

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEBAW TESFAYE KASSA,)

Docket No.: 76870-1

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Elizabeth A. Brown
Clerk of Supreme Court

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

INDEX FOR APPELLANT'S APPENDIX

VOLUME 5

14- Jury Instructions..... 000817-000848

ORIGINAL

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

JUN 15 2018

BY: 
SUSAN BOTZENHARY, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

CASE NO: C-16-317365-1

DEPT NO: XII

ABEBAW TESFAYE KASSA,

Defendant.

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

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

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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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.

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

In this case, it is charged in an Amended Information that on or about the 27th day of July, 2016 the Defendant committed the offense(s) of MURDER and FIRST DEGREE ARSON. It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of the offense charged.

COUNT 1 - MURDER

did willfully, unlawfully, feloniously and with malice aforethought, kill ALIPIO LOLITA BUDIAO, a human being, the said killing committed during the perpetration or attempted perpetration of Arson, to-wit: by setting fire to and/or causing to be burned, a certain residence, located at 1009 Marion Drive, Las Vegas, Clark County, Nevada, owned by JOSEFINA ADAMS and/or occupied by ALIPIO LOLITA BUDIAO, by use of open flame and flammable and/or combustible materials, and/or by manner and means unknown.

COUNT 2 - FIRST DEGREE ARSON

did willfully, unlawfully, maliciously, and feloniously set fire to, burn, and/or cause to be burned, a certain residence, located at 1009 Marion Drive, Las Vegas, Clark County, Nevada, owned by JOSEFINA ADAMS, by use of open flame and flammable and/or combustible materials, and/or by manner and means unknown.

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

Each charge and the evidence pertaining to it should be considered separately. The fact you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 4

Any person who willfully, unlawfully, maliciously, and feloniously sets fire to, and thereby causes to be burned, a dwelling or house, is guilty of first degree arson.

Any person shall be deemed to have "set fire to" a building or structure when any part or anything therein shall be scorched, charred or burned.

As used in this instruction, the word "willfully", when applied to the intent with which an act is done or omitted, implies simply a purpose or mere willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.

INSTRUCTION NO. 5

Murder is the unlawful killing of a human being, with malice aforethought, whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 8

The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime, and the jury may infer the existence of a particular state of mind from the circumstances disclosed by the evidence.

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2 Murder of the first degree is murder which is perpetrated by means of any kind of
3 willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation,
4 and premeditation -- must be proven beyond a reasonable doubt before an accused can be
5 convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no appreciable space of time between
7 formation of the intent to kill and the act of killing.

8 Deliberation is the process of determining upon a course of action to kill as a result of
9 thought, including weighing the reasons for and against the action and considering the
10 consequences of the actions.

11 A deliberate determination may be arrived at in a short period of time. But in all
12 cases the determination must not be formed in passion, or if formed in passion, it must be
13 carried out after there has been time for the passion to subside and deliberation to occur. A
14 mere unconsidered and rash impulse is not deliberate, even though it includes the intent to
15 kill.

16 Premeditation is a design, a determination to kill, distinctly formed in the mind by the
17 time of the killing.

18 Premeditation need not be for a day, an hour, or even a minute. It may be as
19 instantaneous as successive thoughts of the mind. For if the jury believes from the evidence
20 that the act constituting the killing has been preceded by and has been the result of
21 premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.
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The law does not undertake the measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

INSTRUCTION NO. 11

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

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2 There is a kind of murder which carries with it conclusive evidence of premeditation and
3 malice aforethought. This class of murder is murder committed in the perpetration or
4 attempted perpetration of an arson. Therefore, a killing which is committed in the
5 perpetration of such an arson is deemed to be Murder of the First Degree, whether the killing
6 was intentional or unintentional or accidental. This is called the Felony-Murder Rule.

7 The intent to perpetrate or attempt to arson must be proven beyond a reasonable
8 doubt.

INSTRUCTION NO. 13

You are instructed that the defendant is presumed sane until the contrary is shown. Insanity is an affirmative defense, and the defendant has the burden of proving his legal insanity by a preponderance of the evidence. "By a preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

The presumption of sanity is not rebutted merely by a history of prior diagnoses of mental illness, disease or defect. And legal insanity is not proved simply by raising a doubt as to whether sanity existed at the time of the crime. Legal insanity is not circumscribed in meaning or purpose by medical criteria concerning human psychoses.

INSTRUCTION NO. 14

Voluntary use of drugs or alcohol do not constitute a severe mental disease or defect. The voluntary use of drugs or alcohol must be disregarded in determining whether the defendant could appreciate the nature and quality of his acts or the moral wrongfulness of his acts. However, if you find that at the time in issue the defendant had a severe mental disease or defect and that the disease or defect gave rise to an inability to appreciate the nature or quality or moral wrongfulness of his acts, then the defendant's subsequent consumption of drugs or alcohol, whether voluntary or involuntary, cannot preclude his defense of insanity.

You may return a verdict of "guilty, but mentally ill," if you find all of the following:

- (a) The Defendant is guilty beyond a reasonable doubt of an offense;
- (b) The Defendant has established by a preponderance of the evidence that due to a disease or defect of the mind, the Defendant was mentally ill at the time of the commission of the offense; and
- (c) The Defendant has not established by a preponderance of the evidence that the Defendant is not guilty by reason of insanity.

A "mentally ill person" is any person whose capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his personal needs is diminished to the extent that he presents a clear and present danger of harm to himself or others.

A defendant who is found guilty but mentally ill is subject to the same criminal, civil, and administrative penalties and procedures as a defendant who is found guilty.

The Defendant has entered, in the alternative or in addition to his plea of not guilty, a plea of not guilty by reason of insanity. Under such a plea or defense, the burden of proof is upon the defendant to establish by a preponderance of the evidence that:

(a) Due to a disease or defect of the mind, the defendant was in a delusional state at the time of the alleged offense; and

(b) Due to the delusional state, he either did not:

1) Know or understand the nature and capacity of his act; or

2) Appreciate that his conduct was wrong, meaning not authorized by law.

INSTRUCTION NO. 17

"Disease or defect of the mind" does not include a disease or defect which is caused solely by voluntary intoxication.

000833

INSTRUCTION NO. 18

To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law. So, if the jury believes that the Defendant was suffering from a delusional state, and if the facts as he believed them to be in his delusional state would justify his actions, he is insane and entitled to a verdict of not guilty by reason of insanity. If, however, the delusional facts would not amount to a legal defense, then the Defendant is not insane.

The ability to understand right from wrong is directly linked to the nature of the defendant's delusional state. Delusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act.

Where a defendant is found not guilty by reason of insanity, the finding of the jury has the same effect as if he were regularly adjudged insane, and the judge must:

- (a) Order a peace officer to take the person into protective custody and transport him to a forensic facility for detention pending a hearing to determine his mental health;
- (b) Order the examination of the person by two psychiatrists, two psychologists, or one psychiatrist and one psychologist who are employed by a division facility; and
- (c) At a hearing in open court, receive the report of the examining advisers and allow counsel for the State and for the person to examine the advisers, introduce other evidence and cross-examine witnesses.

If, after this hearing, the court finds that:

- (1) There is not clear and convincing evidence that the person is a mentally ill person, the court must order his discharge; or,
- (2) That there is clear and convincing evidence that the person is a mentally ill person, the court must order that he be committed to the custody of the Administrator of the Division of Mental Health and Developmental Services of the Department of Human Resources until he is regularly discharged therefrom in accordance with law.

The Court shall issue its findings within 90 days after the defendant is acquitted.

The administrator shall make the reports and the court shall keep each person with mental illness committed to custody under observation. A person committed to the custody of the Administrator is eligible for:

- (a) Discharge from commitment if the person establishes by a preponderance of the evidence that the person would not be a danger, as a result of any mental disorder, to himself or herself or to the person or property of another if discharged; or

Conditional release from commitment if the person establishes by a preponderance of the evidence that the person would not be a danger, as a result of any mental disorder, to

1 himself or herself or to the person or property of another if released from commitment with
2 conditions imposed by the court in consultation with the Division. If a person who is
3 conditionally released from the custody of the administrator fails to comply with any
4 condition imposed by the court, the court shall issue an order to have the person recommitted
5 to the custody of the Administrator.
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INSTRUCTION NO. 20

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

INSTRUCTION NO. 21

In arriving at your verdict, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Jury's verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

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

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

12 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a
13 verdict of not guilty.
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INSTRUCTION NO. 24

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 evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

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

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

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

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

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

INSTRUCTION NO. 26

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

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

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A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

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

8 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
9 decision should be the product of sincere judgment and sound discretion in accordance with
10 these rules of law.
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During your deliberations you are not to communicate with anyone, in any manner regarding the facts and circumstances of this case or its merits, either by phone, email, text messaging, internet, or other means.

You are admonished not to read, watch, or listen to any news or media accounts or commentary about the case. You are not permitted to do any independent research, such as consulting dictionaries, using the internet, or any other reference materials.

You are further admonished not to conduct any investigation, test a theory of the case, re-create any aspect of the case, or in any other manner investigate or learn about the case on your own.

INSTRUCTION NO. 30

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


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

Your verdict must be unanimous. As soon as you agree upon a verdict, the foreperson shall sign and date the verdict form and return with it to this room.

INSTRUCTION NO. 31

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 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.

GIVEN:


DISTRICT JUDGE

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