been given you the whole time that you've been here, okay? I can't thank you
21 enough. We can't do this without you. I hope you don't feel like you got cheated
22 because you were the alternates. But I can't thank you enough for your jury service
23 and Paula will take you and get your jury badges and get --

24 THE DEFENDANT: Thank you.

25 THE COURT: -- exchange of information. I think Tom knows how to get.

1 ahold of you but Paula will get some --

2 THE MARSHAL: I've got all their numbers.

3 THE COURT: Okay, good.

4 All right. Thank you again very much, appreciate it.

5 Can they get a bite of food before -- they're going to get cheated out of
6 having lunch too.

7 THE MARSHAL: We'll handle it out here. I'm not sure how much we've got.

8 THE COURT: All right. We know how to get ahold of everybody?

9 MS. SPELLS: We will provide that information.

10 MS. JONES: I think we did.

11 THE COURT: The only person I know how to get ahold of is Mr. Harvey.

12 All right. We'll see. As they afternoon progresses, we'll all kind of
13 monitor the jurors' progress, if they haven't reached a verdict say by 5 o'clock, I'll
14 have Tom ask them if they're making progress. And if -- I would think, you know, if it
15 goes on to like 6, we'll start maybe suggesting that they take a break and come back
16 tomorrow and deliberate but we'll see. But we'll keep you informed.

17 MR. ROSE: Thank you, Your Honor.

18 MR. SCHWARTZ: Thank you, Your Honor. Appreciate it.

19 THE DEFENDANT: I just want to say thank you to everybody too. I can see
20 that everybody has a job to do, and I understand it a little more than -- it's my first
21 time ever really having to go through this so I do see that it's not just a --

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THE COURT: Did you learn something?

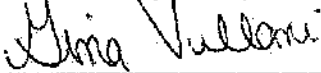
THE DEFENDANT: Thank you, saying thank you.

MR. SCHWARTZ: Best of luck, Mr. Harvey, with whatever happens.

THE COURT: All right, guys. Go relax. We'll see what happens here.

[The jury retired to deliberate at 12:47 p.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case to the best of my ability.



Gina Villani
Court Recorder

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EXHIBIT M



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DISTRICT COURT
CLARK COUNTY, NEVADA

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STATE OF NEVADA,

CASE NO. C314260

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Plaintiff,

DEPT. VIII

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vs.

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ALFRED HARVEY,

13

Defendant.

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BEFORE THE HONORABLE JAMES M. BIXLER, SENIOR DISTRICT COURT JUDGE

15

FRIDAY, NOVEMBER 18, 2016

16

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 4

17

18

APPEARANCES:

19

For the State:

BRYAN S. SCHWARTZ, ESQ.

20

STEVEN ROSE, ESQ.

Deputy District Attorneys

21

For the Defendant:

JASMIN D. SPELLS, ESQ.

22

KELLEY R. JONES, ESQ.

23

24

25

RECORDED BY: JILL JACOBY, COURT RECORDER

1 FRIDAY, NOVEMBER 18, 2016 AT 11:07 A.M.

2
3 [Outside the presence of the jury panel]

4 THE COURT: We're outside the presence of the jury. We're on the record;
5 right?

6 Anything we need to address before the jury comes in?

7 MR. SCHWARTZ: Not from the State, Your Honor.

8 MS. SPELLS: No.

9 THE COURT: You guys good?

10 MS. SPELLS: Yes.

11 MR. SCWARTZ: Yes.

12 THE COURT: Okay.

13 [In the presence of the jury panel]

14 THE MARSHAL: All rise for the jury, please.

15 And be seated.

16 THE COURT: Will the parties stipulate to the presence of the jury.

17 MS. SPELLS: Yes, Your Honor.

18 MS. JONES: Yes, Your Honor.

19 MR. SCHWARTZ: Yes, Your Honor.

20 MR. ROSE: Yes, Your Honor.

21 THE COURT: Very good.

22 Good morning.

23 THE JURY: Good morning.

24 THE COURT: So has the jury selected a foreperson?

25 THE FOREPERSON: Yes.

1 THE COURT: Please stand and identify yourself for the record.

2 THE FOREPERSON: Michelle Moline.

3 THE COURT: And Ms. Moline, has the jury reached a verdict?

4 THE FOREPERSON: Yes, we have.

5 THE COURT: Will you hand that jury verdict form to the marshal, please.

6 Will the Defendant please rise. I'm going to have the clerk read into the
7 record the verdict.

8 THE CLERK: District Court, Clark County Nevada, the State of Nevada,
9 Plaintiff, Alfred C. Harvey, Defendant. In Case Number C-16-314260, in
10 Department VIII.

11 We, the jury, in the above entitled case find the Defendant, Alfred C.
12 Harvey as follows: guilty of robbery.

13 Dated the 18th day of November, 2016.

14 Ladies and gentlemen of the jury, is this your verdict as read?

15 THE JURY: Yes.

16 THE CLERK: So say you one so say you all?

17 THE JURY: Yes.

18 THE COURT: Would anybody like the jury polled?

19 MS. SPELLS: Yes, Your Honor.

20 THE CLERK: Juror number 1, is this your verdict as read?

21 JUROR NUMBER 1: Yes.

22 THE CLERK: Juror number 2, is this your verdict as read?

23 JUROR NUMBER 2: Yes.

24 THE CLERK: Juror number 3, is this your verdict as read?

25 JUROR NUMBER 3: Yes.

1 THE CLERK: Juror number 4, is this your verdict as read?

2 JUROR NUMBER 4: Yes.

3 THE CLERK: Juror number 5, is this your verdict as read?

4 JUROR NUMBER 5: Yes.

5 THE CLERK: Juror number 6, is this your verdict as read?

6 JUROR NUMBER 6: Yes.

7 THE CLERK: Juror number 7, is this your verdict as read?

8 JUROR NUMBER 7: Yes.

9 THE CLERK: Juror number 8, is this your verdict as read?

10 JUROR NUMBER 8: Yes.

11 THE CLERK: Juror number 9, is this your verdict as read?

12 JUROR NUMBER 9: Yes.

13 THE CLERK: Juror number 10, is this your verdict as read?

14 JUROR NUMBER 10: Yes.

15 THE CLERK: Juror number 11, is this your verdict as read?

16 JUROR NUMBER 11: Yes.

17 THE CLERK: Juror number 12, is this your verdict as read?

18 JUROR NUMBER 12: Yes.

19 THE COURT: Thank you very much.

20 Thank you all very much. I'm about to discharge you from your duties
21 and obligations as jurors in this matter. A couple of things that I said before we
22 started, I think probably approved to be pretty much true, one of which it was no
23 matter how straightforward something would appear on the outside, what you guys
24 just went through is not an easy task and it's never easy. So it looks like you guys
25 have done everything that we've asked you to do. You paid close attention, you

1 obviously deliberated full steam, it took a lot of effort for you guys to become
2 unanimous on a verdict, and you've done what we ask a jury to do. Every time we
3 go through this it restores my faith and why we do what we do. We are the only
4 country in the world that goes through this because we can trust you guys to pay
5 attention and to follow the instructions to make a genuine, sincere effort to reach a
6 just verdict. So I cannot tell you how much I appreciate your jury service and all the
7 effort you've put into this.

8 My admonishment about not talking about the case, no longer applies,
9 you're free to talk about the case to whatever extent you fell necessary. You're also
10 free not to talk about it, if you choose not to. So if somebody bugs you about telling
11 you about your jury service and you don't want to talk to them, you call over here
12 and I'll handle it. All right. So at this point -- now, when I say that, one of the best
13 things that can help these guys over here know how they did what they did and why
14 and how it affected you guys is they might want to ask you a few questions. You
15 don't have to talk to them, but if you do, it's certainly appears to help them out
16 understanding how jurors perceive certain things. So if you want to talk to them, feel
17 free to. You're going to go out now, if they're going to talk to you, they'll probably
18 come down to the third floor Jury Commissioner's Office because Tom's going to
19 take you -- get your jury badges and everything and you go down to the third floor
20 Jury Commissioner's Office, and I think that they pay you all the big bucks that you
21 guys get for being here.

22 Do they get the checks right now?

23 THE MARSHAL: Yes.

24 THE COURT: Okay, good. All right. So, you guys, thank you very much, go
25 ahead and go with Tom.

1 [Outside the presence of the jury panel]

2 THE COURT: We're outside the presence of the jury. Relax.

3 Anything we need to put on the record?

4 MS. SPELLS: Your Honor, the defense would like to request that since you
5 were the judge that heard the trial, I don't know if you would be able to sit for the
6 sentencing.

7 THE COURT: You know, it's gone both ways. Sometimes I -- relax you guys,
8 you don't have to stand up. I've just -- I've done it both ways. It's kind of up to
9 Judge Smith. But I will make sure that he knows that that was the request and I
10 have absolutely no problem whatsoever. We're going -- the Defendant's going to be
11 held without bail pending sentencing or a motion for bail and we need a sentencing
12 date.

13 THE CLERK: Yes, Your Honor.

14 That will be March -- excuse me, January 4th at 8 a.m.

15 MR. SCHWARTZ: Thank you.

16 THE COURT: Okay. And if we're going to have an issue about bail, you file
17 an appropriate motion, let the State respond, and -- if you want me to handle that, I'll
18 handle that too, okay, so.

19 MR. ROSE: Your Honor, I don't know if we need to actually have it officially
20 referred for a PSI or not. I don't know if that's part of it.

21 THE COURT: Yes, we -- I don't know -- well, I mean it is referred for PSI;
22 right?

23 THE CLERK: Yes.

24 MR. SCHWARTZ: We'll send --

25 THE COURT: That just happens automatically. Just so you're aware,

1 Mr. Harvey, a Presentence Investigative Report will be prepared, the folks from P&P
2 will be over to the jail or --

3 THE DEFENDANT: Yes, sir.

4 THE COURT: -- I don't know if they come in person or if they do it by
5 telephonic interview.

6 THE CLERK: They come in person.

7 THE COURT: But I think they do, too. I think it would be in person.

8 THE DEFENDANT: Okay.

9 THE COURT: So, expect to have a call in some form or fashion in the --

10 THE DEFENDANT: Thank you, sir.

11 THE COURT: -- fairly near future, probably within the next 30 days for an
12 interview; okay?

13 THE DEFENDANT: All right. Thank you, sir.

14 MS. SPELLS: Your Honor, we'd also like to request, and the defense will do
15 this as well, any PowerPoints that were part of evidence we should be given the
16 Court a hard copy so that it goes up with the file.

17 MR. ROSE: Yes, Your Honor, we'll provide printouts of the State's
18 summation and rebuttal PowerPoints. We did not use one for opening.

19 THE COURT: Okay.

20 MR. ROSE: But we will provide the printouts of both of those to the Court.

21 THE COURT: Hardcopy?

22 MR. ROSE: Yes, Your Honor.

23 THE COURT: Okay. All right.

24 MS. SPELLS: And we'll do the same.

25 THE COURT: Is that it?

1 MS. SPELLS: I believe that's it, Your Honor.

2 THE COURT: All right.

3 MR. SCHWARTZ: Thank you, Your Honor.

4 MS. SPELLS: Thank you.

5 THE COURT: Folks, it's been a pleasure working with professional, like you
6 guys, you guys have done an excellent job, you did a wonderful presentation, you've
7 been completely and totally professional about your presentations and I'm
8 impressed.

9 MS. SPELLS: Thank you.

10 MS. JONES: Thank you.

11 THE DEFENDANT: Thank you, sir.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 MR. ROSE: Thank you, Your Honor.

14 THE COURT: Have a good thanksgiving.

15 MR. ROSE: Are the jurors headed down to the third floor?

16 THE COURT: I think they are.

17 MR. ROSE: Okay.

18 THE COURT: I think they're collecting the badges and whatever --

19 MR. ROSE: Okay. Thank you.


20 [Trial concluded at 11:17 a.m.]

21

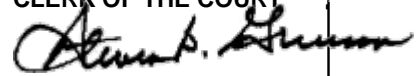
22 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
23 recording in the above-entitled case to the best of my ability.

24

25



Gina Villani
Court Recorder



1 SUPP
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 3710
6 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
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12 Facsimile: (702) 383-2849
13 *Attorneys for Defendant*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

13 THE STATE OF NEVADA,
14 Plaintiff,
15 v.
16 ALFRED C. HARVEY,
17 Defendant,
18

CASE NO. C-16-314260-1
DEPT. NO. VIII
DATE: 04/30/18
TIME: 08:00 a.m.

19 **SUPPLEMENT TO DEFENDANT'S REPLY TO STATE'S OPPOSITION TO**
20 **DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD AND**
21 **MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS**
22 **MATTER**

22 COMES NOW, the Defendant, Alfred Harvey, by and through his
23 attorneys, JASMIN SPELLS and SHARON G. DICKINSON, Deputy Public
24 Defenders, and respectfully files this Supplement to the Reply asking this
25 Honorable court to direct this motion be heard by the trial judge, Judge Bixler, to
26 reconstruct the record regarding the jury note found in the District Court Evidence
27
28

1 Vault and asks for an Evidentiary Hearing. This Supplement is made and based
2 upon all the papers and pleadings on file herein, the attached Declarations of
3 Counsel, and oral argument at the time set for hearing this Motion.
4

5 DATED this 27 day of April, 2018.

6 PHILIP J. KOHN
7 CLARK COUNTY PUBLIC DEFENDER

8 By: /s/ Sharon G. Dickinson
9 SHARON G. DICKINSON, #3710
10 Chief Deputy Public Defender

11 PHILIP J. KOHN
12 CLARK COUNTY PUBLIC DEFENDER

13 By: /s/ Jasmin D. Spells
14 JASMIN D. SPELLS, #11635
15 Chief Deputy Public Defender
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POINTS AND AUTHORITIES

1
2 Since the filing of the Reply Motions to State's Opposition to Defendant's
3 Motion for a New Trial and Motion to Reconstruct the Record, Defense learned
4 that at the beginning of deliberations in this case, the Court Marshall gave his cell
5 phone number to the jurors. One juror indicated someone told her the foreperson
6 called the Court Marshall the first day of deliberations regarding a procedural
7 issue. On the second day, "the Court Marshall came into the jury room, closed the
8 door, and stated if someone with a procedural issue would like to speak to the
9 Judge, the Judge would like to speak with that person." *Exhibit N*. However no
10 one left the room to speak to the Judge. The jury foreperson also contacted the
11 Court Marshall during the second day of deliberations. *See Exhibits N, and O*.

12
13 The jury foreperson remembered giving the note to the Court Marshall on
14 the second day of deliberations and the Court Marshall returning within an hour.
15 The Court Marshall told the jury they could not elaborate and that this was asked
16 and answered. Shortly after receiving the answer, the jury reached a verdict. *See*
17 *Exhibit P*.

18
19 A bailiff's oral ex parte communications with a jury, beyond what NRS
20 175.391 allows, "is a species of jury misconduct." *Lamb v. State*, 251 P.3d 700,
21 711-12 (2011). Statements from a judge to a jury or from a bailiff are subject to
22 scrutiny since "the 'official character of the bailiff – as an officer of the court as
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1 well as of the State – beyond question carries great weight with a jury.” *Lamb at*
2 712 *citing Parker v. Gladden*, 385 U.S. 363, 365 (1966). Therefore all
3 communications between the court or bailiff and the jury must be in writing or
4 conducted orally in the courtroom so that there is a record of the exact
5 admonishment given to the jury for appellate review. *Daniel v. State*, 119 Nev.
6 498, 511 (2003). Failing to notify counsel about a communication with the jury
7 and failing to make a record of such communication can result in reversible error.
8 *Daniel* at 511. Accordingly, an evidentiary hearing is needed to determine what
9 the Court Marshall said to the deliberating jurors.
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13 The exact wording of what was said to the jury is important to determine if
14 there was a coercive nature to the ex parte communications. In *Redeford v. State*,
15 93 Nev. 649 (1977), without approval of the parties, the judge orally informed the
16 deadlocked jury that if the case had to be tried over again, that they would not
17 accomplish anything by not reaching a verdict and asked them to “put your
18 collective minds together, and reach a verdict in this case.” *Id.* at 651. The
19 Nevada Supreme Court found the court’s comments coercive when less than two
20 hours later the jury convicted the appellant of one charge and acquitted him of the
21 other.
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1 Here, the jury deliberated over two days and came back with a verdict
2 quickly after receiving an answer to the question on the note. Thus, query into the
3 comments made by the Court Marshall is needed.
4

5 Not only is an inquiry into what the Court Marshall said to the jury
6 important, inquiry into what the Court Marshall said to others is needed. The
7 Defense believes information regarding jury deliberations in this case may have
8 been given to others because Mr. Harvey was aware that there was a holdout juror
9 before learning the verdict. Thus, an evidentiary hearing is needed to determine
10 how such information was leaked. *Exhibit Q*.
11
12

13 CONCLUSION

14 In view of the above, an evidentiary hearing is needed.

15 DATED this 27 day of April, 2018.

16
17 PHILIP J. KOHN
18 CLARK COUNTY PUBLIC DEFENDER

19 By: /s/ Sharon G. Dickinson
20 SHARON G. DICKINSON, #3710
21 Chief Deputy Public Defender

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: /s/ Jasmin D. Spells
25 JASMIN D. SPELLS, #11635
26 Chief Deputy Public Defender
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EXHIBIT N

DECL

1 PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
2 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
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Lillyjd@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 v.)

12 ALFRED C. HARVEY,)

13 Defendant.)

CASE NO. C-16-314260-1

DEPT. NO. VIII

14
15 **DECLARATION**

16
17 **SUSIE CHANG** makes the following declaration:

18 1. I am more than 18 years of age and am competent to testify as to the
19 matters stated herein. I also have personal knowledge of the facts stated herein or I have been
20 informed of these facts and believe them to be true.

21 2. To my best recollection I remember the following events occurring during
22 jury deliberations in the above entitled case.

23 3. I was a juror in State v. Harvey. We deliberated for two days.

24 4. At the beginning of jury deliberations, the Court Marshall gave each juror his
25 cellular telephone number. During the first day of deliberations, I heard ^{from someone (AC)} that the jury foreperson
26 telephoned the Court Marshall regarding a procedural issue. We did not reach a verdict the first
27 day.
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5. On the second day of deliberations, the Court Marshall came into the jury room, closed the door and stated if the person with a procedural issue would like to speak with the Judge, the Judge would like to speak with that person. At that time no one spoke with the Judge.

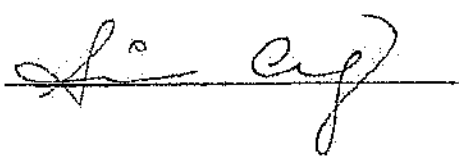
6. I ~~thought~~ ^{heard from someone that (he)} the foreperson may have contacted the Court Marshall during the second day of deliberations.

7. I remember a question being asked regarding a definition. I do not remember if the question was asked in written form. However, there was an answer within 5-10 minutes.

8. The discussions during deliberations focused on whether a person could be fearful and we discussed the circumstances of the incident.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 27 day of April, 2018.



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EXHIBIT O

1 DECL
2 PHILIP J. KOHN, PUBLIC DEFENDER
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11 Lillyjd@clarkcountynv.gov
12 Attorneys for Defendant

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 ALFRED C. HARVEY,

13 Defendant.

CASE NO. C-16-314260-1

DEPT. NO. VIII

14
15 DECLARATION

16 LEE ANN WORTHAM-THOMAS makes the following declaration:

17
18 1. I am more than 18 years of age and am competent to testify as to the
19 matters stated herein. I also have personal knowledge of the facts stated herein or I have been
20 informed of these facts and believe them to be true.

21
22 2. To my best recollection I remember the following events occurring during
23 jury deliberations in the above entitled case.

24 3. I was a juror in State v. Harvey. We deliberated for two days.

25
26 4. At the beginning of jury deliberations, the Court Marshall gave each juror his
cellular telephone number in case of emergency.

27
28 5. To the best of my recollection, a note was given to the Court Marshall on day

TWO.

1 6. During deliberations, jurors discussed being scared of a knife and the
2 difference between a robbery and a shoplifting.

3 I declare under penalty of perjury that the foregoing is true and correct. (NRS
4 53.045).

5 EXECUTED this 26th day of April, 2018.

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7 *Leela Thomas*
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EXHIBIT P

DECL

1 PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
2 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
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Lillyjd@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 ALFRED C. HARVEY,

13 Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

14
15 **DECLARATION**

16 **MICHELLE MOLINE** makes the following declaration:

17
18 1. I am more than 18 years of age and am competent to testify as to the
19 matters stated herein. I also have personal knowledge of the facts stated herein or I have been
20 informed of these facts and believe them to be true.

21
22 2. To my best recollection I remember the following events occurring during
23 jury deliberations in the above entitled case.

24 3. I was the jury foreperson in State v. Harvey. We deliberated for two days.

25
26 4. At the beginning of jury deliberations, the Court Marshall gave each juror his
cellular telephone number. We did not reach a verdict the first day.

27
28 5. On the second day of deliberations, I authored a note which I gave to the Court
Marshall. Within an hour of giving him the note, he returned to the jury room and said they

1 could not elaborate and that this was asked and answered. The note was given towards the end
2 of jury deliberations and shortly after receiving the answer we reached a verdict.

3 6. The jury note attached to this declaration is the note I wrote. I never received
4 the note back and therefore do not have any knowledge as to the typed statement on top of the
5 note or the sticker on the bottom.

6 7. The only person I had contact with during jury deliberations was the Court
7 Marshall.

8 8. The discussions during deliberations focused on whether a person could be
9 fearful and what could be considered a threat. We discussed the circumstances of the incident.
10

11 I declare under penalty of perjury that the foregoing is true and correct. (NRS
12 53.045).

13 EXECUTED this 27 day of April, 2018.

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The Court is not at liberty to supplement the evidence.

Can we have
alterations on the
definitions, by
means of force or
violence or fear or
injury.

Michelle Moline

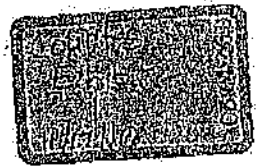


EXHIBIT Q

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EXHIBIT Q

1 DECL
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11635
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11 Lillyjd@clarkcountynv.gov
12 Attorneys for Defendant

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 v.

12 ALFRED C. HARVEY,
13 Defendant,

CASE NO. C-16-314260-1
DEPT. NO. VIII

14
15 DECLARATION

16 DOUGLAS HENKE makes the following declaration:

17 1. I am more than 18 years of age and am competent to testify as to the
18 matters stated herein. I also have personal knowledge of the facts stated herein or I have been
19 informed of these facts and believe them to be true.

20 2. To my best recollection I remember the following events occurring during
21 my investigation regarding the above entitled case.

22 3. I am currently employed with the Office of the Public Defender.

23 4. I am the investigator for the Public Defender in State v. Harvey.

24 5. During the jury deliberations, I was requested to investigate possible jury
25 tampering and for inappropriate communications with the jurors and due to Alfred Harvey
26 knowing there was a holdout juror before learning of the verdict.
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1 6. During my investigation, I contacted and attempted to contact several
2 jurors regarding any tampering and/or inappropriate communications with the jurors. All
3 contacted jurors denied any inappropriate behavior/communication.

4 7. In April of 2018, Attorney Jasmin Spells informed me that Attorney
5 Sharon Dickinson discovered a jury note.

6 8. I was requested to contact the jurors regarding the note.

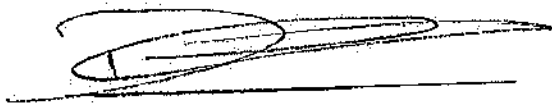
7 9. During my second investigation, several jurors stated the Court Marshall
8 provided his cellular telephone to the jury and possible telephone calls were made from a juror to
9 the Court Marshall.

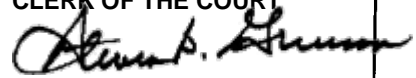
10 10. Upon information and belief from my second investigation, conversations
11 between the jurors, Court Marshall and Clark County Detention Transportation Officers were
12 made during and after the jury deliberations.

13 11. Based on the new information obtained, an ongoing investigation is being
14 conducted regarding the abovementioned events.

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18 I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

19 EXECUTED this 27 day of April, 2018.

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1 **ORDER**
2 Judge Douglas E. Smith
3 Eighth Judicial District Court
4 Department VIII
5 Regional Justice Center
6 200 Lewis Avenue
7 Las Vegas, Nevada 89155
8 (702)671-4338

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 ALFRED HARVEY,
12 #7013098

13 Defendant.

CASE NO: C-16-314260-1

DEPT NO: VIII

14 **ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND**
15 **DEFENDANT'S MOTION TO RECONSTRUCT THE RECORD**

16 DATE OF HEARING: April 30, 2018
17 TIME OF HEARING: 8:00 A.M.

18 THIS MATTER, having come on for hearing before the above entitled Court on the
19 30th day of April, 2018, the Defendant not being present, represented by JASMIN SPELLS
20 and SHARON DICKINSON, Deputy Public Defenders, the Plaintiff being represented by
21 STEVEN B. WOLFSON, District Attorney, through BRYAN SCHWARTZ, Deputy District
22 Attorney, and the Court having heard the arguments of counsel and good cause appearing
23 therefor,

24 THIS COURT FOUND the allegations presented by Defendant did not constitute new
25 "evidence," the Court having found that Judge Bixler does not recall the jury question.

26 THIS COURT HAVING FURTHER FOUND that in response to the discovered jury
27 question, Judge Bixler did not remember whether or not the question was presented to
28 attorneys.

///

DOUGLAS E. SMITH
DISTRICT JUDGE

DEPARTMENT EIGHT
LAS VEGAS NV 89155

1 THIS COURT HAVING FURTHER FOUND that even if the question was presented
2 to the attorneys, the question held the notation "The Court is not at liberty to supplement the
3 evidence" would have been the proper and legal response to respond to the jury inquiry,
4 attached as Exhibit A.

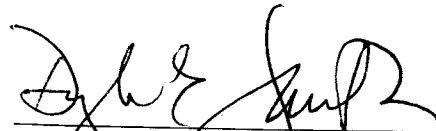
5 THIS COURT HAVING FURTHER FOUND that the Defendant failed to show that a
6 different outcome would have been probable;

7 IT IS HEREBY ORDERED that the Defendant's Motion for New Trial shall be and it
8 is Denied.

9 THIS COURT HAVING FOUND that the Defendant failed to show that it was
10 necessary to reconstruct the record, and that it would be unfair to allow the Defendant to
11 reconstruct the record using the juror affidavits;

12 IT IS HEREBY ORDERED that the Defendant's Motion to Reconstruct the Record
13 shall be and it is Denied.

14 DATED this 4th day of May 2018.

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17 DOUGLAS E. SMITH
18 DISTRICT COURT JUDGE

19
20 **CERTIFICATE OF SERVICE**

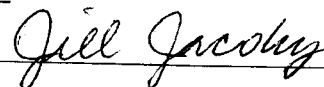
21 I hereby certify that on the 4th day of May 2018, a copy of this Order was
22 electronically served to all registered parties in the Eighth Judicial District Court
23 Electronic Filing Program and/or placed in the attorney's folder maintained by the
24 Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid,
by United States mail to the proper parties or per the attached list as follows:

25 Bryan Schwartz, bryan.schwartz@clarkcountyda.com

26 DA motions, Motions@clarkcountyda.com

27 Jasmin Spells, lillyjd@clarkcountynv.gov

28 Sharon Dickinson, dickinsg@clarkcountynv.gov

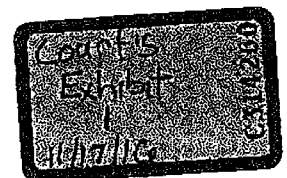


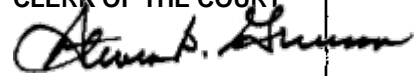
Jill Jacoby, Judicial Executive Assistant

The Court is not at liberty to supplement the evidence.

Can we have
elaboration on the
definition, by
means of force or
violence or fear of
injury.

Michelle Moline





1 EXPR
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11635
6 **PUBLIC DEFENDERS OFFICE**
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 384-1969
11 Lillyjd@clarkcountynv.gov
12 *Attorneys for Defendant*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 THE STATE OF NEVADA,)

16 Plaintiff,)

17 v.)

18 ALFRED C. HARVEY,)
19 Defendant,)

20 CASE NO. C-16-314260-1

21 DEPT. NO. VIII

22 **EX PARTE ORDER FOR TRANSCRIPT**

23 Upon the ex parte application of the above-named Defendant, ALFRED C.
24 HARVEY, by and through, JASMIN D. SPELLS, Deputy Public Defender, and good cause
25 appearing therefor,

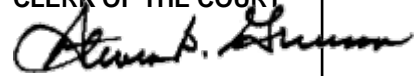
26 IT IS HEREBY ORDERED that the court recorder Gina Villani, prepare at State
27 expense, an expedited transcript of the proceedings for case C-16-314260-1 heard on April 16,
28 2018 in District Court, Dept. 8.

DATED this 18th day of April, 2018.

29 
30 _____
31 DISTRICT COURT JUDGE

32 Submitted by:
33 PHILIP J. KOHN
34 CLARK COUNTY PUBLIC DEFENDER

35 By /s/ Jasmin D. Spells
36 JASMIN D. SPELLS, #11635
37 Deputy Public Defender



1 EXPR
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11635
6 **PUBLIC DEFENDERS OFFICE**
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 384-1969
11 Lillyjd@clarkcountynv.gov
12 *Attorneys for Defendant*

7 **DISTRICT COURT**
8
9 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)
10)
11 Plaintiff,) CASE NO. C-16-314260-1
12 v.) DEPT. NO. VIII
13 ALFRED C. HARVEY,)
14 Defendant.)

14 **EX PARTE ORDER FOR EXPEDITED TRANSCRIPT**

15 Upon the ex parte application of the above-named Defendant, ALFRED C.
16 HARVEY, by and through, JASMIN D. SPELLS, Deputy Public Defender, and good cause
17 appearing therefor,

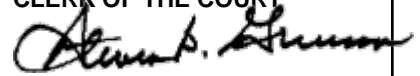
18 IT IS HEREBY ORDERED that the court recorder Gina Villani, prepare at State
19 expense, an expedited transcript of the proceedings for case C-16-314260-1 heard on April 30,
20 2018 in District Court, Dept. 8.

21 DATED this 30 day of April, 2018.

22
23 
24 _____
25 DISTRICT COURT JUDGE *geg*

25 Submitted by:
26 PHILIP J. KOHN
27 CLARK COUNTY PUBLIC DEFENDER

27 By /s/Jasmin D. Spells
28 JASMIN D. SPELLS, #11635
Deputy Public Defender



1 **NOAS**
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR No. 0556
4 309 South Third Street, Suite 226
5 Las Vegas, Nevada 89155
6 (702) 455-4685
7 Attorney for Defendant

8
9
10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 THE STATE OF NEVADA,)
13)
14 Plaintiff,) CASE NO. C-16-314260-1
15)
16 v.) DEPT. NO. VIII
17)
18 ALFRED C. HARVEY,)
19)
20 Defendant.)
21)
22)

NOTICE OF APPEAL

23 TO: THE STATE OF NEVADA

24 STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY,
25 NEVADA and DEPARTMENT NO. VIII OF THE EIGHTH JUDICIAL
26 DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE
27 COUNTY OF CLARK.

28 NOTICE is hereby given that Defendant, Alfred C. Harvey,
presently incarcerated in the Nevada State Prison, appeals to the
Supreme Court of the State of Nevada from the judgment entered
against said Defendant on the 4 day of May, 2018, whereby the
Order Denying Defendant's Motion for New Trial and Defendant's
Motion to Reconstruct the Record was entered.

DATED this 16 day of May, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Deputy Public Defender

1 DECLARATION OF MAILING

2 Carrie Connolly, an employee with the Clark County
3 Public Defender's Office, hereby declares that she is, and was
4 when the herein described mailing took place, a citizen of the
5 United States, over 21 years of age, and not a party to, nor
6 interested in, the within action; that on the 16 day of May, 2018,
7 declarant deposited in the United States mail at Las Vegas,
8 Nevada, a copy of the Notice of Appeal in the case of the State of
9 Nevada v. Alfred C. Harvey, Case No. C-16-314260-1, enclosed in a
10 sealed envelope upon which first class postage was fully prepaid,
11 addressed to Alfred C. Harvey, c/o High Desert State Prison, P.O.
12 Box 650, Indian Springs, NV 89070. That there is a regular
13 communication by mail between the place of mailing and the place
14 so addressed.

15 I declare under penalty of perjury that the foregoing is
16 true and correct.

17 EXECUTED on the 16 day of May, 2018.

18
19
20 /s/ Carrie M. Connolly
21 An employee of the Clark County
22 Public Defender's Office
23
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing was made this 16 day of May, 2018, by Electronic Filing to:

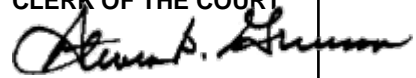
District Attorneys Office
E-Mail Address:

PDMotions@clarkcountyda.com

Jennifer.Garcia@clarkcountyda.com

Eileen.Davis@clarkcountyda.com

/s/ Carrie M. Connolly
Secretary for the
Public Defender's Office



1 **CAS**

2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR No. 0556
4 309 South Third Street, Suite 226
5 Las Vegas, Nevada 89155
6 (702) 455-4685
7 Attorney for Defendant

8
9
10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 THE STATE OF NEVADA,)
13)
14 Plaintiff,) CASE NO. C-16-314260-1
15)
16 v.) DEPT. NO. VIII
17)
18 ALFRED C. HARVEY,)
19)
20 Defendant.)
21 _____)

22 **CASE APPEAL STATEMENT**

23 1. Appellant filing this case appeal statement:
24 Alfred C. Harvey.

25 2. Judge issuing the decision, judgment, or order
26 appealed from: Douglas E. Smith.

27 3. All parties to the proceedings in the district
28 court (the use of et al. To denote parties is prohibited): The
State of Nevada, Plaintiff; Alfred C. Harvey, Defendant.

1 All parties involved in this appeal (the use of
2 et. al. to denote parties is prohibited): Alfred C. Harvey,
3 Appellant; The State of Nevada, Respondent.

1 5. Name, law firm, address, and telephone number of
2 all counsel on appeal and party or parties whom they represent:

3 PHILIP J. KOHN
4 Clark County Public Defender
5 309 South Third Street, #226
Las Vegas, Nevada 89155-2610

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155

6 Attorney for Appellant

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

7
8
9
10 6. Whether appellant was represented by appointed or
11 retained counsel in the district court: Appointed.

12 7. Whether appellant is represented by appointed or
13 retained counsel on appeal: Appointed.

14 8. Whether appellant was granted leave to proceed in
15 forma pauperis, and the date of entry of the district court
16 order granting such leave: N/A.

17 9. Date proceedings commenced in the district court
18 (e.g., date complaint, indictment, information, or petition was
19 filed): Information filed 04/19/16.

20 DATED this 16 day of May, 2018.

21 PHILIP J. KOHN
22 CLARK COUNTY PUBLIC DEFENDER

23
24 By: /s/ Sharon G. Dickinson
25 SHARON G. DICKINSON, #3710
26 Deputy Public Defender

1 **CERTIFICATE OF ELECTRONIC FILING**

2 I hereby certify that service of the above and
3 foregoing was made this 16 day of May, 2018, by Electronic
4 Filing to:

5
6 District Attorneys Office
7 E-Mail Address:
PDMotions@ccdandv.com

8 Jennifer.Garcia@ccdandv.com

9 Eileen.Davis@ccdandv.com

10
11 /s/ Carrie M. Connolly
12 Secretary for the
13 Public Defender's Office

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

February 07, 2018

C-16-314260-1 State of Nevada
vs
Alfred Harvey

February 07, 2018 8:00 AM Status Check: Supreme Court Order Granting Motion
to Withdraw and Remanding to Secure
Counsel

HEARD BY: Smith, Douglas E. COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

PARTIES
PRESENT:

JOURNAL ENTRIES

- Jonathan Cooper, Chf Dep DA, present on behalf of the State and Kelli DeVaney-Sauter, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC).

This is the time set for the Status Check regarding the Supreme Court Order Granting Motion to Withdraw and Remanding to Secure Counsel. Court noted that Timothy Treffinger, Esq., was appellate counsel for the Deft.; however, he has withdrawn as counsel of record so the Supreme Court has remanded the appeal for the limited purpose of securing new counsel for appellate. This Court's staff contacted the Office of Appointed Counsel and was told that the Public Defender could be appointed as counsel for the Deft. Therefore, COURT ORDERED, matter set for status check: the Public Defender's office is to perform a conflict check and confirm, if possible, next date.

NDC

02/14/18 8:00 AM STATUS CHECK: CONFIRMATION OF PUBLIC DEFENDER AS APPELLATE COUNSEL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

February 14, 2018

C-16-314260-1 State of Nevada
vs
Alfred Harvey

**February 14, 2018 8:00 AM Status Check: Confirmation of Public Defender as
Appellate Counsel**

HEARD BY: Smith, Douglas E.

COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Vivian Luong, Dep DA, present on behalf of the State and Kelli DeVaney-Sauter, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC).

This is the time set for the Status Check on Confirmation of Public Defender as Appellate Counsel. Ms. DeVaney-Sauter advised that the Public Defender's office performed a conflict check and it appears there are none; therefore, they can CONFIRM as Appellate Counsel at this time. COURT SO NOTED.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

April 16, 2018

C-16-314260-1 State of Nevada
vs
Alfred Harvey

April 16, 2018 8:00 AM All Pending Motions

HEARD BY: Smith, Douglas E. COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- DEFT.'S MOTION FOR NEW TRIAL PURSUANT TO NRS 176.515 BASED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE . . . DEFT.'S MOTION TO RECONSTRUCT THE RECORDS AND MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS MATTER

Brian Schwartz, Dep DA, present on behalf of the State; Sharon Dickinson, Chf Dep PD, and Jasmin Spell, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC). Ms. Spells requested that the Deft.'s presence be WAIVED.

This is the time set for hearing on the above-named motions; Mr. Schwartz advised that the State has not had an opportunity to respond to the motions but will get their Oppositions filed today. With regard to the trial judge hearing the motions, the State submits.

Ms. Spells advised that the Defense is requesting that this Court set this matter at a time when Judge Bixler would be available to hear it; she understands that Judge Bixler is a Senior Judge but he is the Judge who presided over the trial. This case was heavily litigated; the matter was originally assigned

to Judge Miley, who heard and decided most of the motions. The matter was then sent to Overflow, picked up by this Department, and heard by Judge Bixler. The issue that the parties are dealing with occurred during the trial and that is why they believe Judge Bixler should be the one to decide it because he is the one who is most familiar with the facts and circumstances of the underlying issue.

Court noted that the newly discovered evidence is the note from the Jury, which reads as follows: "Can we have elaboration on the definition, by means of force or violence or fear of injury." To which the Court responded, "The Court is not at liberty to supplement the evidence." Defense claims that they never saw the question and were not consulted on a possible answer to the question.

Colloquy as to whether or not the Court is at liberty to supplement the Jury Instructions; Ms. Spells believes there are numerous arguments she could make in support of the Jury's question but she would like an opportunity to see the State's Oppositions and respond before this Court makes a final determination. COURT ORDERED, Motions CONTINUED.

NDC

CONTINUED TO: 04/30/18 8:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

April 30, 2018

C-16-314260-1 State of Nevada
vs
Alfred Harvey

April 30, 2018 8:00 AM All Pending Motions

HEARD BY: Smith, Douglas E. COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Gina Villani

PARTIES
PRESENT:

JOURNAL ENTRIES

- DEFT.'S MOTION FOR NEW TRIAL PURSUANT TO NRS 176.515 BASED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE . . . DEFT.'S MOTION TO RECONSTRUCT THE RECORDS AND MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS MATTER

Brian Schwartz, Dep DA, present on behalf of the State; Sharon Dickinson, Chf Dep PD, and Jasmin Spells, Dep PD, present on behalf of Deft. Harvey, who is not present. Deft. is incarcerated in the Nevada Department of Corrections (NDC).

This is the time set for hearing on Deft.'s Motion for New Trial and Motion to Reconstruct the Record. Upon Court's inquiry, Ms. Spells advised that the newly the newly discovered evidence is the note from the Jury that was marked as an exhibit. Counsel found the note during the appellate process and the parties were not notified at the time the Jury was deliberating that there was a question. The noted said, "Can we have elaboration on the definition, by means of force or violence or fear of injury," which is one of the elements of a robbery charge. At the top of the note the Court's response was as follows: "The Court is not at liberty to supplement the evidence."

Ms. Dickinson advised that in the note, the Jury was asking for a legal definition but the response had to do with evidence so that is not what they were asking for. Ms. Dickinson believes the Court should have brought the trial attorneys back into court to look at the instruction, formulate an answer, and

decide what to do; she discussed NRS 175.451, Gonzales v. State, and Jeffries v. State. When the parties were last present, the Court indicated that Judge Bixler did not remember this case so Defense Counsel spoke with a few of the Jurors; Supplemental Points and Authorities were submitted. The Jurors remember giving the note and one of the Jurors made comments about the response given by the Court's Marshal, which brings up further concern because the trial attorneys were not made aware of any of this because none of it is a part of the record. Therefore, Ms. Dickinson believes an Evidentiary Hearing is necessary to ascertain why the procedures were not correctly followed and what happened with the note.

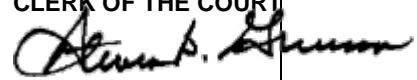
Colloquy; the Court believes that "The Court is not at liberty to supplement the evidence" is the appropriate response to the question and that it is not new evidence; the appropriate evidence and arguments were presented at the time of trial, there is no new evidence. Although a mistake may have occurred, what difference would it have made because if the trial attorneys would have been brought back into court, the response the Court gave would have been the response of the trial attorneys.

Ms. Spells advised that the note is not evidence but a clarification on what the law is. The Jury is the trier of fact and the Court informs the Jury on what the law is. Ms. Spells believes that the Jury was confused as to what the law was. If Defense counsel would have had the opportunity, they would have objected to the Court's response to the note, directed the Jurors to the appropriate Jury Instruction, or proffered new ones. Court noted that the Jury Instructions cannot be supplemented once the Jury begins their deliberations. COURT ORDERED, the Motion is DENIED.

Ms. Spells advised that there is an additional argument; Defense counsel believes there was possible misconduct because the Deft. was aware that there was a holdout Juror prior to the Jury coming back with a verdict. Additionally, in speaking with some of the Jurors, they indicated that there were additional conversations between the Jurors and the Court's Marshal about procedural aspects and he may have provided them with his cell phone number. Defense Counsel was not made aware of the conversations; they should have been done in writing or placed on the record, neither occurred and the cell phone issue also needs to be explored. Therefore, Ms. Spells is requesting that the Court set an Evidentiary Hearing. COURT FURTHER ORDERED, the prior ruling STANDS, the Motion is DENIED. State to prepare Findings of Fact and Conclusions of Law consistent with their Opposition.

With regard to the Motion to Reconstruct the Records, Ms. Dickinson advised that Defense Counsel needs to have the record reconstructed to determine how the note ended up in the District Court's evidence vault; there is nothing in the record which explains that; colloquy. COURT ORDERED, Ms. Dickinson is free to file a reconstruction; however, her request to use the Declarations from the Jurors is DENIED. State to prepare the Order.

NDC



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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ALFRED HARVEY,
Defendant.

CASE#: C-16-314260-1
DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE
MONDAY, APRIL 16, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO NRS
176.515 BASED ON GROUNDS OF NEWLY DISCOVERED
EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND
DECISION BY TRIAL JUDGE
DEFENDANT'S MOTION TO RECONSTRUCT THE RECORDS AND
MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS
MATTER**

APPEARANCES:

For the State: BRYAN S. SCHWARTZ, ESQ.
Deputy District Attorney

For the Defendant: SHARON G. DICKINSON, ESQ.
JASMIN D. SPELLS, ESQ.
Deputy Public Defenders

RECORDED BY: GINA VILLANI, COURT RECORDER

1 Las Vegas, Nevada, Monday, April 16, 2018

2
3 [Hearing began at 8:02 a.m.]

4 THE COURT: C314260, Alfred Harvey.

5 MS. DICKINSON: Good morning, Your Honor, Sharon
6 Dickinson from the Public Defender's Office. I'm waiting for Jasmine
7 Spells. She was the trial attorney.

8 THE COURT: Who?

9 MS. DICKINSON: Jasmine Spells. She was the trial attorney.

10 THE COURT: All right. Okay.

11 MS. DICKINSON: If we could wait until she gets here.

12 [Hearing trailed at 8:03 a.m.]

13 [Hearing recalled at 8:32 a.m.]

14 THE COURT: C314260, Alfred Harvey.

15 MS. SPELLS: Good morning, Your Honor, Jasmine Spells
16 and Sharon Dickinson on behalf of Mr. Harvey, who is not present but in
17 custody in NDOC, we'd ask that his presence be waived.

18 THE COURT: Okay.

19 MR. SCHWARTZ: And, Your Honor, I hadn't had a chance to
20 respond to their motion. I'll get it filed today. I know that they were
21 going to request that the trial judge actually hear the motion. The State's
22 position on that is --

23 THE COURT: He's a senior judge now; he's not the trial
24 judge.

25 MR. SCHWARTZ: So the State's position is we'll submit it to

1 you on the --

2 THE COURT: All right.

3 MS. SPELLS: And, Your Honor, we are asking that the Court
4 set this at a time that Judge Bixler can hear -- we do understand that
5 Judge Bixler is a senior judge at this time. This case was heavily
6 litigated, we were originally in front of Judge Miley, who heard most of
7 the motions, decided most of the motions, and made those records. But
8 the issue that we're dealing with now is very pertinent to exactly what
9 occurred during the trial and we were sent here from overflow, Your
10 Honor --

11 THE COURT: What the question to the jury, is that what you
12 wanted -- you want that issue of, is that what you're talking about?

13 MS. SPELLS: Yes, Your Honor, as well as perfecting the
14 record. Because Judge Bixler was the one who would have been most
15 intimately familiar with the facts and circumstances of that because he
16 would have been the judge proceeding over the trial.

17 THE COURT: I talked to Judge Bixler about this and Bixler
18 doesn't remember. If the question -- the question was something to the
19 effect that the jury asked a question about the definition of --

20 MR. SCHWARTZ: Robbery.

21 THE COURT: -- the robbery; is that correct?

22 MR. SCHWARTZ: Yes.

23 MS. SPELLS: Yes, force or violence. Specifically --

24 THE COURT: Force or violence.

25 MS. SPELLS: Force or violence.

1 THE COURT: And then -- and there is a notation at the top of
2 the paper that says, the Court is not at liberty to supplement the
3 evidence.

4 MS. DICKINSON: Correct.

5 MS. SPELLS: Yes.

6 THE COURT: And your position is that you didn't discuss this
7 at all?

8 MS. SPELLS: Our position is that we never seen the
9 question, we were unaware of it, and --

10 THE COURT: Had you been in trial right now and that
11 question came up, what would the response likely be?

12 MS. SPELLS: Your Honor, we would have had a number of
13 responses, which is what we detailed in our motion. Specifically, we
14 would have asked that certain jury instructions be presented, additionally
15 we would have asked to --

16 THE COURT: Now, the jury is deliberating when they came
17 up with this -- this -- is the Court at liberty to supplement the jury
18 instructions? No.

19 MS. SPELLS: Yes, Your Honor, the Court is at liberty given
20 the --

21 THE COURT: No, they're not.

22 MS. SPELLS: Respectfully, Your Honor, I disagree given the
23 jury instructions that were given to the jury specifically which are
24 enumerated in our motion. Additionally, we are at liberty to answer
25 certain questions. We can at least refer them to jury instructions that

1 were already given and that was one of the things that we argued in our
2 motion.

3 So there are a lot of different arguments, Your Honor. We
4 would like an opportunity to review the State's response and then again
5 respond additionally before the Court makes any ruling.

6 But our concern is that --

7 THE COURT: Well, they submitted it. And my position is
8 this --

9 MS. SPELLS: Your Honor, they're asking for time to file --

10 THE COURT: Do you want to respond?

11 MR. SCHWARTZ: Well, what I was saying, Your Honor, is we
12 submitted who was going to hear the motion, that's what I was saying,
13 Your Honor.

14 I'll -- I'd be happy to orally argue it right now, if you --

15 THE COURT: No, if you want to -- if you want to file --

16 MR. SCHWARTZ: I can --

17 THE COURT: -- something written.

18 MR. SCHWARTZ: Yeah.

19 THE COURT: At this point I am not inclined to grant it,
20 because if you had come -- if we were in trial and that question came up,
21 then what happens is, normally, the judge calls the attorneys and both
22 attorneys agree that the Court is not at liberty to supplement the jury
23 instructions and would send the jury back that letter.

24 That's exactly what is on that paper. I've reviewed this with a
25 few other judges and they all agree that this should be denied. But I will

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let the State respond.

MR. SCHWARTZ: Thank you, Your Honor.

MS. SPELLS: And we'd like an opportunity to file a response to their opposition, Your Honor.

THE COURT: That's fine.

MR. SCHWARTZ: Your Honor, I'll have my response filed today.

THE COURT: All right.

MS. DICKINSON: Your Honor, I'll probably need till Friday or Monday to file --

THE COURT: Two weeks.

THE CLERK: April 30th.

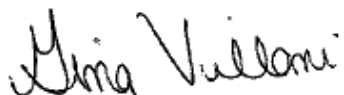
THE COURT: Make sure all your papers -- and send copies to the Court for courtesy.

MR. SCHWARTZ: Yes, Your Honor. Thank you.

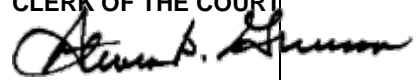
[Hearing concluded at 8:37 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Gina Villani
Court Recorder/Transcriber



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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ALFRED HARVEY,
Defendant.

CASE#: C-16-314260-1
DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE
MONDAY, APRIL 30, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO NRS
176.515 BASED ON GROUNDS OF NEWLY DISCOVERED
EVIDENCE AND MOTION FOR EVIDENTIARY HEARING AND
DECISION BY TRIAL JUDGE
DEFENDANT'S MOTION TO RECONSTRUCT THE RECORDS AND
MOTION ASKING TRIAL JUDGE TO MAKE A DECISION IN THIS
MATTER**

APPEARANCES:

For the State: BRYAN S. SCHWARTZ, ESQ.
Deputy District Attorney

For the Defendant: SHARON G. DICKINSON, ESQ.
JASMIN D. SPELLS, ESQ.
Deputy Public Defenders

RECORDED BY: GINA VILLANI, COURT RECORDER

1 Las Vegas, Nevada, Monday, April 30, 2018

2
3 [Hearing began at 8:31 a.m.]

4 THE COURT: C314260, Alfred Harvey.

5 MS. DICKINSON: Your Honor --

6 THE COURT: All right. Defense motion.

7 MS. DICKINSON: -- Sharon Dickinson on behalf of
8 Mr. Harvey. I'm his appellate attorney. Ms. Jamine is his trial attorney.

9 THE COURT: You filed a motion saying there's newly
10 discovered evidence. What's the newly discovered evidence?

11 MS. SPELLS: Your Honor, the newly discovered evidence is
12 the note that was an exhibit. We found that during the appellate
13 process. The parties weren't previously notified that there was a note
14 that the jury asked of the Court.

15 THE COURT: What note -- what did the note say?

16 MS. SPELLS: The note asked specifically for a clear
17 definition -- or for more definition to use of force or injury, which is one of
18 the elements of the robbery charges.

19 THE COURT: And what was typed on the top?

20 MS. SPELLS: What was typed on the top, Your Honor, was
21 that the Court is not at liberty to supplement the evidence.

22 THE COURT: Isn't that exactly what would happen in a trial?
23 We went back -- we've talked about this before. But when a jury is out,
24 the Court is not at liberty to supplement the evidence. The evidence is
25 what it is. So this isn't newly discovered evidence.

1 MS. DICKINSON: But, Your Honor, if I could say something.
2 In the note they were asking for a definition, legal definition.

3 THE COURT: Okay.

4 MS. DICKINSON: The response had to do with evidence. It
5 doesn't -- it isn't what they were asking for, they weren't asking for
6 evidence.

7 And there are four reasons why the Court should have brought
8 the defense back into court to look at this instruction and seek their
9 input. The first is NRS 175.451, which is a statute that directs the trial
10 Court to do this.

11 The second is jury instruction number 23. The jury was given
12 instructions from this trial Court, not you but the judge who was presiding
13 at the time, that if the jury had a question about the law or if they were
14 confused, they were to give a note to the court marshal and they would
15 be -- they would receive more instruction.

16 Fourth, we have the *Gonzalez versus State* case from 2015,
17 where the Nevada Supreme Court said, where a jury's question during
18 deliberations suggest confusion or lack of understanding of a significant
19 element of the applicable law, the Court has a duty to give additional
20 instructions on the law to clarify the jury's doubt or confusion.

21 And number four, we have a more recent case, *Jeffries versus*
22 *State*, it's from 2017, and in that case the Supreme Court again said to
23 the trial judge that you are allowed to give additional instructions. And
24 they did this by saying the defense is required to proffer additional jury
25 instructions, if such a note comes during deliberations.

1 So there are four reasons why the trial Court should have
2 brought everybody back into court to look at this note and decide what to
3 do.

4 Now, when we were in here last time I know the Court said
5 that Judge Bixler doesn't remember anything about it. We did, since
6 then, go ahead and speak to a few of the jurors. And we did submit
7 some supplemental points and authorities where the jurors have talked
8 about this note, they remember giving the note, they -- one jurors made
9 comments about what was said.

10 I'm curious, did the Court receive copies of these?

11 THE COURT: Yeah.

12 MS. DICKINSON: Because we filed them late on Friday.

13 In fact, one of the jurors made comments as to what the court
14 marshal -- the court's marshal said to them at the time, which brings up
15 further concern because the trial attorneys were not privy to any of this,
16 none of this is in the record either.

17 So, basically, I'm just summarizing why the procedures were
18 not correct -- correctly done by this trial -- by this trial judge. And we
19 don't know what happened to the note. We don't know if it was given to
20 him because he doesn't remember it. We don't know if it was given to
21 some other judge.

22 THE COURT: But -- but you've tried cases and I've tried
23 cases. If the jury had asked that question, the Court is not at liberty to
24 supplement the evidence would have been the response that was
25 appropriate. That is marked on top of that question.

1 Now, that doesn't mean that's new evidence. It's my belief
2 that you argued at the -- at the -- that there wasn't enough there for
3 robbery and you argued that issue. That -- this isn't new evidence.

4 Is it a mistake? It could have been a mistake. But even if the
5 mistake was made, it wouldn't have changed because that is exactly
6 what the answer would have been had he brought everybody in and said
7 this question was asked. Everybody would have said -- defense and
8 prosecution -- Judge, you're not at liberty to supplement the evidence.

9 MS. DICKINSON: Your Honor, could the trial attorney
10 respond as to what she would have said if she was brought into court?

11 THE COURT: Sure.

12 MS. SPELLS: Thank you, Your Honor.

13 Our position is that this is not evidence, but this is a
14 clarification on what the law is. And the jury is the trier of facts; however,
15 the Court is the one who informs the jury what the law is. And so our
16 position, and the case law supports this, is that if the jury has confusion
17 as to what the law is, what law applies here, here a particular element of
18 the crime robbery, that we would have been able to give additional jury
19 instructions.

20 And we've laid out in our motion, as well as our response, I
21 would have specifically objected to the typed portion that is on the top of
22 this note that says the Court is not at liberty to supplement the evidence.

23 Our position is that at a minimum the jury should have been
24 directed to some of the jury instructions that were already given but we
25 could have proffered new ones and we lay out which new ones that we

1 would have --

2 THE COURT: You can't proffer new jury instructions. Once
3 they're back deliberating, that's the sanctity of the jury. You can't
4 supplement that. They have the jury instructions.

5 So I understand your argument --

6 MS. SPELLS: Your Honor, we disagree, and I think that --

7 THE COURT: -- I -- and it's a good argument but it's not -- it
8 doesn't follow the law and your motion --

9 MS. SPELLS: Your Honor, can we address --

10 THE COURT: -- for a new trial pursuant to 176.515 based on
11 newly discovered evidence is denied. The State will prepare findings of
12 fact, conclusions of law consistent with their opposition.

13 Thank you.

14 MS. SPELLS: Your Honor --

15 MS. DICKINSON: Your Honor, can I say one more thing?

16 THE COURT: No. You're going to -- you're going to appeal --
17 they're going -- you're going to appeal this to the Supreme Court, tell the
18 Supremes.

19 MS. SPELLS: We would just like to address the misconduct
20 portion of our motion. We didn't get to argue that portion, Your Honor.

21 THE COURT: What misconduct?

22 MS. SPELLS: In our reply, and as well as our supplemental,
23 we indicated that there was another road, even if it didn't fall under the
24 seven factors of *Lenmore* that we were --

25 THE COURT: Put it on the record.

1 MS. SPELLS: -- indicated that there was possible
2 misconduct.

3 I didn't hear you, Your Honor.

4 THE COURT: Put it on the record.

5 MS. SPELLS: Thank you, Your Honor.

6 Your Honor, here we are also indicating that misconduct had
7 to occur because, one, Mr. Harvey, the Defendant in the case, was
8 aware that there was a hold-out juror prior to the verdict coming in.
9 Additionally, which we've laid out in some of our exhibits in speaking
10 with the jurors, they indicate that there was additional conversation with
11 the marshal about a procedural aspect and if there was an individual
12 who had a question about procedure, they needed to come in and speak
13 with the judge. We were not notified of that, that was never put on the
14 record.

15 And so we are asking -- we're asking for an evidentiary
16 hearing based on the newly discovered evidence, as well as the fact that
17 there was mis --

18 THE COURT: You say it's newly discovered evidence. It is
19 not evidence.

20 MS. SPELLS: I understand the Court's ruling.

21 We were also basing on an evidentiary -- asking for an
22 evidentiary hearing based on the fact that there was misconduct
23 because none of those communications between the jurors and the
24 marshal or court staff were put on the record. And there is case law that
25 specifically indicates that, as an arm of the court, those communications

1 need to either be in writing at all times --

2 THE COURT: All right.

3 MS. SPELLS: -- or be done in the courtroom where they can
4 be put on the record so that we know what happens with regards to an
5 appeal. And it indicates that the Court needs to make sure that those
6 statements are not coercive.

7 Additionally, which we laid out in our reply and our
8 supplemental briefs, is that we understand that the marshal gave his cell
9 phone number. There was one juror, I believe Ms. Susie Chang,
10 indicated that she was informed or she thought someone told her that
11 one of the jurors had actually contacted the marshal via cell phone. And
12 so that issue needs to be explored as well because that would be
13 communication from the Court to the jurors that was not put on the
14 record, Your Honor.

15 And so --

16 THE COURT: We all get their cell numbers. Tom gets the
17 cell numbers on every juror. So that if a juror doesn't show up, he can
18 call them. That doesn't mean he's calling them during deliberations.

19 MS. SPELLS: Your Honor, I'm not indicating that the court
20 marshal called anyone. I am stating that we were informed that it is
21 possible that one of the jurors called the court marshal after the first day
22 of deliberations.

23 THE COURT: All right.

24 MS. SPELLS: This would not be in the morning to be late to
25 court but after deliberating period.

1 THE COURT: All right. Thank you.

2 Your motions denied.

3 MS. DICKINSON: Your Honor, the Court --

4 THE COURT: And you'll -- and the State will prepare a
5 findings of fact, conclusions of law and a higher court is going to have to
6 decide this because I don't see it as problematic. Because we are not at
7 liberty to supplement the evidence or the testimony or the jury
8 instructions once given. Because I am sure you went through the jury
9 instructions. I am sure the judge said, are you familiar with jury
10 instructions 1 through 45, or whatever it was, and you -- I'll bet anything
11 that you said yes, I'm familiar with them. No, I don't have any others
12 with the oppositions that we sent.

13 It's already been appealed or if it hasn't been appealed, it's
14 going to be. So thank you.

15 MS. DICKINSON: Your Honor, the Court -- we have a second
16 motion, the motion to reconstruct the record and that was filed because
17 we need to have a reconstruction of the record to determine how this
18 note ended up in the district court evidence vault. We have nothing in
19 the record that explains that. I'm asking the Court to reconstruct it. I
20 believe the jurors at least say approximately when they gave it to the
21 marshal, which was the second day of deliberations. The jurors also say
22 that shortly after that they made a decision when they were told
23 something by the court marshal to the effect that this has already been
24 asked and answered.

25 So we would like to reconstruct the record to show what

1 occurred.

2 THE COURT: All right. Thank you.

3 I'm not going to bring Judge Bixler in to reconstruct the record.
4 He doesn't remember. It's been so long. And if you want to file a
5 reconstruction, you can.

6 MS. DICKINSON: Your Honor, so would the Court be willing
7 to allow us to use the affi -- the declarations we have from the jurors that
8 explain what they did with the note so we could as least use that in the
9 appeal, reconstruct it in that manner?

10 THE COURT: No, because I don't think that's fair to go back
11 and say this happened and ask for specific times and stuff. I just don't
12 think that's fair to either -- to justice.

13 Should that question have been asked? Yeah, it should have.

14 Did some telephone -- cell numbers be given? Yes, I'm sure
15 that happened because all of the marshals have to get their telephone
16 numbers to call jurors in case they don't show up.

17 I don't see a need to reconstruct it and that motions denied.
18 Thank you.

19 MS. SPELLS: Thank you.

20 MR. SCHWARTZ: Thank you, Your Honor.

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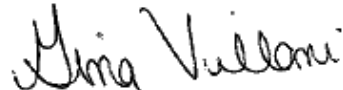
THE COURT: State, prepare that order.

MR. SCHWARTZ: Yes, Your Honor.

[Hearing concluded at 8:44 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Gina Villani
Court Recorder/Transcriber

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

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3 ALFRED C. HARVEY,) No. 72829/75911
 4)
 5 Appellant,)
 6)
 7 vi.)
 8)
 9 THE STATE OF NEVADA,)
 10)
 11 Respondent.)
 12 _____)

13 **APPELLANT’S APPENDIX VOLUME VIII PAGES 1464-1699**

14 PHILIP J. KOHN	STEVE WOLFSON
15 Clark County Public Defender	Clark County District Attorney
16 309 South Third Street	200 Lewis Avenue, 3 rd Floor
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18 Attorney for Appellant	ADAM LAXALT
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	Counsel for Respondent

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that this document was filed electronically with the Nevada
 21 Supreme Court on the 22 day of October, 2018. Electronic Service of the foregoing
 22 document shall be made in accordance with the Master Service List as follows:

23 ADAM LAXALT	SHARON G. DICKINSON
24 STEVEN S. OWENS	HOWARD S. BROOKS

25 I further certify that I served a copy of this document by mailing a true and
 26 correct copy thereof, postage pre-paid, addressed to:

27 ALFRED C. HARVEY, NDOC# 1174900
 28 C/O SOUTHERN DESERT CORRECTIONAL CENTER
 P.O. BOX 208
 INDIAN SPRINGS, NV 89070

BY /s/ Rachel Howard
 Employee, Clark County Public Defender’s Office