

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

2  
3   ALFRED C. HARVEY,

4                                   Appellant,

5                                   v.

6  
7   THE STATE OF NEVADA,

8                                   Respondent.

)                   No. 72829/75911

)  
)                   Electronically Filed  
)                   Oct 23 2018 08:57 a.m.  
)                   Elizabeth A. Brown  
)                   Clerk of Supreme Court

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10                                   **APPELLANT'S APPENDIX VOLUME V PAGES 918-1021a**

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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8 STATE OF NEVADA,

CASE NO. C314260

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Plaintiff,

DEPT. VIII

10

11 vs.

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13 ALFRED HARVEY,

Defendant.

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

16

**TRANSCRIPT OF PROCEEDINGS**  
**JURY TRIAL - DAY 3**

17

18

APPEARANCES:

19

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STEVEN ROSE, ESQ.  
Deputy District Attorneys

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21

For the Defendant:

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

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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 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 sketchie, 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.

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

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

3 [In the presence of the jury panel]

4 THE MARSHAL: All rise, please.

5 And be seated.

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

7 MS. SPELLS: Yes, Your Honor.

8 MS. JONES: Yes, Your Honor.

9 MR. SCHWARTZ: Yes, Your Honor.

10 MR. ROSE: Yes, Your Honor.

11 THE COURT: All right. Good morning.

12 THE JURY PANEL: Good morning.

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

15 MS. SPELLS: Yes, Your Honor.

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

25 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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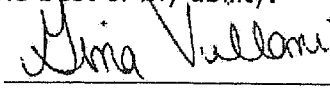
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THE COURT: Did you learn something?  
THE DEFENDANT: Thank you, saying thank you.  
MR. SCHWARTZ: Best of luck, Mr. Harvey, with whatever happens.  
THE COURT: All right, guys. Go relax. We'll see what happens here.

[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



1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 STATE OF NEVADA,

9 Plaintiff,

10 vs.

11  
12 ALFRED HARVEY,

13 Defendant.

} CASE NO. C314260

} DEPT. VIII  
}  
}  
}  
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}

14 BEFORE THE HONORABLE JAMES M. BIXLER, SENIOR DISTRICT COURT JUDGE  
15 FRIDAY, NOVEMBER 18, 2016

16 **TRANSCRIPT OF PROCEEDINGS**  
17 **JURY TRIAL - DAY 4**

18 APPEARANCES:

19 For the State:

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

20  
21 For the Defendant:

JASMIN D. SPELLS, ESQ.  
KELLEY R. JONES, ESQ.

22  
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 18<sup>th</sup> 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 4<sup>th</sup> 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.

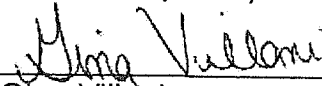
20 [Trial concluded at 11:17 a.m.]

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.

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Gina Villani  
Court Recorder



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DISTRICT COURT  
CLARK COUNTY, NEVADA

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STATE OF NEVADA,

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Plaintiff,

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vs.

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ALFRED HARVEY,

13

Defendant.

CASE NO. C314260

DEPT. VIII

14

BEFORE THE HONORABLE JAMES M. BIXLER, SENIOR DISTRICT COURT JUDGE  
WEDNESDAY, JANUARY 4, 2017

15

16

**TRANSCRIPT OF PROCEEDINGS  
SENTENCING**

17

18

**APPEARANCES:**

19

For the State:

20

STEVEN ROSE, ESQ.  
Deputy District Attorney

21

For the Defendant:

22

JASMIN D. SPELLS, ESQ.  
Deputy Public Defender

23

24

25

RECORDED BY: JILL JACOBY, COURT RECORDER

1 WEDNESDAY, JANUARY 4, 2017 AT 8:08 A.M.

2  
3 THE COURT: C314260, Alfred Harvey.

4 [Colloquy between the Court and the Clerk]

5 THE COURT: Judge Bixler will be here as soon as he's here.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: He'll come in for the sentencing.

8 THE DEFENDANT: Thank you, sir.

9 [Proceeding trailed at 8:08 a.m.]

10 [Senior District Court James M. Bixler has now taken the bench and  
11 proceedings resumed at 9:47 a.m.]

12 THE COURT: State of Nevada versus Alfred Harvey, who is present in  
13 custody. Time set for sentencing.

14 Everybody ready to go?

15 MS. SPELLS: Your Honor, we're not ready to go. We had emailed -- I had  
16 emailed the Court -- was it a few weeks ago or -- quite some time -- as well as the  
17 State and let them know that we were requesting a continuance. We did request to  
18 see a copy of the field interview cards. I received those. I think they sent them last  
19 week. I actually got them this week. I was out of the office last week. And there are  
20 some issues with the PSI that we wanted to note. We were also looking at doing the  
21 sentencing memorandum. I informed the State that given my schedule, and me  
22 being out of the office, my social worker wasn't able to get me all the information I  
23 needed and I would not be able to get it to the court prior to this date. And then now  
24 in speaking with my social worker we're also looking for additional records. But if I  
25 can just put on the record some of the issues we had with the PSI.

1 THE COURT: Sure.

2 MS. SPELLS: Thank you.

3 On Page 2, Your Honor, Mr. Harvey is indicating that the social security  
4 number, as well as the additional social security number they've listed, is incorrect.

5 On Page 3 --

6 THE COURT: Wait, wait, wait. It says -- all right. Social security number and  
7 then it has additional social security numbers. Instead of 9803 it's -- they have  
8 9802.

9 That's the difference?

10 MS. SPELLS: He's indicating that both of those are actually wrong.

11 THE COURT: Really?

12 MS. SPELLS: Yes.

13 THE COURT: As many times he's been arrested, you'd think that they'd have  
14 his social security number down pat. So how are we going to determine his real  
15 one?

16 MS. SPELLS: Go get it from him. And what I can do is --

17 THE COURT: We're going to believe that he's going to give us the correct  
18 one?

19 MS. SPELLS: I mean, he has every incentive to. I found him to be honest  
20 with me in our interactions. Obviously, I would need to notify Parole and Probation  
21 of all of the issues that we have and then they would go through whatever process  
22 they have to verify that. They may come back and still say that this is what is listed,  
23 but I don't have any way of necessarily --

24 THE COURT: Verifying?

25 MS. SPELLS: I mean, I can look at his scope. I don't have access to NCIC



1 but he's indicating that those numbers are incorrect. And it could be where the  
2 person who typed this may have mistyped. I don't know.

3 THE COURT: I just -- okay, I mean, it is what it is. I just have a hard time  
4 understanding a guy at his age of 40, with as many arrests and convictions and  
5 incarcerations as he's had, that there is a -- even an issue about what his social  
6 security number is. Holy crap.

7 What else?

8 MS. SPELL: Your Honor, I can say that we're dealing with a lot of different  
9 agencies. So I'm not familiar with those agencies or their record keeping.

10 With regard to Page 3.

11 THE COURT: Okay.

12 MS. SPELLS: The mental health history is incorrect. The gang activity and  
13 affiliation that is incorrect. We will likely be challenging those. I did receive two field  
14 interview cards from the State. One indicated that there was no gang affiliation, the  
15 other one indicated that the gang affiliation came through an interview at the jail. I  
16 had my investigator pull that -- an interview that we had in our file yesterday and he  
17 said he didn't see any indication of there being gang affiliation noted in that  
18 particular interview. So I want to do some further research to see if there are  
19 additional interviews at the jail. But the information that I have is not correlating. So  
20 that's an issue.

21 THE COURT: But his -- I don't know how long he's been in Las Vegas. I  
22 don't know exactly how they came by that. You go through those gang -- there's not  
23 a gang unit anymore, is there?

24 MR. ROSE: There is not since the decentralization. The former gang  
25 detectives are now your general detectives.

1 THE COURT: Well, thanks to the sheriff.

2 In any event, the Defendant is always -- his criminal record, his entire  
3 criminal history is all in California, this is the first arrest he's had in Las Vegas.

4 MS. SPELLS: That's correct, Your Honor.

5 Skipping over to page 5.

6 THE COURT: How many times he was revoked or violated on his '03  
7 conviction?

8 MS. SPELLS: He's noted some issues with some of these. I told him that I  
9 would do my best to look into it. I do have my investigator trying to get some of  
10 these records.

11 Actually, I think we need to go to page 6, page 5 was fine. But with  
12 regard to the allegation from August 6, 2006, and with regard to the allegation from  
13 June 17<sup>th</sup>, 2012, he's indicating that some of these may be incorrect with regard to  
14 the arrest and the actual disposition. He was under the impression that he only had  
15 a misdemeanors on his record and that the felonies had been cleared due to a  
16 particular proposition in California. So that would be with regard to all the felonies.  
17 And, again, I have not had the opportunity to even begin to look into that. But that  
18 was something that we discussed.

19 On page 7, I did want to ask the Court to order that Parole and  
20 Probation change the offense synopsis. This is a jury trial here and so I think that it  
21 is pertinent that the jury's decision is respected. And I noticed in the fact section it  
22 mentions the weapons and things of that nature, and although that was the original  
23 allegation, the jury did not find beyond a reasonable doubt that there was a weapon  
24 used. So I would like that to be illustrated in the facts synopsis for the offense  
25 synopsis.

1           Those are all of the notes that I have for the PSI.

2           THE COURT: Does the State have any comments?

3           MR. ROSE: Just briefly, Your Honor.

4           On page 2, I looked quickly at the scope, the NCIC's in the file itself but  
5 on the scope it has the initial social security number.

6           MS. SPELLS: Can we approach and put it -- I'll believe you.

7           MR. ROSE: I wasn't going to.

8           MS. SPELLS: Oh, Okay.

9           MR. ROSE: The initial social security number is the one that's listed on the  
10 scope, the additional is not listed in the scope. I can check NCIC as well.

11           On page 3, the mental health history, I don't know -- I was just going to  
12 ask if we could get the records for what that is supposed to be. It just says that  
13 there is none reported. I, you know, unless the Defendant gave them some other  
14 indication all they're doing is saying that he didn't report any to them.

15           As far as the gang activity, you know, we have the FI cards. We can  
16 kind of find out what's going on with that.

17           With the priors, you know, I'm more than happy to let Parole and  
18 Probation look into those. I believe we have requested those. I've spoken with  
19 Bryan Schwartz, who's my co-counsel on this, we have those. We're going to be  
20 photocopying those and getting those to defense counsel as soon as we can. We  
21 should have done that previously. But because of the holidays we didn't have a  
22 chance to do that and we'll get those to defense counsel as soon as we can.

23           With regard to the facts section, I think it reflects both the initial arrest  
24 reports and the testimony. Now, I agree the jury did not return a verdict with respect  
25 to the -- the weapon -- I guess I should say, they returned a verdict and they did not

1 find beyond a reasonable doubt that a weapon was used. However, it was what the  
2 testimony showed and I think that the PSI reflects the fact that it is only a robbery  
3 and not a robbery with use. If we want to have a specific notation in there that he  
4 was only convicted of robbery and not robbery with use, I'm fine with that. But I still  
5 think the -- having the synopsis reflect the testimony itself is not necessarily  
6 inappropriate. And maybe I'm misunderstanding counsel's point in terms of how  
7 that reflects. I would just ask that the reference to a weapon remain in there;  
8 however, I would not have an objection to a specific notation that the jury returned a  
9 verdict of guilty only as to robbery and not robbery with use. I guess, that would be  
10 my position on that.

11 I said a lot very quick and I apologize.

12 THE COURT: That's quite all right. But the testimony did, in fact, say that the  
13 Defendant pulled out a knife, waved it, and then held it by his side. Obviously the  
14 jury did not feel as though that was sufficient to show that robbery was committed. I  
15 don't think they understood the instructions. But it is what it is. But I'm not going to  
16 strike out the part of the synopsis that says that he pulled a knife out. But it's quite  
17 clear that he was convicted of robbery and not robbery with use. If we need to make  
18 a special notation of that, I guess we can do that, noting that the Defendant was only  
19 convicted of robbery and not robbery with use.

20 How long is this going to take?

21 MS. SPELLS: So --

22 THE COURT: I mean, is this going to take like 60 days to get this thing  
23 reviewed and --

24 MS. SPELLS: And one of the issues is that -- my understanding is that there  
25 are substantial mental health records that we need to procure, they're coming out

1 of --

2 THE COURT: From California, no doubt.

3 MS. SPELLS: From California, yes.

4 THE COURT: Well, you know, this could be forever. And what are these --

5 MS. SPELLS: We're not --

6 THE COURT: -- records going to end up -- I mean, what's the bottom line  
7 going to be? Is -- there's no competency issues here. What is that going to do?

8 MS. SPELLS: Sure, we're not -- we're not going to be --

9 THE COURT: Is it just going to show that he's had a history of some mental  
10 health issues?

11 MS. SPELLS: It will be relevant with regard to my sentencing memorandum  
12 that I anticipate filing with the Court, and it may also be relevant with regard to  
13 specialty court program. We previously applied --

14 THE COURT: Well, here's the -- here's the issue --

15 MS. SPELLS: -- to drug court and --

16 THE COURT: -- the Defendant is sitting over here in CCDC, they're short of  
17 space and the conditions are way less comfortable than they will be at prison. So, I  
18 mean, if it's a choice between CCDC and going to prison, I'm sure he'd rather be  
19 there. And I know that your argument is going to be put him on probation. Let me  
20 be perfectly frank, he's got six felony convictions, plus a multitude of other  
21 convictions. He's convicted of a robbery charge, the jury convicted him of robbery a  
22 charge, the chances of him getting probation are slim.

23 THE DEFENDANT: May I say something, Your Honor?

24 THE COURT: No. You're going to get a chance to say all you want to say  
25 when we come time for sentencing but this isn't your sentencing date. So whatever

1 you want to say --

2 THE DEFENDANT: Just real quick?

3 THE COURT: -- you're going to get a chance to say it but just not right now.

4 THE DEFENDANT: I was off my meds -- I was off my meds the day of the  
5 offense. My mental health just fell out of [indiscernible].

6 THE COURT: What did I just say? Zip it and then you'll get a chance to say  
7 anything you want to say when it comes times for sentencing; all right.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Here's the problem, and I can see this is going to turn into a  
10 problem, getting mental health records from California is going to be a challenge,  
11 and we're not going to put off the sentencing for a prolong period of time in order to  
12 get mental health records.

13 We'll do this. It's already been -- when was the trial? In October?

14 MR. ROSE: I believe it was --

15 MS. SPELLS: November 18<sup>th</sup>.

16 MR. ROSE: It was November.

17 THE COURT: November 18<sup>th</sup>. So it's already been a couple of months. We'll  
18 pass this off 60 days and that's it. Whatever hasn't happened isn't going to happen  
19 in 60 days. So let's pick a day -- let's see --

20 THE CLERK: March 6<sup>th</sup> or March 8<sup>th</sup>?

21 THE COURT: Can we wait just one second. Let me go get my calendar real  
22 quick. Is there any way I can bail out of this?

23 [Brief pause in proceedings]

24 THE COURT: You're talking about March 6<sup>th</sup> or March 8<sup>th</sup>?

25 THE CLERK: Yes.

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1 WEDNESDAY, MARCH 8, 2017 AT 9:11 A.M.

2  
3 THE COURT: While we're here, C314260, Alfred Harvey.

4 MR. GLASGOW: Your Honor, that's Ms. Spells' case. It's on for sentencing.  
5 I believe Judge Bixler's coming for that; is that correct?

6 THE COURT: Nah, I'll just sentence him.

7 MR. GLASGOW: Ms. Spells isn't here yet. If we could trail that for a few  
8 minutes, I have a number of other cases to do.

9 THE COURT: Bixler's too old to remember he's supposed to go anywhere.  
10 He's still too old.

11 [Proceeding trailed at 9:11 a.m.]

12 [Proceeding recalled at 9:28 a.m.]

13 THE COURT: C314260, Alfred Harvey.

14 Who's handling Mr. Harvey for you?

15 MR. GLASGOW: That's Ms. Spells, Your Honor.

16 THE COURT: Where is she?

17 MR. GLASGOW: I was texting her. She should be here any second now.

18 THE COURT: Just wait until your attorney gets here.

19 [Proceeding trailed at 9:29 a.m.]

20 [Senior District Court James M. Bixler has now taken the bench and  
21 proceedings resumed at 9:55 a.m.]

22 THE COURT: On the record in the matter of the State of Nevada versus  
23 Alfred Harvey, present in custody. Time set for sentencing.

24 Are we ready to go?

25 MS. SPELLS: Yes, Your Honor.

1 MR. ROSE: We are, Your Honor.

2 THE COURT: Okay. Did all the errors and issues that were of concern back  
3 in January get addressed?

4 MS. SPELLS: Somewhat, Your Honor. Parole and Probation issued two  
5 letters. And basically with regard to the criminal history, I don't think they did  
6 anything about it. The State and I could not come to an agreement with regard to  
7 the gang affiliation and so I did provide that information, the sentencing  
8 memorandum, and attached it -- attached all the documents. And then the Court  
9 ruled last time that the Court would not order Parole and Probation to change the  
10 fact section as we requested.

11 THE COURT: Well, I think the way this works is we just supplement the PSI  
12 with the statement to the effect that the Defendant disavows any affiliation with  
13 gang, any gang affiliation. I think is the way it works. The only impact is if the  
14 Defendant is incarcerated and sentenced to time at Department of Corrections they  
15 need to know in terms of, you know, his location. If there's some concerns about  
16 some kind of gang affiliation. I mean, that's the only affect that it has but it's kind of  
17 serious. I mean, it's kind of a serious issue for Department of Corrections.

18 MS. SPELLS: We agree. And I believe the Department of Corrections will do  
19 a separate interview. So, if the Court would be fine with then just, I guess, adding a  
20 line that says he --

21 THE COURT: And my understanding is that the Defendant can supplement  
22 and add something to the PSI when it -- as it gets -- I don't know exactly how this  
23 works. But I know that the Department of Corrections works directly off of what  
24 department -- P&P prepares. But I do think that the Defendants able to supplement  
25 with some information that says, I contest or disavow.

1 MR. ROSE: And what the State would ask for would be a line in the  
2 Judgment of Conviction just noting that, you know, he has disavowed any gang  
3 affiliation at this point in time. Because once he's sentenced, under *Stockmeier*, we  
4 don't have the authority to go back and change or supplement the PSI itself;  
5 however, one of the ways that it was identified by the Supreme Court in that  
6 decision of noting these contested issues is to have a reference to it in the  
7 Judgement of Conviction itself. So we would request that the Judgement of  
8 Conviction just include a line saying that the Defendant has at this point in time  
9 disavowed any gang affiliations. I think that would be sufficient to alert, you know,  
10 the prisons to the fact that perhaps what was in the PSI was old information, not  
11 new information.

12 THE COURT: Well, your request is granted. I don't know exactly --

13 [Colloquy between the Court and the Clerk]

14 THE COURT: We'll do it exactly as you're suggesting.

15 MR. ROSE: Thank you, Your Honor.

16 MS. SPELLS: Did the Court get a copy of the defense sentencing  
17 memorandum?

18 THE COURT: Yes, I got everything.

19 MS. SPELLS: Okay.

20 THE COURT: I think.

21 MR. ROSE: Your Honor, if I may approach your clerk, I have some certified  
22 Judgements of Convictions to enter. If I may approach the clerk I have --

23 THE COURT: Sure, yes, absolutely.

24 There are what -- how many do you have? I have six.

25 MR. ROSE: I have six here.

1 THE COURT: Do you have certified copies of all six?

2 MR. ROSE: Yes.

3 THE COURT: Really?

4 MR. ROSE: Yep.

5 THE COURT: Okay.

6 MR. ROSE: And the defense has had -- we sent a digital copy -- I think last  
7 week, possibly the week before, but I think it was only last week -- to defense and  
8 then Ms. Spells and I looked at them again this morning. One of the ones that we  
9 got was actually a misdemeanor. We got seven Judgement of Convictions but one  
10 of those was a misdemeanor so that has not been submitted to the Court.

11 THE COURT: Yeah, my notes were six prior felony convictions, nine  
12 misdemeanor convictions but we're not concerned with those. We're just --

13 MR. ROSE: Correct.

14 THE COURT: Okay.

15 All right. So now are we ready to proceed to sentencing?

16 MS. SPELLS: Yes.

17 MR. ROSE: Yes, Your Honor.

18 THE COURT: You're up.

19 MR. ROSE: Your Honor, today the State would ask that Your Honor  
20 adjudicate the Defendant as a habitual criminal. We have the six certified  
21 Judgements of Conviction. I do believe that both the nature of the convictions and  
22 the time period across which they span do justify and do warrant a finding of  
23 habitual felon status. We start out in 2001 with an evading -- with a charge out in  
24 California. We move on to 2003, possession of stolen property.

25 THE COURT: Okay. Let me -- I want to follow you along. I have -- I don't

1 know if these convictions -- these certified convictions are in order.

2 MR. ROSE: I don't believe they are and I apologize for that.

3 THE COURT: Okay, so, let's go from the 2001. I have -- is that the first -- is  
4 that the oldest one?

5 MR. ROSE: Yes. That's the oldest felony, that's the evading a peace officer  
6 and that's out of California. I think all of these actually are out of California.

7 The next one that Your Honor may have is the 2003 possession of  
8 stolen property conviction. I would note in the PSI, on page 5, it notes, I believe, if  
9 my math is correct, 11 parole violations on that particular case. Including multiple  
10 times with which he was recommitted.

11 THE COURT: Just slow down. You're way more familiar with how you read  
12 these than I am.

13 The one from 2006 --

14 MR. ROSE: Yes, Your Honor. That should be a vehicular manslaughter with  
15 gross negligence. It was noted on there as a DUI

16 THE COURT: Grand larceny -- evading a police officer --

17 MS. SPELLS: That's a misdemeanor.

18 THE COURT: Okay, hang on, hang on.

19 Okay, 2001, eluding, evading, fleeing from police officers, okay.

20 MR. ROSE: Correct, Your Honor. And on that particular case, as the PSI  
21 notes, he got probation and that probation was later revoked.

22 The next one that the State has is 2003, that possession of stolen  
23 property. I don't know if Your Honor has that one in front of him.

24 THE COURT: He had so many. Certainly doesn't like to stop when  
25 somebody's got red lights on behind him.

1 All right, go ahead.

2 MR. ROSE: So we had that, the 2003 conviction, the 11 parole violations, we  
3 have a 2004 conviction for grand theft from a person, there's a, I believe it was a  
4 2005 conviction for possession of stolen property. The '06 one that I had spoken  
5 about was actually the misdemeanor as noted in the PSI.

6 THE COURT: Okay.

7 MR. ROSE: But that was a misdemeanor for vehicular manslaughter with  
8 gross negligence. Then, you know, to the Defendant's credit, we do have  
9 approximately a five-year gap in the history there. But then in 2011 there's a  
10 misdemeanor DUI, the second misdemeanor DUI later in 2001, then we get to our  
11 2012 felony evading, and then finally when we reach 2016 we have this particular  
12 case that Your Honor heard the trial on.

13 I'd also note that in the PSI, under the section immediately following the  
14 criminal history, indicating other misdemeanor offenses is that there's a second  
15 vehicular manslaughter with gross negligence from 2007.

16 So, as I mentioned earlier, Your Honor, I believe that the -- both the  
17 nature of the violations, of the history, including, you know, multiple times trying to  
18 evade the police, the lack of ability to complete community supervision as noted with  
19 11 parole violations, all warrants and merit a habitual adjudication.

20 Now, we have enough here for a large habitual and I'm not asking for  
21 that. I'm not asking for life without. I'm not asking for 10 to life. What I'm asking for  
22 today is an 8 to 20. I think it's the maximum under the small habitual statute, which  
23 only requires two felonies and we have six in front of Your Honor. I think that that's  
24 warranted. The case that was before Your Honor was a robbery with a use case,  
25 which has a maximum of a -- maximum of 30 years on it. Now, admittedly the

1 Defendant was not found guilty of the use of a deadly portion; however, I believe  
2 that the evidence could have also supported that because there was testimony  
3 about the use of that weapon there.

4           So what I'm asking for is slightly higher than what you'd have on a  
5 robbery, but significantly less than what you'd potentially have on a robbery with  
6 use. The robbery is the 6 to 15 on a maximum. I'm only asking for an 8 to 20 on  
7 that. I think that that is appropriate for an individual who has six prior felonies, who  
8 has demonstrated an inability to be supervisable on parole, who has twice  
9 committed -- or been found guilty of vehicular manslaughter with gross negligence,  
10 and then is going on committing this particular crime, which is an inherently violent  
11 crime with his family with him, right. As Your Honor remembers, he took his family  
12 with him to the T.J. Maxx and then, you know, almost left the kids behind because  
13 he ran back to the car to try and get away.

14           So I think under all of the circumstances of this that an 8 to 20 as a  
15 habitual felon is warranted. I'm not asking for more than that, even though it could  
16 be imposed, and perhaps if it were Judge Smith it would be imposed. But, I believe,  
17 an 8 to 20 is warranted in this particular case. We're not asking for restitution, all of  
18 the property was recovered, and I currently have 344 days credit.

19           THE COURT: This is the case that a bystander, an older fellow that was a  
20 bystander, maybe he's even here, was -- was --

21           MR. ROSE: Mr. Appel.

22           THE COURT: -- observed this thing to happen, followed him down the road.  
23 Those security guys from the store weren't, you know, they were just going to back  
24 up and not do anything. But this guy saw what was going on, followed him down the  
25 road, followed him for some time, and had the cops on the phone, and they --

1 that's -- I mean, he followed him long enough that he was apprehended because of  
2 a bystander that just happened to see what was going on and followed the  
3 Defendant down.

4 Am I right?

5 MR. ROSE: Mostly, Your Honor. It was Mr. Appel. He didn't actually see the  
6 robbery itself occur.

7 THE COURT: Right. He --

8 MR. ROSE: He saw that there was some kind of disturbance, asked the  
9 victim what happened.

10 THE COURT: At the -- outside the store, he watched what was going on, he  
11 saw that there was some interchange going on, saw the Defendant go off to his  
12 vehicle, and then followed him out of the parking lot, and got the police on the phone  
13 and --

14 MR. ROSE: That's correct.

15 THE COURT: Okay. I remember exactly.

16 When did we do this trial?

17 MR. ROSE: It was November, Your Honor.

18 THE COURT: Okay. So I'm not that far gone that I can't remember last  
19 November.

20 MR. ROSE: Certainly not, Your Honor.

21 THE COURT: So, you all finished?

22 MR. ROSE: I am, Your Honor.

23 THE COURT: All right. You want to go first or do you want your client to  
24 speak?

25 MS. SPELLS: Your Honor, Mr. Harvey is not going to speak given that this



1 was a jury trial.

2 THE COURT: Okay.

3 MS. SPELLS: The Court indicated that it received the memorandum; right?

4 THE COURT: I -- you know what, I said that I did, but I -- now that I'm looking  
5 at the paperwork, I don't know for sure that it was in this packet.

6 [Colloquy between the Court and the Clerk]

7 MR. ROSE: It appears, Your Honor, that it was filed on the 6<sup>th</sup>. I have an  
8 extra copy if Your Honor wants to take a look at it. We did get a copy.

9 THE COURT: Well, yeah, let me double check because -- thank you. Thank  
10 you. Give me a minute.

11 You filed this March 6<sup>th</sup>?

12 MS. SPELLS: Yes.

13 THE COURT: I don't know how you got so lucky that I was sitting for Judge  
14 Smith when this trial was heard. Just commenting.

15 But before I even finish this, I'm going to tell you, I'm not adjudicating  
16 the Defendant as an habitual criminal. His priors are of a nature that really in my  
17 opinion -- I would have to say probably 89 percent of the time, over the course that  
18 I've been on the bench dealing with habitual criminal issues, I probably have  
19 adjudicated somebody at least at the lower lever a habitual criminal.

20 But the Defendant in this case, despite his horrible record, has been of  
21 a nature in my opinion that doesn't really justify habitual criminal treatment. He's got  
22 drug issues. He's got alcohol issues. He's a thief. But this was an over -- petty  
23 larceny case and the fact that -- he's going to get some prison time, but I'm not  
24 adjudicating him as a habitual criminal. I'm just telling you that upfront. His own  
25 stupidity is what's caused him to be where he is. He wouldn't even have gotten a

1 citation if he'd just been a little bit cooperative with those security officers. If he'd  
2 just gone back in and gotten trespassed out of T.J. Maxx, he wouldn't have gotten --  
3 forget getting arresting, he wouldn't even have got cited for the misdemeanor  
4 offense of petty larceny. Stupidity is his biggest crime at this point. But it's still  
5 going to cost him some time.

6 Let me finish this.

7 Where are his kids?

8 MS. SPELLS: His kids are --

9 THE DEFENDANT: Outside.

10 MS. SPELLS: -- they're present. His wife is present in the courtroom, Your  
11 Honor. The younger kids are here.

12 THE COURT: Are they with the mother?

13 MS. SPELLS: Well, she's right here, Your Honor.

14 THE DEFENDANT: And Hope for Prisoners is here.

15 THE COURT: I really don't know how the jury didn't find the Defendant guilty  
16 of the use part of the crime. It was pretty obvious that he pulled the knife and used  
17 a knife to facilitate his escape. Sometimes I think maybe the jury just doesn't fully  
18 grasp the way the instructions read.

19 All right. You're Tara?

20 MS. HARVEY: Yes.

21 THE COURT: Okay. Counsel.

22 MS. SPELLS: Thank you, Your Honor.

23 Before I do argument, Your Honor, there are just a few things that I  
24 want to just clarify for the record given that this was a jury trial. The State  
25 mentioned that Mr. Harvey had been convicted twice of vehicular manslaughter with

1 gross negligence, and I understand that that's mentioned in the bottom of page 6,  
2 but it's given the same year that it's listed in the conviction portion of it. So we don't  
3 believe that there are actually two convictions. We just believe that it's referenced  
4 twice.

5 With regard to -- I believe the State corrected itself with one of the  
6 convictions that it was speaking of. It was actually a misdemeanor conviction with  
7 regard to the manslaughter with gross negligence and then the DUI's were  
8 misdemeanor offenses.

9 Respectfully, Your Honor, we disagree with -- we respect the jury's  
10 decision but we disagree that the jury should have found that there was a weapon  
11 here. If you look through Mr. Harvey's record, and the State has noted, the Court  
12 has noted, that it is pretty extensive. We don't see a history of weapons. As the  
13 Court noted, there was an individual who saw the altercation and followed  
14 Mr. Harvey, and I think it's notable that there was never a weapon located here.

15 From the time period that I have known Mr. Harvey, obviously in the  
16 capacity as a client and speaking with his wife, and we did try to elicit some of that  
17 testimony I -- where Tara was on the stand and she testified as to whether her  
18 husband normally carried a knife and different things like that. So we disagree that  
19 there was sufficient evidence for the weapon.

20 But that being said, Your Honor, the Court has reviewed the sentencing  
21 memorandum, and I do just want to inform the Court that Mr. Harvey is requesting  
22 an opportunity at probation. I understand what the Court is indicated the potential  
23 sentence will be. Mr. Harvey has been very dedicated in looking for programming  
24 and things like that even while he's been in custody. His wife has reached out to a  
25 number of different people as -- as has Mr. Harvey. We early on did apply to drug

1 court. He was denied drug court. The Court should have seen that in the  
2 sentencing memorandum. But he did reach out himself to Hope for Prisoners.  
3 Hope for Prisoners is here in the courtroom this morning as well as his wife. His  
4 children are outside. He also reached out to some different sober living programs  
5 including the Frog House. And we did have him evaluated and he was deemed to  
6 meet the criteria for inpatient drug treatment.

7 Now, that's significant because some of the things that we see is when  
8 an individual has been in custody for so long, as the State noted, we're pushing a  
9 year, often times a person is not amenable to the level of treatment of inpatient  
10 because they've obviously been in custody and had an opportunity to be clean. So I  
11 think that that's significant because it goes into just how heavy the addiction is here.

12 Now, I did want to note, Your Honor, that Parole and Probation  
13 recommended a sentence of 4 to 15 years.

14 THE COURT: Okay, you know, I don't know if you guys know this because,  
15 you know, you haven't -- you weren't regularly in my department when I -- before I  
16 retired.

17 MS. SPELLS: I was not.

18 THE COURT: But the -- I don't read the recommendation. I read everything  
19 in the PSI. I was kind of counseled years ago that after this long I ought to be able  
20 to make up my own mind without referring to somebody who's probably recently  
21 educated and making recommendations in the PSI. So I don't read that part.

22 MS. SPELLS: Okay.

23 THE COURT: So what did they recommend?

24 MS. SPELLS: They recommended 4 to 15, Your Honor. 48 to --

25 THE COURT: Well, whoever did that was pretty smart.

1 MS. SPELLS: I didn't hear you.

2 [Colloquy between Counsel]

3 MS. SPELLS: Your Honor, when we originally looked at this case I think it is  
4 significant to note that the State originally thought that this case was worth a 3 to 8.  
5 Now, obviously Mr. Harvey --

6 THE COURT: 3 to 8?

7 MS. SPELLS: Yes.

8 THE COURT: That's what they offered?

9 MS. SPELLS: Yes, originally.

10 Obviously -- we had other conversations and there were a number of  
11 different things that happened prior to that, but after we were set for trial a number of  
12 different times that was kind of what they had settled on after there had been a  
13 number of different trial settings and a number of different offers rejected. There  
14 were other offers.

15 However, Your Honor, so I'm asking the Court to consider a 2 to 5. I  
16 know that that may be a little low or 3 to 8. If you look at his history, I would note  
17 that he's never served more than 2 years, approximately 16 months or so.

18 THE COURT: You know, I'll have to say, that it was worthy of comment from  
19 my perspective that he commits a vehicular -- intoxicated. He killed somebody in an  
20 accident in California.

21 THE DEFENDANT: I wasn't -- I wasn't intoxicated.

22 THE COURT: Well, that's what the charge was.

23 MR. ROSE: It was gross negligence, Your Honor.

24 THE COURT: Oh, okay, all right.

25 MR. ROSE: There were later DUI's but those were not necessarily --

1 THE COURT: Well, on the -- on the -- the only reason I said that was on the  
2 PSI it said --

3 THE DEFENDANT: Yeah, I wasn't intoxicated.

4 THE COURT: -- vehicular manslaughter while intoxicated, that was the  
5 original charge. But that's not what he ended up -- with gross negligence is what he  
6 ended up getting convicted of. Okay.

7 THE DEFENDANT: I was handing my baby a bottle and I got into a crash. I  
8 was handing my son a bottle. And actually --

9 THE COURT: Well, who died?

10 THE DEFENDANT: Somebody that was in the five-car pileup.

11 THE COURT: Okay. All right.

12 But my point was that he was at least charged in with -- in being  
13 involved in an accident that included a death, and in California he served 365 days.

14 Was that --

15 MS. SPELLS: Yeah, it was adjudicated as a misdemeanor. And that's what  
16 Mr. Harvey has told me in the past --

17 THE COURT: Okay. All right.

18 MS. SPELLS: -- that he was in an accident giving --

19 THE COURT: Okay.

20 MS. SPELLS: -- his son a bottle.

21 THE COURT: All right. That clarifies it. All right. Now I understand what  
22 they were referring to as the misdemeanor. Okay.

23 MS. SPELLS: Your Honor, Mr. Harvey is an individual who didn't have a  
24 perfect childhood. We noted that in the sentencing memorandum. He started using  
25 drugs at a very young age, by age 11 was already addicted. So he is now 40 years

1 old. He's had a number of years where he's been using. And when we were able to  
2 speak to him a little bit more as -- I'm sure the Court is aware, sometimes individuals  
3 are a little bit guarded because they don't know their attorney, they don't know if the  
4 attorney has their best interest in heart, and so it takes some time to really get to  
5 know a person and be able to speak about things that are very personal to you. So  
6 I've gotten to know Mr. Harvey and his family fairly well over the course of doing this  
7 case. We've had regular contact with his wife as well as Mr. Harvey. And we found  
8 out that, I think, some of the issues with the addiction were definitely  
9 self-medication.

10           And what I found was extremely interesting, I noted it in the sentencing  
11 memorandum, but I did not attach the records because it wasn't being filed under  
12 seal, but I thought it was extremely interesting that when he was in the California  
13 prisons instead of releasing him to parole from the prison they instead took him to  
14 Atascadero Hospital to deal with some of the mental health issues and some of the  
15 medication regimen and the fact that he was at that point having auditory  
16 hallucinations and a number of different things. And so he's never really had an  
17 opportunity at, one, getting some sort of drug treatments to deal with the addiction  
18 but also really dealing with the root issue which is the mental illness. He was on  
19 risperidone. He wanted me to mention to the Court that during the time that this  
20 incident occurred what happened was that he was having complications and issues  
21 with risperidone. He later has filed suit and that's ongoing with regard to that lawsuit  
22 with risperidone. So he needed to get a new medication regimen. He had moved  
23 from California to Las Vegas and in the meantime was trying to deal with new  
24 insurances and things like that. So he was not on his medication at the time of this  
25 incident.

1 THE COURT: What is that? It's -- what are you saying?

2 THE DEFENDANT: Risperdal.

3 MS. SPELLS: That, Risperdal. I mispronounced it.

4 THE DEFENDANT: Risperdal. It causes men --

5 THE COURT: What's that for?

6 THE DEFENDANT: For mental health.

7 MS. SPELLS: It's for mental health. It's an anti-psychotic.

8 THE DEFENDANT: Recently they found out that it causes male breasts so I  
9 got off that medication. Me and my wife filed a suit against Risperdal. She has that  
10 proof. I came here on a book tour trying to, you know, be a father.

11 MS. SPELLS: So during the time period of this particular incident, Your  
12 Honor, he was not on any type of medication regimen. I did want to note that. And  
13 we did include, Your Honor, that the reason that he came to Nevada was with  
14 regard to the book tour. We did have a copy of the book that he wanted the Court to  
15 see.

16 So this is an individual who, despite everything that he's done through,  
17 despite the addiction, despite the mental illness, despite really a difficult childhood  
18 and being introduced to drugs by a family member at an early age and kind of trying  
19 to leave the house that was just not a good fit for him. It's been a little bit chaotic but  
20 he has still managed to be successful. And if you look at the history there are a  
21 number of times, so from the last conviction to this incident, we have a four-year gap  
22 where he did well. And the State also noted that prior to that, the conviction before  
23 this and the convictions that are before that, there was a five-year gap where he was  
24 doing fairly well. And, so, he definitely needs some sort of -- he needs a plan. And  
25 he needs someone who is going to assist him and support him with that plan. And



1 that plan needs to include mental health, medication, and a regimen as well as drug  
2 medication. We included documentation showing that he was on a book tour.

3           What I found very noteworthy, Your Honor, and I did not submit all of  
4 the letters because I thought it was a little bit weird, but there were a number of  
5 inmates who wrote letters on behalf of Mr. Harvey. I think I included one or two in  
6 the sentencing memorandum. I've been practicing for 8 years now. I've never had  
7 that experience of an inmate just reaching out. There was a doctor who reached  
8 out, one of the doctors who has been on the news, I forget his last name, but whose  
9 been charged with a murder. He wrote a letter. We did not include that letter. But  
10 just individual people in custody who have noted that Mr. Harvey has been an  
11 inspiration to show people that, you know, you don't have to be defined by your  
12 convictions and you can definitely reach out and try to do things successfully and  
13 also just being an uplift when people have been really depressed having a positive  
14 outlook even while you're in custody. And he did start a class within the jail where  
15 he was teaching other individuals creative writing skills and as an outlet to try to deal  
16 with some of the things that they're going through or dealing with some of the issues  
17 that they may have repressed, which have led to a number of different issues in their  
18 life, Your Honor.

19           This is an individual who has a family. He has children. I know that he  
20 loves his family. I know that he is capable of a lot of different good things and I don't  
21 think that he is only what you see on paper through the convictions. I think with the  
22 proper help, as far as mental health and drug counseling, that Mr. Harvey can be  
23 even more successful and be free of crime.

24           He's 40 years old and he definitely has reached an age where he's  
25 tired. He's been using drugs for 29 years. And as we know people have to be

1 ready to get help and I think he's reached that stage, Your Honor. So we are  
2 requesting that the Court consider a shorter prison sentence. Like I said, we're  
3 asking for a 2 to 5. But if the Court feels that that's not sufficient, we would ask the  
4 Court to consider nothing higher than a 4 to 10. I think that anything higher than that  
5 given the facts of this case becomes a little bit unjust especially given the person  
6 that's before you and all of the different things that we've laid out in the sentencing  
7 memorandum.

8 If I may approach, Your Honor, he did want you to see the book.

9 THE COURT: Sure.

10 MS. SPELLS: And his picture in the book. And I'll show the State that  
11 picture.

12 THE COURT: Did he autograph the book?

13 [Colloquy between counsel]

14 MS. SPELLS: The State has a copy of the book and I do not.

15 THE COURT: Did he autograph a copy so I --

16 MS. SPELLS: Would you autograph this?

17 THE DEFENDANT: I will.

18 MS. SPELLS: He will autograph it for the Court.

19 THE DEFENDANT: Can you show him the picture in the back?

20 MS. SPELLS: It's on page 305, Your Honor.

21 THE DEFENDANT: I've written and published two more since I've been here,  
22 sir.

23 THE COURT: I noticed that your picture doesn't have any of your --

24 THE DEFENDANT: I cover them up with make-up.

25 THE COURT: -- artwork on it.

1 MS. SPELLS: And I think if the Court -- I'll have him sign it for you. I think if  
2 the Court recalled --

3 THE COURT: I'm going to give this -- no, no, no, before you do this. I'm  
4 going to give this to the State. I'm going to look at this but I'm going to give this to  
5 the State because I want them to have this in their file.

6 MS. SPELLS: They already have one.

7 THE COURT: Oh, you do?

8 MR. ROSE: Yeah, we have a copy of the book.

9 THE COURT: Oh, okay. Well, in that case then you don't need one.

10 Have him sign this just in case he gets famous.

11 MS. SPELLS: I will, Your Honor.

12 But if the Court notes in this case also we had filed a motion to cover  
13 the tattoos, because actually on the date in question the tattoos were covered.

14 THE COURT: Yeah, and I granted that and he went through the trial and the  
15 jury didn't see his tats. But just so the Defendant knows, Judge Smith was hearing  
16 this trial he would not have let him cover up his tattoos. I can promise you that. So  
17 he got every kind of a break you could possibly get. First of all, he had, as  
18 somebody said, we didn't know that we were going to have the nice judge. So he  
19 got the nice judge as opposed to the not so nice judge.

20 MS. SPELLS: Your Honor, this case came from overflow. We were originally  
21 in front of --

22 THE COURT: Oh, it did. Is that how we got it?

23 MS. SPELLS: We were originally in front of --

24 THE COURT: Because somebody showed up that day and they made that  
25 comment and I had to laugh.

1                   So where did this --

2           MS. SPELLS: We were originally in front of Judge Miley.

3           THE COURT: -- where did this -- Miley?

4           MS. SPELLS: Yeah.

5           THE COURT: Judge Miley?

6           MS. SPELLS: And I think she dealt with some of the evidentiary hearings with

7 regard to the tattoos and some of the other things.

8           THE COURT: Oh, okay. All right. I kind of forgotten.

9           MS. SPELLS: Yeah.

10          THE COURT: I had kind of forgotten all that.

11                   This was not originally Judge Smith's case then?

12          MR. ROSE: No.

13          THE COURT: Okay. All right. I know every time I sit for somebody over here

14 I kind of like press them to make sure that if there's anything that needs to be tried

15 someplace that I get to try it.

16          MS. SPELLS: May I approach?

17          THE COURT: Yes, absolutely.

18          MS. SPELLS: And I've showed the State what was written inside.

19          THE COURT: And you know what this is; right?

20          MR. ROSE: Yes.

21          THE COURT: So who published this?

22          THE DEFENDANT: I did, sir.

23          THE COURT: This is a self-publication?

24          THE DEFENDANT: Yes, sir. And I've written two more since I've been down

25 on this -- and that's writing day in and day out. I have two more books released in

1 May. One to help other inmates who are like me, that have slight mental illness plus  
2 drug addiction. And I'm hoping that, you know, I was hoping that I can get probation  
3 and work with Hope for Prisoners and to completely turn my life around. I even took  
4 a job at Taco Bell while I was promoting this book, when money got tight. My kids  
5 are out in the hallway. My wife is here. I just want a shot.

6 THE COURT: Now, your counsel has made an argument indicated that you  
7 weren't going to make a statement but that's not exactly the fact.

8 Do you have anything else that you want to say before the Court  
9 imposes sentence?

10 THE DEFENDANT: I would like to apologize to my wife. And thank Help for  
11 Prisoners. I want to thank the District Attorney. I realize and understand and  
12 believe in the box, the 12 in the box, what you had to tell them to do. I thank  
13 Ms. Spells for everything and everybody else that had to be involved with this case.  
14 And my apologies. Thank you, sir, for being here and not Judge Smith.

15 THE COURT: Listen, I'm not going to make any bones about this, you're  
16 going to prison. I'm not adjudicating you as a habitual criminal. Probably Judge  
17 Smith -- I didn't realize this wasn't his case but still I know him pretty well. In all  
18 probability you would have been adjudicated as a habitual criminal. I've got to tell  
19 you that when somebody is standing in front of a judge for sentencing purposes, like  
20 you are right now, at least half of what the Court considers revolves around your  
21 background. And you've got a horrible background. You've got a horrible  
22 background. You've got all kinds of drug and alcohol issues. You've --

23 THE DEFENDANT: Never had treatment, sir.

24 THE COURT: And they go -- and they date way back. I mean, you're a  
25 mess. I mean, you're a mess. You look like a mess. You've acted like a mess.

1 You're just -- but the kind of things that you've been doing really, in my opinion, don't  
2 amount to habitual criminal. You're a habitual drug addict. You're a habitual  
3 alcoholic-drug addict. And you've done -- everything you've done in your  
4 background is consistent with that, that you're a drug addict and an alcoholic.  
5 You're also a thief and you've -- your history justifies the Court saying that you have  
6 a history of not only alcohol and drug abuse but theft related offenses too. But you  
7 have some redeeming qualities about you. You're not --

8 THE DEFENDANT: I would love treatment for once, sir.

9 THE COURT: I know. This is my turn. I'm the one that gets to flap my lip at  
10 this point.

11 I'll get right to the gist here. You're adjudicated guilty on the category B  
12 felony offense of robbery pursuant to the verdict by the jury. You're sentenced to a  
13 period of incarceration between 36 to 144 months in Nevada Department of  
14 Corrections, that's 3 to 12 years you're sentenced to incarceration. There's a \$25  
15 administrative assessment, \$3 collection fee.

16 Credit for time served is how much?

17 MR. ROSE: 344 days.

18 THE COURT: 344 days credit for time served.

19 I think that's it; isn't it?

20 [Colloquy between the Court and the Clerk]

21 THE COURT: We don't have any of these priors here, do we?

22 MS. SPELLS: No.

23 MR. ROSE: I don't know if there are no prior felonies or gross misdemeanors  
24 from Nevada. So I don't know whether or not --

25 THE COURT: So we'll impose \$150 with just a caveat if it has been imposed

1 at any point someplace else, then we'll waive it.

2 [Colloquy between the Court and the Clerk]

3 THE COURT: Yeah, and the \$250 indigent fee for the Public Defender's  
4 Office.

5 Okay?

6 MS. SPELLS: Your Honor, can you recommend the 184 Program from the  
7 JOC?

8 THE COURT: Yes. Yeah, I forgot about that, sorry.

9 We'll put on there, if this is all right with you, we'll facilitate a fast entry  
10 into the 184 Drug Treatment program at Department of Corrections. We'll insert that  
11 and put that on the PSI so that when you get there they'll know exactly that's where  
12 you want to be.

13 Okay?

14 THE DEFENDANT: Yes, sir, thank you.

15 THE COURT: All right. Good luck.

16 MS. SPELLS: Thank you.

17 [Proceeding concluded at 10:37 a.m.]

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20  
21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
22 recording in the above-entitled case to the best of my ability.

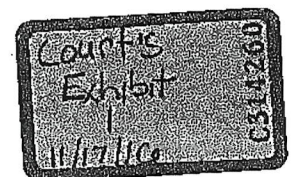
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24 Gina Villani  
25 Court Recorder

The Court is not at liberty to supplement the evidence.

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

Michelle Moline



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ALFRED C. HARVEY, )  
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 Appellant, )  
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 THE STATE OF NEVADA, )  
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22 day of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT  
STEVEN S. OWENS

SHARON G. DICKINSON  
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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INDIAN SPRINGS, NV 89070

BY /s/ Rachel Howard  
Employee, Clark County Public Defender's Office