

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

)
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10 **APPELLANT'S APPENDIX VOLUME VII PAGES 1272-1463**

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1 reports; correct?

2 A That's correct.

3 Q And I asked you about did you write a voluntary report for Metro, the
4 Las Vegas Metropolitan Police Department?

5 A Yes, I did.

6 Q And you wrote it shortly after -- after the incident in what you did that
7 day; correct?

8 A I wrote what I saw at that time, yes.

9 Q But it was on that day?

10 A It was on that day.

11 Q Shortly after you saw it happen?

12 A Probably about a half hour, 45 minutes afterwards.

13 Q I would say that was kind of shortly afterwards.

14 I have a copy of your report, Mr. Appel. I'm showing it to the State.

15 Mr. Appel, can I just ask you to read your report?

16 A To read it?

17 Q To yourself.

18 A Oh, okay.

19 Okay.

20 Q Mr. Appel, do you remember me asking you how many people you saw
21 running from the T.J. Maxx store?

22 A Uh-huh.

23 Q And you said there were two?

24 A Repeat the question.

25 Q Do you remember when I asked you how many people were running

1 from the T.J. Maxx store?

2 A Okay. Whether it was -- okay, go ahead.

3 Q And you said that there were two people running from the T.J. Maxx
4 store?

5 A Taking pictures with their cameras; correct.

6 Q Correct.

7 And what did you write in your -- your voluntary statement that --

8 A There was a third person but he wasn't involved, so.

9 Q But you did write that there were three people running from the T.J.
10 Maxx store?

11 A I wrote -- yeah, there was three, so, okay.

12 Q Okay. And three males from the T.J. Maxx store --

13 A If you take --

14 Q -- photographing the van that was in your --

15 A Excuse me?

16 Q -- that was in your voluntary statement?

17 A Yeah, okay, let me clarify that what you're trying to get to. Okay, three
18 people means two people that were taking the pictures and one gentleman running
19 there, so that's a total of three.

20 Q But, Mr. Appel, you mentioned to me that you were a HUD inspector
21 and you write accurate reports; correct?

22 A Okay, ma'am, I know what --

23 Q I'm just asking you to answer the question.

24 A -- you're trying -- I understand what you're trying to say. There were
25 three individuals running from that store.

1 Q Okay.

2 A Two of them taking -- two of them are white males, taking pictures with
3 their camera and another black male that was also running from that store. So that's
4 a total of three.

5 Q Mr. Appel, I'm going to ask that you answer my questions, okay.

6 A I just did, ma'am.

7 Q I'm going to ask that you answer my questions.

8 A Okay.

9 Q So, again, I'm going to ask, in your voluntary statement you state that
10 there are three people who are running from the T.J. Maxx store photographing the
11 van, that's in your voluntary statement that you just read?

12 A Two of them are photographing, okay, one is not photographing.

13 Q And, again, I'm going to ask the question, did you write in your report --
14 THE COURT: Couldn't you just -- read it. Read it so we know what you're
15 talking about.

16 MS. JONES: And I did, Your Honor.

17 BY MS. JONES:

18 Q -- that three males from the T.J. Maxx out of the store photographing
19 the van that's --

20 A I didn't specify which ones were photographing, ma'am.

21 Q But that's what you wrote in your voluntary statement; correct, because
22 I'm reading from the statement?

23 A Okay, ma'am, three males running from the store.

24 Q Mr. Appel, it's really a yes or no question. Did you write that in your
25 voluntary statement?

1 A It's in the statement, ma'am.

2 Q Okay.

3 A I didn't specify how many were --

4 Q But it is in the statement that you had three people who were
5 photographing the van?

6 A Three people are running from the store.

7 Q Okay.

8 A I did not specify how many people were photographing.

9 Q And yet you testified today that it was only two?

10 A Okay, whatever, ma'am.

11 Q All right. You testified today that there were only two?

12 A There was two taking pictures, there was three people running from the
13 store. You can't change the spots on the leopard.

14 Q No, sir, you cannot. But sometimes you can -- sometimes it's not
15 always what it appears to be or what it seems.

16 A It's sometimes what, ma'am?

17 Q It's not always what it appears to be.

18 MR. ROSE: Your Honor, is there a question?

19 THE WITNESS: I don't really want to get into a sparring --

20 THE COURT: All right. We're getting sidetracked. You're good.

21 MS. JONES: Thank you.

22 THE COURT: Is that it?

23 MS. JONES: Yes, Your Honor.

24 THE COURT: Do you have any further questions?

25 MR. ROSE: Nothing by the State, Your Honor.

1 THE COURT: Okay. All right. Mr. Appel, thank you very much for your
2 testimony. I appreciate it. You can go ahead and step down and you'll be excused.
3 Now, if you're going to wait outside in the hallway for any length of time,
4 I'm going to caution you not to discuss any of your testimony while you're waiting
5 outside.
6 THE WITNESS: Okay.
7 THE COURT: Okay.
8 THE WITNESS: Not a problem.
9 THE COURT: Thank you, very much.
10 THE WITNESS: Thank you.
11 THE COURT: All right. That was fun.
12 All right. What are we doing?
13 MR. SCHWARTZ: What's that?
14 THE COURT: I said what are we doing now?
15 MR. SCHWARTZ: The State has two more witnesses if you want to get it
16 going right now or if we want to take a break?
17 THE COURT: No, let's roll. Let's get going.
18 MR. SCHWARTZ: State would call Officer Nelson, please.
19 THE COURT: And these two witnesses aren't taking too long, are they?
20 MR. SCHWARTZ: Not from the State, Your Honor. I don't anticipate from the
21 defense either.
22 MS. SPELLS: Your Honor, may we briefly approach?
23 THE COURT: Sure.
24 Have a seat for just for a second.
25 THE WITNESS: Yes, sir.

1 [Bench conference begins]

2 MS. SPELLS: Just for timing issues, I know that we reserved, but should we
3 also be prepared to call a witness today? It's 3:30. I didn't know when the Court
4 was anticipating breaking for the day.

5 THE COURT: If you can, yeah. Yeah, if that's possible.

6 MS. SPELLS: Okay. I'll try to see if we can get them --

7 THE COURT: Because I don't think he's going to take too long.

8 MS. SPELLS: -- right down here, okay.

9 THE COURT: Perfect.

10 [Bench conference concludes]

11 **RICHARD NELSON**

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

13 THE CLERK: Please be seated and then state and spell your name for the
14 record.

15 THE COURT: State and spell both your first and your last name.

16 THE WITNESS: Yes, sir. Richard Nelson, R-I-C-H-A-R-D N-E-L-S-O-N.

17 THE COURT: Okay.

18 MR. SCHWARTZ: May I proceed?

19 THE COURT: Yeah.

20 MR. SCHWARTZ: Thank you, Your Honor.

21 **DIRECT EXAMINATION BY MR. SCHWARTZ**

22 By MR SCHWARTZ:

23 Q Sir, how are you employed?

24 A Police officer with Las Vegas Metropolitan Police Department.

25 Q And how long have you been with Metro as a whole?

1 A Seven years.

2 Q And is that all been as a police officer?

3 A Correct.

4 Q And specifically that's a patrol officer?

5 A That's correct.

6 Q Okay. Now, I want to direct your attention to March 30th, 2016, did you

7 have occasion to respond to a call at T.J. Maxx?

8 A I did.

9 Q And what was the nature of that call?

10 A It was a robbery call.

11 Q As far as what you're -- you're under the impression when you're

12 arriving on scene was there any allegations of a knife in the call?

13 A Yes.

14 Q And that T.J. Maxx that you arrived at is 4640 West Sahara?

15 A That's correct.

16 Q Okay. Tell me what happened when you arrived at that T.J. Maxx?

17 A When I arrived I made contact with the victim who is loss prevention

18 with the T.J. Maxx.

19 Q Okay. Would that be Mr. Munoz?

20 A Yes.

21 Q And at that time when you arrived had the suspect left?

22 A Yes, the suspect was not there.

23 Q So what was your role, what types of things did you do at the T.J.

24 Maxx? You spoke to Mr. Munoz?

25 A I spoke to Mr. Munoz and he explained to me what happened.

1 Q Was it your understanding whether or not there were other officers
2 involved in the apprehension of the suspect?

3 A Yes. Upon my arrival the air unit had located the suspect vehicle.

4 Q Okay. So as far as you knew there was an air unit involved that had
5 located the vehicle?

6 A Correct.

7 Q And what is an air unit?

8 A Air unit is an air patrol unit that assists us with locating -- could be
9 subjects, missing persons. It's a tool for -- resource tool for patrol officers.

10 Q Helicopter?

11 A Correct.

12 Q Okay. After you had a chance to speak with Mr. Munoz, did you also
13 speak with another loss prevention agent Mr. Bramble?

14 A Yes, briefly.

15 Q At that point did you review any surveillance video?

16 A I believe some surveillance video was seen, yes.

17 Q So, as you're conducting this investigation were you able to determine a
18 general description of the suspect?

19 A Yes.

20 Q And what was that?

21 A It was a light skinned black or Hispanic male, wearing shorts, and a
22 blazer type coat.

23 Q Okay. Any identifying tattoos?

24 A On his neck.

25 Q Once you realize, once you learn from air unit that there had been a

1 suspect apprehended or stopped, did you respond to that location?

2 A I did.

3 Q Okay. And specifically was that location at 1312 Vista Avenue?

4 A It was.

5 MR. SCHWARTZ: And, Your Honor, I know we don't have to ask permission,
6 how about permission to publish?

7 THE COURT: Permission is granted. Which exhibit is it?

8 MR. SCHWARTZ: State's Exhibit 1.

9 THE COURT: Okay.

10 BY MR. SCHWARTZ:

11 Q Just for a little context, Officer, this blue dot at the bottom of the screen,
12 on the left, bottom left of the exhibit.

13 A Yes.

14 Q Do you recognize that as T.J. Maxx?

15 A That's correct.

16 Q And up here, off of Vista Drive is this Desert Torah Academy area, is
17 this the general area where the suspect would have been apprehended?

18 A Yes, in that parking lot.

19 Q And was that the parking lot -- is this a school here?

20 A It is a school.

21 Q Okay. It was in that parking lot?

22 A That's correct.

23 Q So when you responded to the area other officers and other units had
24 responded before --

25 A Correct.

1 Q -- before you got there?

2 And at that point was the suspect in custody?

3 A Yes.

4 Q And do you see the suspect here in court today?

5 A I do.

6 Q And can you please point to him and identify an article of clothing he's
7 wearing?

8 A The gray shirt.

9 MR. SCHWARTZ: Your Honor, would the record please reflect identification
10 of the Defendant.

11 THE COURT: Yes, the record will so show.

12 MR. SCHWARTZ: Thank you.

13 By MR SCHWARTZ:

14 Q And through your investigation, prior to arriving at the Vista location,
15 had you also developed a description of the vehicle that the suspect was in?

16 A Yes, it was a U-Haul vehicle with Arizona license plates.

17 Q Okay. And what -- would that be a white U-Haul vehicle?

18 A It would have been multi-colored with stickers.

19 Q Okay. And it would be an Arizona tag, would it be AG5 --

20 MS. SPELLS: Objection, I'm sorry.

21 Q -- would it be Arizona tag AG55084?

22 A Yes.

23 Q Okay. And that's -- you would have documented that in your report?

24 A Correct.

25 Q Okay. And when you arrived on scene did the description of the vehicle

1 match the description you had?

2 A Yes.

3 Q I'm sorry, that was a bad question.

4 When you arrived on the scene, did you observe a vehicle that matched
5 the description you had of the vehicle?

6 A That's correct.

7 Q Okay. So there was a U-Haul van with matching plates?

8 A Correct.

9 Q Now, you mentioned that there was a -- the call came out that there
10 was a potential weapon involved?

11 A That's correct.

12 Q When you respond to calls in general where a weapon is involved but
13 there's certain things that you keep in mind when you're responding that you want to
14 make sure to do?

15 A Look out for if the suspects there, just any description you had.

16 Q Is it fair to say that you would -- for officer safety you would want to
17 secure the suspects?

18 A Yes.

19 Q Is it also fair to say that for officer safety you would want to locate, if
20 possible, a weapon?

21 A That's correct.

22 Q And secure the weapon?

23 A Correct.

24 Q Okay. And when you arrived on scene, at the Vista location, which is
25 by that school you looked at on the map, were officers already at that point

1 searching and looking for -- searching the van and looking in the surrounding areas
2 for a potential weapon?

3 A That's correct.

4 Q To your knowledge was any weapon ever found?

5 A Not to my knowledge.

6 Q Now, Officer, in general do you always find a weapon when there's an
7 allegation of a weapon?

8 A No.

9 Q Is it at all surprising to you that there was not a weapon found at this
10 location?

11 A No, it's not surprising.

12 Q Okay. Why is that?

13 A The distance from the T.J. Maxx to the in custody location a lot could
14 happen between there.

15 Q So, from T.J. Maxx all the way to where the apprehension occurred,
16 weapon could have been ditched or something along that nature?

17 A That's correct.

18 MS. JONES: Objection, Your Honor, speculation.

19 THE COURT: Sustained.

20 By MR SCHWARTZ:

21 Q No weapon was found at the Vista location?

22 A No.

23 Q Now, Officer, you're the reporting officer in this case; correct?

24 A Yes.

25 Q And are you aware of what items were located inside the vehicle?

1 A From T.J. Maxx?

2 Q Yeah, just in general. So, specifically are you -- actually, you know,
3 could I approach Your Honor?

4 THE COURT: Sure.

5 [Colloquy between District Attorney and Defense Counsel]

6 MR. SCHWARTZ: I'm going to -- permission to approach, okay. Thanks,
7 Your Honor.

8 MS. JONES: Objection, Your Honor.

9 MS. SPELLS: Do you want us --

10 THE COURT: You just want to approach the witness?

11 MR. SCHWARTZ: Correct.

12 THE COURT: Yeah. He doesn't want to approach the bench.

13 MR. ROSE: Oh, you just confused us all.

14 MS. JONES: Oh, I was actually calling for an objection, Your Honor.

15 THE COURT: Oh, okay.

16 MS. JONES: I'm sorry.

17 MS. SPELLS: We are going to the bench?

18 THE COURT: Come here.

19 MS. JONES: We are coming to the bench.

20 [Bench conference begins]

21 MR. SCHWARTZ: So this has already been admitted.

22 THE COURT: Okay. What are these?

23 MR. SCHWARTZ: Well, I don't know if this officer will be able to identify them
24 or not but these are items that were all found in the van.

25 MS. JONES: [indiscernible]

1 MR. SCHWARTZ: Oh, sorry.

2 THE COURT: What do these have to do with this? What do those items
3 have to do with this whole case?

4 MS. SPELLS: Nothing.

5 MR. SCHWARTZ: Well, that's the objection. My position is --

6 THE COURT: They're irrelevant if they don't have any connection to the T.J.
7 Maxx.

8 MR. SCHWARTZ: Well, Your Honor, I don't believe that they're irrelevant
9 because they didn't show the Defendant's state of mind in general. [Indiscernible]
10 This is going to be testimony that it's a security --

11 MS. SPELLS: Well, let's not do that. You don't know which angle you're
12 holding that picture up and who can see what.

13 MR. SCHWARTZ: Okay. That thing is a security radio.

14 THE COURT: Is -- okay.

15 MR. SCHWARTZ: This is safety tags. My position is it's relevant because it
16 shows the state of mind the Defendant in general. Now, there's no allegations that
17 these were in the actual items taken at this point, but it shows the state of mind of --

18 THE COURT: Those are the security tags that come off of items of whatever
19 that are --

20 MR. SCHWARTZ: Correct.

21 THE COURT: -- that are -- and that's how they protect their --

22 MR. SCHWARTZ: Correct.

23 THE COURT: That's how every store in the world protects their clothing and
24 their items. They have security tags on them, is that your theory?

25 MR. ROSE: Take it off the mic.

1 MS. JONES: [Indiscernible] our position is that [indiscernible]

2 THE COURT: Has this all been -- always consistently apart of your evidence,
3 this clothes and -- they've been aware of all this?

4 MR. SCHWARTZ: Absolutely, yeah.

5 THE COURT: And these were --

6 MS. SPELLS: We're not --

7 THE COURT: -- items that were taken out of the van?

8 MR. SCHWARTZ: Yes.

9 MS. SPELLS: We were aware of it later. To say -- I mean --

10 THE COURT: What, what?

11 MS. SPELLS: To necessarily say consistent -- consistently I wouldn't say
12 that -- I wouldn't say that it's necessarily new; however, this is not something that
13 was disclosed in the beginning. This is photographs that we don't get photographs
14 until --

15 MR. SCHWARTZ: Your Honor, it was in that --

16 MS. SPELL: -- obviously later on in the case --

17 MR. SCHWARTZ: I'm sorry.

18 MS. SPELL: -- it's not the initial packet of discovery. But it would have been
19 later on in the case. Our position --

20 THE COURT: But you've seen all this before?

21 MS. SPELLS: We've seen this.

22 Our position is this, I mean, this amounts to bad act evidence. This is
23 not a specific intent crime. It's a general intent crime. They have the --

24 THE COURT: Well, this probably should have been addressed in a Motion in
25 Limine before --

1 MS. SPELLS: And I could -- and here's the thing, we do try to make things a
2 little bit cleaner through Motions in Limines; however, I think --

3 THE COURT: Let me --

4 MS. SPELLS: -- the burden is on the State to ask permission.

5 THE COURT: Let me put it like this.

6 MR. SCHWARTZ: Can I make one point before you rule, Your Honor?

7 THE COURT: Okay. You're just going to make this muddy. You're just going
8 to muddy up this case, if you do this. I think you probably have a good enough legal
9 basis to get this in but it's not that clear by a long shot. And if you get this in, you're
10 going to, without any question, you're going to create a real, viable appellate issue
11 and you probably don't need it. I'll tell you what --

12 MR. SCHWARTZ: Can I make one thing clear though?

13 THE COURT: Sure.

14 MR. SCHWARTZ: These items were listed on the impound report, which was
15 given in initial discovery. So what it sounds like, Your Honor, this ruling is that you
16 would allow me to but you would suggest to consider --

17 THE COURT: I will allow you to but --

18 MR. SCHWARTZ: Okay.

19 THE COURT: -- I don't think it's a good idea.

20 MR. SCHWARTZ: Okay, that's fair.

21 THE COURT: You don't need it, it's just borderline relevant.

22 MS. SPELLS: And, Your Honor --

23 MR. SCHWARTZ: How about this one? Will you guys object to that?

24 THE COURT: You know what if you can tie those -- because the wife is
25 outside of the store. She never appears inside the store. Those radios, is that

1 some form of communication? I mean, how do you tie that into this case?

2 MR. SCHWARTZ: Well, the only tie in that we have is that it's a security radio
3 that is used by security officers at a hotel. And so it's just evidence that he has a
4 security radio that he can listen to security --

5 THE COURT: Oh, boy, you're asking for trouble.

6 MS. SPELLS: This is not --

7 THE COURT: Don't do it. Just --

8 MR. SCHWARTZ: Okay. That's fair.

9 THE COURT: Okay.

10 MS. SPELLS: And are they --

11 MR. SCHWARTZ: Whatever the Court's ruling is.

12 THE COURT: All right. They're not going to do it. Sure. They're not going to
13 do it.

14 MR. SCHWARTZ: But I would like to use this though?

15 MS. SPELLS: The shirt?

16 THE COURT: That's fine. That's the jacket?

17 MS. SPELLS: Okay.

18 THE COURT: That's the jacket that he had on.

19 MR. SCHWARTZ: Okay. So there's no objection to that?

20 MS. SPELLS: He was wearing that; right?

21 MR. SCHWARTZ: The Defendant?

22 MS. SPELLS: Are you saying something --

23 MR. SCHWARTZ: Yeah.

24 MS. SPELLS: Yeah.

25 MR. SCHWARTZ: Okay.

1 MS. SPELLS: Oh, okay, yes. As long as you're not saying he was stealing it.

2 MR. SCHWARTZ: No. I would never do that with your theory of defense.

3 THE COURT: Okay, use that.

4 MR. SCHWARTZ: So we'll withdraw the -- we'll withdraw the [indiscernible].

5 [Bench conference concludes]

6 MR. SCHWARTZ: Your Honor, if I may approach the Officer?

7 THE COURT: Yes.

8 By MR SCHWARTZ:

9 Q Officer, this is State's Exhibit 2, do you recognize these items?

10 A Yes.

11 Q And how do you recognize them?

12 A They were -- the other officer stated that they were recovered inside the

13 U-Haul van.

14 Q Now, this is State's Proposed Exhibit 3, do you recognize that?

15 A Yes.

16 Q Was this also recovered in the van?

17 A It was.

18 MR. SCHWARTZ: Your Honor, the State would move to admit State's

19 Proposed Exhibit 3.

20 THE COURT: Did we already admit two?

21 MR. SCHWARTZ: We did.

22 THE COURT: Okay. So three, any objection?

23 MR. SCHWARTZ: Just showing defense counsel State's Proposed 3.

24 THE COURT: Just to make sure you're not -- all right, no objection?

25 MS. JONES: No objection, Your Honor.

1 THE COURT: Two is already admitted, three is also admitted.

2 **[STATE'S EXHIBIT 3 ADMITTED]**

3 MR. SCHWARTZ: Your Honor, State's publishing State's 2.

4 BY MR. SCHWARTZ:

5 Q And, Officer, you just testified that these are the items recovered from
6 the white U-Haul van?

7 A Correct.

8 Q And State's 3 now publishing for the jury, also recovered from the
9 U-Haul van?

10 A Correct.

11 Q And, Officer, do you have occasion to go actually go back to T.J. Maxx
12 to recover the surveillance video?

13 A Yes, I went back and recovered it.

14 MR. SCHWARTZ: Okay. Your Honor, State has nothing further with this
15 witness.

16 THE COURT: Okay, cross.

17 MS. JONES: Yes, Your Honor.

18 **CROSS EXAMINATION BY MS. JONES**

19 BY MS. JONES:

20 Q Good afternoon, Officer Nelson.

21 A Good afternoon.

22 Q Officer Nelson, you mentioned that you have been a patrol officer for
23 seven years?

24 A Correct.

25 Q So you're trying to investigate?

1 A Yes, ma'am.

2 Q Trying to write reports?

3 A Yes.

4 Q Make them very accurate?

5 A Correct.

6 Q Comprehensive?

7 A Yes.

8 Q And in your investigation you tend to follow the facts in order to solve a
9 crime; correct?

10 A Correct.

11 Q Okay. And you know that your reports are used by the prosecution;
12 right?

13 A Yes.

14 Q Determine how strong their case is?

15 A Yes.

16 Q Whether or not they might need to negotiate the case?

17 A Yes.

18 Q And you know that those reports are also seen by the defense?

19 A Correct.

20 Q And if there's anything missing out of those reports you know we're
21 going to ask you about them?

22 A Of course.

23 Q Okay. And you tend to write your reports shortly after you've gathered
24 your information; correct?

25 A Correct.

1 Q And you have enough time to write those reports?

2 A Yes.

3 Q And you write reports in case they may have to be used at trial like
4 today?

5 A Yes.

6 Q Okay. Now, you mentioned that you had actually interviewed
7 Mr. Munoz?

8 A Yes.

9 Q And he identified himself as the person who reported the theft; correct?

10 A Yes.

11 Q And he told you about what items were taken?

12 A Yes.

13 Q And where did that interview take place; was it inside or outside the T.J.
14 Maxx?

15 A A little bit of both actually.

16 Q Okay. All right. And he explained to you that he followed Mr. Harvey
17 out of the store?

18 A Correct.

19 Q And he mentioned to you that Mr. Harvey got into a U-Haul, a white
20 U-Haul van?

21 A Yes.

22 Q And he also mentioned to you that there was a surveillance video?

23 A For inside the store, yes.

24 Q Okay. And Mr. Munoz mentioned to you that there were photographs
25 taken of the van?

1 A Not to my recollection.

2 Q No one mentioned to you any that there were any photographs taken of
3 the van; right?

4 A Not that I recall.

5 Q Okay. Because if they had you would have written it in your report?

6 A It would have been documented somehow.

7 Q Right. Okay. And in this particular case you wrote the property report;
8 correct?

9 A I'm not sure if I did or one of my partners did.

10 Q Okay. If I showed you a copy of your report, would that help you?

11 A Yes.

12 Q Okay.

13 A Yeah, that was an additional property report when I picked up the
14 surveillance.

15 Q And you also wrote the impound report in this case; correct?

16 A For that DVD?

17 Q Oh, no. I was talking about the impound report.
18 Court's indulgence.

19 And let me back up. You testified that you saw the items that had been
20 inventoried by your partner; correct?

21 A Items that had been -- which items?

22 Q Inventoried from the U-Haul van?

23 A Which items?

24 Q I'm sorry, I think that was Exhibit 2.

25 A The photograph of items?

1 Q Correct.

2 A Yes.

3 Q Thank you.

4 And in that report there was never a knife documented; correct?

5 A In the -- no, not in that report.

6 Q And not in your property report, the one with the DVD, no knife?

7 A There was no knife located, yes.

8 MS. JONES: Pass the witness.

9 THE COURT: Redirect?

10 MR. SCHWARTZ: Briefly, Your Honor.

11 **REDIRECT EXAMINATION BY MR. SCHWARTZ**

12 By MR SCHWARTZ:

13 Q Now, Officer, you did indicate that there had been allegations of a knife
14 in your arrest report; correct?

15 A That's correct.

16 Q And Ms. Jones asked you about your discussion with Mr. Munoz?

17 A That's correct.

18 Q And that he told you that he followed Mr. Harvey, the Defendant, out of
19 the store?

20 A Yes.

21 Q And that the Defendant got into the U-Haul; correct?

22 A In the driver seat of the U-Haul.

23 Q Mr. Munoz also told you that prior to that the Defendant threatened him
24 with a knife; correct?

25 A That's correct.

1 MR. SCHWARTZ: Okay. No further questions.

2 THE COURT: Anything else?

3 MS. JONES: No, Your Honor.

4 THE COURT: Thank you very much for your testimony. I appreciate it.

5 THE WITNESS: Thank you, sir.

6 THE COURT: You can go ahead and step down and be excused. If for some
7 reason you're going to be out in the hallway for any length of time, I'll caution you
8 not to discuss any of your testimony.

9 MR. SCHWARTZ: State's final witness, Your Honor, is Officer Humpherys.

10 THE COURT: Humpherys.

11 **TRAVES HUMPHERYS**

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

13 THE CLERK: Please be stated and then state and spell your name for the
14 record.

15 THE COURT: State and spell your first and your last name.

16 THE WITNESS: First name; last name?

17 THE COURT: First name, last name, and spell them both.

18 THE WITNESS: First name Traves, T-R-A-V-E-S, last name
19 H-U-M-P-H-E-R-Y-S.

20 MR. SCHWARTZ: Thank you, Your Honor.

21 **DIRECT EXAMINATION BY MR. SCHWARTZ**

22 BY MR. SCHWARTZ:

23 Q Sir, how are you employed?

24 A Las Vegas Metropolitan Police Department for seven and a half years
25 now.

1 Q And for the seven and a half years operate as a patrol officer?

2 A Yes, sir.

3 Q Okay. Directing your attention to March 30th, 2016, did you have
4 occasion to respond to a call at a Vista Avenue?

5 A I did, sir.

6 Q What was the nature of that call?

7 A The call initially came out that a -- a 407, which is a robbery, was taking
8 place at T.J. Maxx. An ATL had started, I believe I was either the second or the
9 third officer assigned to the call. I was primarily assigned to ATL the area to look for
10 a suspect vehicle.

11 Q And what does ATL mean?

12 A Attempt to locate.

13 Q Okay. So you got a call to attempt to locate a robbery suspect?

14 A Yes, sir.

15 Q Anything in the call indicate that a weapon could potentially be used?

16 A I briefly remember some radio traffic in regards to a -- what we call is,
17 our code is 413A, which is a knife. It was possibly that was seen. It was displayed.
18 And --

19 Q So when you received that call you responded to 1312 Vista Avenue?

20 A Yes, that's a school, which is about a mile and a half to two miles east
21 of the location of where this occurred.

22 Q And the location where it occurred was that a T.J. Maxx?

23 A Yes, sir.

24 Q Okay. The school, is it a Jewish school?

25 A It's a Jewish school, yes.

1 Q You were the -- were you the first officer to arrive at that scene, at the
2 school?

3 A At the school, yes. And then moments later, within a couple of minutes,
4 another unit arrived.

5 Q And when you arrived, did you observe a vehicle in front of or near the
6 school?

7 A In the parking lot, in the front, yes.

8 Q What vehicle was that?

9 A It was a -- I recall a white, U-Haul van.

10 Q And did you have occasion to apprehend anyone from that van?

11 A I detained the gentleman sitting in a classroom -- or in the courtroom,
12 excuse me.

13 Q And you're pointing over in this direction, could you describe an article
14 of clothing that gentleman was wearing? Today, I'm sorry.

15 A Um --

16 Q Today, an article of clothing he's wearing today?

17 A Today, yes. He's wearing a gray or a blue shirt with a dark colored tie,
18 slacks.

19 MR. SCHWARTZ: Your Honor, will the record please reflect identification of
20 the Defendant.

21 THE COURT: Yes, the record will so show.

22 BY MR. SCHWARTZ:

23 Q So you said you arrived and you apprehended the Defendant?

24 A I took him into custody, detained him, yes.

25 Q Okay. Were there any other people in the van at that time?

1 A I recall a -- his significant other and two children, I believe, two small
2 children.

3 Q Would this significant other have been a black female adult?

4 A Yes, sir.

5 Q And did you have any interactions with them or did other officers --

6 A Very, very brief. I had a very brief interaction with them. It was
7 basically just to -- just a brief description or explanation of what we were doing, what
8 was going on, and just try to keep them calm.

9 Q Did you -- but they were removed from the vehicle?

10 A They were.

11 Q And did you, along with other officers, have occasion to search that
12 U-Haul vehicle?

13 A Once I was initially done doing what I was doing with the suspect, I
14 went over and assisted Officer Resberg and another officer. I can't recall the
15 officer's name.

16 Q Now, Officer, just in general when a weapon is potentially involved and
17 you're responding to that scene, what are some of the thoughts and concerns when
18 you arrived to that scene?

19 A Does the suspect still have the weapon in their possession, is it on their
20 person, is it in their vehicle, could it be located nearby, was it disposed of nearby or
21 at the actual location of the crime, there's all kinds of stuff that you can consider.

22 Q As far as you are aware, was a knife ever recovered at the scene?

23 A Not that I'm aware of, no.

24 Q Okay. Part of your goals in arriving at the scene would be to secure the
25 scene of any weapons; correct?

1 A My goal, since I initially come in contact with the suspect, would be to
2 make it safe, get him into custody, and make sure there was no weapons. And if
3 there were weapons, then I would make sure they were secure in place.

4 Q Now, Officer, I'm going to show you State's Exhibit 2, do you recognize
5 these items as being recovered from the U-Haul van?

6 A I do. I impounded those items.

7 Q And so after you -- after you and other officers recovered them, you
8 would have impounded them and documented that in an impound report?

9 A Yes.

10 Q Or property report?

11 A Yes.

12 Q And showing you State's Exhibit 3, same question, this was an item
13 recovered in the U-Haul van?

14 A Yes.

15 Q And, again, impounded by yourself?

16 A Yes, sir.

17 MR. SCHWARTZ: Court's indulgence.

18 THE COURT: Sure.

19 BY MR. SCHWARTZ:

20 Q Now, Officer, you testified that there was no knife recovered at the
21 scene to your reflection, is that at all surprising to you?

22 A No, sir, it's not.

23 Q Why is that?

24 A A lot of times, through my experience from being on the job for the last
25 seven and a half years, that when we get calls similar in nature suspects or people

1 that are involved do dispose of weapons that are used between where they actually
2 committed the crime and to where they're caught.

3 Q As you testified earlier, there was several miles between where it was
4 alleged to be used and the apprehension of the Defendant?

5 A Yes, there was a significant distance between where it occurred and
6 where he was caught.

7 MR. SCHWARTZ: Your Honor, I don't have any further questions.

8 THE COURT: All right, cross-examination.

9 MS. JONES: Yes, Your Honor.

10 Court's indulgence.

11 THE COURT: Sure.

12 **CROSS-EXAMINATION BY MS. JONES**

13 BY MS. JONES:

14 Q Good afternoon, how you are this afternoon, Officer Humpherys?

15 A I'm good, ma'am. How are you doing?

16 Q Good. Thank you for asking.

17 A Your welcome.

18 Q I'm going to ask you a little bit about your background, your training and
19 experience, especially since you brought it up on that direct. So, you attended the
20 police academy?

21 A Yes, ma'am.

22 Q You were taught the importance of reports?

23 A Yes, ma'am.

24 Q The importance of investigating?

25 A Yes, ma'am.

1 Q To do comprehensive reports?

2 A Yes, ma'am.

3 Q Comprehensive investigation?

4 A Yes, ma'am.

5 Q Collect all the facts?

6 A Yes, ma'am.

7 Q Try to document those facts?

8 A Yes.

9 Q And document them to the best of your ability?

10 A Yes.

11 Q Make sure those facts are accurate?

12 A Yes.

13 Q Great. You know that those reports are going to be used by the
14 prosecution?

15 A Absolutely, yes.

16 Q By the defense?

17 A Yes.

18 Q That they could be used later on for trial like today?

19 A Yes.

20 Q Did you have an opportunity to review your reports before you came in
21 today?

22 A I did.

23 Q Okay, great.

24 You mentioned the fact that you had an opportunity to do a safety
25 search on Mr. Harvey; correct?

1 A Pat-down, a Terry pat-down.

2 Q Correct. And that's considered a search; correct?

3 A It's not considered a search, no. It's --

4 Q Oh, okay. But you do a pat-down as you --

5 A For safety, yes.

6 Q For safety reasons?

7 A Yes.

8 Q And during that pat-down you did a thorough pat-down?

9 A Absolutely.

10 Q You checked all his pockets?

11 A Absolutely.

12 Q And his jacket, the jacket pockets?

13 A Yes.

14 Q You checked his short pockets?

15 A With his permission, yes, I did. He gave me consent to go into his

16 pockets.

17 Q Thank you for following procedure, Officer. I appreciate that.

18 A You're welcome.

19 Q You checked his shoes?

20 A Initially the upper region of the shoe. It's a procedure that we're taught.

21 Just to scoop with our fingers to make sure there's no sharp objects or weapons

22 protruding out of the shoe or within, you know, that we can see.

23 Q Right. And, again, that's for safety --

24 A I don't recall taking his shoes off, if that's what you're asking.

25 Q No, sir. I was just asking if you checked his shoes because I'm familiar,

1 as you were saying, about the shoes.

2 But you did check those?

3 A Yes, the top of them I did.

4 Q Okay. And during your search you found some items; correct?

5 A If I recall, I found his wallet with his identification, just initial identification
6 and stuff like that in it. So I can identify him.

7 Q Okay. And during your search of Mr. Harvey's person, you did not find
8 a knife?

9 A No, I did not, ma'am.

10 Q And you mentioned with your training and experience that's not
11 unusual?

12 A Absolutely, it's not unusual.

13 Q And in your training and experience you've talked to several witnesses
14 in the past; correct?

15 A Yes, ma'am, I have.

16 Q And in your training and experience over those seven and a half years
17 has it been anytime where a witness may have just misunderstood or didn't see
18 what they thought they saw?

19 A Absolutely.

20 Q Okay. You mentioned that you were present during the search of the
21 U-Haul van?

22 A Not --

23 Q Assisted --

24 A Not initially but towards the --

25 Q Towards the end?

1 A -- towards -- middle or the end. Like I said, I don't have the time table.
2 Once I was done dealing with the suspect --

3 Q Yes, sir.

4 A -- and I knew that he was safe and secure in the hands of other officers,
5 I believe it was Officer Nelson, if I recall right. It's been so long though. That I went
6 over and I assisted Officer Resberg and another officer with the items in the van.

7 Q And to the best of your recollection, do you remember that -- if there
8 was a knife found in that van?

9 A No, no, I do not remember a knife being found in the van.

10 MS. JONES: Okay. Court's indulgence.

11 Thank you.

12 BY MS. JONES:

13 Q Officer, understanding that this happened a while back, back in March
14 of this year, you mentioned the CAD and that you were actually the second on
15 location for the ATL; correct?

16 A I believe I was assigned second or third. I can't remember which one I
17 was assigned but I know that I was assigned. I assigned myself to attempt to locate
18 the vehicle that was involved in the crime.

19 Q And based on that dialogue in the CAD, the indent at T.J. Maxx started
20 at about 4:35 p.m., do you remember about what time you arrived at -- is it 1412
21 Vista Avenue?

22 A I don't know exact times and I'm not going to guess what time. So I
23 don't know exact time.

24 Q Would it help you if I had you review the CAD log?

25 A Sure, absolutely.

1 My call sign that day was 3 Union 13, so I see a recording to CAD,
2 which would be -- it was either by MDT, which is our computer because we can
3 communicate with dispatch through our computer. A lot of times if there's a lot of
4 radio chatter, instead of getting on the air, you will an AM, which is like a direct
5 message to the dispatcher either assigning yourself or telling them what your intent
6 is on the call. Like I said, I can't remember if I came over the radio or if I sent a
7 message to the MDT. I, you know, it says right here 1638 was when my call sign, 3
8 Union 13, first pops up on CAD. So that would be when I was first assigned to the
9 call. 1638 which would be 4:38.

10 Q Thank you.

11 A You're welcome.

12 Q And you were aware that there was an air detail also following the --

13 A Yes.

14 Q -- vehicle also?

15 A Yes.

16 Q And were you also aware that there was a civilian that was following the
17 U-Haul?

18 A Briefly, I briefly remember maybe some radio chatter in regards to -- I
19 didn't know whether it was loss prevention or if it was a witness. I can't attest to
20 that.

21 Q And was there any mention in the CAD log that an item had been
22 thrown from the U-Haul?

23 A I don't recall that, no.

24 Q Is it common to have so many patrol cars and vehicles actually in
25 pursuit of a vehicle -- of a suspect?

1 A I wouldn't -- I'm not trying to correct you, ma'am, but I wouldn't say it
2 was a pursuit.

3 Q Okay.

4 A It would depend on the nature of the call. I would on -- depends on how
5 many units are available, I mean, at any given time we can only have a certain
6 amount available. It depends on what day it is, of how many people were working in
7 that area. The nature of this call I would say, yes, a minimum, most of the time, of at
8 least two or three. Depending on man power, depending on what we have.

9 Q Okay. To have that many people covering that one vehicle?

10 A A call of this nature, yes. If -- when a weapon is mentioned or as
11 possibly witnessed or seen or used in nature of the crime, then, yes, there would be
12 multiple patrol units that would be responding or should be responding to assist.

13 Q Okay. And one last question, Officer, you were shown a picture of a
14 blue blazer?

15 A Correct.

16 Q Was that the blazer that Mr. Harvey had on the day that you
17 apprehended him?

18 A I honestly cannot remember if he had it on him or if it was in the vehicle,
19 that part of my memory is not clear, and I can't answer that question accurately.

20 Q All right. Thank you, one moment.

21 If I could just show you that CAD one more time, Officer.

22 A Okay.

23 Q Does it give a description?

24 A Would you like me to read it?

25 Q Just to yourself.

1 A Okay.

2 Okay.

3 Q Thank you, Officer.

4 Does this blue blazer in the exhibit at least match what is stated in the
5 CAD?

6 A One was impounded, yes.

7 Q Okay. And another question, Officer, is it common for a witness to
8 actually follow someone that could be considered a suspect?

9 A Honestly, I -- I can't really say if it's common or not. It depends on the
10 situation and it depends on that actual individual person.

11 Q But in your seven and a half years of training and experience would you
12 say that --

13 A I would say in my seven and a half years I would say at least 50 percent
14 of the time there's somebody that -- on the calls that I've been involved in, similar to
15 this in nature, there is somebody that follows either on foot, on a bike, a car for a
16 certain amount of time or the whole time until we arrive.

17 MS. JONES: Court's indulgence.

18 BY MS. JONES:

19 Q And, Officer, just for clarification, that blue blazer was an item that was
20 actually stated as a piece of clothing that was on the Defendant -- on the suspect at
21 the time?

22 A Like I said earlier, I can't recall if it was on him or not. I don't -- I
23 honestly cannot remember. It's been so long ago.

24 Q And I'm just asking, was that in the CAD that that was part of the
25 description of locating the suspect?

1 A Um -- do I -- can I review it again?

2 Q Absolutely.

3 A I'm sorry there was a lot of information there to recall.

4 Can you restate your question, please?

5 Q Was the blue blazer a description of a piece -- or an item of clothing
6 that the suspect was wearing at the time?

7 A What I just read it was white T-shirt and blue jeans, I believe.

8 Q Not blue shirt?

9 A No.

10 Okay. It says, blue shirts. White shirt, blue shirts. I'm confused
11 because it's shirts plural, so. A white shirt and blue shirts and then down here it
12 says -- that's a description of his significant other, is black shirt, black pants.

13 Q Thank you.

14 A Your welcome.

15 MS. JONES: No further questions.

16 THE COURT: Redirect?

17 MR. SCHWARTZ: Court's indulgence.

18 THE COURT: What does CAD stand for?

19 THE WITNESS: Honestly, Judge, I don't -- I cannot remember. I just know --
20 we just call it CAD.

21 THE COURT: I can't remember either.

22 THE WITNESS: And we just know that it's information pertaining to the calls
23 that we're on.

24 MS. SPELLS: Communication.

25 THE COURT: Okay.

1 THE WITNESS: Communication something probably.

2 MS. SPELLS: Communication something Detail.

3 THE WITNESS: What's that, ma'am?

4 MS. SPELLS: I think it stands for Communication something Detail. Is that
5 what you're asking?

6 THE WITNESS: We have so many acronyms we have to remember I --
7 sometimes I just can't remember them all.

8 THE COURT: Anything else?

9 MR. SCHWARTZ: Just briefly, Your Honor.

10 **REDIRECT EXAMINATION BY MR. SCHWARTZ**

11 By MR SCHWARTZ:

12 Q So CAD is just sort of the way you guys document where certain people
13 are and what calls are going on?

14 A CAD is the official record, I believe, that the department uses for
15 communications.

16 Q Okay.

17 A When we're assigned to calls, when we're communicating on the
18 computer, when we're communicating on the radio, communicating amongst each
19 other over the radio. All that stuff is documented by the dispatcher and it's put into
20 what we call CAD as record.

21 Q So the dispatcher will input different things that are being said over the
22 radio?

23 A If it is called out over the radio, yes.

24 Q And do you remember when Ms. Jones was asking you if there's
25 anything in the CAD regarding whether a knife or something was being disposed of

1 and you said you don't recall seeing that in the CAD?

2 A I don't remember it being disposed of, no, I don't remember that.

3 MR. SCHWARTZ: Okay. If I may approach, Your Honor, just to refresh --

4 THE COURT: Sure.

5 MR. SCHWARTZ: -- possibly refresh your recollection --

6 BY MR. SCHWARTZ:

7 Q Would it refresh your recollection maybe to look at the CAD?

8 A Sure. I'll do my best.

9 Q And I'll just direct you to page two. Just read it to yourself, please.

10 A Just this line here; right?

11 Q Yeah.

12 So does this refresh your reflection whether there was any information in
13 the CAD about possible disposition of a knife?

14 A Now that I just read it, yes.

15 Q Okay. And what was that?

16 A It says in there it was around 1643 hours that subject may have
17 possibly dumped an item and then headed back towards the van.

18 MR. SCHWARTZ: Nothing further, Your Honor.

19 THE COURT: Anything else?

20 MS. JONES: Yes, Your Honor.

21 THE COURT: Okay.

22 **RECROSS-EXAMINATION BY MS. JONES**

23 BY MS. JONES:

24 Q And, Officer, just to be specific, it actually reads that possible just
25 dumped property; correct?

1 A Property.

2 Q Not knife?

3 A Not -- no, I did not read knife.

4 Q Or weapon?

5 A No.

6 MS. JONES: Thank you.

7 THE COURT: Is that it?

8 MR. SCHWARTZ: That's all, Your Honor. Thank you.

9 THE COURT: Okay. Thank you very much for your testimony.

10 THE WITNESS: Yes, sir.

11 THE COURT: I appreciate it, Officer.

12 THE WITNESS: Yes, sir.

13 THE COURT: You can go ahead and step down and you'll be excused. Just
14 in case you're going to be out in the hallway for any length of time, I'll caution you
15 not to discuss your testimony.

16 THE WITNESS: Of course, of course.

17 THE COURT: I don't think you need to stick around. I think you're free --

18 THE WITNESS: If I need to stick around, I will.

19 THE COURT: I think you're free to leave.

20 THE WITNESS: All right. Thank you.

21 MR. SCHWARTZ: Your Honor, just making sure that all are exhibits that were
22 marked were admitted.

23 THE COURT: All right. You've got 1 through 40 something?

24 MR. SCHWARTZ: 3 to 7 were not admitted.

25 THE COURT: 3 to 7 were not admitted.

1 1, 2 and starting at 8, it goes 8 through 42.

2 MR. ROSE: I believe it was either 41 or 43.

3 MR. SCHWARTZ: 43.

4 THE COURT: 1 through 43 were admitted?

5 MR. SCHWARTZ: That's correct.

6 MS. SPELLS: Your Honor, I would confer that it is Exhibits 1 through 3 and
7 Exhibits 8 through 41 --

8 THE COURT: 41, correct.

9 MS. SPELLS: -- that have been admitted.

10 THE COURT: So we've got them all?

11 MR. SCHWARTZ: That's correct, yes, Your Honor.

12 THE COURT: Okay. So is the State going to rest?

13 MR. SCHWARTZ: Your Honor, at this time the State would rest.

14 THE COURT: All right. We're going to take a short break. And then we're
15 going to come back and figure out how we're going to wrap this all up. The defense
16 reserved their opening statements. So at the close of the State's evidence then the
17 defense will be given an opportunity to make their opening statement. And I believe
18 they've also indicated the potential of a couple of witnesses. But let's just go take a
19 couple of minutes, okay. Let's take about, it's 20 after, we'll say 4:30 and we'll be
20 back here and we'll see how this is going to wrap up.

21 In this next ten minute break I'll admonish the members of the jury not
22 to converse or discuss amongst themselves or with anyone else on any subject
23 connected or related to this trial. Don't watch, listen, or read any reports or
24 commentaries regarding this trial through any medium of information, radio,
25 television, newspapers, Internet. And don't form or express any opinions on any

1 subject connected or related to this trial until such time as this case has been finally
2 submitted to the jury.

3 10 minutes.

4 [Outside the presence of the jury panel]

5 THE COURT: All right. We're outside the presence of the jury.

6 Is there anything we need to put on the record?

7 What's our plan here?

8 MS. SPELLS: We plan to do opening and do one witness today.

9 THE COURT: Okay.

10 MS. SPELLS: And then return tomorrow and finish up.

11 THE COURT: Okay. Fairly short witness?

12 MS. SPELLS: Yes.

13 THE COURT: Do you know who the witness is?

14 MR. SCHWARTZ: I believe it's Ms. Harvey.

15 THE COURT: Okay. Then let's really keep this close. 4:30 we've got about 7
16 or 8 minutes and then we're going to start, crank it up --

17 MR. ROSE: Yes, Your Honor. And --

18 THE COURT: -- because I want to be done right around 5-ish.

19 MR. ROSE: And, Your Honor, just one thing, just kind of for clarification
20 purposes, the defense did reserve their opening statement. My understanding is an
21 opening statement is only about what the evidence is going to show. Given that the
22 State has presented its case in chief we would simply ask that the opening
23 statement by the defense be restricted to whatever they believe the evidence that
24 Ms. Harvey will present has shown or will have shown -- my apologies. Otherwise, it
25 would simply be commentary on what the evidence has shown, which is more akin

1 to a closing statement.

2 THE COURT: Don't make your opening and closing. I mean, make it an
3 opening. If you're going to reserve your opening, make it an opening and don't
4 make it is as second chance to get more closing argument in. All right.

5 MR. ROSE: Thank you, Your Honor.

6 THE COURT: Take a break.

7 MS. SPELLS: Your Honor, how late will we be going tonight?

8 THE COURT: Five. I'm going to shut this down at 5 o'clock.

9 MS. SPELLS: Okay. Well, after the jury is excused, are you expecting us to
10 stay or do you want to handle jury instructions --

11 THE COURT: Well, I want them out of here by 5 o'clock. Are we going to try
12 and settle instructions?

13 MS. SPELLS: That's what my inquiry is.

14 THE COURT: Well, I would suggest we do that in the morning. Let's hear
15 your witness and then when we come back in the morning before -- before we get
16 away from here, we'll pick out a time, tell them to be here, let's give ourselves at
17 least 30 minutes to try and settle instructions. You guys need to, you know, let's not
18 argue about every single one. You guys go through the damn instructions and pick
19 out the ones that you have an argument on. But don't make me just sort through
20 them and hear an argument on every single instruction, okay. You know what the
21 instructions are. I mean, the instructions are -- there's no -- should be barely any
22 argument. The standard instructions are so well known let's just not do anything
23 goofy or strange. Go through them and pick out the ones that you really have a
24 dispute about.

25 Now we're down to 5 minutes.

1 [Recess taken at 4:27 p.m.]

2 [Trial resumed at Resume 4:34 p.m.]

3 [Outside the presence of the jury panel]

4 THE COURT: Mr. Harvey, I need to explain your options with regards to
5 testifying.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: First of all, you need to understand that pursuant to the
8 Constitution of the United States and also the Constitution of the State of Nevada
9 you are protected against self-incrimination, which means that you cannot be
10 compelled to testify in a criminal case where you're the Defendant. If you choose
11 not to testify, you have the option to include as an instruction, in the set of
12 instructions to the jury, that they are told they -- the fact that you may have elected
13 not to testify cannot be discussed or considered by the jury in any form or fashion
14 and they cannot even bring it up during the course of their deliberations.

15 On the other hand, you can waive your right against self-incrimination
16 and you can get on the witness stand and testify just like any other witness. If you
17 do that, I need to caution you you'll be subject to being cross-examined by the State
18 of Nevada. And if you have any prior convictions or felonies within the last 10 years,
19 they will be allowed to ask you about those convictions. It's a limited query. They
20 can ask you have ever been convicted of a felony and when and what it was for but
21 then they can't go into any other aspects of a prior conviction.

22 This is all something that you need to discuss with your attorney. And
23 at some point you'll have to declare whether you are going to exercise your Fifth
24 Amendment right against self-incrimination and not take the stand or that you're
25 actually going to testify.

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Okay?

THE DEFENDANT: Yes, sir.

THE COURT: And if you're not going to testify, you need to tell me if you want to insert that instruction into the packet of instructions telling the jury not -- that they cannot discuss the fact that you choose not to testify.

Okay. You understand everything?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any questions about what I just told you?

THE DEFENDANT: No, sir.

THE COURT: Okay.

MR. ROSE: And just for the record, Your Honor, we do have the certified JOC's, I believe there are two that are within the relevant time period.

THE COURT: Within ten years?

MR. ROSE: I believe so, Your Honor.

THE COURT: Okay.

MS. SPELLS: We would just ask for a copy of the said certified JOC's. We don't have them.

THE COURT: Yeah, bring them in.

[In the presence of the jury panel]

THE MARSHAL: All rise, please.

And be seated.

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

MR. SCHWARTZ: Yes, Your Honor.

MR. ROSE: Yes, Your Honor.

MS. JONES: Yes, Your Honor.

1 MS. SPELLS: Yes.

2 THE COURT: All right. So we're going to have the defense opening
3 statement and then call a witness; is that correct?

4 MS. JONES: Correct, Your Honor.

5 MS. SPELLS: Yes, Your Honor.

6 THE COURT: All right.

7 **DEFENSE OPENING STATEMENT**

8 MS. JONES: Good afternoon.

9 THE JURY PANEL: Good afternoon.

10 MS. JONES: May I introduce myself again. My name is Kelley Jones and
11 Ms. Jasmin Spells and I have the honor and the privilege to actually represent
12 Mr. Alfred C. Harvey in this case.

13 Now, when you were sworn in, and during voir dire, you mentioned that
14 you would keep an open mind. You would let all the evidence be presented before
15 you make a decision. Now, as Judge Bixler told you earlier what happens is that the
16 State gets to present their case and then Mr. Harvey gets to actually present his
17 case, which is what is about to occur now.

18 Before I tell you what I think the evidence actually will show, I want to
19 say one thing, that this is a very simple case. And to quote that wonderful
20 philosopher Tom Cruise, perception and reality are two different things. The State
21 has the burden of proving that Mr. Harvey stole items with the threat or force to
22 obtain or retain those items. And you need to pay attention to make sure that the
23 evidence does show that. It is their burden to prove each and every element of the
24 crime to the specific detail of the information as it was read.

25 MR. SCHWARTZ: Your Honor, may we approach?

1 MR. ROSE: Your Honor, may we approach?

2 THE COURT: Okay.

3 [Bench conference begins]

4 MR. SCHWARTZ: Our objection is going to be that this is improper opening
5 statement [indiscernible] what the opening -- what the evidence will show.

6 THE COURT: Well, I don't mind her explaining that the burdens of the
7 [indiscernible], that's fine. As long as you don't reference what's already been
8 presumed as evidence. You can explain the burdens of proof, what the
9 requirements of the State are in order to convict, and all that stuff, that's fine. But
10 you can't reference what's already been presented, okay.

11 MR. SCHWARTZ: Okay.

12 [Bench conference concludes]

13 MS. JONES: Ladies and gentlemen of the jury, once again, I'm just asking
14 that you listen, that you've taken notes on the evidence already presented, that you
15 listen to the evidence that's about to be presented to you. And I believe if you do
16 that, and also follow the instructions that the judge will give you in following the law,
17 you will render a verdict of not guilty. You will find that Mr. Alfred C. Harvey did not
18 commit a robbery with use of a deadly weapon.

19 And that's all we're asking for a verdict of not guilty.

20 Thank you.

21 THE COURT: Thank you very much.

22 And your witness is who again?

23 MS. SPELLS: Your Honor, we're going to call Tara Harvey.

24 THE COURT: Tara Harvey, okay.

25 And before the witness comes in, let me -- this is exactly why we tell

1 you to keep an open mind. If you keep an open mind throughout the entire trial, this
2 trial is still not over with, they still got some witnesses, so do not form or express any
3 opinions, do not form any opinions on this case until all of the evidence has been
4 adduced, okay.

5 **TARA HARVEY**

6 THE CLERK: Please be stated and then state and spell your name for the
7 record.

8 THE WITNESS: Tara Jefferson Harvey. Tara, T-A-R-A, Jefferson,
9 J-E-F-F-E-R-S-O-N, Harvey, H-A-R-V-E-Y.

10 THE COURT: Very good.

11 MS. SPELLS: May I proceed, Your Honor.

12 THE COURT: Yes, please.

13 **DIRECT EXAMINATION BY MS. SPELLS**

14 BY MS. SPELLS:

15 Q Good afternoon.

16 A Good afternoon.

17 Q Mrs. Harvey, how do you know this gentleman at this table?

18 A He's my husband.

19 Q He's your husband.

20 How long have you been married?

21 A Four years.

22 Q Four years.

23 Now, are you familiar with the charge in this case?

24 A Yes, ma'am.

25 Q Okay. And kind of the location, the T.J. Maxx area?

1 A Yes, ma'am.

2 Q And were you present at T.J. Maxx on March 30th, 2016?

3 A I was present but I was in the vehicle.

4 Q You were in the vehicle?

5 A Yes.

6 Q What type of vehicle was that?

7 A It was a U-Haul rental, truck, van.

8 MS. SPELLS: Can everyone -- can you hear her okay? Okay.

9 BY MS. SPELLS:

10 Q And so you didn't enter the store on that day?

11 A No, I didn't.

12 Q Do you recall what color shirt your husband was wearing that day?

13 A Blue.

14 Q Blue shirt.

15 I'm showing you what has been admitted into evidence as State's

16 Proposed or -- not proposed. It is actually admitted. State's admitted Exhibit

17 Number 3, do you recognize that shirt?

18 A Yes.

19 Q That picture?

20 A Yes.

21 Q What is that a picture of?

22 A It's a picture of a shirt, jacket type.

23 Q Okay. Do you know who this shirt, jacket type belongs to?

24 A Alfred.

25 Q And was he wearing this shirt on that day?

1 A Yes.

2 MS. SPELLS: May I publish?

3 THE COURT: Yes.

4 BY MS. SPELLS:

5 Q So, Mr. Harvey was wearing this shirt on March 30, 2016?

6 A Yes.

7 Q Mrs. Harvey, are you familiar with the names Shaun Bramble or Julian
8 Munoz at all?

9 A The loss prevention guys, T.J. Maxx?

10 Q Yes.

11 A Yes.

12 Q And have you seen them before?

13 A Yes.

14 Q Did you see them on March 30th, 2016?

15 A Yes.

16 Q Where did you see them at exactly?

17 A They were in front of the U-Haul.

18 Q In front of the U-Haul.

19 And did you see them doing anything?

20 A Taking pictures.

21 Q You saw them taking pictures.

22 Who did you see taking pictures?

23 A Both guys were taking pictures.

24 Q And what was it that made you -- that gave you the conclusion they
25 were taking pictures?

1 A Their cell phones were pointed up towards the van and the flashes
2 were going off on their cell phones.

3 Q Did you see flashes go off on both phones?

4 A Yeah, but more on the taller guy phone.

5 Q Okay. Taller guy, that is the individual who -- does he have more of a
6 beard?

7 A Yes, yes, he does.

8 MS. SPELLS: And I don't believe the State has any objection that individual
9 would be identified as Mr. Bramble.

10 MR. SCHWARTZ: No, objection.

11 MR. ROSE: No, objection.

12 BY MS. SPELLS:

13 Q Now, at this T.J. Maxx store there are a number of stores in that plaza?

14 A Yes, there are.

15 Q And the U-Haul van, do you know where it was parked at?

16 A We were parked along the curb of the shopping center, kind of by Dollar
17 Tree but, you know, in between Ross and T.J. Maxx.

18 Q Okay. So let me show you a picture because -- to actually clarify a little
19 bit better.

20 I'm going to put a picture right up here. It should come up on your
21 screen.

22 A Okay.

23 Q Right there. And the screen that you're looking at is a touch screen.

24 A Okay.

25 Q So you can make marks on that screen.

1 Now, where my pen is located, that is the T.J. Maxx store.
2 A Okay.
3 Q And this is the Ross store.
4 A Okay.
5 Q So you're indicating that you were parked along this curb around here?
6 A Yes.
7 Q And do you know exactly where on this curb, if you can make a star?
8 A How do I make a star? I'm sorry, I just touch it?
9 Q Yeah, just touch it approximately where you think you were parked at?
10 A [Witness complies]
11 Q So you've marked over here closer to --
12 A I can't -- I kind of want to mark maybe one slot over. We're kind of by
13 that -- the --
14 THE COURT: Let me clear it out.
15 THE WITNESS: Okay.
16 THE COURT: And you can start again.
17 THE WITNESS: Okay.
18 THE COURT: Because when you make a mark it doesn't go exactly where
19 you --
20 THE WITNESS: I'm sorry, okay.
21 THE COURT: Kind of lead it a little.
22 THE WITNESS: Okay. About right there.
23 Is that -- this is Ross right here?
24 BY MS. SPELLS:
25 Q This is Ross right here, yes?

1 A Yeah.

2 Q Okay. So you were parked --

3 A Can you make it bigger? I'm sorry.

4 Q Can we make this bigger?

5 A I just want to see the -- thank you. Okay.

6 Q Is that zoom too much for you?

7 A Okay. Yeah, about right there. We were parked about right there.

8 Q I'm not seeing where you marked.

9 A Oh, I'm sorry.

10 THE COURT: Mark it again.

11 Quit moving it.

12 THE WITNESS: Sorry, I'm sorry.

13 THE COURT: There you go.

14 BY MS. SPELLS:

15 Q Okay. So approximately the middle of the Dollar Tree?

16 A Yeah.

17 Q Okay. Ms. Harvey, do you know what Mr. Harvey's dominant hand is?

18 A Right.

19 Q And on March 30th, 2016, did you see Mr. Harvey with a knife at all?

20 A No, I didn't.

21 Q Did he give you a knife?

22 A No, he didn't.

23 Q Do you know him to generally carry a knife on his person?

24 A No, he doesn't.

25 MS. SPELLS: Court's brief indulgence.

1 THE COURT: Sure.

2 MS. SPELLS: We'll pass the witness, Your Honor.

3 THE COURT: Cross.

4 MR. SCHWARTZ: Thank you, Your Honor.

5 **CROSS-EXAMINATION BY MR. SCHWARTZ**

6 By MR SCHWARTZ:

7 Q How are you doing, Ms. Harvey?

8 A Good. How are you?

9 Q Pretty good, thank you.

10 March 30th, 2016, the date we're talking about --

11 A Uh-huh.

12 Q -- do you remember?

13 A Yes.

14 Q Okay. What were you and Harvey doing that day before you went to

15 T.J. Maxx?

16 A We were --

17 MS. SPELLS: Objection.

18 THE COURT: Why?

19 MS. SPELLS: This is cross-examination, Your Honor, not direct examination.

20 The questions should be leading in scope.

21 THE COURT: No, no, no, he gets to ask cross-examination questions.

22 Overruled, go ahead.

23 THE WITNESS: We were moving stuff from some storage.

24 BY MR. SCHWARTZ:

25 Q Okay. Moving it from storage to where?

1 A To a new place we were moving into.
2 Q And who was moving things?
3 A Me and Mr. Harvey.
4 Q Okay. The Defendant?
5 A Yes.
6 Q Were your kids with you?
7 A Yes.
8 Q Okay. And how many kids do you have?
9 A Three but two were with me.
10 Q And two kids were with you?
11 A Yes.
12 Q And are they kids that you have had with Mr. Harvey?
13 A One is with Mr. Harvey; one is from a prior relationship.
14 Q Okay. And the other kid just wasn't there that day?
15 A Just wasn't there. He's older.
16 Q How old are the two kids that were with you?
17 A Four and thirteen.
18 MS. SPELLS: Your Honor, I'm going to object as to relevance.
19 THE COURT: Well, it's all, I mean -- first of all they're in the video, they've
20 seen them.
21 BY MR. SCHWARTZ:
22 Q Four year old's a girl?
23 A Yes.
24 Q 13 year old's a boy?
25 A Yes, yes.

1 Q And once you guys got done moving stuff is that when you went to T.J.
2 Maxx?
3 A Yes. I believe so, yes.
4 Q And did you go anywhere else or you just go straight to T.J. Maxx?
5 A We went other places, gas and stuff.
6 Q Any other stores?
7 A No.
8 Q Okay. Just T.J. Maxx?
9 A Well, yeah, it was early in the day.
10 Q Did you go to some other stores after?
11 A After what?
12 Q After T.J. Maxx?
13 A No, he got arrested. He couldn't go anywhere.
14 Q So you just went to T.J. Maxx that day as far as stores?
15 A Yes, that's -- that was our -- our first store we went to, yes. We was
16 planning to go to other places but we went to T.J. Maxx.
17 Q Okay. Where were you going to go next?
18 A Just the grocery store.
19 Q Okay. You go to T.J. Maxx and you park in this spot that you marked
20 on the map; right?
21 A Yes.
22 Q You weren't driving though; right?
23 A No.
24 Q Mr. Harvey was driving?
25 A Yes.

1 Q And then he went into the T.J. Maxx store?
2 A Yes.
3 Q With the two children?
4 A Yes.
5 Q Okay. And you stayed in the car?
6 A Yes.
7 Q Why did you stay in the car?
8 A My stomach hurt.
9 Q Your stomach hurt.
10 And was the car on or off?
11 A It was off.
12 Q It was off.
13 So the air wasn't on?
14 A No.
15 Q Radio wasn't playing?
16 A No.
17 Q Okay. You have the windows up or down?
18 A Cracked, probably.
19 Q Cracked.
20 Were you sitting in the passenger seat?
21 A Yes.
22 Q Okay. How long would you say they were in the store for?
23 A Maybe 20 minutes.
24 Q What type of items were you guys going to get at T.J. Maxx?
25 A My daughter wanted a toy that she saw at a previous T.J. Maxx.

1 Q Okay. So you were just looking for a toy?

2 A Well, she wanted -- yeah, to see if she could get the toy, yes.

3 Q So your husband, the Defendant, was going to take her in there?

4 A Yes.

5 Q To get a toy?

6 A Yes.

7 Q Come back out and you guys were going to go about your day?

8 A Yes.

9 Q Fair?

10 A Exactly.

11 Q Did you ever leave the car?

12 A No.

13 Q When was the first time you saw Mr. Harvey come back?

14 A He was -- what do you mean? I'm sorry, can you repeat the question.

15 Q Yeah.

16 So he left the car to go inside the store?

17 A Yes.

18 Q With the two children?

19 A Yes.

20 Q And when is the next time you saw him again?

21 A He was coming out with the kids.

22 Q Okay. And specifically we have the map here, you see T.J. Maxx right

23 here?

24 A Yes.

25 Q And your car is where this -- I might have moved it, sorry. Where the

1 red dot is?

2 A Yes.

3 Q Where did you see Mr. Harvey?

4 A He was walking towards the car.

5 Q And just mark it on the map for me, if you don't mind.

6 MR. SCHWARTZ: Your Honor, one of the jurors has a --

7 JUROR NUMBER 2: We're having a little problem hearing her.

8 THE WITNESS: I'm sorry.

9 THE COURT: Yeah, speak up.

10 THE WITNESS: Okay. Can I have some water, please.

11 THE COURT: Can you have some what?

12 THE WITNESS: Water, please.

13 THE COURT: Right here.

14 THE WITNESS: Oh, thank you.

15 THE COURT: Right here, right here. We've got a pitcher of water and a
16 couple of glasses and it's all fresh.

17 BY MR. SCHWARTZ:

18 Q And now did you mark it on the screen where you saw him?

19 A Okay. Kind of in front of the U-Haul van.

20 Q Okay. So the first time you saw him is when he's about at the van --

21 A Yes.

22 Q -- fair to say?

23 A Yes.

24 Q And behind him is the two loss prevention officers you talked about?

25 A No --

1 Q No?

2 A -- not yet.

3 Q Okay. So you don't see them yet?

4 A No.

5 Q And Mr. Harvey gets in the van?

6 A Yes.

7 Q Turns it on?

8 A Not yet.

9 Q He doesn't turn it on?

10 A Well, he doesn't but that's -- I saw loss prevention before he turned it

11 on.

12 Q Okay, okay. So let's then -- we'll go in order. So he gets in the car and

13 then you saw loss prevention?

14 A Yes.

15 Q And they were at the front of the store, the T.J. Maxx store?

16 A No, they were in front of the U-Haul.

17 Q Okay. So they had been behind Mr. Harvey?

18 A Well, not exactly behind. They came running behind him.

19 Q Okay. And once you saw them, Mr. Harvey turned the car on?

20 A Yes. Well, the car -- before that, the car was already started kind of. It

21 kind of happen fast like the -- the loss prevention guys came out and he kind of

22 started the car at the same time they were coming out. But it wasn't exactly when

23 they came out though. It was a little before.

24 Q So is it fair to say he got in the car and turned the car on?

25 A Yes.

1 Q Okay. And it's fair to say about that time is when you noticed the loss
2 prevention kind of by the van?

3 A Yes.

4 Q Okay. And at that point the car is facing the Dollar store; correct?

5 A Yes.

6 Q Okay. So you would have to back out and then drive forward to get out;
7 right, you back out of the spot?

8 A Yes.

9 Q That's what happened?

10 A Yes.

11 Q So after you got in, turned the car on, you guys backed out, and you
12 drove off; fair?

13 A Yes.

14 Q And you went out this direction; right?

15 A Is that --

16 Q You went on Decatur Boulevard; correct?

17 A Yes.

18 Q Okay. Made your way to Charleston?

19 A Yes.

20 Q And you made your way ultimately to a school?

21 A Yes.

22 Q Okay. And you would agree with me that that trip, from T.J. Maxx to the
23 school, the Defendant was driving the whole time?

24 A Yes.

25 Q And you were in the passenger seat the whole time?

1 A Yes.

2 Q And you would agree with me that he was driving fast?

3 A No, he wasn't driving fast.

4 Q He was driving slow then?

5 A Not slow. Just regular speed limit.

6 Q Driving the speed limit.

7 What's the speed limit?

8 A I'm not sure in Vegas but.

9 Q Okay.

10 A 35, 40. I don't know the speed limit.

11 Q So if the speed limits 35 or 40 on Decatur that's what he was going?

12 A Yeah, he was going with the traffic, yeah.

13 Q Okay. And he was changing lanes?

14 A Yes, like normal driving, yes.

15 Q Okay. And when you guys got to the school he actually got out and he

16 ran to the door of the school; correct?

17 A No, it didn't happen like that.

18 Q He got out and went to the school door; right?

19 A Yes.

20 Q Okay. And he tried to open it and it was locked; fair?

21 A No, it was not locked.

22 Q He didn't go in the school though, did he?

23 A He didn't go in the school but it wasn't locked.

24 Q He --

25 A He went into --

1 Q He didn't go in the school though; right?

2 A He did go in the school.

3 Q He went in the school and then he came out back?

4 A Yes, yes.

5 Q So he opened the door and went inside the school?

6 A Yes.

7 Q Okay. And you were aware at the time that there was another car
8 behind you, right, that was following you?

9 A Yes.

10 Q Okay. Were you -- you were a little confused on why that was
11 happening; right?

12 A Yes.

13 Q Okay. You must have also been confused why loss prevention was
14 running after your husband; right?

15 A They weren't running after him so much but is taking pictures.

16 Q Okay. Did you think they were running after you?

17 A No.

18 Q Did you think they were running after your kids?

19 A No. I hope not, no.

20 Q So who were they running after?

21 A Alfred.

22 Q Thank you.

23 MS. SPELLS: Objection, she's asked and answered that she didn't know.

24 MR. SCHWARTZ: She answered. Thank you.

25 THE COURT: I'm going to let her answer. She's a percipient witness. She's

1 able to make conclusions. Go ahead.

2 MR. SCHWARTZ: Okay. Thank you, Your Honor.

3 BY MR. SCHWARTZ:

4 Q So were you concerned that they were running after Alfred?

5 A Well, I didn't know what was going on really.

6 Q Okay. Because you didn't see it?

7 A I saw them come out to -- I saw them come out to the van, that's what I
8 saw.

9 Q And that's what you said?

10 A Uh-huh.

11 Q But you didn't see what happened before that?

12 A No, I wasn't in the store, no.

13 Q Sure.

14 And you also didn't see anything that happened before Mr. Harvey was
15 right in front of the van?

16 A I saw him walking.

17 Q That's what you just said -- that's what you just said previously; right?

18 A Yeah, I saw him walking from the store that's all I saw.

19 Q Okay, excellent. Thank you.

20 Ma'am, you testified today that you saw the loss prevention officers
21 both of them were taking pictures of your car; correct?

22 A Yes, they were.

23 Q Now, you remember testifying just a few days, weeks ago --

24 A Uh-huh.

25 Q -- right, and we were talking about this whole picture situation?

1 A Yes.

2 Q And actually you said you only saw one person --

3 A That's not true.

4 Q -- that --

5 A That's not what I said. I said --

6 Q Let me finish and then you can tell me whatever you said.

7 A Okay.

8 Q Today you said you saw two people taking pictures and you saw both
9 cameras flashing?

10 A Yes.

11 Q Okay. And previously, isn't it true that you testified that actually only the
12 gentleman with the big beard, only his phone was flashing?

13 A That's not what I said. I said that they both were taking pictures but his
14 flash was going off more than the other one. And I conclude that he was taking
15 pictures because his flash was going off more. I didn't say the other one wasn't
16 taking pictures.

17 Q So specifically when you testified about a week ago you did not say
18 then as your testimony today you did not say that only one phone was flashing,
19 you're telling me you didn't say that last time you testified?

20 A I didn't say it in those words, no, I didn't.

21 Q But for the most part the gentleman with the beard his phone was
22 flashing and you noticed more?

23 A Yeah, he was took more pictures than the other one.

24 Q Okay. Excellent. Thank you.

25 Ma'am, I'm showing you State's Exhibit 10, you recognize that

1 gentleman, don't you?

2 A Yes.

3 Q Who is it?

4 A Alfred.

5 Q Okay, fair. And that's what he was wearing the day that we're talking
6 about; right?

7 A Yes.

8 Q He had a hat on, he had a blue shirt, and he had a blue blazer?

9 A Yes.

10 Q Okay, thank you.

11 Now, when the Defendant came back to the car with his -- with the two
12 kids --

13 A Yes.

14 Q -- he got in, he didn't have any children's toys with him; right?

15 A No, because he was waiting for me to come in.

16 Q Okay. So, I guess, maybe I misunderstood, you were actually planning
17 to go into the store?

18 A Yeah, because I have the money so.

19 Q Okay. So is there -- he was waiting for you to come into the store to
20 bring the money?

21 A Well, we were going to look together for the toy, and I said, give me a
22 few minutes, my stomach hurt.

23 Q Okay. I thought you said he was in the store for about 20 minutes?

24 A Well, it seemed like -- I'm not good at time but it seemed like about 20
25 minutes.

1 Q You never went in the store to help him with the money; right?
2 A No, because I assumed he's going to come back out --
3 Q And he did?
4 A -- and get me.
5 Yeah.
6 Q And he did?
7 A Yeah.
8 Q And he got you but you didn't go back in the store to buy the toy; right?
9 A Well, obviously loss prevention was right there chasing us, chasing.
10 Q That's concerning; right?
11 A When I found out later, yeah. I didn't know what was going on.
12 Q Okay. But you did find out later what was going on inside?
13 A Yes.
14 Q Okay. So Alfred went in there without any money?
15 A He had money but not enough to buy a toy that she wanted. He had
16 money.
17 Q Okay. The toy was going to be more expensive than whatever
18 amount -- how much money did he have?
19 A He had probably like 10, 15 bucks.
20 Q Okay. Toy was going to be more than that?
21 A Yes.
22 Q So you were going to come in and just give him money when you got in
23 there?
24 A No, I was going to pay for it with my credit card.
25 Q Okay, excellent. Thank you.

1 A Uh-huh.

2 Q Now, ma'am, I mean, not a trick question, but you love your husband --

3 A Yes.

4 Q -- fair?

5 You guys have been married for four years; you just have the one kid

6 together?

7 A Yes.

8 Q Okay. You don't want to see anything bad happen to him; fair?

9 A No.

10 Q Okay. And there's nothing you have to hide; right?

11 A No.

12 Q Okay. Now, did you get contacted by an investigator in my office to talk

13 to you about the case?

14 A Yes.

15 Q And did he ask you kind of what happened that day, on March 30th?

16 A You mean today when he asked me?

17 Q He asked you what happened; right?

18 A Yeah, and I said -- I talked to him briefly.

19 Q You told him you didn't really want to talk to him; fair?

20 A I told him that I knew -- he asked me if I wanted to talk, and I said, I

21 don't want to talk -- I did tell him I'm talking -- I'm coming to testify about what I know

22 what happened outside the T.J. Maxx. And he said, you don't want to elaborate.

23 And I said, no, because I'm already nervous and I'm going to testify.

24 Q Okay. So you didn't elaborate for him what had happened --

25 A No.

1 Q -- fair?

2 Okay. Court's indulgence. Thank you.

3 THE COURT: Sure.

4 MR. SCHWARTZ: Pass the witness, Your Honor.

5 MS. SPELLS: Can we approach?

6 THE COURT: Sure.

7 [Bench conference begins]

8 MS. SPELLS: We're going to object and ask that last question and answer --

9 THE COURT: I can't hear you.

10 MS. SPELLS: I object. I ask that the last question and answer be stricken
11 from the record. I mean she has no obligation necessarily to speak to that officer.
12 Whether she does or does not is not relevant in this [indiscernible] process. If she
13 says it's -- I mean, officers don't return our phone calls. We don't get [indiscernible]
14 They don't return any of our phone calls, she won't talk to us. Like we can't even --

15 MR. ROSE: Well, you could. I mean, you could ask that question. That's a
16 fair question. It goes to bias and [indiscernible], Your Honor.

17 MR. SCHWARTZ: I didn't elaborate on [indiscernible].

18 MR. ROSE: I just asked if she --

19 MR. SCHWARTZ: Sorry, I just asked if she --

20 THE COURT: Talk to the investigator and she said, no, she said I'm going to
21 testify and I don't want to talk to you.

22 MR. SCHWARTZ: Of course.

23 THE COURT: I'm going to let it stand in. I don't think there's anything wrong
24 with it.

25 MS. SPELLS: Okay.

1 [Bench conference concludes]

2 THE COURT: Any additional direct?

3 MS. SPELLS: Just briefly.

4 **REDIRECT EXAMINATION BY MS. SPELLS**

5 BY MS. SPELLS:

6 Q Ms. Harvey --

7 A Yes.

8 Q -- how many times were you contacted by an investigator with their
9 office, if you know?

10 A Once on the phone and once in person.

11 Q Did you speak with the individual in person?

12 A Yes, briefly.

13 Q Were you trying to hide something from them?

14 A No, I wasn't.

15 Q I'm going to talk you about this U-Haul car, you were sitting in the car?

16 A Yes.

17 Q When you left T.J. Maxx and went to the school, were you driving the
18 car?

19 A No, Alfred was driving.

20 Q Where were you seated?

21 A Passenger.

22 Q Okay. Were you turning around, looking behind you?

23 A What do you mean? No, just -- just sitting in the car, just driving.

24 Q Okay. And you're not driving?

25 A No.

1 Q Did you have a reason to look in the rear-view mirror?

2 A No.

3 Q Okay. So when the State asked you a question you said that you knew
4 a car was following you, is that something you knew while you were in the car with
5 Alfred driving?

6 A No, the -- one gentleman that was in T.J. Maxx parking lot, he tried to
7 block us in for some reason.

8 Q Okay. That car tried to block you in and then Mr. Harvey drove off?

9 A Yes, yes.

10 Q While he's driving off, are you turning around looking in the rear-view
11 mirror or the back mirror?

12 A No.

13 Q Is there even a back window?

14 A Yeah, there's a back window but you can't see out that window really.

15 Q Why can't you see out of it?

16 A It's because it's got a -- the way the seats are designed in the U-Haul
17 van, and then there's like a cage, so it's -- I mean, it has little holes but you can't
18 really -- really, you know, see-see, you could see but not like.

19 Q You can't see well?

20 A Yes.

21 Q Are you nervous today?

22 A Yes.

23 Q Why?

24 A First time being in court really.

25 Q Okay. Now, you've testified in this case one other time?

1 A Yes.

2 Q Besides that time and this time have you testified in court before?

3 A Never.

4 Q So is this a scary experience for you?

5 A Yes, never been arrested before either so.

6 Q Now, Mr. Harvey stopped the car at this school?

7 A Yes.

8 Q Did you see prior to Mr. Harvey stopping the car at the school, did you
9 see any lights and sirens?

10 A When we started approaching the school, we started to see the lights
11 and sirens.

12 Q Okay. Were there any lights and sirens directing you to stop at that
13 school?

14 A No.

15 MS. SPELLS: Pass the witness.

16 THE COURT: Anything else?

17 MR. SCHWARTZ: Just a couple. Thank you, Your Honor.

18 **RECROSS-EXAMINATION BY MR. SCHWARTZ**

19 BY MR. SCHWARTZ:

20 Q So the gentleman that ended up following the U-Haul van, you first saw
21 him actually in the T.J. Maxx parking lot?

22 A Yes, he didn't actually follow us from T.J. Maxx. He just blocked us.

23 Q Okay. He's not -- you didn't see -- I thought you said you saw him once
24 you got to the school you knew that somebody had been following you, right, that's
25 what you told me?

1 A I never said -- I didn't -- no, I never said that.

2 Q Okay. So maybe I got it confused. I thought when I talked to you just a
3 second ago that you told me that when you arrived at the school you were aware
4 that someone had been following you, a car?

5 A No, a car wasn't following us. The guy who blocked us in I wasn't sure.
6 He might have followed us but I wasn't sure. But he tried to block us in but that's all.

7 Q Okay. So to be clear now you don't -- you never saw anyone following
8 you?

9 A No, I never said anyone was following us.

10 Q Okay. And when you got to the school you didn't see the other car that
11 had followed you; right?

12 A No.

13 Q Okay.

14 A No, car followed us.

15 Q The only time you saw -- go ahead.

16 A No, car followed us.

17 Q Okay. The only time you saw the gentleman who blocked you in was at
18 that point when he blocked you in?

19 A Yeah, and he blocked us in and we got around his car and went out.

20 Q Okay. And you'd agree with me you were at the school for a while;
21 right?

22 A Yes.

23 Q Okay. And never once did you see that same man hanging around
24 there, huh?

25 A No, but I did -- I think he might have came later and talked to police or

1 something. I think I might have seen him then.

2 Q And you saw the car that he was driving at the time he blocked you, it
3 was a white car; fair?

4 A Yes.

5 Q And you saw that same car at the school later on?

6 A Yes. I believe so, yes.

7 Q Now, you said just now, correct me if I say this wrong, okay, when you
8 were about to stop at the school is when you first noticed the sirens and the lights?

9 A Yes, it wasn't directed towards us though.

10 Q Okay. Were they -- where were the lights and sirens coming from?

11 A The lights and sirens were in front of us. We were turning, I believe,
12 right under the street. We were turning right on that street that goes into the school.
13 And the sirens and lights were at the stop light in front of us. But they --

14 Q In front of you?

15 A Yes, but not directed.

16 Q And you told me, I think before, tell me if I got this wrong, but when you
17 got to the school, Mr. Harvey --

18 A Uh-huh.

19 Q -- got out --

20 A Yes.

21 Q -- and is it fair for me to say that he ran inside?

22 A He did not run inside.

23 Q He just walked inside?

24 A Yes.

25 Q Okay. Why did he go inside?

1 A Because my daughter had to go to the bathroom.
2 Q Okay. So he took your daughter into the bathroom with him?
3 A He attempted to get to the bathroom.
4 Q Okay. Did he take your daughter into the bathroom with him?
5 A He could not go to the bathroom. They would not let him go to the
6 bathroom with my daughter. They said he couldn't come in.
7 Q So, just very simple, he took your daughter from the car --
8 A Yes.
9 Q -- into the school?
10 A Yes.
11 Q Okay. And then he took her back out of the school, back to the van?
12 A Yes.
13 Q And that was just about immediately after you saw the lights and
14 sirens?
15 A Yes.
16 Q But they weren't -- you didn't think in any way they were directing you to
17 stop?
18 A No, not at all, they didn't say anything to us.
19 Q So you were -- you would have been -- you were confused when
20 actually the police were looking for your van; right?
21 A Yes.
22 Q And you were confused when loss prevention was coming out to you
23 when you were in the U-Haul; fair?
24 A Yes.
25 Q The entire time that you were in the car with Mr. Harvey, from T.J. Maxx

1 all the way to the school, was he also surprised why loss prevention was following
2 him? He was, wasn't he? He didn't know any idea why he was being followed;
3 right?

4 A Not -- no.

5 Q He didn't?

6 A He -- he -- he didn't say. I didn't -- I can believe --

7 MS. SPELLS: Objection, speculation.

8 THE WITNESS: Yeah.

9 THE COURT: Well --

10 MR. SCHWARTZ: Based on her conversation with him.

11 MS. SPELLS: Personal knowledge.

12 THE COURT: They're having a conversation.

13 MS. SPELLS: There's been no foundation.

14 THE COURT: Well, you know, he didn't ask her if they discussed it.

15 BY MR. SCHWARTZ:

16 Q Did you have any discussion with Mr. Harvey during the car ride from
17 T.J. Maxx to the school?

18 A Brief.

19 Q Brief, okay.

20 Were the kids talking as well or just you and Mr. Harvey?

21 A Just me and Mr. Harvey.

22 Q And during that entire time that you were talking with him --

23 A Uh-huh.

24 Q -- he had no idea what was going on either; right?

25 A No, I never said that.

1 Q Okay. So he knew exactly what was going on; right?

2 A No. He was -- he was wondering why loss prevention was following
3 him because he got into like a little thing with them.

4 MS. SPELLS: Objection, personal knowledge.

5 THE WITNESS: Yeah.

6 MR. SCHWARTZ: It's what he told her, Your Honor.

7 THE COURT: Well, this is a conversation apparently they had. I'm going to
8 let me you go. Go ahead.

9 BY MR. SCHWARTZ:

10 Q Okay. They got into a little thing with him, huh? Isn't that why they
11 were following you?

12 A No, he didn't understand why they were following him. Like he told me
13 that they thought he did something but he didn't do anything.

14 Q He didn't do anything?

15 A Yeah.

16 Q He told you he didn't do a thing; right?

17 A Yeah.

18 Q Okay. That's all I'm asking.

19 So it's fair for me to say, right --

20 A Yes.

21 Q -- if he told you that he didn't do anything wrong, then he didn't know
22 why loss prevention was following him?

23 A Yes, you could say that.

24 Q Similarly he didn't know why the police and the helicopters were
25 following you guys; right?

1 A Yes.

2 MR. SCHWARTZ: Nothing further, Your Honor.

3 THE COURT: Anything else?

4 **FURTHER REDIRECT EXAMINATION BY MS. SPELLS**

5 BY MS. SPELLS:

6 Q Ms. Harvey, did you know the helicopter was following you?

7 A I assumed because they were right over our van.

8 MS. SPELLS: Okay. So you saw it right over your van.

9 Nothing further.

10 THE COURT: Is that it?

11 MR. SCHWARTZ: Yes, Your Honor.

12 THE MARSHAL: I thought there was a question from a juror.

13 It was already asked.

14 THE COURT: Okay. So, we're all done.

15 MS. SPELLS: Your Honor can we still have it submitted to the court or --

16 THE COURT: She withdrew it. We never even got a chance --

17 MS. SPELLS: She withdrew it, okay.

18 THE COURT: -- to even look at it.

19 Thank you very much for your testimony. I appreciate it. You can go
20 ahead and step down and you'll be excused.

21 Ms. Harvey, if you're going to wait outside in the hallway here, I caution
22 you not to discuss any of your testimony while you wait outside, okay.

23 THE WITNESS: Okay, yes, sir.

24 THE COURT: All right.

25 We passed our target time here. So we're going to take a break, an

1 overnight break.

2 Now, timewise, we're going to need about 30 minutes to discuss what's
3 going on and specifically reviewing the instructions. So what time would you like to
4 start this trial?

5 MR. ROSE: Can we approach briefly, perhaps.

6 THE COURT: I want them to hear what time you guys are proposing because
7 I don't want anybody to -- as far as I'm concerned, we can start at 6 o'clock in the
8 morning.

9 MR. SCHWARTZ: Your Honor, could we start at 9:30 and we will be here at
10 9:00 with you.

11 THE COURT: Okay, that sounds good. You guys -- 9:30, okay?

12 All right. Because we're getting close, you guys will be deliberating very
13 quickly.

14 Ask Tom.

15 Tom, we've got a question over here.

16 THE MARSHAL: She has to take children to school. She said 10 o'clock
17 would be more amenable to her.

18 THE COURT: There's fine. We can do it.

19 MR. SCHWARTZ: We should be done by lunch time.

20 THE COURT: 10 o'clock is fine.

21 All right. I think we have one more question over here, Tom.

22 JUROR NUMBER 9: I'm having a hard time to come tomorrow here. My
23 husband --

24 THE COURT: Wait, wait, wait. Tell Tom and --

25 THE MARSHAL: She says her husband doesn't get off work until 11 and

1 that's her childcare for tomorrow.

2 THE COURT: I don't know if we can start that late. We can take a -- if we
3 don't get started until 11 o'clock, that's going to put us well into the afternoon.

4 There's no other arrangements that you can make? I mean, for
5 childcare for an hour or so if we go to 10 o'clock, can you get somebody that can
6 provide childcare for an hour and then just like take an Uber or something. Can you
7 do that?

8 JUROR NUMBER 9: I don't have anyone whose -- I don't have any family
9 here.

10 THE COURT: Can you be here at 11 o'clock?

11 JUROR NUMBER 9: He get off at 11. He work --

12 THE COURT: Okay. Well, this is getting -- now we're not starting until noon.
13 If he doesn't get off until 11, by the time he gets home and you get here it's going to
14 be 12 o'clock.

15 Any suggestions?

16 MS. SPELLS: Court's brief indulgence.

17 MR. SCHWARTZ: Can we approach, Your Honor.

18 THE COURT: Sure.

19 [Bench conference begins]

20 MR. SCHWARTZ: I don't know if this is a thing people do. But if she brought
21 the kids with her, could they go down to Victim Witness and hang out there with
22 some supervisors. I don't know.

23 MR. ROSE: What we can -- bring them to the Victim Witness Center.

24 MR. SCHWARTZ: That's what I said.

25 MR. ROSE: Yeah.

1 MS. SPELLS: I'll watch the baby.

2 THE COURT: All right.

3 MR. SCHWARTZ: That's an idea at least.

4 THE COURT: Do you think you can call Victim Witness and see if they can
5 help her out and watch --

6 MR. SCHWARTZ: Yeah, I know -- I don't think that they're probably open but
7 one of our Victim Witness advocates will definitely take care of it for us.

8 THE COURT: Okay. Let me make that suggestion.

9 MR. SCHWARTZ: Okay.

10 MR. ROSE: Okay.

11 [Bench conference concludes]

12 THE COURT: Okay. Here's a way we can do this. All you would need to do
13 is get down here because the District Attorney's Office has Victim Witness
14 advocates who can watch your kids until your husband can get here and pick them
15 up. So, you'll have childcare built into the system, all you'll need to do is just get
16 down here.

17 JUROR NUMBER 9: [Indiscernible].

18 THE COURT: And bring your kids. Come down here a little early, bring your
19 kids, and they'll make arrangements for the Victim Witness Office advocates. They
20 have folks down there that do this kind of thing. So that'll get you off the hook as far
21 as your childcare, okay.

22 All right. So we'll do it like this, we'll say --

23 MS. SPELLS: Your Honor, can we approach again, please?

24 THE COURT: Sure.

25 ///

1 [Bench conference begins]

2 MS. SPELLS: I'm a mom and I'm fearing some hesitation. Can we provide
3 accommodations that the Victim Witness will be like in the courtroom, in the back or
4 something?

5 THE COURT: Sure.

6 MR. ROSE: Oh, yeah.

7 MR. SCHWARTZ: Let's do it. That's fine.

8 MS. SPELLS: I mean --

9 MS. ROSE: Oh, yeah. Well, yeah. No, that way they --

10 MS. SPELLS: I certainly wouldn't want my kids with strangers.

11 MR. ROSE: Yeah.

12 THE COURT: Absolutely, we can do that. We'll explain that.

13 MS. SPELLS: That's -- okay.

14 MR. ROSE: That's fine.

15 [Bench conference concludes]

16 THE COURT: What we can do is so you don't have to worry about your kids
17 being someplace where you can't watch them. There's two offices right here,
18 between the outer doors and the inner doors, and we can have the Victim Witness
19 folks come down and watch your kids right outside the courtroom. So you'll never --
20 they'll never be more than 30 feet away.

21 Does that ease your mind a little?

22 JUROR NUMBER 9: Yeah, they are only seven months babies
23 [indiscernible].

24 THE COURT: Seven months?

25 JUROR NUMBER 9: Seven months. [indiscernible]

1 THE COURT: Okay. So they're little kids.

2 JUROR NUMBER 9: Yes.

3 THE COURT: Okay. Well, you know, bring that thing you do that, you know,
4 your -- and, I mean, they have people that are real competent and good and they
5 can watch the little -- the babies right here. And if you have any questions or
6 problems, you're going to be like 10 giant steps away. Okay?

7 JUROR NUMBER 9: [Shakes head yes]

8 THE COURT: All right. So all you'll have to do is bring your kiddies down
9 here. Be here from between 9:30 and 10 and we'll be ready to start at 10 o'clock.

10 We'll be here earlier and they'll make all the arrangements for you. And
11 you just -- when you would normally just be coming in here, just bring your kids and
12 they'll have -- they'll get them all ready to go, okay.

13 JUROR NUMBER 9: [Indiscernible]

14 THE COURT: All right. So for us, we'll be here by -- I'd like to say maybe like
15 between 9:00 and 9:15 and we'll be ready to go at 10 o'clock, okay.

16 MR. ROSE: Yes.

17 MR. SCHWARTZ: Yes.

18 THE COURT: All right. Anything else I need to ask of these guys?

19 All right. So we're going to have an overnight recess, again. But we're
20 getting real close to the end now. When I tell you that part about keeping an open
21 mind, the defense has identified another witness, well maybe a couple, so there is a
22 possibility of some witnesses for the defense, keep an open kind, do not form or
23 express any opinions about this case until you've heard all of the evidence. We
24 haven't heard all of the evidence necessarily. All right.

25 Remember this overnight admonishment. I will admonish you not to

1 converse or discuss amongst yourselves or with anyone else on any subject
2 connected or related to this trial. Don't watch, listen, or read any reports or
3 commentaries regarding anything having to with this trial through any medium of
4 information, radio, television, newspapers, Internet. And don't form or express any
5 opinions on any subject connected or related to this trial until such time this case
6 has been finally submitted to you, which I can promise you it's going to happen real
7 soon. All right.

8 All right, go relax, get this off your mind, and I'll see you guys tomorrow.

9 [Outside the presence of the jury panel]

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

11 It is going to be interesting. I don't think I've ever had this situation.

12 Listen, I don't want you guys showing up without having gone and
13 talked over these instructions. I don't want to be starting from scratch. I want you
14 guys to go through the instructions, that there's nothing unusual about this case.
15 The instructions in this kind of a case are historic. So let's not make something out
16 of nothing. Go through the instructions, just make me decide those instructions that
17 you have a real legitimate complainant over.

18 MR. SCHWARTZ: Yes, Your Honor.

19 MR. ROSE: Yes, Your Honor.

20 THE COURT: All right. So let's show up about, like I said, between 9:00 and
21 9:15.

22 You'll have to decide what you're going to do. I don't know if you're
23 going to call your other witness or however you want to do it. But let's just be ready
24 so we can get this thing rock and rolling by 10 o'clock, all right.

25 MR. SCHWARTZ: Thank you, sir.

1 MR. ROSE: Is this a reporting or a recording courtroom? Because our stock
2 instructions have both --

3 THE CLERK: Recording.

4 THE COURT: We're a recording.

5 MR. ROSE: Recording, okay.

6 THE COURT: We're recording.

7 MR. ROSE: Okay.

8 THE CORRECTIONS OFFICER: Judge, what time do you want the
9 Defendant here? 9:15?

10 THE COURT: Yeah, have him here between 9:00 and 9:15.

11 THE CORRECTIONS OFFICER: Yes, sir.

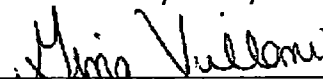
12 THE COURT: I mean, we can't even -- we can't settle any of the instructions
13 without him here.

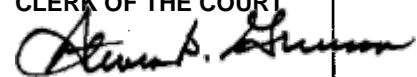
14 THE CORRECTIONS OFFICER: Yes, sir, okay.

15 THE COURT: We can do something off the record but really he should be
16 here.

17 [Jury Trial, Day 2, concluded at 5:29 p.m.]

18
19
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.

23 
24 Gina Villani
25 Court Recorder



RPLY
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 3710
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
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PUBLIC DEFENDERS OFFICE
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Las Vegas, Nevada 89155
Telephone: (702) 455-4588
Facsimile: (702) 383-2849
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/30/18

TIME: 8:00 AM

DEFENDANT'S REPLY TO STATE'S OPPOSITION TO DEFENDANT'S
MOTION FOR A NEW TRIAL AND MOTION FOR EVIDENTIARY
HEARING AND DECISION BY TRIAL JUDGE

COMES NOW, Defendant, Alfred Harvey, by and through Chief Deputy Public Defenders, JAMIN SPELLS, and Sharon Dickinson and files this Reply in support of the motion for a new trial pursuant to NRS 176.515(3) based on the grounds of newly discovered evidence. Alfred Harvey also asks for an evidentiary hearing and that this motion for a new trial be decided by the trial judge, Judge Bixler, because he is the only person who knows about the issues and facts from

1 this trial. This motion is based on the points and authorities attached and on such
2 argument as this court will entertain at a hearing on this motion.
3

4 DATED this 23rd day of April, 2018.

5 PHILIP J. KOHN
6 CLARK COUNTY PUBLIC DEFENDER

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

10 PHILIP J. KOHN
11 CLARK COUNTY PUBLIC DEFENDER

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

A. Request to have trial judge decide motion.

State submitted this issue to the court. Alfred Harvey asks Judge Bixler decide this motion.

The reason it is important for Judge Bixler to decide the motion for a new trial is to establish continuity in the jury instruction decisions. Judge Bixler heard the trial and is familiar with the facts and law. In this motion, Alfred Harvey is arguing he would have advised Judge Bixler to further instruct the jury as to the definition of robbery and outlined the requests he would have made to Judge Bixler. Thus, only Judge Bixler can decide if he would have given additional instructions. *See below.*

B. Merits for granting the Motion for a New Trial.

State contends Alfred Harvey failed to demonstrate the seven factors listed in *Lenmore v. State*, 94 Nev. 237, 239-40 (1978) and NRS 176.515(3). State focuses its argument on step 5: “such as to render a different result probable upon retrial.” *Id.* Because State did not specifically address the other factors, this court may find Alfred Harvey fulfilled Steps 1, 2, 3, 4, 6, and 7. *Polk v. State*, 233 P.3d 357, 359 (Nev.Sup.Ct. 2010).

However, juror misconduct or conduct occurring during deliberations by an outside influence may also be the basis for granting a new trial without

1 showing a different result would be probable upon retrial. *Brioady v. State*, 396
2 P.3d 822, 824 (Nev. 2017), *reh'g denied* (Oct. 2, 2017)(juror failed to answer
3 truthfully during voir dire; *Lamb v. State*, 127 Nev. 26, 43-46 (2011)(bailiff had
4 contact with deliberating jury without notifying parties); *Manning v. State*, 348
5 P.3d 1015 (Nev. 2015)(trial court failed to seek input from parties before
6 answering a jury note). To prevail on a motion of a new trial involving juror
7 misconduct or misconduct from court or staff, the defendant only needs to show
8 misconduct occurred and the misconduct was prejudicial. *Meyer v. State*, 119 Nev.
9 554, 563–64 (2003).

13 Here, misconduct occurred because the parties were not advised by
14 the court that the jury sent a note asking the court to elaborate on the definition of
15 the words “by means of force or violence or fear of injury” – the same argument
16 Alfred Harvey’s attorney made in closing. Because the parties were not notified
17 and the jury not brought back into court, NRS 175.391 and NRS 175.451 were
18 violated.
19

21 NRS 175.451 states:

22
23 After the jury have retired for deliberation, if there is any
24 disagreement between them as to any part of the testimony, **or if they**
25 **desire to be informed on any point of law arising in the cause, they**
26 **must require the officer to conduct them into court.** Upon their
27 being brought into court, the information required shall be given in the
28 presence of, or after notice to, the district attorney and the defendant
or the defendant’s counsel. (emphasis added).

1 Accordingly, misconduct occurred because NRS 175.451 was violated.

2 Likewise, NRS 175.391 may not have been followed. NRS 175.391 states in
3 pertinent part:
4

5 ... The officer shall not permit any communication to be made to [the
6 deliberating jurors], or make any personally, unless by order of the
7 court, except to ask them if they have agreed upon their verdict. The
8 officer shall not, before the verdict is rendered, communicate to any
person the state of their deliberations or the verdict agreed upon..

9 Because Judge Bixler does not remember anything about the jury note it appears
10 there may have been contact with the deliberating jury without court order.

11 As noted in the motion, in *Gonzales v. State*, 366 P.3d 680, 682 (Nev. 2015),
12 the Nevada Supreme Court held: [W]here a jury's question during deliberations
13 suggests confusion or lack of understanding of a significant element of the
14 applicable law, the court has a duty to give additional instructions on the law to
15 adequately clarify the jury's doubt or confusion." However, no error occurs if the
16 Defense does not provide the court with proffered instructions to clarify the jury's
17 doubt or confusion. *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2017), *reh'g denied*
18 (Sept. 29, 2017)
19
20
21

22 If the jury had been brought back to court for court to address their question,
23 Defense Counsel would have asked the trial court give an answer because Jury
24 Instruction 23 told the jury the court would respond to a question on the law. Jury
25 Instruction 23 directed the jury as follows:
26
27
28

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

5 NRS 175.451 required the trial court to discuss the note with the parties.
6

7 Defense Counsel would have objected to the response given on the notes as
8 nonresponsive to the question and confusing because the jury asked about the law
9 and the response was about evidence.
10

11 Had trial counsel been advised by the court of the jury note, she would have
12 asked the court to direct the jury to review jury instructions 6, 11 and 12. Exhibit E
13 and H. Jury instructions 6 and 11 told the jury that force or fear "must be used to
14 either: (1) obtain or retain possession of taken property, (2) prevent or overcome
15 resistance to the taking of property, or (3) to facilitate escape with the property."
16 Jury instruction 12 further directed the jury that in order for there to be a robbery,
17 "the taking must be accomplished by force or intimidation." By pointing to these
18 instructions, the trial court would have helped the jury focus on examples of force
19 and fear and how/when force or fear was used if at all.
20
21
22

23 Trial Counsel would also have asked the court to supplement the jury
24 instructions. Counsel would have requested the trial court reconsider some of the
25 defense proposed instructions that were not used at trial. Exhibit I. The defense
26 proposed instruction on page 7 reminds the jury that the State has the burden of
27
28

1 proof and again details the three ways in which force or fear must be used for a
2 robbery to be committed. The proposed instruction on page 10 is a lesser
3 instruction which informs the jury that if they are not convinced beyond a
4 reasonable doubt that a robbery occurred, then they may find the defendant guilty
5 of the lesser included offense of petit larceny. Exhibit E.

7
8 Trial Counsel would have also requested the court give the jury the *Crane*
9 jury instruction, as submitted in the Defendant's Proposed Jury Instructions and
10 Verdict Form, which instructs the jury how to proceed when there are two
11 reasonable interpretations, one pointing to guilt and one not. *Crane v. State* 88
12 Nev. 684, 504 P.2d 12 (1972). Exhibits E and J. Given the jury's question, its
13 arguable the jury found two reasonable interpretations of the facts of the case.
14

15
16 Additionally, Trial Counsel would have requested that the court give the
17 legal definitions of force, fear and violence as defined in Black's Law Dictionary,
18 as these terms are legal terms, which are not defined by Nevada statutes. Exhibit E.
19 Specifically these definitions are:
20

- 21 • *Actual force*- force consisting in physical act, esp. a violent act
22 directed against a victim.
- 23 • *Fear*- the strong, negative feeling that a person experiences
24 when anticipating danger or harm.
- 25 • *Violence*- the use of physical force, usu. Accompanied by fury,
26 vehemence, or outrage; especially physical force unlawfully
27 exercised with the intent to harm.
28

1 Black's Law Dictionary (10th ed. 2014). These definitions directly answer the
2 jury's question and Jury instruction 23 allowed the court to inform the jury of these
3 definitions.
4

5 Further clarification on the words identified by the jury as confusing would
6 render a different result probable on retrial. The question asked by the jury
7 focused on Alfred Harvey's defense as argued in closing. *Exhibit L*. Alfred
8 argued:
9

10 There was also no fear, no force, or nor violence. Kinda rewind, go
11 back to the interaction between Mr. Munoz and Mr. Harvey, and we
12 hear that Mr. Munoz asked Mr. Harvey for the wallets. He freely
13 gave them back. He's not screaming at him. He's not pushing him.
14 He's not throwing those wallets at t him. He just gave him the wallets
15 back. Mr. Munoz testified there's no yelling, there's no body contact,
16 there's no force or fear of violence in that interaction. He says at that
17 point Mr. Harvey refuses to turn back to the store. *Exhibit L*, page 50.

18 Alfred also argued that he was not being threatening according to Mr. Muonz. "at
19 the end of the day, he's thief, not a violent robber." *Id*.

20 Therefore, if trial court would have discussed the jury note and allowed
21 Alfred Harvey to supplement the instructions, he would have provided a clear
22 definition and it is probable the jury would have found him not guilty of robbery.
23

24 Based on the above, Alfred Harvey was *prejudiced* because if Defense
25 Counsel had knowledge of the jury note and had been allowed to submit the
26 instructions or provide a specific request on how the court should respond, it is
27
28

1 *probable* the trial court would have responded differently and it is *probable* that
2 the jury would have found him not guilty.

3 While the new evidence discovered is a jury note, the question asked by the
4 jury showed they were attempting to decide between a larceny and a robbery. At
5 trial, Alfred admitted stealing but denied the robbery. If court grants this motion
6 for a new trial, on retrial Defense Counsel will submit the instructions discussed in
7 this motion and it is *probable* a different result will occur.
8
9

10 **C. Evidentiary Hearing.**

11 At the hearing on April 16, 2018, district court told the parties that he had
12 spoken to the trial judge, Judge Bixler, and Judge Bixler did not remember
13 anything about Court Exhibit 1.
14
15

16 **In light of Judge Bixler not remembering the jury note, Alfred Harvey**
17 **asks for an evidentiary hearing to determine how the jury note was made part**
18 **of the district court file.** Accordingly, Alfred asks the court to hold an
19 evidentiary hearing and allow testimony and cross-examination of the court staff
20 present during time the jury was deliberating:
21

- 22 1. Court Marshall, Tom
- 23 2. Court Clerk, Phyllis Irby
- 24 3. Court Clerk, Carol Donahoo
- 25 4. Court Recorder, Jill Jacoby
- 26
- 27
- 28

1 5. Any other person involved with the jury note

2 See *Exhibit K*: Court minutes for November 17 and November 18, 2016; *Exhibit*
3 *L*: November 17, 2016, transcript; *Exhibit M*: November 18, 2016, transcript.
4

5 An evidentiary hearing is necessary for Alfred to proceed with his case in
6 the Nevada Supreme Court because how the bailiff and court staff interacted with
7 the deliberating jury may warrant a new trial and may be an issue on appeal
8 warranting reversal. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, when the
9 jury sent a note, the bailiff did not inform anyone, taking it upon himself to
10 respond by telling the jurors to read the jury instructions. The bailiff's actions
11 were in direct violation of NRS 175.391 and NRS 175.451.
12

13 In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court
14 found constitutional error violating due process when a trial court failed to notify
15 and seek input from the parties after receiving a note from the jury that it was
16 deadlocked.
17

18 In view of the above, Alfred Harvey asks this court to grant his motion and
19 reconstruct the record of his trial so that he has a record as to what occurred with
20 the jury note.
21

22 ///

23 ///

24 ///

CONCLUSION

In view of the above, Alfred Harvey asks this court to allow Judge Bixler to conduct an evidentiary hearing and to make a decision on his motion for a new trial.

DATED this 23rd day of April, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

1
2 **CERTIFICATE OF ELECTRONIC SERVICE**

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

6 By: /s/Carrie M. Connolly
7 An employee of the
8 Clark County Public Defender's Office
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EXHIBIT K

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

November 17, 2016

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

November 17, 2016 10:00 AM Jury Trial

HEARD BY: Bixler, James

COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Jill Jacoby

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

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

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

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

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

///

PRINT DATE: 12/20/2016

Page 1 of 2

Minutes Date: November 17, 2016

C-16-314260-1

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

CUSTODY

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

November 18, 2016

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

November 18, 2016 9:30 AM Jury Trial

HEARD BY: Bixler, James

COURTROOM: RJC Courtroom 11B

COURT CLERK: Phyllis Irby

RECORDER: Jill Jacoby

REPORTER:

PARTIES

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

JOURNAL ENTRIES

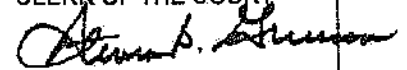
- JURY PRESENT. Verdict reached at the hour of 11:10 am. The Court thanked and excused the jury.
OUTSIDE THE PRESENCE OF THE JURY. The Defense requested to have Judge Bixler do the
sentencing. The State will provide PowerPoint as exhibit.
COURT ORDERED, DEFT HELD WITHOUT BAIL. SENTENCING SET.

CUSTODY

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

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EXHIBIT L



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

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

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

18 APPEARANCES:

19 For the State:

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

21 For the Defendant:

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

22
23
24
25 RECORDED BY: JILL JACOBY, COURT RECORDER

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

2
3 [Outside the presence of the jury panel]

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

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

8 Do you want to start with number seven?

9 MS. SPELLS: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Well, you --

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

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

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

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

1 MS. SPELLS: Oh, okay.

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

4 MS. SPELLS: Okay.

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

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

8 THE COURT: Yeah.

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

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

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

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

16 THE COURT: Oh, it does?

17 MR. ROSE: Yes.

18 MR. SCHWARTZ: That was our issue.

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

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

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

23 MR. SCHWARTZ: Okay.

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

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

2 MR. ROSE: Yes, Your Honor.

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

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

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

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

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

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

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

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

25 THE COURT: Page nine?

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

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

9 MS. SPELLS: Your Honor, the --

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

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

17 THE COURT: You can argue it.

18 MS. SPELLS: -- argue --

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

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

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

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

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

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

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

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

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

4 MS. SPELLS: Your Honor, we --

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

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

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

13 THE COURT: Your verdict?

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

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

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

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

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

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

9 THE COURT: Sure.

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

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

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

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

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

23 THE COURT: Okay, excellent.

24 [Colloquy between District Attorney and Defense Counsel]

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

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

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

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

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

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

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

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

9 Are all our jurors here? Even --

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

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

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

14 THE COURT: Apparently not.

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

17 THE COURT CLERK: [Indiscernible]

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

20 THE COURT: Okay.

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

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

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

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

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

1 something on the record.

2 THE COURT: Certainly.

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

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

18 THE COURT: All right.

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

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

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

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

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

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

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

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

19 THE COURT: Okay.

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

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

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

23 [Colloquy between District Attorney and Defense Counsel]

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

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

2 THE COURT: Yes, we are.

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

5 MS. SPELLS: Thank you.

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

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

11 MS. SPELLS: No, Your Honor.

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

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

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

18 MS. SPELLS: Sure.

19 THE COURT: Page three.

20 MS. SPELLS: Yes.

21 THE COURT: Page seven.

22 MS. SPELLS: Yes.

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

24 MS. SPELLS: That's correct.

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

1 offered and not given?

2 MS. SPELLS: No, Your Honor.

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

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

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

8 MS. SPELLS: Yes.

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

10 MS. SPELLS: No.

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

13 MR. SCHWARTZ: No, Your Honor.

14 MR. ROSE: No, Your Honor.

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

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

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

23 MR. ROSE: We are.

24 THE COURT: Any objection to it?

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

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

3 Can we start this trial?

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

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

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

7 [Colloquy between the Court and the Court Clerk]

8 [Brief pause in proceeding]

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

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

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

13 MR. ROSE: Yes, Your Honor.

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

15 MS. SPELLS: Yes.

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

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

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

20 MR. ROSE: Thank you, Your Honor.

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

23 MS. SPELLS: Thank you.

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

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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THE COURT: Did you learn something?

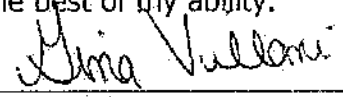
THE DEFENDANT: Thank you, saying thank you.

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

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

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

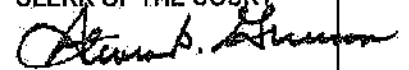
ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case to the best of my ability.



Gina Villani
Court Recorder

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EXHIBIT M



1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 STATE OF NEVADA,

9 Plaintiff,

CASE NO. C314260

DEPT. VIII

10 vs.

11
12 ALFRED HARVEY,

13 Defendant.

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

21 For the Defendant:

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

23
24
25 RECORDED BY: JILL JACOBY, COURT RECORDER

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

2
3 [Outside the presence of the jury panel]

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

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

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

8 MS. SPELLS: No.

9 THE COURT: You guys good?

10 MS. SPELLS: Yes.

11 MR. SCWARTZ: Yes.

12 THE COURT: Okay.

13 [In the presence of the jury panel]

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

15 And be seated.

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

17 MS. SPELLS: Yes, Your Honor.

18 MS. JONES: Yes, Your Honor.

19 MR. SCHWARTZ: Yes, Your Honor.

20 MR. ROSE: Yes, Your Honor.

21 THE COURT: Very good.

22 Good morning.

23 THE JURY: Good morning.

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

25 THE FOREPERSON: Yes.

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

2 THE FOREPERSON: Michelle Moline.

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

4 THE FOREPERSON: Yes, we have.

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

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

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

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

13 Dated the 18th day of November, 2016.

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

15 THE JURY: Yes.

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

17 THE JURY: Yes.

18 THE COURT: Would anybody like the jury polled?

19 MS. SPELLS: Yes, Your Honor.

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

21 JUROR NUMBER 1: Yes.

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

23 JUROR NUMBER 2: Yes.

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

25 JUROR NUMBER 3: Yes.

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

2 JUROR NUMBER 4: Yes.

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

4 JUROR NUMBER 5: Yes.

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

6 JUROR NUMBER 6: Yes.

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

8 JUROR NUMBER 7: Yes.

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

10 JUROR NUMBER 8: Yes.

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

12 JUROR NUMBER 9: Yes.

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

14 JUROR NUMBER 10: Yes.

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

16 JUROR NUMBER 11: Yes.

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

18 JUROR NUMBER 12: Yes.

19 THE COURT: Thank you very much.

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

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

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

22 Do they get the checks right now?

23 THE MARSHAL: Yes.

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

1 [Outside the presence of the jury panel]

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

3 Anything we need to put on the record?

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

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

13 THE CLERK: Yes, Your Honor.

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

15 MR. SCHWARTZ: Thank you.

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

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

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

23 THE CLERK: Yes.

24 MR. SCHWARTZ: We'll send --

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

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

3 THE DEFENDANT: Yes, sir.

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

6 THE CLERK: They come in person.

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

8 THE DEFENDANT: Okay.

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

10 THE DEFENDANT: Thank you, sir.

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

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

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

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

19 THE COURT: Okay.

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

21 THE COURT: Hardcopy?

22 MR. ROSE: Yes, Your Honor.

23 THE COURT: Okay. All right.

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

25 THE COURT: Is that it?

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

2 THE COURT: All right.

3 MR. SCHWARTZ: Thank you, Your Honor.

4 MS. SPELLS: Thank you.

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

9 MS. SPELLS: Thank you.

10 MS. JONES: Thank you.

11 THE DEFENDANT: Thank you, sir.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 MR. ROSE: Thank you, Your Honor.

14 THE COURT: Have a good thanksgiving.

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

16 THE COURT: I think they are.

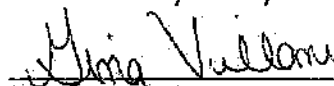
17 MR. ROSE: Okay.

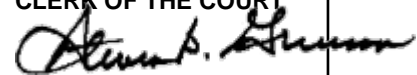
18 THE COURT: I think they're collecting the badges and whatever --

19 MR. ROSE: Okay. Thank you.

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

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

24 
Gina Villani
25 Court Recorder



SUPP
PHILIP J. KOHN, PUBLIC DEFENDER
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DATE: 04/30/18

TIME: 8:00 AM

**SUPPLEMENT TO DEFENDANT'S REPLY TO STATE'S OPPOSITION
TO DEFENDANT'S MOTION FOR A NEW TRIAL AND MOTION FOR
EVIDENTIARY HEARING AND DECISION BY TRIAL JUDGE**

COMES NOW, Defendant, Alfred Harvey, by and through Chief Deputy Public Defenders, JAMIN SPELLS, and Sharon Dickinson and files this Supplement to Defendant's Reply in support of the motion for a new trial pursuant to NRS 176.515(3) based on the grounds of newly discovered evidence. Alfred Harvey also asks for an evidentiary hearing and that this motion for a new trial be decided by the trial judge, Judge Bixler, because he is the only person who knows

1 about the issues and facts from this trial. This motion is based on the points and
2 authorities attached and on such argument as this court will entertain at a hearing
3 on this motion.
4

5 DATED this 27 day of April, 2018
6

7 PHILIP J. KOHN
8 CLARK COUNTY PUBLIC DEFENDER

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

12 PHILIP J. KOHN
13 CLARK COUNTY PUBLIC DEFENDER

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

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

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

A bailiff's oral ex parte communications with a jury, beyond what NRS 175.391 allows, "is a species of jury misconduct." *Lamb v. State*, 251 P.3d 700, 711-12 (2011). Statements from a judge to a jury or from a bailiff are subject to scrutiny since "the official character of the bailiff -- as an officer of the court as

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

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

13 CONCLUSION

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

15 DATED this 27 day of April, 2018.
16

17 PHILIP J. KOHN
18 CLARK COUNTY PUBLIC DEFENDER

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

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: /s/ Jasmin D. Spells
25 JASMIN D. SPELLS, #11635
26 Chief Deputy Public Defender
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountydade.com on this 27 day of April, 2018.

By: /s/Carrie M. Connolly

An employee of the
Clark County Public Defender's Office

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EXHIBIT N

DECL
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Lillyjd@clarkcountynv.gov
6 Attorneys for Defendant

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 ALFRED C. HARVEY,

13 Defendant,
14

CASE NO. C-16-314260-1

DEPT. NO. VIII

15 DECLARATION

16
17 SUSIE CHANG makes the following declaration:

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

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

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

24 4. At the beginning of jury deliberations, the Court Marshall gave each juror his
25 cellular telephone number. During the first day of deliberations, I heard ^{from someone (SC)} that the jury foreperson
26 telephoned the Court Marshall regarding a procedural issue. We did not reach a verdict the first
27 day.
28

1 5. On the second day of deliberations, the Court Marshall came into the jury
2 room, closed the door and stated if the person with a procedural issue would like to speak with
3 the Judge, the Judge would like to speak with that person. At that time no one spoke with the
4 Judge.

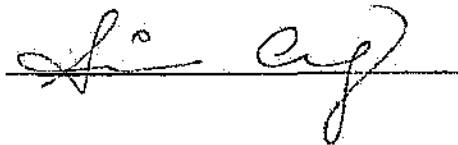
5 6. ^{heard from someone that (he)} I thought the foreperson may have contacted the Court Marshall during the
6 second day of deliberations.

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

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

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

13
14 EXECUTED this 27 day of April, 2018.

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EXHIBIT O

DECL
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
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Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant.

CASE NO. C-16-314260-1

DEPT. NO. VIII

DECLARATION

LEE ANN WORTHAM-THOMAS makes the following declaration:

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

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

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

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

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

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

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

5 EXECUTED this 26th day of April, 2018.

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7 Leela Thomas
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EXHIBIT P

DECL
PHILIP J. KOHN, PUBLIC DEFENDER
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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant.

CASE NO. C-16-314260-1

DEPT. NO. VIII

DECLARATION

MICHELLE MOLINE makes the following declaration:

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

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

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

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

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

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

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

6 7. The only person I had contact with during jury deliberations was the Court
7 Marshall.
8

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

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

13 EXECUTED this 27 day of April, 2018.
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The Court is not at liberty to supplement the evidence.

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

Michael Malone



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EXHIBIT Q

DECL

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Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ALFRED C. HARVEY,

Defendant,

CASE NO. C-16-314260-1

DEPT. NO. VIII

DECLARATION

DOUGLAS HENKE makes the following declaration:

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

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

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

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

5. During the jury deliberations, I was requested to investigate possible jury tampering and /or inappropriate communications with the jurors and due to Alfred Harvey knowing there was a holdout juror before learning of the verdict.

1 6. During my investigation, I contacted and attempted to contact several
2 jurors regarding any tampering and/or inappropriate communications with the jurors. All
3 contacted jurors denied any inappropriate behavior/communication.

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

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

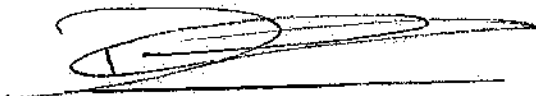
7 9. During my second investigation, several jurors stated the Court Marshall
8 provided his cellular telephone to the jury and possible telephone calls were made from a juror to
9 the Court Marshall.
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11 10. Upon information and belief from my second investigation, conversations
12 between the jurors, Court Marshall and Clark County Detention Transportation Officers were
13 made during and after the jury deliberations.

14 11. Based on the new information obtained, an ongoing investigation is being
15 conducted regarding the abovementioned events.
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18 I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

19 EXECUTED this 27 day of April, 2018.
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ALFRED C. HARVEY,) No. 72829/75911
)
Appellant,)
)
vi.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

PHILIP J. KOHN Clark County Public Defender 309 South Third Street Las Vegas, Nevada 89155-2610 Attorney for Appellant	STEVE WOLFSON Clark County District Attorney 200 Lewis Avenue, 3 rd Floor Las Vegas, Nevada 89155 ADAM LAXALT Attorney General 100 North Carson Street Carson City, Nevada 89701-4717 (702) 687-3538 Counsel for Respondent
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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:

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