

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL McNAIR

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 78871

Appeal From A Judgment of Conviction (Jury Trial)
Eighth Judicial District Court
The Honorable Douglas Herndon, District Judge
District Court No. C-17-327395-1

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1 INST

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STEVEN D. GRIERSON
CLERK OF THE COURT

MAR 06 2019

BY: Kory Schlitz
KORY SCHLITZ, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 Defendant.

CASE NO:

C327395

III

DEPT NO:

13 DEFENDANT'S PROPOSED INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

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

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

25 C-17-327395-1
26 INST
Instructions to the Jury
4820920



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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

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

INSTRUCTION NO. 3

An indictment is but a formal method of accusing a person of a crime and is not itself any evidence of guilt. In this case, it is charged in an Information that on or about the 14th day of September, 2017 the Defendant committed the offenses of MURDER WITH USE OF A DEADLY WEAPON; and CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON. It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the State has proven beyond a reasonable doubt that Mr. McNair is guilty of the any criminal offense charged.

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

did willfully, unlawfully, feloniously and with malice aforethought, kill GORDON PHILLIPS, a human being, with use of a deadly weapon, to wit: a handgun, by shooting at and into the body of the said GORDON PHILLIPS, the said killing having been willful, deliberate and premeditated. Defendant being liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crimes be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other unknown person to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendant and unknown person aiding or abetting and/or conspiring by acting in concert throughout.

COUNT 2 – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON

did there and then willfully, intentionally, unlawfully and feloniously carry concealed upon his person, a firearm or other deadly weapon, to wit: a firearm.

INSTRUCTION NO. 4

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the State has met their burden of proof beyond a reasonable doubt as to each and every element of each of the charges against the Defendant, Mr. McNair.

Each charge and the evidence pertaining to it must be considered separately. The fact that you may find the State has or has not met their burden of proof as to one of the offenses charged should not control your verdict as to any other defendant or offense charged.

INSTRUCTION NO. 5

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

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

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

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

INSTRUCTION NO. 6

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

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

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

INSTRUCTION NO. 7

You are here to determine whether the State has met their burden of proving beyond a reasonable doubt that the Defendant is guilty from the evidence in the case. You are not called upon to return a verdict as to whether any other person is guilty or not guilty. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more other persons are also guilty.

INSTRUCTION NO. 8

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

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

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

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

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

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

INSTRUCTION NO. 9

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

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

INSTRUCTION NO. 10

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

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

INSTRUCTION NO. 11

When a witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement makes it a prior inconsistent statement. The previous statement is not hearsay and may be considered both substantively and for impeachment.

INSTRUCTION NO. 12

The defendant is not required to present any evidence or prove his innocence. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

INSTRUCTION NO. 13 (Replaces State's 13 and 14)

Conspiracy is an agreement or mutual understanding between two or more persons to commit a crime. To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not. It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy must be proven beyond a reasonable doubt. You may consider all circumstances that show the common intent the same way as any other fact may be proven. This may be by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully concealed the crime and eluded capture.

However, in order to find the defendant criminally liable for acts of another conspirator, pursuant to a conspiracy to the crime s charged, you must find that Michael McNair possessed the specific intent to commit those specific crimes.

INSTRUCTION NO. 14

Where several parties knowingly and with criminal intent join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his co-conspirator committed in furtherance of the conspiracy. In contemplation of law, the act of one is the act of all.

However, a defendant cannot be liable under a conspiracy theory of liability for acts committed by a co-conspirator unless the defendant also had the intent necessary for the particular crime.

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2 In order to find Michael McNair criminally liable for the acts of another, you must
3 find that the State has proven beyond a reasonable doubt that Mr. McNair had the specific
4 intent to commit the specific crimes of first degree murder with use of a deadly weapon.¹
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25 ¹ The Nevada Supreme Court has "[c]onsistently recognized that specific jury instructions
26 that remind jurors that they may not convict the defendant if proof of a particular element is
27 lacking should be given upon request." Hardin v. State, 2018 Nev. Unpub. LEXIS No. 695,
28 422 P.3d 1230 (2018) (citing Crawford v. State, 121 Nev. 746, 753, 121 P.3d 582, 588)

INSTRUCTION NO. 16

Where two or more persons are accused of committing a crime together, their guilt may be established if the State proves beyond a reasonable doubt that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

INSTRUCTION NO. 17

While a verdict must be unanimous, the jurors need not be unanimous on the means or the theory of liability in arriving at the verdict. In other words, you do not need to be unanimous in deciding whether the defendant is responsible by directly committing an offense or by conspiring or aiding and abetting, so long as all of you agree that the defendant is guilty of committing the crime beyond a reasonable doubt.

INSTRUCTION NO. 18

In this case the defendant is accused in an Information alleging an open charge of Murder. This charge includes and encompasses Murder of the First Degree and Murder of the Second Degree.

The jury must decide if the State has proven beyond a reasonable doubt that Mr. McNair is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 19

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

INSTRUCTION NO. 20

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

INSTRUCTION NO. 21

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

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

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

INSTRUCTION NO. 23

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

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.²

² Byford v. State, ____ Nev. ____, 994 P.2d 700, 714 (2000)

INSTRUCTION NO. 24

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

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.³

³ Byford v. State, ____ Nev. ____, 994 P.2d 700, 714 (2000)

INSTRUCTION NO. 25

The law does not undertake the measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.⁴

⁴ Byford v. State, ____ Nev. ____, 994 P.2d 700, 714 (2000).

INSTRUCTION NO. 26

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.⁵

⁵ Byford v. State, ____ Nev. ____, 994 P.2d 700, 714 (2000)

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2 The flight of a person after the commission of a crime is not sufficient in itself to
3 establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt.
4 Likewise, absence of flight is a circumstance that can be considered by the jury in
5 determining if the state has met it's burden of proof.

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

Mr. McNair's proposed alternative:

The flight of a person immediately after the commission of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.⁶

⁶ Miles v. State, 97 Nev. 82, 84, 624 P.2d 494, 495 (1981).

INSTRUCTION NO. 28

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

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

INSTRUCTION NO. 29

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

Objection:

Mr. McNair objects to this instruction as it improperly burden shifts and minimizes the State's burden of proof. He requests that this instruction be modified to properly reflect the State's burden or stricken entirely.

INSTRUCTION NO. 30

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

Mr. McNair's proposed alternative/objection:

"To return a verdict of not guilty, the State must prove beyond a reasonable doubt, the Defendant's state of mind. The prosecution may meet this burden by presenting direct evidence of a defendant's state of mind as it existed during the commission of a crime or through circumstantial evidence."

INSTRUCTION NO. 31

All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the Second Degree is murder with malice aforethought, but without the admixture of premeditation and deliberation.

All murder which is not Murder of the First Degree is Murder of the Second Degree.⁷

⁷ State v. Lopez, 15 Nev. 407 (1880)

INSTRUCTION NO. 32

There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of a robbery or kidnapping. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery or kidnapping is deemed to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder Rule.

The intent to perpetrate or attempt to perpetrate robbery or kidnapping must be proven beyond a reasonable doubt. In order for the Felony-Murder Rule to apply under a robbery theory, the intent to take the property must be formed prior to the act constituting the killing.

Mr. McNair requests the following instruction:

Benefit of doubt (second degree murder)

If you find that the evidence is insufficient to establish that the State has proven beyond a reasonable doubt that the defendant is guilty of the offense charged in the Information, he may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged, if the evidence is sufficient to establish his guilt of such lesser offense beyond a reasonable doubt.

The offense of murder, with which the Defendant is charged in the Information, necessarily includes the lesser offenses of second degree murder.

If the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, but you entertain a reasonable doubt as to which of the offenses the defendant is guilty, it is your duty to find him guilty only of the lesser offense.⁸

⁸ NRS 175.501.

INSTRUCTION NO. 34

When it has been proven beyond a reasonable doubt that a person has committed a particular crime and at the same time and by the same conduct may have committed another offense of lesser grade or degree, the latter is with respect to the former, a lesser included offense.

You are instructed that if you find that the State has proven beyond a reasonable doubt that the defendant has committed First Degree Murder you shall select First Degree Murder as your verdict. The crime of First Degree Murder includes the lesser offense of Second Degree Murder. You may find the defendant guilty of Second Degree Murder if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

PROPOSED:

In considering the charge of willful, deliberate, premeditated murder, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion induced by the requisite legal provocation.⁹ If you find the state failed to meet this burden, you may find the defendant guilty of voluntary manslaughter.¹⁰

Manslaughter is defined as the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.

To find the defendant guilty of voluntary manslaughter, you must find the killing was voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or, involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.¹¹

A provocation sufficient for a finding of voluntary manslaughter occurs if there existed a serious and highly provoking injury inflicted upon the defendant, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.¹² A serious and highly provoking injury need not be a direct physical assault on the accused.¹³

⁹ Crawford v. State, 121 Nev. 746, 753-754, 582, 588, (2005).

¹⁰ Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261, 1983 (a defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it).

¹¹ NRS 200.040.

¹² NRS 200.050

¹³ Roberts v. State, 102 Nev. 170, 174, 717, (1986); Nevada v. Ah Mook, 12 Nev. 369 (1877).

INSTRUCTION NO. 36

You are instructed that if you find a defendant guilty of Murder, either in the first or second degree, or of Voluntary Manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

A deadly weapon is any instrumentality which is inherently dangerous. Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause a life-threatening injury or death or any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon.

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3 If you find that the State has not proven beyond a reasonable doubt that Mr. McNair
4 was part of a conspiracy, you may however return a verdict of guilty for Mr. McNair as to
5 accessory after the fact if you find that the State has proven beyond a reasonable doubt that
6 he had, after the commission of the felony, destroyed or concealed, or aided in the
7 destruction or concealment of, material evidence.¹⁴
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¹⁴ NRS 193.030

Mere presence at the scene of a crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

INSTRUCTION NO. 40

A person who carries concealed upon his or her person a pistol, revolver, or other firearm, or other dangerous or deadly weapon is guilty of Carrying Concealed Firearm or Other Deadly Weapon.

INSTRUCTION NO. 41

“Concealed weapon” means a weapon described in these instructions that is carried upon a person in such a manner as not to be discernible by ordinary observation.

INSTRUCTION NO. 42

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

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

INSTRUCTION NO. 43

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of whether the State has proven beyond a reasonable doubt Mr. McNair's guilt.

PROPOSED INSTRUCTION:

You have heard testimony from Mitchell Johnson who has been named a person who either committed the murder or was involved with either a Conspiracy to Commit Murder with use of a deadly weapon. Mr. Mitchell was given a benefit for his testimony. You may consider these factors and the possible related pressures in determining his credibility and the extent to which they influenced his testimony. You should view his testimony with greater caution than that of other witnesses.¹⁵

A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable for prosecution for the identical offenses charged against the defendants on trial in the cause in which the testimony of the accomplice is given.

¹⁵ "The district court is required to give a cautionary jury instruction when an accomplice's testimony is uncorroborated. If the testimony is corroborated, a cautionary instruction is favored, but failure to grant it is not reversible error. An accomplice-distrust instruction advises the jury that it should view as suspect incriminating testimony given by those who are liable to prosecution for the identical charged offense as the accused." Gonzalez v. State, 131 Nev. , 366 P.3d 680, 686 (2015).

PROPOSED INSTRUCTION:

Evidence to corroborate accomplice testimony does not suffice if it merely casts grave suspicion on the defendant. Further, where the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or it equally supports a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is sufficient evidence which tends to connect the defendant with the commission of the offense. If there is not sufficient independent evidence which tends to connect the defendant with the commission of the offense the testimony of the accomplice is not corroborated. If there is such sufficient independent evidence, which you believe, then the testimony of the accomplice is corroborated.¹⁶

¹⁶ Id.

During the course of this trial, and your deliberations, you are not to:

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

INSTRUCTION NO. 47

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

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

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

INSTRUCTION NO. 48

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

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

INSTRUCTION NO. 49

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

GIVEN:

DISTRICT JUDGE

1 VER

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 -vs-

8 MICHAEL MCNAIR

9 Defendant.

CASE NO: C-17-

DEPT NO: III

10
11 SPECIAL V E R D I C T

12 We, the jury in the above entitled case, find as follows:

13 **COUNT 1** – MURDER WITH USE OF A DEADLY WEAPON

14 *(Please check the appropriate box, select only one)*

- 15 € The Jury finds unanimously that Michael McNair committed the
16 homicide.
- 17 € The Jury finds unanimously that Mitchell Johnson committed the
18 homicide.
- 19 € The Jury does not find unanimously that Michael McNair or Mitchell
20 Johnson committed that homicide, but all 12 jurors find that either
21 Mitchell Johnson or Michael McNair committed the homicide.
- 22 € The Jury does not find that the State has proven beyond a reasonable
23 doubt that either Michael McNair or Mitchell Johnson committed the
24 homicide.

25
26 DATED this _____ day of March, 2018.

27
28 _____
FOREPERSON

001720

1 **VER**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 **THE STATE OF NEVADA,**

5 **Plaintiff,**

6 **-vs-**

7 **MICHAEL MCNAIR**

8 **Defendant.**

CASE NO: C-17-

DEPT NO: III

9
10 **VERDICT**

11 We, the jury in the above entitled case, find the defendant MICHAEL MCNAIR as
12 follows:

13 **COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON**

14 *(Please check the appropriate box, select only one)*

- 15 ☐ Guilty of First Degree Murder With Use of a Deadly Weapon
16 ☐ Guilty of First Degree Murder Without the Use of a Deadly Weapon
17 ☐ Guilty of Second Degree Murder With Use of a Deadly Weapon
18 ☐ Guilty of Second Degree Murder Without the Use of a Deadly Weapon
19 ☐ Voluntary Manslaughter With Use of a Deadly Weapon
20 ☐ Voluntary Manslaughter Without the Use of a Deadly Weapon
21 ☐ Not Guilty

22
23 **COUNT 2 – CARRYING A CONCEALED WEAPON**

24 *(Please check the appropriate box, select only one)*

- 25 ☐ Guilty of carrying a concealed weapon.
26 ☐ Not Guilty

27
28
001721



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

MICHAEL MCNAIR,
Defendant.

CASE NO. C-17-327395-1
DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,
DISTRICT COURT JUDGE

WEDNESDAY, MARCH 06, 2019

**RECORDER'S TRANSCRIPT OF HEARING
JURY TRIAL - DAY 7
VOLUME VII**

APPEARANCES:

For the State:

JACQUELINE M. BLUTH, ESQ.
JEFFREY S. ROGAN, ESQ.
Chief Deputy District Attorneys

For the Defendant:

RANDALL H. PIKE, ESQ.
MELINDA E. SIMPKINS, ESQ.
NAVID AFSHAR, ESQ.
Chief Deputy Special Public Defenders

RECORDED BY: SARA RICHARDSON, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

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Las Vegas, Nevada, Wednesday, March 06, 2019

[Trial began at 11:12 a.m.]

[Outside the presence of the jury]

THE COURT: All right. What do we have outside the presence?

MR. PIKE: Your Honor, the State had one last question that they wanted to ask the detective and that was in regards to his contact with my client, Michael McNair, as -- because he asked him about who would wear their shirts and when. They could ask that -- they could move to reopen and do that after my cross-examination. As far as purposes for my cross-examination, I would just assume that they just go ahead and ask that one question now --

THE COURT: Okay.

MR. PIKE: -- and so we could move on.

THE COURT: Okay. Anything else?

MS. BLUTH: Nope, that's it.

THE COURT: Oh, all right.

You can go ahead, JR.

THE MARSHAL: Yes, Your Honor.

[In the presence of the jury]

THE MARSHAL: All rise for the jurors.

Panel's present, Your Honor.

THE COURT: Thank you. You all can be seated.

We'll be back on the record. Mr. McNair, attorneys, jurors are

1 all present. We are going to continue on with the State's case in chief
2 and finish up with Detective Hoffman.

3 If you could grab him, JR, please.

4 Detective, I'll get you sworn in again, please.

5 **DETECTIVE JOHN HOFFMAN**

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

8 THE CLERK: Thank you, please be seated.

9 If you could state and spell your name for the record.

10 THE WITNESS: John Hoffman; J-O-H-N, H-O-F-F-M-A-N.

11 THE COURT: All right. And you had a couple more questions
12 before we start cross --

13 MS. BLUTH: I do.

14 THE COURT: -- so you can go ahead.

15 MS. BLUTH: Thank you, Judge.

16 **CONTINUED DIRECT EXAMINATION**

17 BY MS. BLUTH:

18 Q Detective Hoffman, yesterday you had talked about the fact
19 that you had interviewed the Defendant. When you did so, did you ever
20 ask him why he had changed his shirt while at work?

21 A Yes, I did.

22 Q And what was his response?

23 A The Defendant stated that he changed his shirt because he
24 was going to play a prank on some of his coworkers.

25 MS. BLUTH: That concludes my questioning. Thank you,

1 Judge.

2 THE COURT: All right. Mr. Pike.

3 MR. PIKE: Thank you.

4 **CROSS-EXAMINATION**

5 BY MR. PIKE:

6 Q Good morning, Detective Hoffman.

7 A Good morning.

8 Q I'm Randy Pike, I'll be asking you a few questions today.

9 A Okay.

10 Q All right. When you got the call, what time was it that you got
11 the text that you had to go over to that area?

12 A I don't exactly remember the exact time the text was, but I
13 would say it would probably be about 10:30 in the evening.

14 Q And as part of your investigation, you would have gone back
15 and retrieved the records as to when the first 9-1-1 call?

16 A Yes.

17 Q And so you did that, so you know when the first 9-1-1 call
18 came in?

19 A Yes.

20 Q Do you what time that was?

21 A I believe it was approximately 9:26 p.m.

22 Q Okay. Now, I noticed that you brought a notebook in -- or a
23 binder --

24 A Yes.

25 Q -- in with you. And that's called a detective's notebook?

1 A It's a case file.

2 Q Case file, okay. Changed over the years, I guess.

3 And that's where you maintain the records that you gather
4 during the course of an investigation and you bring them to court so you
5 can refer to them if you need to refresh your recollection?

6 A Yes.

7 Q It's much like a doctor bringing in the autopsy notes?

8 A Yes.

9 Q Okay. You probably got an autopsy report in there.

10 A I believe I do, yes.

11 Q In going through this, I note that the initial report indicated that
12 this was reported by the Tourist's Safety Division. What is that?

13 A The Tourist Safety Divisions is -- our Area Command are
14 broken down into two sections, so downtown Area Command would fall
15 under the Tourist Safety Division.

16 Q Okay. So the downtown area then I'm guessing, and correct
17 me if I'm wrong, would probably encompass the Fremont Street area, all
18 the way to North Las Vegas?

19 A Yeah. A portion of it, yes.

20 Q Okay. Now, when you went through and you had an
21 opportunity to meet with Mr. Coon, who was one of the owners and go
22 through the video recordings, all of those were video and there was no
23 audio?

24 A I believe yes, it's just video.

25 Q Okay. If there was audio, you would have obtained that

1 recording?

2 A Yes.

3 Q And then part of your investigation would be probably to have
4 you -- oops. I broke it.

5 THE CLERK: Oh, you know what, it might be off.

6 [Colloquy between the Clerk and Counsel]

7 MR. PIKE: Okay. I think we're online now.

8 BY MR. PIKE:

9 Q All right. I'm going to post on this for you State's Exhibit
10 Number 3. And do you recognize what is contained in this photograph?

11 Let me secure it so that the west would be facing on your left.

12 A Yes, that's going to be an overhead view of the Unified
13 Container property, which would also encompass the scene as well.

14 Q All right. Do you recall approximately the distance between
15 Searles Street and Foremaster?

16 A No, I don't.

17 Q Okay. How about from Searles up to this parking lot that I'm
18 pointing to now?

19 A No, I don't.

20 Q And so --

21 THE COURT: Hold on, Randy, I'm sorry.

22 You're talking about the parking lot that's on the back of
23 what's labeled as the Grant Sawyer Office Building, correct?

24 MR. PIKE: Yes.

25 THE COURT: Okay. Thank you.

1 BY MR. PIKE:

2 Q When I was -- thank you.

3 That -- the Grant Sawyer Office Building is a government
4 building, correct?

5 A Yes.

6 Q And that's where the Attorney General's office is, the
7 Governor's office is for southern Nevada, and you've probably gone in
8 there and obtained records for various cases over the years.

9 A I have not, no.

10 Q You have not.

11 But are you familiar with that building in that area?

12 A I'm familiar with where the building is, yes.

13 Q Okay. During the course of your investigation, did you attempt
14 to determine whether or not there were any video surveillance that would
15 be around that governmental building?

16 A No, we did not.

17 Q How about what I'm pointing to now, which is Bunker's Eden
18 Vale Memorial Park? That's a business, correct?

19 A Yes.

20 Q And it also has a cemetery and a mausoleum that's part of it.

21 A Yes.

22 Q Did you ever go to that business and determine if they had
23 any surveillance videos that were available --

24 A Yes, that --

25 Q -- of that day?

1 A That business was contacted and they said they did not have
2 any video surveillance.

3 Q They have none at all.

4 A No.

5 Q Okay. And then we also have the Desert -- or excuse me, the
6 Vegas Cloud, and I'm pointing to that here. And the Desert Memorial
7 Cremation and Burial. Did you also check those businesses to
8 determine if they had any video?

9 A No, I did not.

10 Q Going down this -- or excuse me -- I say down but heading
11 north between the Bunkers Memorial, through to the end of Flavors, that
12 was the area that was kind of blocked off by the crime scene tape so
13 that you could search that area?

14 A Yes.

15 Q And you indicated that you went there in the evening to begin
16 with and you conducted some interviews and investigation at that point
17 in time?

18 A Yeah.

19 Q And you did not find any bullets?

20 A Yes, we did, we found one bullet.

21 Q You found one, okay. And you came back the next day
22 because it was light and you wanted to examine the premises again to
23 see if there was any other bullets or any other evidence that you could
24 better find during the day time?

25 A Yes.

1 Q And another bullet projectile was recovered at that time?

2 A It was actually two.

3 Q Two more were.

4 A Yes.

5 Q Okay. And who found those?

6 A I located the first one and just by happenstance a gentleman
7 had been walking south on North Las Vegas Boulevard and he came up
8 to me he said are you looking for this and he has a bullet in his
9 possession. And from what I looked at, it seemed that it was the same
10 type of bullet, so the crime scene analyst who was there she asked him
11 where was it when you found it and she had him place it in the
12 approximate area where he found it and then it was recovered.

13 Q Okay. And when you located the bullet, did you mark that and
14 have the crime scene analyst photograph where it was found and --
15 before you picked it up?

16 A The one that I found, yes.

17 Q Yes, okay.

18 Now, in going through this -- so the only video surveillance
19 that you're looking at is coming from the Flavors business and out -- I'm
20 talking about the outside one, that -- it was out -- looking out towards this
21 vacant area?

22 A Yes.

23 Q Okay. Do you know if there was any audio -- or excuse me,
24 video surveillance that was around the back parking area?

25 A Not that I remember, no.

1 Q And I assume that other than just talking to the security guard
2 from Palms Mortuary, which is located up here off of Main Street that
3 you determined -- you attempted to determine whether or not there was
4 any video surveillance at that point in time.

5 A Yes.

6 Q And were there -- was there any?

7 A No.

8 Q During the course of the investigation, you indicated you had
9 an interrogation with Michael --

10 A Yes.

11 Q -- McNair?

12 Who was present during the time of that interrogation?

13 A Myself and Detective Todd Williams.

14 Q Was Todd Williams your partner at that point in time or was he
15 just assisting?

16 A He was assisting.

17 Q And after you did that, then you went through and you made
18 contact with him and you went through and you gathered certain pieces
19 of evidence. You gathered a red shirt that said Joe on it?

20 A Yes.

21 Q Okay. You gathered the clothing that Michael was wearing?

22 A Yes.

23 Q And did you gather any other clothing?

24 A We gathered a shoe that was on -- in the desert landscaping
25 of North Las Vegas Boulevard, which was the same shoe that the victim

1 was wearing. And I don't remember any other clothing that we took.

2 Q All right. Now during the course of the investigation, you
3 found out that the white Suburban --

4 A Yes.

5 Q -- belonged to Mitchell?

6 A Yes.

7 Q And was it -- it belonged to him or to his girlfriend?

8 A The Suburban was registered to his wife, Bianca Redding.

9 Q Okay. Was she a wife or a girlfriend, do you know?

10 A I believe she's wife.

11 Q And that registration you knew -- you were able to locate that
12 address?

13 A Yes.

14 Q And you went over to the address to talk with both Mitchell
15 and Bianca?

16 A Yes.

17 Q During the course of that time, did you find the white
18 Suburban?

19 A Yes.

20 Q Did you search the white Suburban?

21 A No, I did not.

22 Q Did you ask if you could search that white Suburban?

23 A No.

24 Q Didn't get a search warrant to search that white Suburban?

25 A No.

1 Q Did you search the residence of Mitchell?

2 A No.

3 Q And that was a -- I believe a small apartment up a flight of
4 stairs?

5 A I never entered the apartments, I don't know how big it was.

6 Q Okay. Did -- how did they know to come down to talk to you?

7 A We went and knocked on the front door.

8 Q Okay. So you knocked on the front door.

9 Was it in like a four-plex or an apartment area and you went
10 up the stairs and knocked on the door?

11 A Yes.

12 Q Okay. And then both of them came out to talk to you?

13 A Yes.

14 Q Okay. During the course of that you made no attempt to
15 search the apartment. Did you ask Mitchell whether or not he still had
16 the clothing that he was wearing that night?

17 A No, I did not.

18 Q Okay. So I assume that you did not gather it then?

19 A No.

20 Q Now, Mr. Razo, you made some reference to what he had told
21 you and then potentially said something a little bit different and then
22 changed his mind --

23 A Yes.

24 Q -- and he said something different?

25 A Yes.

1 Q You weren't present during the time that he testified in front of
2 the preliminary hearing, were you?

3 A No, I was not.

4 Q You were not present at the time that he testified here in the
5 courtroom?

6 A No.

7 Q So you don't what his testimony was and whether not --
8 whether or not it differed from what he told you and whether or not he
9 corrected himself?

10 A No, I do not.

11 Q In going through the evidence that you obtained, you were the
12 lead detective?

13 A Yes.

14 Q Okay. Then the lead detective has the -- assigns different
15 duties -- or different tasks to other individuals within the Las Vegas
16 Metropolitan Police Department, but -- I said that way too fast.

17 You make assignments and request to have items tested and
18 preserved?

19 A Yes.

20 Q And you work with the CSIs and in fact because you spent a
21 number of years, both on patrol and working as a detective, you'll assist
22 them in saying these are things that we want to preserve?

23 A Yes.

24 Q And you'll point out items of evidence or what may be
25 evidence and you'll try and preserve everything that you can that may be

1 of importance on the continued investigation and ultimately whether or
2 not there's a criminal case that is filed against somebody?

3 A Yes.

4 Q And does that pretty much encompass your understanding
5 or -- of your duties as a lead detective?

6 A Yes.

7 Q And that isn't say -- not to say that you won't work with your
8 partner because the two of you are coordinating together?

9 A Yes.

10 Q Okay. And going through this, you talked with Mitchell when --
11 and did you talk with him separate from him being there with Bianca or
12 did you talk with him while they were together?

13 A We separated them. They were talked to separately.

14 Q Okay. Were they both interviewed by you or did Bianca -- was
15 Bianca interviewed by somebody else?

16 A She was interviewed by somebody else.

17 Q Okay. Well the time that you were talking with Mitchell, did he
18 ever tell you that he had gone up and struck Mr. Phillips?

19 A No.

20 Q So if I was to suggest to you that he said that -- and testified
21 that he --

22 MS. BLUTH: Judge, I'm going to object as to what any other
23 witness testified to in trial.

24 THE COURT: I'll sustain the objection. You can rephrase the
25 question though.

1 MR. PIKE: Thanks.

2 BY MR. PIKE:

3 Q You -- during the course of your interview and then
4 ultimately -- well I guess it came close to being an interrogation of Mr.
5 Mitchell, you caught him in a lot of lies, didn't you?

6 A Yes, I did.

7 Q Okay. And part of the training that you have to interview and
8 interrogate people, you will let them talk and then if they're telling you
9 something that you know to be a lie, you'll call them on it?

10 A Yes.

11 Q Because you want to see if you can get them to change their
12 story or fess up to the fact that they're lying and doing -- and that's just
13 part of the interrogation technique that you use?

14 A Yes.

15 Q And it's a common interrogation technique?

16 A Yes, it is.

17 Q In fact, you as a detective have been trained presumably in a
18 number of different areas on how -- and theories on how to interview and
19 interrogate people?

20 A Yes.

21 Q Have you studied the Reid Method, for instance?

22 A Yes, I have.

23 Q Okay. And any other interrogation techniques that you have
24 studied?

25 A No.

1 Q During the course of this, sometimes you'll call them on the
2 lies and during the course of the interview with Mitchell sometimes you
3 get a little bit frustrated at the fact that they're lying to you over and over
4 and over again. Would that be fair?

5 A I wouldn't quite use the word frustrated.

6 Q Okay. It's -- you recognize that that was --

7 A Yes.

8 Q -- was going on?

9 And so in order to call him on that, did you tell him you were
10 tired of his deception sandwich?

11 A Yes.

12 Q Okay. Descriptive term. And it was just full of lies. That's
13 what you were suggesting, right?

14 A Yes.

15 Q Now, going -- and then -- I'm sorry if I'm jumping around a little
16 bit. You testified for a while, I'm trying to shorten it down so sometimes
17 I'll jump back and forth.

18 But by the time that you were there at the scene -- now we're
19 back on the evening and you're interviewing or interrogating Michael, he
20 was wearing a blue shirt? He was wearing the blue shirt that had his
21 name on it?

22 A During the actual interview?

23 Q Yes.

24 A No, at that time we had already taken his clothing.

25 Q Oh, okay. When you first came into contact with him, he was

1 wearing the blue shirt?

2 A Yes, he was.

3 Q Okay. And then you took -- you seized that from him at the
4 time that you arrested him?

5 A Yes.

6 Q So you have the red shirt or the -- excuse me, the maroon
7 shirt that says Joe on it?

8 A Yes.

9 Q Okay. Do you know Joe's last name?

10 A No.

11 Q Do you know if there's an employee there whose first name
12 was Joe and who worked for Golden Wheat?

13 A No.

14 Q Do you know -- but then by -- but you seized that shirt out of a
15 net?

16 A Yes.

17 Q Were there any other -- was there any other clothing inside that
18 netted area?

19 A No.

20 Q So you seized that, you seized the clothing from Mr. McNair,
21 and --

22 During the course of your investigation, you then ask that the
23 gun -- or the pistol that you found would be swabbed for DNA?

24 A Yes.

25 Q Did you observe the swabbing or did you just assign that to

1 the technician and then that technician did that?

2 A Yes. I wasn't present for when the firearm was swabbed.

3 Q Okay. So you don't -- you didn't instruct the technician to
4 swab individual parts of the gun and have those individual parts
5 preserved separately, such as well, I want you to swab any bullets that
6 may be in the magazine and then keep that separate; that's a function
7 you just left to the technician?

8 A Yes.

9 Q When you examined the gun, did you check and see if it was
10 still loaded? If there were any bullets inside of the magazine?

11 A Examined how?

12 Q Opened it up? Do anything to determine if there were still
13 bullets with -- in the clip that was within the magazine?

14 A Are you asking did I actually physically --

15 Q Yeah.

16 A -- see it?

17 No, I wasn't present for that.

18 Q Okay. So you had the DNA tested on that and you actually
19 gathered the DNA from -- the buccal swab from Mitchell Johnson?

20 A Yes.

21 Q Did you obtain any buccal swabs from anybody else?

22 A We obtained buccal swabs from Mitchell Johnson --

23 MS. BLUTH: Judge, I'm sorry. Can we approach?

24 THE COURT: Sure.

25 [Bench Conference Begins]

1 THE COURT: I know talked about this one earlier. You asked
2 him about third --

3 MR. PIKE: Yes.

4 THE COURT: A third person?

5 MS. BLUTH: So if you wouldn't mind just leading him through
6 it because I don't remember having a specific conversation with him
7 about [unintelligible] because he wasn't --

8 MR. PIKE: Oh, I'm not going ask --

9 MS. BLUTH: No --

10 MR. PIKE: Oh, but he may -- okay, I understand.

11 THE COURT: We're good.

12 MR. PIKE: Thanks.

13 MS. BLUTH: Thank you.

14 THE COURT: Thank you.

15 [Bench Conference Concludes]

16 BY MR. PIKE:

17 Q Okay. So it was you that obtained the buccal swab from
18 Mitchell Johnson and then you turned that over to the DNA lab so that
19 they -- or to -- a part of Metro's lab so that they'd have that to make
20 comparisons?

21 A Yes.

22 Q All right. You also -- did you impound any telephones?

23 A Yes.

24 Q Whose telephones did you obtain?

25 A One was Defendant's and there was another cell phone that

1 was found in the locker that he was going in and out of.

2 Q And on the Defendant's telephone, was that processed in any
3 way? Was the downloaded by Metro's Forensic Unit that deals with
4 downloading information off of cell phones and computers?

5 A No, it wasn't.

6 Q Had you requested that to be done, it would have been done?

7 A Yes.

8 Q Now, although you did not search the Suburban, you did
9 search the truck at the location?

10 A It was searched, yes.

11 Q It was searched. Who was it searched by?

12 A I believe Detective Kowalski.

13 Q Okay. Did you assist with that or did you in any way
14 personally search any of the contents of the truck?

15 A No, I did not.

16 Q Do you know if there was any alcohol that was found in that
17 truck?

18 A Not that I was made aware of, no.

19 Q Do you know exactly every area that was searched inside of
20 the truck?

21 A No.

22 Q When you interviewed Mitchell and Bianca, did you have a
23 CSA present with you at that time?

24 A No.

25 Q Did you take any photographs -- or let me ask -- before I ask

1 that question, let me ask another question. Did you have any recording
2 device, other than just the recording that -- device that you were using to
3 record the conversation with Mr. Mitchell?

4 A No, I don't believe so.

5 Q Did you have a camera with you?

6 A Yeah, the room that he was interviewed in is audio and video
7 recorded.

8 Q At the loc -- you indicated that you received the text, then you
9 went out. Did you -- do you have records or did you preserve the text
10 that you received?

11 A For the initial response?

12 Q Yeah.

13 A No.

14 MS. BLUTH: I apologize, I'm just going to object for clarity.
15 Are we talking about the initial response out to the scene on the --

16 MR. PIKE: Right.

17 MS. BLUTH: -- 14th? Oh, okay, thanks.

18 MR. PIKE: I'm sorry.

19 MS. BLUTH: That's okay.

20 BY MR. PIKE:

21 Q In going through and completing the investigation which is
22 then turned over to the District Attorney's Office, you -- did you make a
23 determination or did you request that the blue shirt that you impounded
24 from the body of Michael McNair be examined for any DNA?

25 A No.

1 Q Did the red shirt be impounded -- be impounded be tested for
2 any DNA?

3 A No.

4 Q Did you determine that Mitchell Johnson still had the shirt that
5 he was wearing on that evening?

6 A No.

7 Q Did you test the door on the white Suburban to determine if
8 the passenger side doors were unable to be opened because of the
9 damage to them?

10 A No, I did not.

11 Q During the interview with Mrs. McNair, she granted you access
12 to the house so you can search it?

13 A Yes.

14 Q Okay. You didn't need a search warrant and she was
15 cooperative?

16 A She gave consent, yes.

17 MR. PIKE: Okay. Court's indulgence.

18 Thank you. I was reminded by my Co-Counsel that I was
19 supposed to ask this question.

20 BY MR. PIKE:

21 Q So now did you go back and were you there when the red
22 backpack was searched?

23 A No.

24 Q Okay. But you were -- Defendant's Exhibit B that has been
25 admitted into evidence, you've seen this photograph before?

1 A Yes, I have.

2 Q Okay. And that would be your -- it would be your testimony
3 that this was the -- a red backpack that was located and booked into
4 evidence?

5 A Yes.

6 Q Okay. And then it would be pretty normal for whoever was
7 processing this or preparing it to go ahead and take the items outside of
8 that, lay them all out, and take photographs of them?

9 A Yes.

10 Q I'm showing what's been admitted into evidence as
11 Defendant's Exhibit D. You're familiar with what's contained in that
12 photograph?

13 A Yes.

14 Q And what's contained in that photograph?

15 A It appears a package of Ramen noodles, a piece of candy,
16 safety glasses, a title to a vehicle, and I believe the black items were
17 described as arm covers.

18 Q Okay. And arm covers for the wrist area or could --

19 A I don't know. When I read the reports, it just said arm covers.

20 Q And it's your understanding that these are the items that were
21 also removed from Defendant's Exhibit -- or excuse me, from the red
22 backpack which is contained in Defense Exhibit B?

23 A Yes.

24 Q Okay. And finally, there would be C, which would be a spoon
25 and something to maybe put that Ramen noodles in and eat it?

1 A Possibly, yes.

2 Q Okay. Thank you very much. I appreciate it, Detective.

3 THE COURT: Ms. Bluth.

4 **REDIRECT EXAMINATION**

5 BY MS. BLUTH:

6 Q So I just want to ask you a few follow-up questions if I could in
7 regards to Mr. Pike's questions, all right?

8 So you were asked the question whether you -- whether or not
9 you searched the vehicle of Mitchell Johnson and the house or
10 apartment of Mitchell Johnson, do you remember that question?

11 A Yes.

12 Q What is -- okay, in order to search something, you have to get
13 something to search it, right? Like you have to get a search warrant?

14 A Yes.

15 Q In order to get a search warrant, what do you have to
16 establish?

17 A In order to get a search warrant you have to establish
18 probable cause that the items that you're looking for would be inside that
19 vehicle.

20 Q Okay. At the time you have interviewed Mitchell Johnson on
21 the 19th, do you already have the gun in police possession?

22 A Yes, we do.

23 Q Okay. Do you have probable cause to search either Mr.
24 Johnson's vehicle or house?

25 MR. PIKE: Objection, Your Honor, that calls for a legal

1 opinion?

2 THE COURT: Well, you can ask him if it's in -- in his opinion,
3 did he have probable cause from a police perspective.

4 MS. BLUTH: Sure.

5 MR. PIKE: No objection to that question.

6 THE COURT: Okay. Thank you.

7 MS. BLUTH: Okay.

8 BY MS. BLUTH:

9 Q As you're your position as the lead homicide investigator in
10 this case, from your perspective did you believe that you had probable
11 cause to search those two things, being his vehicle and/or his house?

12 A No.

13 Q And why not?

14 A Because as we've already discussed the firearm in this case
15 had already been recovered and when the rounds in the magazine were
16 removed, the head stamps on those rounds also matched the head
17 stamps of the cartridge cases that were found out on the scene.

18 Q Now, you were also asked some questions in regards to did
19 you retain the clothing that Mitchell Johnson was wearing on the night of
20 the homicide, so on September 14th, and your answer was no?

21 A Right.

22 Q If you had retained that clothing, could GSR testing have been
23 done on those clothes?

24 A No.

25 Q And why is that?

1 A The GSR testing would not have been done on those clothing
2 for the main reasons is because it was outside of the four-hour time lock
3 that the CSAs use to recover those tests from said items.

4 Q Okay. You were asked some questions in regards to whether
5 the bullets found in the firearm or maybe they were also -- the question
6 was also asked for the cartridge cases at the sentence, but the question
7 was were those swabbed for DNA and fingerprinted or anything like that
8 and the answer was no, is that correct?

9 A Yes.

10 Q Does the Las Vegas Metropolitan Police Department do
11 forensic testing such as fingerprints or DNA on bullets or cartridge
12 cases?

13 A No, they do not.

14 Q You were asked questions in regards to the phones, whether
15 or not you did any forensic testing on the Defendant's phone. As -- did
16 you subpoena the phone records relating to Mr. McNair's telephone?

17 A Yes. What it is, I obtained a court order for Mr. McNair's
18 phone calls for -- from the night of, to about a week prior.

19 Q Okay. And in those records did you in fact see any
20 communication from the Defendant to Mitchell Johnson?

21 A Yes, I did.

22 Q And when was that contact made?

23 A The night of there was a phone call placed at about, I want to
24 say 9:17 p.m. and it lasted for about ten seconds.

25 Q And -- sorry, who was the originator of that call?

1 A Michael McNair.

2 Q Was there any other phone contact between the two that
3 night?

4 A Yes, I believe the other -- next phone call was at
5 approximately 9:41 p.m. and I believe that time it was Mitchell calling the
6 Defendant and I think that was about ten seconds in duration as well.

7 Q Before the night in question, on September 14th, when was the
8 last time the two had telephonic contact?

9 A Per the records that I had, the last telephone call was
10 sometime approximately on the 9th of September.

11 Q So five days earlier?

12 A Yes.

13 Q You were asked -- well let me ask you this, when you submit
14 for things to be tested such as for DNA testing or fingerprint analysis,
15 what is the point of requesting those types of things?

16 A The purpose of requesting that is to further the investigation
17 and obtain as much evidence as possible.

18 Q Okay. So when you're asked okay, did you do DNA testing on
19 that red -- on that burgundy shirt, do you remember being asked that by
20 Mr. Pike?

21 A Yes.

22 Q Why didn't you?

23 A I didn't request DNA on the shirt because in essence it didn't
24 have anything to do with the crime itself. The Defendant had changed
25 into that shirt or a shirt similar to that after the homicide occurred.

1 Q On the video, do you see the Defendant in that shirt?

2 A I --

3 Q Wearing that shirt, I guess I should say.

4 A Or I see the Defendant wearing a shirt -- a color shirt that's
5 similar to that.

6 Q To the burgundy shirt?

7 A Yes.

8 Q And on camera, if you follow the cameras then you can see
9 him utilizing that, is that right?

10 A Yes.

11 Q You were asked some questions in regards to the search by
12 Detective Kowalski on the Defendant's vehicle?

13 A Yes.

14 Q If items such as alcohol or cartridge cases or bullets, if those
15 things are found, is that information relayed to you as the lead
16 investigator?

17 A Yes.

18 Q And correct me if I'm wrong, I believe on direct examination
19 you testified that there was nothing of evidentiary value found within that
20 vehicle?

21 A Yes.

22 MS. BLUTH: Thank you so much. That concludes my
23 redirect, Your Honor.

24 THE COURT: Okay. Anything further, Randy?

25 MR. PIKE: Briefly.

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Q In going through and obtaining telephone records there -- it appears from the information that Bianca Redden gave you that she received a call from Mitchell on that evening. Do you recall that?

Q Well, in the video you see that the -- she gets out of her car, Suburban --

Q -- gets into the driver's side and then pulls out and pulls down street where presumably Mitchell joins her?

Q Okay. And so did you get the telephone number for Bianca Iden?

Q Okay. And do you recall what her telephone numbers may have been?

Q In the determining what items -- in determining whether or not
can search a car or a house, there's another way, you don't have to
a search warrant.

Q Just like Mrs. McNair said come on in, look through our house, any -- see anything that you want to. Look out for the kids' toys.

1 Then -- and she gave you that permission. Bianca or Mitchell could
2 have given you permission to go in and search?

3 A Could have, yes.

4 Q They could have said come on back, I'll give you the clothing
5 that I was wearing that night, right?

6 A Yes.

7 Q And at that point in time then you could -- it may have been
8 another item to determine whether or not he was wearing a long-sleeve
9 black shirt or the black shirt was a really a dark blue. That is a piece of
10 evidence that you could have obtained had they volunteered or had they
11 agreed to give it to you?

12 A Yes.

13 Q Okay. Did you ever ask for it?

14 A No.

15 Q Okay. And in going through and determining whether or not a
16 gunshot residue testing is to be done there are certain protocols; for
17 instance, as we've heard before, you won't do it after four hours?

18 A True.

19 Q Okay. And your detective vehicle, is that equipped with a
20 gunshot residue testing kit?

21 A No, it is not.

22 Q Who do you have to call to get one to come in?

23 A The crime scene analysts.

24 Q When do the crime scene analysts arrive at the scene?

25 A I am not sure when they arrive there, but I believe they were

1 there before we arrived.

2 Q Okay. They were there before you arrived and you arrived
3 within about an hour of the shooting?

4 A I believe I arrived somewhere around 11:20.

5 Q Okay. Now, at that point in time, you also wanted to make a
6 determination as to whether or not you can get a statement from the
7 deceased, not knowing whether -- well, that's a bad question.

8 Because by the time you get the call, you have knowledge that
9 he's deceased.

10 A Yes, we did.

11 Q Okay. But you do want to go in and find out if anybody that
12 was there before he passed away talked with him and heard anything
13 that he had to say or the question of about what happened, would that
14 be fair to say?

15 A Yes.

16 Q So you probably looked for any of the homeless people that
17 were around him that he may have had conversations with?

18 A Yes.

19 Q And you may have also contacted the first responders, the
20 police officers that came to the scene, along with the other first
21 responders, which would have been the ambulances that came to the
22 location and then transported Mr. Phillips to the hospital where he was
23 treated?

24 A Yes.

25 Q Do you recall which ambulance company had transported

1 him?

2 A Not offhand, no.

3 Q Do you remember the officers that had contact with Mr.
4 Phillips?

5 A No, I don't.

6 MR. PIKE: I have no further questions.

7 THE COURT: Anything further, Jacque?

8 MS. BLUTH: Nothing, Your Honor, thank you.

9 THE COURT: Anything from our jurors?
10 Yes.

11 [Bench Conference Begins]

12 THE COURT: I'm not sure what that means. I wouldn't let
13 him answer it anyway but I'm not sure what that even means.

14 MS. BLUTH: I don't know what that means. [Inaudible].

15 Well, it can't be answered anyway so I don't -- I mean, I don't
16 even under --

17 THE COURT: It's not appropriate to ask him that question. I
18 just wanted to figure out what it meant so you guys what the jurors --

19 MS. BLUTH: Could we at least --

20 THE COURT: -- [indiscernible].

21 MS. BLUTH: Could we ask her that?

22 THE COURT: What's that?

23 MS. BLUTH: Can we ask her?

24 THE COURT: No, because it wouldn't be appropriate to have
25 them say whether a witness --

1 MS. BLUTH: Well I know but I just want to know what the hell
2 she's talking about.

3 MR. PIKE: No, we can't really.

4 MS. BLUTH: Okay.

5 MR. PIKE: I have --

6 THE COURT: I mean, you guys agree? I'm assuming you
7 guys --

8 MR. PIKE: I have two questions --

9 THE COURT: Okay.

10 MR. PIKE: -- that I'd like to ask if I could.

11 THE COURT: For him?

12 MR. PIKE: Yeah.

13 THE COURT: Okay. So are you ready to do your reading of
14 Saldana?

15 MR. PIKE: Yes.

16 THE COURT: And so while we're up there -- and we'll do that
17 first. When we take our break I'll advise him of his right -- but if you got
18 the person ready, I'm going to do that before we take our lunch break --
19 [unintelligible] finding on the record but my understanding is you guys
20 are agreeing that --

21 MS. BLUTH: Yes.

22 THE COURT: -- Saldana is unavailable.

23 MS. BLUTH: We are.

24 THE COURT: That due diligence has been made to find him
25 and so his testimony is going to be admissible, correct?

1 MS. BLUTH: Yep.

2 THE COURT: Okay. All right.

3 [Bench Conference Concludes]

4 THE COURT: All right. Mr. Pike, you had a couple other
5 questions?

6 MR. PIKE: Yes, I do. Your Honor, I apologize.

7 **CONTINUED RECROSS-EXAMINATION**

8 BY MR. PIKE:

9 Q Now during the course of your investigation, you found that
10 Mitchell's telephone number was 702-628-0805?

11 A Yes.

12 Q And at the same time you found out that Bianca Redden's
13 telephone number was 702-472-5907? You could check your report.

14 A Okay.

15 And what was the number that --

16 Q Oh, I'm sorry, for Bianca Redden?

17 A Yes.

18 Q 702-472-5907?

19 A Yes.

20 Q Okay. And you indicated that you subpoenaed the records
21 from T-Mobile in relationship to that?

22 A Yes, for the Defendant's phone.

23 Q Okay. So just the Defendant's phone.

24 A Yes.

25 Q You did not obtain the records from those other two phones?

1 A No, I did not.

2 Q Okay. And the telephone number that you identified as being
3 associated with Michael McNair, what number was that?

4 A It was 702-501-8823.

5 Q Okay. So those were the records that you -- I'm sorry, what
6 was the number again?

7 A 702-501-8823.

8 Q Do you have a copy of the T-Mobile records with you?

9 A No, I don't.

10 Q Okay. You don't have that. Would you recognize them if I
11 showed them to you?

12 A Yes, I believe so.

13 Q Okay.

14 MR. PIKE: May I approach the witness, Your --

15 [Colloquy between Counsel]

16 MR. PIKE: Court's indulgence.

17 [Colloquy between Counsel]

18 MR. PIKE: May I approach the witness, Your Honor?

19 THE COURT: Yes.

20 BY MR. PIKE:

21 Q I'm showing what's been provided the Defense and it appears
22 to be information provided by T-Mobile. Is this the type of a spreadsheet
23 that you would have obtained from your subpoena?

24 A Yes.

25 Q And it's broken down by both the date and the time as to when

1 calls are made?

2 A Yes.

3 Q Okay. I would like you to look at the highlighted area here
4 which indicates it's from 20:59:24. And what time would that be?

5 A That would be -- 20:59 is 8:59 p.m.

6 Q Okay. And so it's military time up through 22:41:08?

7 A Yes.

8 Q Okay. And since you obtained only the records of Michael
9 McNair's telephone, during that period from 8:00 -- almost 9:00, up until
10 10:00 -- 10:41, you look at the calls that were outgoing and incoming?

11 A Yes.

12 Q Okay. Did you look through that and see if that matches either
13 of the two telephone numbers that you -- we were discussing and I wrote
14 them down over here so --

15 A From what I see none of them match Mitchell Johnson's
16 phone number. Yeah, I don't see any of that match Bianca's.

17 But the issue with the records as you're showing me those,
18 those are not -- the time that we get from T-Mobile, it's in UTC time, so
19 actually the times that are on there are seven hours ahead, so we have
20 to subtract seven hours from there.

21 Q Okay. Seven hours ahead and track back --

22 A Uh-huh.

23 Q -- to a period of time.

24 MR. PIKE: No further questions.

25 THE COURT: State, any further, Jacque?

1 MS. BLUTH: Yes.

2 **FURTHER REDIRECT EXAMINATION**

3 BY MS. BLUTH:

4 Q So the timeframe that Mr. Pike --

5 MS. BLUTH: I'm sorry, Mr. Pike, can I see those records, if
6 you wouldn't mind? Thank you.

7 BY MS. BLUTH:

8 Q So when cell records come, they come with a time on them,
9 right?

10 A Yes.

11 Q But explain what you're talking about, the UTC time and how it
12 relates to reading cell records?

13 A When you get the spreadsheet from telephone companies,
14 they put it in UTC time and unfortunately the acronym, it's escaping my
15 mind now. But what it has to do, it has to do with daylight savings time,
16 whether it be in the spring or the fall. So depending on what time of year
17 you are, you either subtract seven hours or eight hours from the records.
18 So the records that I was just shown, yes, it does say September 14th,
19 2017 at 8:00, but in actuality from those records, it's seven hours back.
20 So instead of it being, we'll say 8:00 in the evening, seven hours would
21 be 1:00 in the afternoon.

22 Q Okay. So if we look at the time and then subtract those seven
23 hours --

24 A Yes.

25 Q -- so we don't look at the actual time because it's UTC, we

1 have to subtract seven hours --

2 A Yes.

3 Q -- and that is where the two numbers that you -- the two phone
4 calls between the Defendant and Mitchell Johnson, that would be in UTC
5 time. We would be looking at seven hours forward --

6 A Yes, if the phone --

7 Q -- behind?

8 A -- call was placed at 9:17, actually on the records I believe it
9 would be on the 15th at approximately 4:17 in the morning.

10 Q Okay. And if I approached with these, would you be able to
11 find that?

12 A Yes.

13 Q Okay.

14 MS. BLUTH: And I'm approaching with, again, Judge, the
15 T-Mobile records that Mr. Pike had given to the detective.

16 THE COURT: Okay.

17 BY MS. BLUTH:

18 A It's right here at the top of the page here,

19 Q Could you just read what time it says, please?

20 A For the phone call on September 15th, 2017 at 04:17 hours,
21 which like I said is seven hours ahead so that'd be 9:17 p.m. on the 14th,
22 there was a ten-second outgoing call from the Defendant to Mitchell
23 Johnson.

24 Q Okay. And then after that, is there a phone call from Mitchell
25 to the Defendant?

1 A Yes. I believe that was at 9:41 hours, there's an incoming
2 from Mitchell Johnson to the Defendant.

3 Q Thank you.

4 MS. BLUTH: Nothing further, Your Honor.

5 THE COURT: Mr. Pike, anything -- okay.

6 MR. PIKE: Thank you.

7 MS. BLUTH: You're welcome.

8 **FURTHER RECROSS-EXAMINATION**

9 BY MR. PIKE:

10 Q Okay. And so a ten-second call, is that from the time that it
11 engages it from the time that the call is placed?

12 A I'm not 100 percent sure when the actual duration begins.

13 Q And you also have the ability to subpoena in any text
14 messages that may have occurred between those two lines?

15 A The issue that you run into with text messages is the phone
16 companies only keep text messages for a certain amount of time and
17 usually it's a short amount of time.

18 Q About how long do T-Mobile keep them?

19 A Offhand, I don't remember.

20 Q Okay. So you have that ability, but you don't remember
21 whether it was within the timeframe? Or you just didn't even do it at all?

22 A No, when we looked at the records, I believe there's only one
23 text message on those records during that time and it doesn't -- it's not a
24 text message between the Defendant and Mitchell Johnson.

25 Q And there's no recording that was obtained as -- and that's not

1 part of what is recoverable during a telephone conversation unless it's
2 being recorded by somebody?

3 A What type of recording are you -- a voice recording.

4 Q Okay. Let me restate the question. This just says a call is
5 attempted or connected for whatever amount of time and -- but there is
6 nothing to indicate what the contents of that telephone conversation
7 was?

8 A No.

9 Q Okay.

10 MR. PIKE: Nothing further.

11 THE COURT: Ms. Bluth, anything?

12 MS. BLUTH: No, Your Honor.

13 THE COURT: All right. Detective, you are excused. Thank
14 you very much for your time. I appreciate it the last couple of days.

15 THE WITNESS: You're welcome.

16 THE COURT: State have any further witnesses in case in
17 chief?

18 MS. BLUTH: No, Your Honor. The State would rest at this
19 time. I haven't had the opportunity to go through all of the exhibits. If I
20 could just have the lunch --

21 THE COURT: Yeah.

22 MS. BLUTH: -- period to be able to do that.

23 THE COURT: We'll do that when we take our lunch break.

24 MS. BLUTH: Thank you.

25 THE COURT: So just subject to making sure all the exhibits

1 are admitted there, you all rest your case in chief?

2 MS. BLUTH: Yes.

3 THE COURT: All right. And then before we take our lunch
4 break, moving to the Defense case, you all wanted to read in the
5 testimony, correct, of Mr. Saldana?

6 MR. PIKE: That is correct, Your Honor.

7 THE COURT: So, Ladies and Gentlemen, I believe based on
8 the best efforts and due diligence of both sides, Mr. Saldana has not
9 been able to be located. He testified at the preliminary hearing, which is
10 a lower court proceeding in this case. That testimony is given under
11 oath so you can accept that testimony as if it's given here in court.

12 MR. PIKE: Thank you.

13 THE COURT: Okay. Who's going to assist us?

14 MR. PIKE: Jonathan Kendall from my office.

15 May I approach the bench?

16 THE COURT: You may.

17 He doesn't need to be sworn in, he's just reading the
18 testimony. But if you could just state your full name for the record,
19 please.

20 MR. PIKE: I brought you a copy.

21 MR. KENDALL: Jonathan Kendall.

22 THE COURT: And how do you spell your name, Jonathan.

23 MR. KENDALL: J-O-N-A-T-H-A-N.

24 THE COURT: Okay. Last name?

25 MR. KENDALL: K-E-N-D-A-L-L.

1 THE COURT: Okay. You have a copy of the testimony there
2 for you of Kenneth Saldana, correct?

3 MR. KENDALL: I do.

4 THE COURT: All right. Mr. Pike, you can go ahead.

5 MR. PIKE: Your Honor, Jonathan Kendall is employed with
6 the Clark County Special Public Defender's Office as one of our
7 investigators.

8 THE COURT: Okay.

9 MS. BLUTH: So, Your Honor, at this time I'm going to read
10 into the record my questions at the preliminary hearing.

11 THE COURT: Okay.

12 MS. BLUTH: Good aft -- I'm --

13 THE COURT: I'm sorry, before you start with the questions.
14 Just for the record, Mr. Saldana at that time was asked to spell his name
15 as well, which he spelled K-E-N-N-E-T-H; last name, S-A-L-D-A-N-A.

16 Okay, Jacque, you can go ahead.

17 **[THE PRELIMINARY HEARING TESTIMONY OF**
18 **KENNETH SALDANA WAS READ INTO THE RECORD]**

19 THE COURT: All right. Mr. Kendall, thank you very much for
20 your assistance, I appreciate it.

21 Can you guys approach the bench?

22 [Bench Conference Begins]

23 THE COURT: Is he going to testify?

24 MR. PIKE: What?

25 THE COURT: Is he going to testify?

1 MR. PIKE: No.

2 THE COURT: Okay. Are you going to have any rebuttal
3 witnesses?

4 MS. BLUTH: No.

5 THE COURT: No, okay. So we'll take a quick break, I'll
6 admonish him and then I'm going to get him back in so that you guys
7 can all rest and then we'll send them out to lunch.

8 MS. BLUTH: Sounds good.

9 [Bench Conference Concludes]

10 THE COURT: Okay, folks, we need to take a quick break.
11 We're not taking our lunch break just yet, but I need to take a break for
12 about ten minutes. So during the recess you're admonished not to talk
13 or converse among yourselves or with anyone else on any subject
14 connected with this trial. Or read or watch or listen to any report of or
15 commentary on the trial by any medium of information including, without
16 limitation, newspapers, television, the internet, or radio. Or form or
17 express an opinion on any subject connected with the trial until the case
18 is finally submitted to you. No legal or factual research or investigation
19 or recreation of testimony on your own.

20 Thank you very much.

21 THE MARSHAL: Rise for the jurors.

22 [Outside the presence of the jury]

23 THE COURT: All right. You all can be seated. Okay. So
24 there was a couple things that I needed to go through with you, Mr.
25 McNair. And I know you've had conversations with your attorneys about

1 this already but it's just making your record of things related to your right
2 to testify. That you understand that under the Constitution of the United
3 States and under the Constitution of the State of Nevada, nobody can
4 compel you to be a witness.

5 THE DEFENDANT: Yes.

6 THE COURT: That means you and you alone, on the advice
7 and counsel of your attorneys get to decide whether you want to testify
8 but your attorneys cannot make you testify, the State cannot call you as
9 a witness and make you testify. You understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: You have the right, if you want to, to give up
12 your right to remain silent and to take the witness stand and testify. But
13 if you do so, you understand that not only will your attorneys be allowed
14 to question you, but the State's attorneys would be allowed to question
15 you as well?

16 THE DEFENDANT: Yes.

17 THE COURT: And then thereafter, anything that you say
18 during testimony, it would be available to the attorneys to make comment
19 on in their closing arguments, just like any other witness?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. If you choose not to testify, then I will
22 give the jury a written jury instruction, which we -- I think you were -- well
23 you were here last night, we were discussing it but they didn't have the
24 instruction sitting in front of us. But it is an instruction that tells the
25 members of the jury specifically that: It is a constitutional right of a

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

6 You understand that as well?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Finally, if you decide that you wanted to testify,
9 you have to be advised that if you have felony convictions and more
10 than ten years has not elapsed from the date of conviction or the date
11 you were released from incarceration, or the date you were released
12 from parole or probation, whichever is the most recent time, if your
13 convictions fall within those time periods, then the attorneys would be
14 allowed to ask you questions about whether you've been convicted of a
15 felony or felonies, they could ask you what those felonies were, and
16 when did they occur. Cannot go into the details of those other felony
17 convictions, unless that gets opened up in some other way, though. You
18 understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And like I said you guys can sit down. It's
21 okay.

22 My understanding is from the discussions at the bench that it's
23 Mr. McNair's decision not testify, is that correct?

24 THE DEFENDANT: That is correct, Your Honor.

25 THE COURT: Okay. And that the State does not intend on

1 calling any witnesses in rebuttal, correct?

2 MS. BLUTH: Correct.

3 THE COURT: Okay. Then we will get our jurors back in, I'll
4 allow you both to rest your cases, subject to exhibits on both sides. You
5 can figure that out.

6 [Pause in proceedings]

7 [In the presence of the jury]

8 THE MARSHAL: Rise for the jurors.

9 THE COURT: All right. You all can be seated.

10 We will be back on the record. Mr. McNair is present with his
11 attorneys, State's attorneys are present, jurors are present. So Mr. Pike,
12 does the Defense have any other witnesses to call in case in chief?

13 MR. PIKE: No, Your Honor, the Defense rests.

14 THE COURT: All right. And is the State going to call any
15 witnesses in rebuttal?

16 MS. BLUTH: No, Your Honor, but the State and the Defense
17 are stipulating to the admission of State's Proposed 129.

18 THE COURT: Okay.

19 MS. BLUTH: And just so the Court understands, there are 14
20 CDs --

21 THE COURT: Okay.

22 MS. BLUTH: -- as part of this exhibit, which is every camera
23 angle during the time period to 12:00 to 1:00, in case the jury wants to
24 watch each camera for the entire hour.

25 THE COURT: Okay. And then the other one that contains the

1 totality of the video is still Number 1, right?

2 MS. BLUTH: There are two. There is State's 1 and then I
3 believe 125.

4 THE COURT: Okay.

5 MS. BLUTH: And then the last thing is, is when we were just
6 reading in Mr. Saldana's preliminary hearing testimony we were talking
7 about specific times --

8 THE COURT: Okay.

9 MS. BLUTH: -- though can be -- those times are the time
10 that's in the upper right-hand and they will correspond with State's 1 and
11 State's 125.

12 THE COURT: Okay.

13 MR. PIKE: That is correct, Your Honor.

14 THE COURT: Okay. So, folks, both sides have rested the
15 presentation of witnesses and evidence, save and except all that you
16 guys over the lunch hour make sure all the exhibits have been
17 introduced. So, we're going to get ready for closing arguments. I'm
18 going to send you to lunch first and then we'll get copies of all the jury
19 instructions made and when you come back we will move into closing
20 arguments, okay?

21 So, again, during the recess you're admonished not to talk or
22 converse among yourselves or with anyone else on any subject
23 connected with this trial. Or read or watch or listen to any report of or
24 commentary on the trial by any medium of information including, without
25 limitation, newspapers, television, the internet, and radio. Or form or

1 express any opinion on any subject connected with the case until it is
2 submitted to you. No legal or factual research or investigation on your
3 own.

4 It's about 12:40, so we'll plan on starting back up at 1:45,
5 okay? Thank you very much.

6 THE MARSHAL: Rise for the jurors.

7 [Outside the presence of the jury]

8 THE COURT: Okay. You all can be seated.

9 So I do not believe based on anything that was presented
10 from an evidentiary standpoint today that I would make any changes to
11 the jury instructions. I don't know if you all want to make any further
12 record of that?

13 MR. PIKE: No, Your Honor, I'd agree with that. We did settle
14 the jury instructions on the record last evening.

15 THE COURT: Correct.

16 MR. PIKE: And Michael McNair was present during that time.

17 THE COURT: Okay.

18 MR. PIKE: I -- the Defense had submitted a packet of our
19 proposed jury instructions, which included voluntary manslaughter and
20 accessory after the fact.

21 THE COURT: Correct.

22 MR. PIKE: The Court ruled on that --

23 THE COURT: Do you want that entire packet marked as a
24 court exhibit?

25 MR. PIKE: I've already done that --

1 THE COURT: Okay.

2 MR. PIKE: -- it's been file -- actually filed with -- as a pleading
3 because --

4 THE COURT: Okay.

5 MR. PIKE: -- it makes it easier to reference it in the appeal.

6 THE COURT: Okay.

7 MR. PIKE: So I've done that.

8 THE COURT: All right. And I'll just tell you that what -- the
9 packet that got e-mailed out, all the corrections were essentially made.
10 There were two -- a couple of little things that I changed at the bottom of
11 the information instruction, I think that you guys forgot to just include the
12 little parenthesis S in the parentheses after the word offense, since there
13 were multiple --

14 MS. BLUTH: Yeah, we did.

15 THE COURT: -- charges. And I took out -- it said -- it still said
16 should not control your verdict as any other Defendant, since there is no
17 other charge or on trial, it just says any other offense charged.

18 And then I also on the verdict form, and I missed this last
19 night. I don't like it when it says with use of deadly weapon/without use
20 of deadly weapon. I just take out without use of deadly weapon.

21 MS. BLUTH: Okay.

22 THE COURT: So that it just goes through first-degree murder
23 with use of a deadly weapon or first-degree murder.

24 MS. BLUTH: Okay.

25 THE COURT: And then also I took out AKAs. There was a --

1 it listed the AKA on the first page and on the verdict form. I just always
2 kind of leave AKAs off when it goes to the jury.

3 MS. BLUTH: Sounds good.

4 THE COURT: Other than that we have the 42 that we went
5 through last night. I'll get copies of those made for you all, so you'll have
6 them when you come back, okay?

7 MR. PIKE: Thank you very much, Your Honor.

8 THE COURT: See you back at 1:45, guys, thank you.

9 [Recess taken at 12:41 p.m.]

10 [Trial resumed at 1:58 p.m.]

11 [In the presence of the jury]

12 THE MARSHAL: Rise for the jurors.

13 THE COURT: You all can be seated, thank you.

14 We'll be back on the record. Mr. McNair's present with his
15 attorney, the State's attorneys are present, the jurors are present. We
16 are going to move into the closing argument phase of our trial. Before
17 we do that, as you'll recall from the jury selection process I indicated that
18 I needed to read to you the jury questions.

19 So, first question, does everybody have a copy in your chair?

20 Yes, okay.

21 So again, yeah, I got to read them to you and I know it's not
22 real pleasant to be read to so we give you a copy of the instructions so --
23 well maybe some of you think it is very pleasant to be read to, I don't
24 know.

25 We give you a copy of the instructions so that you can read

1 along. I think it's a lot easier to start understanding and digesting a little
2 bit if you can see them while I'm reading them to you. You'll get to take
3 your individual packet with you when you go back to deliberate. So to
4 the extent you want to write any notes on the packet while I'm reading
5 them to you or while the attorneys are making arguments, feel free to do
6 so.

7 I always suggest to folks that you might write your name or
8 your initials or something on the front of your packet just so your packet
9 doesn't get messed up with somebody else's back in the deliberation
10 room.

11 And I will read through these as quick as I can so we can get
12 you on to the arguments from the attorneys.

13 [The Court read the instructions to the jury]

14 THE COURT: So thank you all for your patience with me.
15 You each probably have attached to your packet a copy of the verdict
16 form. We'll get an original copy to fill out when you go back. The verdict
17 form is pretty self-explanatory. The only thing that I'll point out to you is
18 that you only check one box under each of the two counts. The
19 attorneys may talk to you more about the verdict form in their closing
20 arguments.

21 Again, thank you. And I will turn it over to the State for closing
22 argument. Mr. Rogan.

23 MR. ROGAN: Thank the Court, thank Counsel.

24 ...

25 ...

1 **CLOSING ARGUMENT**

2 BY MR. ROGAN:

3 Ladies and Gentlemen of the jury, in the old days before there
4 were fingerprints and DNA and forensic examinations, crime scene
5 analysts, ballistics testing, jurors like yourself relied on certain
6 information, like eyewitness identification, the Defendant's behavior
7 before and after a crime was committed. You asked questions like did
8 the Defendant have a motive to kill the victim, did the Defendant have
9 the means to kill the victim, meaning did the Defendant have the weapon
10 that was used to kill someone, and did the Defendant have the
11 opportunity to kill the victim. That means was there a moment in time
12 where the two were together that the death resulted at that time?

13 Now in this day and age, of course we have all of those things,
14 like forensic evidence and ballistics and DNA that aids us in our
15 investigation and helps us sometimes to determine behavior, motive,
16 means, opportunity. But in your deliberations, I think that you'll find that
17 what you'll be discussing is not perhaps DNA or ballistics, but the
18 testimony. And you'll be discussing the Defendant's behavior before
19 and after that crime. And you'll be thinking about motive, and means,
20 and opportunity.

21 And I think when you digest the eyewitness testimony, and
22 you think about how the Defendant behaved on that video, and what he
23 said to the police officers who were interviewing him, and of course, the
24 motive, means, and opportunity, you'll find that there's only one person
25 that ever had the motive, means, and the opportunity to kill Gordon

1 Phillips and that person, the Defendant, Michael McNair.

2 If you remember, the Defense attorneys opened this case
3 insinuating and suggesting that the Defendant only went across the
4 street North Las Vegas Boulevard with pure motives. He only went over
5 there because he was protecting Flavors employees or Unified
6 Containers employees. I'll use those interchangeably.

7 He only went over there because he thought there was a
8 crazy homeless man, Gordon Phillips, and he just wanted to 86,
9 meaning forbid Gordon from coming back on the property. Of course,
10 you didn't hear any evidence of that during the trial, did you? Nothing
11 was said about that by any of the witnesses.

12 So I suggest to you that the motive that Mike McNair had to go
13 across the street was not a pure motive, it was not out of kind
14 heartedness; it was to go over there and hurt Gordon Phillips. And how
15 do we know that? 12:17, I think it's Camera 7, you see Michael McNair
16 before the murder pointing a firearm in the direction of where Gordon
17 Phillips is standing outside the frame of that camera. On the other side
18 of the fence on Searles.

19 There's a lot of argument during the testimony about whether
20 that is a gun, but now it's in your court, you get to look at that video
21 yourself and I suggest that you do. This is just a still shot in this
22 PowerPoint closing. But if you look at that video, you'll actually see
23 Michael McNair come out of that door with Romero and he's pointing
24 initially and you'll see that his arm is crooked as he's pointing.

25 And then he puts his arm down and the next thing you know

1 he flips his arm up with that gun and it is extended, that elbow is locked.
2 And that movement, as well as this photograph, clearly indicate that in
3 his hand is a gun. I suggest to you that that is indisputable. Indisputable
4 despite the fact of what Ramiro Romero said. And think about that -- I
5 mean, I suggest you take Mr. Romero's testimony with a grain of salt
6 considering how he acted on the stand.

7 So, knowing this and seeing that gun, do you think that
8 Michael McNair's motive for going across the street was to 86 Gordon
9 Phillips or something worse?

10 So let's talk a little bit more about motive. The instructions tell
11 you that the State isn't required to prove a motive but in this case, we do
12 have it, right? We know what it is. So you can consider that evidence of
13 motive or lack of motive as a circumstance in this case. You're also
14 instructed that you can determine a person's state of mind, that is what
15 they're thinking, based upon the evidence that you know.

16 Now, what that means is essentially this. You're not required
17 to be mind readers. At certain points you're going to be required to
18 figure out what the Defendant's state of mind was when he did certain
19 things. But you know that we can't get into their brain, you have to look
20 at all the facts and circumstances, all the evidence, how he behaved,
21 what he said, what other people were doing around him to make that
22 determination. And that's all this instruction says. And what I mean by
23 this is look, if we're trying to determine what his motive is, we can't get
24 inside his brain, so we have to look at how he acted and he did during
25 that approximately hour-long or 45-minute long video that you have.

1 So we know that Michael McNair is the shooter. Or you
2 should know that by now. McNair has the motive to commit the crime.
3 He's the one that has the problem with Gordon, no one else. He's the
4 one that recruits Ramiro to go outside. He's the one that points that
5 firearm at Gordon. He's the one that opens the gate so that he and
6 Ramiro, who at this point is so hyped up and ready to fight, they follow
7 Gordon across the street in order to fight.

8 McNair also doesn't call security. He also tells Gordon, and
9 this is through the testimony of Bret, Bret Lesh, that we'll be back
10 because if you remember there's two times that he goes over there. The
11 first time with Ramiro, then he returns the second time with his brother.
12 And Bret tells us the first time it's the tall man in the blue shirt, the
13 Defendant, that says we'll be back.

14 And of course Anthony Razo, when he testified, he told you
15 that when he was standing there and hearing this argument and then
16 saw the Defendant, the man -- the tall man in the blue shirt, walk back
17 across the street, he initially said to the police I saw a gun in his hand,
18 then later backtracked and said well, based upon his demeanor I
19 assumed he had a gun. But he got so scared when the Defendant
20 started walking across, down Searles towards Las Vegas Boulevard that
21 he packed up his stuff and he started walking north on North Las Vegas
22 Boulevard because he knew something bad was going to happen.

23 Who has the motive to hurt Gordon? This is what the
24 evidence discloses to you. And from all of this evidence you can
25 determine that Michael McNair is the only one that has the motive.

1 Ramiro has not motive. Ramiro's inside when the initial argument takes
2 place. Ramiro is doing his job while Mike's outside playing loud music
3 and disturbing the homeless folks that are trying to sleep or rest or do
4 whatever it is they were doing over there.

5 And Ramiro only becomes involved when Mike McNair, after
6 he does his donuts and parks his truck across three parking spaces on
7 the southside of that building, runs inside and calls Ramiro over to him.
8 And you see Ramiro run up to where Mike McNair is and they
9 immediately go outside where they engage in a verbal altercation with
10 Gordon who is outside the frame of the video and when Mike McNair
11 points that firearm. It's then that you see Ramiro get agitated and ready
12 to fight, only when Mike McNair gets involved. So you can imagine what
13 that conversation between McNair and Ramiro was about.

14 And Mitchell Johnson, he also doesn't have a motive. He
15 doesn't work at Unified Container anymore. He had been fired for
16 tardiness some time before that. And he only shows up that night,
17 according to his testimony and Bianca's testimony, to get 10 bucks so he
18 could go buy some weed. That's it. And you see how immediately
19 Mitchell Johnson gets out of the Suburban and runs to the gate and then
20 the two of them walk across North Las Vegas Boulevard where
21 unfortunately poor Gordon Phillips is murdered shortly thereafter.

22 But what motive does Mitchell Johnson have to shoot
23 someone eight times within seconds of crossing North Las Vegas
24 Boulevard. Think about that. Think about what it would take for
25 someone that just pulls up, crosses the street, and about 30 seconds

1 after arriving, is given a gun, and shoots and murders someone by
2 shooting them eight times. Don't you think that that person would have
3 some huge motive to do that? But there's no evidence that Mitchell
4 Johnson had a motive. The only person that had a motive to hurt
5 Gordon is Michael McNair.

6 So let's talk about that gun that was used to kill Gordon.
7 Remember the gun that was -- the pictures that you saw and all those
8 casings and the bullets, they were forensically examined. And the gun
9 that was recovered in Mr. McNair's backpack that had been tossed on
10 that mezzanine in the Unified Container building that was forensically
11 examined. And the bullets and the casings that were found at the crime
12 scene, they matched that gun. And you heard the forensic examiner
13 testify that it's his opinion that those bullets and those casings came
14 from Mr. McNair's gun.

15 But Mr. McNair -- there is more evidence that Mr. McNair is
16 the one that had the means to kill Gordon the entire time and that he
17 never handed that gun to anyone else. And the first piece of evidence is
18 that that gun was legally owned by Mr. McNair's wife's cousin, Demar
19 House. That relationship is there, so you can infer using your common
20 sense how Mr. McNair first got this gun; from his wife's cousin. Now we
21 don't know the circumstances of how that came and that's not your
22 concern but certainly the fact that they're closely related can lead you to
23 the conclusion that Demar House gave that gun to Michael McNair.

24 Also, Michael McNair has that gun immediately before and
25 after the murder. As I showed you before, 9:17 he's pointing that firearm

1 directly at Gordon Phillips. And then later, within 90 seconds of the
2 murder, you see Michael McNair showing that firearm to Ramiro Romero
3 and you see the firearm here in Mr. McNair's right hand at
4 approximately, I think it's 9:26.

5 Anthony Razo, as I mentioned before also initially told the
6 police that he had -- that he saw the man with a gun. And also, you
7 state on the video that Mike McNair easily conceals that firearm in his
8 red backpack that he then throws or somehow deposits on that
9 mezzanine level in the Unified Container building.

10 Here's that backpack, we know it's Mike McNair's backpack
11 because in there is a magazine and although that magazine is
12 addressed to someone name Precious Winkler, that's Mike McNair's
13 address.

14 And of course, most importantly, the DNA on that gun. Now I
15 didn't get a lot of what the DNA analyst said, it sometimes can be very
16 confusing. Most people have this understanding that DNA is quite
17 simple, it's not. But the important thing that I got from that DNA analyst
18 is this, 93 percent of the DNA that was found on that gun belonged to
19 Michael McNair, nobody else.

20 And of course, her opinion was also look, there's me else's
21 DNA on this as well, at least one person. But there's not enough of it for
22 me to make a conclusion about whose it is. I can't tell you if it's Mitchell
23 Johnson's, I can't tell you if it's Gordon Phillips.

24 Now think about that for a second. She compared the DNA
25 that was taken from that gun to our victim, Gordon Phillips, who you

1 know or should know from the evidence never touched that firearm. The
2 only time that firearm ever came close to Gordon Phillips was when the
3 bullets were coursing through his body. Those bullets certainly have
4 Gordon's DNA all over it, but that firearm, there was no contact wound
5 you heard from the coroner. It never touched Gordon, but the DNA
6 analyst says I can't even exclude him.

7 So the reliability of that remaining 7 percent, we don't know
8 who's it is. It could be in fact Demar House's DNA, the actual owner of
9 the gun, couldn't it?

10 And finally, we know that Michael McNair had the opportunity
11 to shoot and kill Gordon Phillips. We know that's Mike McNair in the
12 video crossing the street, don't we? We had Mitchell Johnson testify to
13 that. You could follow Mike McNair through Unified Container as he
14 crossed the street, so there's no doubt really that that's him on the video
15 crossing the street with Mitchell Johnson at the -- just before Gordon
16 Phillips is murdered. And of course just after he is murdered, coming
17 back.

18 So Michael McNair is the only person that has the motive, the
19 means, and the opportunity. And I want you to think about this too. That
20 gun that was used to murder Gordon Phillips, that gun you only see in
21 the possession of Mike McNair, right? No one else in that video -- you
22 never seen anyone else with that gun at all.

23 If you look at the timing in that video as well, from the time that
24 Mike McNair and Mitchell Johnson crossed North Las Vegas Boulevard,
25 to the time that they return is 58 seconds. 58 seconds. And during that

1 58 seconds, they cross the street, Mitchell Johnson, according to his
2 testimony punches Gordon. There's words said by Gordon. Something
3 to the effect of let's leave this alone. And then the Defendant pulls out
4 and shoots eight times and then they cross back over the street. All of
5 that happens in 58 seconds.

6 And if you look at that video, I don't think that you'll ever see --

7 MR. PIKE: Objection, Your Honor.

8 THE COURT: I'll sustain the objection as to the phrase, I
9 think.

10 MR. PIKE: Thank you.

11 MR. ROGAN: Okay. I'll rephrase.

12 BY MR. ROGAN:

13 If you look at that video you will see there's never an
14 opportunity, there's never a moment where there's a hand-to-hand
15 transaction between Mike McNair and Mitchell Johnson, where you
16 could see a gun being exchanged; either before or after. And if you're
17 going to believe what the Defendant is going to argue that Mitchell
18 Johnson is the shooter of this man, you'd want to see that, right? You'd
19 want some of the evidence --

20 MR. PIKE: Objection, Your Honor.

21 THE COURT: Well, I'll sustain the objection if --

22 MR. PIKE: Move that it be stricken.

23 THE COURT: Okay. As to like a kind of burden shifting.

24 So --

25 MR. ROGAN: That's fine. I'll rephrase.

1 THE COURT: Yeah, I know. So for the record, Ladies and
2 Gentlemen, the Defense has no burden in the case. I just think Mr.
3 Rogan misspoke, so please rephrase that.

4 BY MR. ROGAN:

5 There's no evidence, whatsoever, of any hand-to-hand
6 transaction where that gun was given to Mitchell Johnson so you'd have
7 to presume that that gun -- if you're going to believe the Defense story,
8 that that gun was given to Mitchell Johnson during that 58-second time
9 period. So think about that for a second as well when you're
10 deliberating. Is it --

11 MR. PIKE: Objection, Your Honor, he can't identify we -- he
12 can say the jury's, but to inject himself into the jury --

13 THE COURT: I didn't hear the term we. If that was said, I'll
14 sustain the objection. I thought the phrase was just think about that
15 when you're deliberating.

16 You can go ahead.

17 MR. ROGAN: Thank you.

18 BY MR. ROGAN:

19 So let's turn now as well to the witnesses. You know, of
20 course, as you probably all know from your common experience in life,
21 you can have something happen in this courtroom and there's probably
22 what 25 people in here right now and you might have five different
23 versions of what took place and that's because people are fallible in their
24 observations.

25 People sometimes aren't looking at something directly when it

1 happens or they're distracted by a noise. And so you're going to have in
2 any situation inconsistencies. Does that mean people aren't telling the
3 truth? Perhaps. But most of the time and I think -- most of the time and
4 perhaps with these witnesses as well, their testimony was a bit
5 inconsistent because they had different vantage points or they were in a
6 position where there was a loud noise say from traffic where they
7 couldn't hear what another witnesses had ample opportunity to hear
8 because of their positioning.

9 Does that mean that they're not telling the truth? Does that
10 mean that you can't glean from their testimony what took place? No, of
11 course not. You have to take into the consideration their difficulties, their
12 handicaps, in observing and hearing what took place. But it doesn't
13 mean you disregard their testimony entirely. And so with that being said,
14 let's talk about how a witness testimony indicates that Mike McNair is
15 that shooter.

16 Anthony Razo, he says I see -- even though he never actually
17 saw the shooting, he describes what he sees beforehand during that
18 argument. He says there is a black male, 6 foot/6-foot-2, he later then
19 says perhaps it's even 5-foot-10, but he's tall, he's skinny, and he's
20 lanky. He looked bald. And if you look at the picture of Mike McNair that
21 was taken that evening, you see he's wearing that do-rag, a black do-rag
22 that blends into the skin. And so if Anthony Razo is some distance
23 away, as he said he was, perhaps that do-rag made him look bald.

24 But doesn't Anthony Razo's description of the person that he
25 saw that night in the argument before the shooting match the

1 Defendant's appearance that evening? Of course, it does.

2 MR. PIKE: Objection, vouching.

3 THE COURT: Well, overruled.

4 BY MR. ROGAN:

5 And what about Joshua Brennan? Joshua Brennan is the
6 security guard at Palm Mortuary. So he's up on that hill. You
7 remembered the photograph, the overhead, there's the alley of trees,
8 palm trees, he's up in that direction, so he's some distance away. He
9 says I see a black man, 6-foot-1, he's wearing a blue shirt and jeans.
10 Again, matches the description of the Defendant.

11 Next, Bret Lesh testifies that he's 75 to 100 feet away. He
12 sees two black men, one is taller, about 6 foot. Everyone seems to get
13 that height right, right? Wearing a blue sweatshirt, that color again, blue.
14 And he, the taller one in that blue sweatshirt, he's on the curb. And
15 when he's shown the video from that evening he says -- he identifies the
16 person told to you to be Mike McNair as the one that he saw that
17 evening. All of these testimonies and descriptions are consistent.

18 And there's Deanna Lopez. Deana Lopez is 24 feet away and
19 according to her testimony, she's the one witness that is closest to
20 Gordon when he is shot and murdered. She sees two black men, one is
21 taller with short hair, matches the description of the Defendant and the
22 tall man was wearing a blue shirt and black pants, which matches the
23 photograph.

24 The shorter is in all black. You can see in the video, Mitchell
25 Johnson is wearing all black. And the shorter one punches Gordon and

1 the taller one on the curb -- which by the way, doesn't that match what
2 Bret testified too, the taller guy being on the curb? That taller one on the
3 curb, the one in the blue shirt is the shooter.

4 So the only one that's an outlier really is Kenneth Saldana,
5 isn't he? Kenneth Saldana is further away from Gordon. He's on the
6 other side of Bret, according to Deanna. And according to his own
7 testimony that you heard today he's behind a tree when this all takes
8 place. There was a question the Judge asked, where are you standing.
9 Oh, I'm behind that tree and points to something on the video,
10 presumably.

11 And of course, there's an ultimate question too. You heard
12 Mr. Pike ask a lot of these homeless witnesses that came in, were you
13 drinking? Were you doing drugs? Hey, Mitchell Johnson, how high
14 were you? You seem to like your weed. Things of that nature. Kenneth
15 Saldana, we know from Deanna and we know from the DA investigator
16 Jamie Honaker, might be an alcoholic.

17 So when he testifies and says no, I didn't have anything to
18 drink that night, weigh that. Determine whether you think that's true
19 based upon Deanna's testimony that he drank a lot, became belligerent
20 when he was drunk. And Jamie Honaker's testimony that we made
21 contact with him to bring him to court, he was drunk and he was
22 belligerent.

23 Of course, we know that people who are using drugs and
24 people who are drinking excessively, they have difficulty assessing
25 what's happening front of them. That's why Mr. Pike was asking those

1 questions of those witnesses, but we didn't really get to hear about that
2 from Kenneth Saldana very much. But we know that he's probably an
3 alcoholic.

4 And finally, we have Mitchell Johnson, the guy the Defense is
5 saying is the shooter. Mitchell Johnson's testimony and statements to
6 the police corroborate Deanna Johnson's observations, don't they?
7 Mitchell Johnson initially tells the police look, I didn't punch that guy. But
8 finally, even after making denials because he most likely does not want
9 to implicate his brother in the murder that took place, finally comes clean
10 and says what he saw.

11 He admits later on to punching Gordon. And as he testified to
12 the police -- or gave in his statement to the police, as well as to Ms.
13 Bluth and I during our pretrial interview, he admits that he saw Michael
14 McNair holding that gun and Gordon Phillips collapsing to the ground
15 after having been shot eight times. All of this is corroborated by
16 Deanna's statement to the police, as well as the descriptions given by
17 the other witnesses, except for Ken Saldana. So all of these
18 eyewitnesses seem to indicate or do indicate that Mike McNair is the
19 shooter.

20 Now I want to talk to you just briefly about Mitchell Johnson's
21 testimony in court because I think it's important. Now you heard what he
22 told police, you heard that from Detective Hoffman, you heard that from
23 Jamie Honaker, what he told Ms. Bluth and I when he came in for his
24 pretrial conference. But when he came in and testified in court, he was
25 reluctant to say his brother had the gun, right? Ms. Bluth had to ask him

1 questions about it. And he never did.

2 And there's an instruction in your packet and it talks about
3 how you assess the credibility and believability of witnesses who testify.
4 And crucially it tells you look, you've got observe their -- what they say in
5 comparison to other witnesses but also their demeanor on the stand and
6 that's important, as we all know from our common experience when
7 we're talking with someone, are they telling the truth or are they telling a
8 lie or are they mistaken, you get to look at how they are responding to
9 the questions that are being asked.

10 And I just remember Mitchell Johnson sitting here, rocking
11 back and forth in this chair from side to side with his right shoulder
12 jacked up so high and his head leaning against it like a coping
13 mechanism during his entire --

14 MR. PIKE: Objection, Your Honor --

15 MR. ROGAN: -- testimony.

16 MR. PIKE: Objection, Your Honor. It's the prosecutor's
17 opinion. He's kind of reverse vouching and he's placing himself in the
18 seat of the jurors.

19 THE COURT: Well, I'll sustain the objection as to the
20 reference to I remember, but his description of the demeanor of the
21 witness and what that could indicate is fine for argument. So I'll overrule
22 that part and you can continue.

23 MR. ROGAN: Okay. Thank you.

24 BY MR. ROGAN:

25 So his shoulder is all jacked up, he's rocking back and forth

1 and crucially he's never making eye contact with his brother. He never
2 looks at his brother. Mitchell Johnson came in and didn't want to snitch.
3 Even though he gave up everything to the police and he gave up
4 everything to Ms. Bluth and I about the Defendant's --

5 MR. PIKE: Objection, Your Honor, vouching --

6 THE COURT: Mister --

7 MR. PIKE: Giving it up to the --

8 THE COURT: Overruled. The description at trial was that the
9 investigator and the attorneys conducted a pretrial conference with the
10 gentleman which is -- the attorneys are allowed to do. That's not
11 vouching.

12 BY MR. ROGAN:

13 So Mitchell Johnson came in and evaluate how he acted on
14 the stand to determine whether his testimony that he didn't see his
15 brother with the gun is truthful or untruthful; mistaken or not mistaken.
16 And I think -- sorry. And based upon that, you should conclude that
17 Mitchell Johnson's testimony or statements to the police and statements
18 during his pretrial interview were the accurate recollections that he had.
19 And it was not his testimony that should be believed.

20 So what about the Defendant's behavior as well? We know
21 he had motive, we know he had opportunity, we know he had the means
22 to kill, and we certainly know -- or should know by now that he was the
23 shooter. But his behavior as well on that video that you observe and
24 what was testified to about his behavior that demonstrates something
25 called consciousness of guilt. Meaning he acts in a way that he's aware

1 that he's done something wrong.

2 And we see that a lot with kids, right? When they start acting
3 in a certain you can tell they must have done something wrong here.
4 They're being too nice or they're avoiding me as a parent. There's
5 something not right. And that's what we mean by a Defendant's
6 behavior demonstrating some consciousness of guilt.

7 And one of them is his behavior after he returns to the Unified Container
8 building. One of the things that he does is he hides that gun in a
9 backpack and tosses it presumably in the mezzanine level where it's
10 found the next day by Lyle Galeener.

11 He also does something where he just keeps checking
12 outside. If you watch that video like I suggest you do, you'll see I think
13 it's about four or five -- it appears from the video four or five times he's
14 peeking outside at that police presence, seeing what's going on,
15 whereas none of the other employees were really doing that. Maybe
16 they peek out one time, I think Matthew Stedeford does, but nobody else
17 really looks out that doorway, except for the Defendant.

18 And then he washes his hands at some point in the video, I
19 think it's about 12:33. And you have to remember the video is three
20 hours fast, so I'm just referring to the time on the video. 12:33 he
21 washes his hand for 25 to 30 seconds.

22 There's been a lot of testimony oh, well this is a sanitary area.
23 If you're doing what Ramiro Romero is doing, dragging up those milk
24 bottles and water jugs you got to put on some -- you got to keep your
25 hands clean, you got to put on that hat -- or that hair net, you got to put

1 on that beard net. And you also saw Ramiro's coworker as well attired
2 in the same fashion. But you never see Michael McNair wearing a
3 hairnet, do you? You never see him doing anything that's -- makes it
4 appear as though he needs to be sanitary.

5 And that's because as you heard Tyler Coon testify, he's a
6 mechanic. He's not a dock worker like Ramiro taking those sanitary
7 items and put them area. He's fixing the greasy machines that makes
8 those jugs and spits them out and allows Ramiro Romero to do his job.
9 He's not washing his hands, I suggest to you, because he needs to go
10 back to work in this sanitary environment, he's washing his hands
11 because he wants to get rid of any evidence that may be on them,
12 something like gunshot residue. That's what he's thinking.

13 And of course, why would he be washing his hands to go back
14 to work in a sanitary environment when he tells Ramiro I'm leaving.
15 Remember that's what Ramiro testified to on the stand. Mike's wearing
16 that red or burgundy short -- the Golden Wheat shirt. And we see in the
17 video -- or you can see in the video Mr. McNair come up to Ramiro and
18 Ramiro testified oh, he's telling me he's leaving. And he's telling me if
19 there's any problem with the machines just call him on his cell phone.
20 So why is he washing his hands if it's a sanitary environment. I mean,
21 he's leaving to go home, presumably, if you believe what he told Ramiro.

22 And finally, and this is an important piece. He changes his
23 shirt. There's a lot of testimony about changing shirts in all this but Tyler
24 Coon, he's the boss and he says there's absolutely no reason that he
25 should be changing his shirt. If he's doing work for other companies

1 within that same building, he doesn't need to change his shirt to do that.
2 He's moving a trailer, he doesn't need to change his shirt to do that. He
3 works for Unified Container; he wears that blue shirt. But of course,
4 what did he tell the police about this? He says oh, I just changed my
5 shirt because I'm going to prank my coworkers. Think about that for a
6 second, just one second.

7 Mike McNair just went across the street and according to
8 State's theory of the case, shot a man eight times. And according to the
9 Defendant's theory, was with his brother when his brother shot a man
10 eight times. And what does he do upon returning to Unified Container,
11 he's going to change his shirt and prank his coworkers? Does that make
12 sense to you? Is that the reason why he changed his shirt? I suggest to
13 you it's not.

14 I suggest to you that he's changing his shirt because as he
15 tells Ramiro he's leaving. And he wants to leave in a red shirt and not a
16 blue shirt because he knows there's video there and he doesn't want to
17 get caught leaving in a blue shirt and identified, perhaps, as the person
18 that crossed back and forth across North Las Vegas Boulevard just
19 before and after Gordon was murdered.

20 And then finally there's that awkward conversation with Matt
21 Stedeford. Remember Matt Stedeford? He came in, he was one of our
22 earlier witnesses and he said I want to know what was going on, I saw
23 the police presence and I went looking for Mike and I had this
24 conversation with Mike. And I can't recall the exact words that he used
25 but he described it as an awkward conversation. I think something along

1 the lines of he was looking for -- he was searching for his words.
2 Searching for his words. And he -- Mike McNair told him that he didn't
3 have any idea of what was going on, which we know not to be the truth,
4 right?

5 So all of these behaviors of the Defendant, they show this
6 consciousness of guilt; that he's aware that he's done something wrong,
7 just like we're aware when children do something wrong when their
8 behavior changes in a certain fashion.

9 And in the end, I've spent a lot of time on why we think Mike
10 McNair is -- or why the State is suggesting to you that Mike McNair is the
11 shooter. But in the end, it doesn't matter. It doesn't matter whether
12 Mike McNair is the trigger puller or whether Mitchell Johnson is the
13 trigger puller.

14 And you'll be instructed -- or you were instructed on this thing
15 called theories of liability. And I'm going to explain it before we get to it.
16 There's three ways that a person can be liable for a crime. They directly
17 commit it, meaning Mike McNair pulled that trigger and shot Gordon
18 Phillips.

19 Or he aided and abetted someone else who pulled the trigger,
20 meaning Mike McNair promoted or encouraged Mitchell Johnson to pull
21 the trigger.

22 And finally, the conspiracy that Mike McNair and Mitchell
23 Johnson engaged in an agreement to kill Gordon Phillips.

24 So what does all of this mean? Let me give you an example.
25 If I decide that I'm upset at the Defense attorneys objecting during my

1 closing argument and I say you know what after the jury leaves the
2 room, I think I'm going to take care of this and I go and I get a gun and I
3 shoot the defense attorney and killing him. That's me directly
4 committing the murder. I have directly done it.

5 But say I don't want to pull the trigger, I'm a little bit afraid of
6 guns but I really want him dead and so I go to Ms. Bluth and I say look, I
7 got this beef with Mr. Pike, I want him dead. I'm going to go help you --
8 I'm going to get a gun for you, can you take care of the problem for me.
9 And then subsequently Ms. Bluth does the deed, pulls that trigger.
10 That's aiding and abetting. I have promoted her, I have encouraged her
11 to do it. And I can't later come to court and talk to a jury and say look,
12 I'm not guilty because I didn't pull the trigger. I'm still just as guilty as
13 Ms. Bluth is, even though she's the one that pulled the trigger and I
14 didn't.

15 And finally, a conspiracy. It's very similar. If she and I agree
16 to commit the crime, it doesn't matter which one pulls the trigger. As
17 long as we both intend that Mister -- that the defense attorney be
18 murdered and that one of us does the deed and one of us pulls the
19 trigger, we both --

20 MR. PIKE: Objection, Your Honor, disparaging --

21 THE COURT: To allegations of somebody wanting to kill you?

22 MR. PIKE: Well, it's --

23 THE COURT: I mean, it's a bad analogy --

24 MR. ROGAN: Sorry.

25 THE COURT: -- but what's the specific objection?

1 MR. PIKE: We used to do a lot of divorces that's -- may be an
2 appropriate one, but disparaging -- Counsel disparaging the Defense,
3 injecting himself into it and injecting the parties here.

4 THE COURT: All right.

5 MR. PIKE: It's --

6 MR. ROGAN: I'll move on from the analogy.

7 THE COURT: So I --

8 MR. PIKE: I'll have motion --

9 THE COURT: Okay. I don't think that was the --

10 MR. PIKE: I'll have a motion.

11 THE COURT: -- the intent to disparage Counsel, but I'll ask
12 that the jury make sure please you ignore that the analogy wasn't an
13 attempt to disparage Mr. Pike, who is a very nice gentleman.

14 MR. ROGAN: And we get along very well. That wasn't the
15 intent, I apologize.

16 BY MR. ROGAN:

17 So those are the three ways that someone can be held liable.
18 It doesn't mean that you actually have to pull the trigger.

19 So in the end you look at the evidence and you conclude hey,
20 look, Mitchell Johnson, he's the trigger puller. But he pulled the trigger
21 because he conspired with Mike McNair or Mike McNair promoted and
22 encouraged him to pull that trigger, he's guilty as well. So it doesn't
23 matter who shot him; whether it's Mitchell or whether it's Michael
24 McNair. As long as they both have the intent that Michael -- that Gordon
25 Phillips die.

1 It's also important to understand this too. There's those three
2 liability -- three theories of liability. And you all have to agree on your
3 verdict, meaning all 12 of you who deliberate, have to make a decision
4 about whether he's not guilty or guilty of second-degree murder or first-
5 degree murder, for example. But you don't have to agree on those
6 theories of liability.

7 Some of you can say well I think the evidence shows that
8 Michael McNair pulled the trigger and others can think well, I don't think
9 he pulled the trigger, I think Mitchell pulled the trigger but definitely it was
10 the result of a conspiracy or definitely it was because Michael McNair
11 was aiding and abetting Mitchell Johnson in the commission of the
12 offense.

13 So even though you have that differing opinion as to the
14 theory of liability, if you all agree on what crime was committed, first-
15 degree, second-degree, you can find him guilty of that offense. You
16 don't have to agree on the theory of liability, you only have to agree on
17 the crime.

18 So what crimes did Michael McNair commit? Count 2 has
19 kind of been left behind during this entire trial, that's carrying a
20 concealed firearm. Instructions 33 and 34 say that a person's guilty of
21 this offense if the Defendant carries a firearm in such a manner as to not
22 to be discernible by an ordinary person.

23 It's hidden on their person, right? We can all get that. It's
24 tucked into the waistband behind a jacket or underneath a shirt. Or it's
25 in a pocket. That means -- that's carrying a concealed weapon. It's on

1 your body and it's not observable to an ordinary person.

2 And on video you see after he's pointing that gun at Gordon
3 Phillips while on the loading dock with Ramiro, he takes it and he puts it
4 where he's been keeping it and that's in the small of his back,
5 underneath his work shirt, where it's not ordinarily observable by a
6 regular person. And so quite -- I would suggest to you that that evidence
7 shows that the Defendant is guilty of carrying a concealed firearm or
8 other deadly weapon. And of course it is a firearm, we all know that,
9 based upon the testimony of the forensic scientist.

10 So let's turn now to the meat of this case and that's murder
11 with use of a deadly weapon. You'll see that the -- this is a portion of the
12 verdict form. He'll have several options to choose from, from not guilty,
13 all the way to guilty of first-degree murder with use of a deadly weapon.

14 In your deliberations, you have to decide was a deadly
15 weapon used and then secondly, what degree of murder was committed.
16 That's what you're going to be thinking about and deciding upon in your
17 deliberations on Count 1, murder with use of a deadly weapon.

18 MR. PIKE: Objection, Your Honor, misstates the law. It's
19 whether or not the State proved any beyond a reasonable doubt.

20 THE COURT: Well, the State has the obligation, Ladies and
21 Gentlemen, as the instructions tell you to prove every material element
22 of every crime beyond a reasonable doubt.

23 You can continue.

24 MR. ROGAN: Thank you, Your Honor.

25 ...

1 BY MR. ROGAN:

2 So I think for your deliberations -- for purposes of your
3 deliberations, the easiest way to begin is to determine whether a deadly
4 weapon was used to kill Gordon Phillips. And Instruction 32 is the
5 deadly weapon instruction. Down the bottom, second paragraph, you
6 are instructed that a firearm is a deadly weapon.

7 So did a firearm -- was it used to kill Gordon Phillips? Well,
8 remember the testimony of the coroner, eight bullets coursed through his
9 body in that 58-second period. Eight bullets. And the coroner testified
10 that it was her opinion, based upon her review of the autopsy that the --
11 that Mr. Phillips was killed by gunshot wounds and the manner of death
12 was homicide.

13 So yes, quite clearly, it -- deadly weapon was used -- a firearm
14 was used in the commission of this offense. So you can cross off the
15 offenses that you can find him guilty of that don't include the use of a
16 deadly weapon. He clearly was killed based upon the evidence with a
17 gun.

18 So now we're just left with what -- with what degree of murder
19 is this? We all know from watching TV, there's usually different degrees
20 of murder and in Nevada there's two types of murder. But murder -- to
21 begin, murder is defined for you as the unlawful killing of a human being
22 with malice aforethought. So that's both degrees of murder. The
23 unlawful killing, meaning unjustified killing, with malice aforethought.
24 And malice aforethought is defined for you as well as the intentional
25 doing of a wrongful act without legal cause.

1 So what does the instruction tell you what that means because
2 malice aforethought, you know, it's an old archaic term, it's not clear.
3 But the instruction tells you look, if the killer is, for example, motivated by
4 something like anger, hatred, revenger, or ill will, spite, or grudge, that's
5 malice. If that's what's motivating this person to commit the offense,
6 that's malice. As opposed to say, for example, an accident. So that's
7 what's meant by malice aforethought.

8 And of course, in this case we know that this murder was
9 motivated by anger, hatred, or revenge. It was motivated by disrespect,
10 right? I think the evidence shows that the Defendant was motivated to
11 hurt Gordon because he felt disrespected given the argument that he
12 had with Gordon in the Flavors parking lot that continued for some
13 minutes. And that's what caused Mike McNair to go over. That's not
14 killing someone by accident. That's not a justifiable killing. He's
15 motivated by anger. He has malice aforethought.

16 So what's the difference between first-degree murder then and
17 second-degree murder? The instructions define that first-degree murder
18 is the murder, an unlawful killing, which is perpetrated by any kind of
19 willful, deliberate, and premeditated killing.

20 So what's second-degree murder? Hey, second-degree
21 murder, it's any kind of murder, any kind of unlawful killing that doesn't
22 have premeditation and deliberation.

23 So the separation between first-degree murder and second-
24 degree murder is that first-degree murder has this -- these two elements
25 called deliberation and premeditation. So let's talk about that for a little

1 bit. Why is this a first-degree murder? Well, it's a first-degree murder
2 because Mike McNair willfully shot and killed Gordon Phillips. He
3 intended to cause Gordon's death. That's what's meant by willful. He
4 intended him to die when he pulled that trigger.

5 What's deliberation? How is that different from second-degree
6 murder? Well deliberation means that he weighed the possible
7 consequences of killing, what would happen.

8 And then finally premeditation means that after weighing the
9 possible consequences and coming upon a decision to pull that trigger,
10 he clearly wanted to kill Gordon at the time he pulled the trigger.

11 And that's what separates first-degree murder and second-
12 degree murder. Those two elements -- the latter two elements,
13 deliberation and premeditation. And we have evidence of this in this
14 case -- or you have evidence of this in your -- in this case.

15 And before we go through that, I want to point out something
16 that's very important. When we think of first-degree murder, we're
17 probably thinking back to television shows like Murder, She Wrote or
18 CSI where you have the killer planning for weeks before how the murder
19 is going to be effectuated. He goes to the store, buys duct tape, buys
20 the gun, plans to have the victim meet them at a particular place. Yeah,
21 that's first-degree murder, right?

22 There's a plan that's ahead. This person, the killer, has
23 clearly thought about what he or she is going to do and they've made the
24 necessary purchases or preparation. Yeah, you can probably discern
25 from that evidence that that's a first-degree murder. But your

1 instructions tell you that first-degree murder need not be similar to that.

2 Your instructions tell you that willfulness and premeditation
3 and deliberation, they can happen like that. It's not about the time the
4 person has to premeditate or deliberate, or form the intent to kill, it's
5 about whether they have.

6 So let me use an example to kind of explain what I mean.
7 This is the yellow light example. Think about when you're driving your
8 car and you're late for work or someone's late for work and that person
9 is coming upon an intersection and about 150 feet away the light turns
10 yellow, from green to yellow. In a fraction of a moment the driver has to
11 make a decision, doesn't he? Am I going to push down on the
12 accelerator or am I going to push down on the brake pad?

13 How quickly does a person go through that process of thinking
14 about which action to take, acceleration or braking? How quickly do
15 they think about the consequences? If I push down on this accelerator I
16 could blow through a red light and get a ticket, I could crash into
17 another --

18 MR. PIKE: Objection, Your Honor. You don't get a red --
19 ticket for going through a yellow light. This is a facetious argument
20 because it would --

21 THE COURT: Well --

22 MR. PIKE: -- be a red light.

23 THE COURT: -- overruled. And I don't want long speaking
24 objections. If you have an objection, just say the objection. And if I don't
25 know what the objection is about, I'll ask you to approach the bench.

1 Thank you.

2 MR. PIKE: Thank you, Your Honor.

3 THE COURT: You can continue --

4 MR. PIKE: Just doing my job.

5 THE COURT: -- with your argument.

6 MR. ROGAN: Thank you.

7 BY MR. ROGAN:

8 So as I was saying, so a person that's making that decision,
9 they have to think about the possible consequences and one of the
10 possible consequences is that light can turn red just before I enter and I
11 can get a ticket.

12 Or even worse, another vehicle going in the opposite direction,
13 they take control of the intersection and I crash into that person. Those
14 are the thoughts that go through a person's mind when they're making
15 that decision on whether to press the accelerator or whether to press the
16 brake pad and it happens in a fraction of a second.

17 And in that fraction of a second that person has deliberated
18 and has decided on a course of action that is premeditated and has
19 formed an intent of what to do. Just like that. And the same is true for
20 first-degree murder. They don't have to have days or weeks or hours to
21 deliberate, it can happen like that.

22 So let's talk about the evidence of premeditation deliberation
23 and willfulness that we have in this case.

24 Oh yeah, before I do that. Again, I want to reiterate, you can
25 infer a state of mind. You can infer what the Defendant's thinking based

1 upon the evidence. So that's what we're going to do now, we're going to
2 go through the evidence.

3 And just remember too, there's a commonsense instruction.
4 When you're thinking about what the Defendant's state of mind is when
5 he pulls that trigger, you got to use your common sense, right? We don't
6 leave that at the door when we walk into the courtroom. We bring in our
7 experiences and we're allowed to say or think about those experiences
8 and think about what's common sense in this circumstance to tie
9 everything together.

10 So the facts and circumstances here surrounding the killing
11 that show that this is a first-degree murder are clear. The Defendant
12 had that motive to kill. He was disrespected during that three or four-
13 minute argument that he had with Gordon Phillips. And that three or four
14 minutes he's arguing with Gordon Phillips.

15 But most importantly, what happens afterwards? He jumps in
16 his car, he goes off video camera and according to testimony, he does
17 donuts in the parking lot. He's blowing off steam, isn't he? He's doing
18 his donuts and then he careens back into the view of the camera and he
19 parks diagonally across three parking spaces.

20 When does a person do that? When they're angry, when
21 they're upset, maybe when they're in a rush, when they something on
22 their mind perhaps, when they're not going to take the time to actually
23 pull in and straighten out into a parking space because they just don't
24 care about it. They're thinking about something else. And that's what
25 happened here.

1 And then you see Mike McNair get out of that truck and what
2 does he do? Look at the video. He gets out of that truck and he points
3 across the parking lot. He points at something off-camera. I suggest to
4 you again that that person that he's pointing at is Gordon Phillips. And
5 then subsequent he goes into Unified Container and summons Ramiro
6 and then again, they go out onto the loading dock and point a gun -- and
7 he points a gun, rather.

8 And that is also important. What's the facts and
9 circumstances that say Mike McNair thought about what he was going to
10 do and decided upon a course of action? He pointed a firearm at
11 Gordon Phillips minutes before Gordon Phillips ends up with eight bullet
12 holes in his body, dying in that rocky area on North Las Vegas
13 Boulevard.

14 And then of course it's his actions just preceding the murder,
15 what does he do? He recruits Ramiro and then his brother. He
16 summons Ramiro, gets Ramiro all agitated. Gets him like a mad dog,
17 right? He's just there, he's all angry. You actually see Ramiro later, he's
18 on video and he's screaming. And then he goes into the trailer and he's
19 punching those cardboard boxes.

20 And he recruits this person to go with him to the intersection of
21 Searles and North Las Vegas Boulevard. This person. If he were just
22 going over there to 85 Gordon Phillips, if we were just going over there
23 to do that, why are picking the clearly agitated employee to go with you?
24 Why aren't you picking Matt Stedeford or that other guy that was in there
25 too that was working with Ramiro?

1 There's a multitude of different people that they could have
2 picked. Including, in fact, that security guard whose job it is to actually
3 secure the scene and who McNair could easily have radioed, as you
4 heard Tyler Coon testify to or call on the security guard's cell phone to
5 summon them to take care of the homeless man's -- the issue with the
6 homeless man.

7 But no, Mike McNair doesn't do any of that. What does he
8 do? He recruits Ramiro, gets him all agitated. And then when that fails
9 for whatever reason when they return to the property, Mike McNair
10 doesn't give up, does he? His brother shows up to collect that \$10 and
11 almost instantaneously they're walking back down Searles to that
12 intersection where they then cross over and Gordon Phillips ends up
13 dead a few minutes later -- or a few seconds later.

14 Those actions seem to demonstrate that Mike McNair has an
15 intent that he wants to hurt Gordon Phillips doesn't it because he tries
16 twice. Twice, to do it. But he's also not agitated at all really. Even
17 though Ramiro is, look at the video, do you see Mike McNair acting like
18 Ramiro? No, of course not. What does that indicate to you?

19 It indicates that he has decided upon what he's going to do.
20 He's thought about it and he's cool with the decision that he's made. It's
21 not a rash or impulsive decision that he's done. It is a cool, calm, and
22 collected one.

23 And then of course, the timing is important too. Within
24 seconds -- remember it's 58 seconds from the time they cross over
25 North Las Vegas Boulevard to the time they return. That's almost

1 instantaneous. The deed is done practically the moment -- or moments
2 after Mike McNair gets across North Las Vegas Boulevard and confronts
3 Gordon Phillips.

4 So that decision wasn't made at that very moment, that
5 decision had to have been made just a few minutes before or seconds
6 before, right? Because there's nothing at that very moment that Gordon
7 Phillips is shot, other than a moment where Gordon Phillips says
8 something like let's keep it cool or something of that nature before eight
9 bullets coursed through his body at the hands of Michael McNair.

10 And then finally, he used a deadly weapon. He shot him eight
11 times. There's an instruction that says the intention to kill, it can be
12 ascertained from the facts and circumstances of the killing, such as the
13 use of a deadly weapon, the manner of the use of that deadly weapon,
14 and the circumstances surrounding the act. Mike McNair used a gun but
15 he shot him eight times -- shot Gordon eight times in 58 seconds. That
16 is eight trigger pulls. One, two, three, four, five, six, seven, eight. Eight
17 trigger pulls. Eight decisions to have a bullet expended from that gun
18 and through -- put through Gordon Phillips' body. Eight times.

19 This is not, Ladies and Gentlemen, a situation where Gordon
20 Phillips was shot in the foot and unfortunately passed away from that
21 injury. That is an arguable situation, isn't it, compared to eight bullets
22 that lethal areas of Gordon Phillips' body; the neck, the chest.

23 You heard the coroner testify the only bullets that really she
24 can't be sure cau -- or contributed to the cause of his death were the
25 ones through his arms. I believe there were two. So the remaining

1 bullets there that were used, about five or six of them were lethal -- shot
2 at lethal parts of his body. And you can use the fact that a deadly
3 weapon was fired at crucial parts of Gordon Phillips' body to deduce that
4 when Michael McNair pulled that trigger, he intended Gordon Phillips to
5 die. Not simply to be injured, to die.

6 So I think after you consider all of those facts and
7 circumstances, not only should you find him guilty of him carrying a
8 concealed firearm, because it's on the video, you should also find him
9 guilty of first-degree murder, with use of a deadly weapon.

10 I thank you for your time.

11 THE COURT: Thank you, Mr. Rogan.

12 Mr. Pike or Ms. Simpkins.

13 MS. SIMPKINS: Thank you, Your Honor.

14 MR. PIKE: Your Honor, before that happens, may we
15 approach the bench?

16 THE COURT: You want to take a break before we continue
17 on?

18 MS. SIMPKINS: Yes, could we take a break --

19 THE COURT: Sure.

20 MS. SIMPKINS: -- I need to set up.

21 THE COURT: All right. We'll take a short recess, Ladies and
22 Gentlemen, before we continue on.

23 During the recess you're admonished not to talk or converse
24 among yourselves or with anyone else on any subject connected with
25 this trial. Or read or watch or listen to any report of or commentary on

1 the trial any medium of information including, without limitation,
2 newspapers, television, the internet, and radio. Or form or express any
3 opinion on any subject connected with the trial until the case it's finally
4 submitted to you. No legal or factual research or investigation on your
5 own.

6 We'll be in break for about 10 or 15 minutes and then we'll
7 finish up. Thank you.

8 THE MARSHAL: Rise for the jury.

9 [Outside the presence of the jury]

10 THE COURT: Do you guys have anything outside of the
11 presence or you just need to run to the restroom?

12 MR. PIKE: I have one, Your Honor.

13 THE COURT: Okay. Go ahead.

14 MR. PIKE: I have a motion for a mistrial.

15 THE COURT: Okay. You can go ahead.

16 MR. PIKE: To indicate that by my making objections,
17 something I'm obligated to do, something that I have to do to make
18 contemporaneous objections is -- that's my job. That's why I'm here. I
19 have to protect Mr. McNair and this institution that we have of trials.

20 But the turnaround -- and I've had, you know, argue -- I've had
21 attorneys call, you know, my arguments maybe sometimes unsupported
22 or something. But to derogate my function and my job to make an
23 objection when I feel it's necessary and when those objections have
24 been sustained by the Court during the time of the arguments, and then
25 to come back and say and I want to kill Mr. Pike because he's objecting

1 too much, is beyond the pail. I don't think he meant that in any way,
2 shape, or form.

3 THE COURT: I'm confident he didn't mean that he wanted to
4 kill.

5 MR. PIKE: I don't believe that either, but --

6 THE COURT: I know.

7 MR. PIKE: -- you know, that's because we know each other.
8 I'm here every month. The Counsel for the State is here every month.
9 We've done trials together, we -- you know, we've fought things when --
10 we've fought things fair. And something that could be said in jest in an
11 informal area is one thing.

12 But in front of those 13 people who are deciding whether or
13 not they're going to listen to what -- or believe what I had to say and to
14 suggest that an appropriate -- an argument would be to use me as a -- in
15 a deris -- diversive [sic] manner is something that I've never been
16 subjected to before.

17 And quite frankly, I think it behooves the Court to come back
18 with some response to the jury saying I'm -- Mr. Pike's doing his job.
19 He's supposed to be doing that.

20 THE COURT: Well we're going to talk about that aspect of it
21 in a second.

22 MR. PIKE: Okay.

23 THE COURT: Let me hear from the State. Is there anything
24 you all want to add?

25 MR. ROGAN: Your Honor, of course it wasn't intended that

1 way and I do agree that there was a spur of the moment example that
2 probably -- definitely shouldn't have been offered. It should have been
3 something different. I don't think it denigrated Mr. Pike in front of the
4 jury, it was quite clearly an example and the jury is not going to take it
5 seriously that Mr. Pike is somehow being obnoxious in doing his job.

6 So I don't think it rises to the level of a manifest necessity to
7 protect the rights of the Defendant at this point. I'd be willing to stipulate
8 to any kind of corrective instruction you give the jury, of course, if that's
9 what you feel is necessary.

10 THE COURT: Well look, I think it was a really bad analogy.
11 Really, really, troublingly bad analogy to say, you know, I want to kill the
12 Defense attorney for objecting during --

13 MR. ROGAN: I know.

14 THE COURT: -- the trial.

15 I -- you know, there are things that I think the Court has an
16 obligation to sua sponte jump in on. I don't know that that was one
17 because, you know, I can see from the Defense perspective saying,
18 yeah, I'm not going to object to this at all. I think it makes the prosecutor
19 look bad to the jury that he's saying he wants to kill me because I'm
20 doing my job.

21 On the other hand, sometimes there are objections. So I think
22 as soon as you raised the objection, I knew exactly what it was and I in
23 part I said -- I tried to make light of it a little bit to diffuse it by saying I'm
24 sure -- are you objecting because of the reference to the prosecutor
25 wanting to kill you. And then, you know, admonished the jury that that

1 was not disparaging Mr. Pike, that Mr. Pike was a very nice gentleman.

2 I didn't know in my mind in that moment how far you would
3 have wanted me to go in terms of admonitions to them, but I'm willing to
4 listen to any other admonition to them beyond what I gave them in the
5 moment of that because I agree that it was very inappropriate.

6 I'm not going to grant a mistrial, but I will not be surprised one
7 iota if you get your trial reversed because of this.

8 But what, if any other, admonitions would you want me to
9 make to the jury?

10 MR. PIKE: That it is the function of the attorneys on both -- of
11 the Defense to raise objections to preserve both the demeanor and
12 sanctity of a trial. And that regardless of what the analogy that the State
13 used, that Mr. Pike was performing his function and his obligation as
14 Counsel for Michael McNair.

15 THE COURT: All right. I will do that as soon as we get them
16 back in before we move on.

17 Do you guys have anything else outside the presence?

18 MR. PIKE: No.

19 THE COURT: State.

20 MS. BLUTH: No.

21 THE COURT: No, okay.

22 All right. We'll be in recess for a few more minutes and then
23 we'll start back up.

24 [Recess taken at 3:30 p.m.]

25 [Trial resumed at 3:52 p.m.]

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[In the presence of the jury]

THE MARSHAL: Rise for the jurors.

THE COURT: You all can be seated, thank you.

We will be back on the record. Mr. McNair is present with his attorneys, State's attorneys are present, all of our jurors are present.

So before we get started with the Defense closing argument I just -- I want to go through something with you. I made light of it a little bit and I'm sure you didn't take it seriously, and I know Mr. Rogan would admit that it was a bad analogy to make reference to being upset with Defense Counsel making objections and giving that analogy about killing Defense Counsel and the various theories of liabilities when he was explaining things.

You'll recall back when we first started the trial and I went through some things with you before opening statements, one of the things I went through was we do not hold it against attorneys for making an objection. That is their legal and ethical responsibility as they zealously represent their clients to make those objections. I rule on them and then we move on.

So I just want to make it really clear to you that that was an improper analogy. As I said Mr. Pike, along with Mr. Rogan, Ms. Bluth, Ms. Simpkins, Mr. Afshar, they're all incredibly decent individuals, they work together all the time, and I know that it was a regrettable statement, but I just want to order you to disregard that in its entirety, the nature of that analogy that was being reached and make sure you don't hold it in anyway against Mr. Pike that is was disparaging to him at all.

1 Okay. Ms. Simpkins, on behalf of Mr. McNair.

2 MS. SIMPKINS: Thank you, Your Honor.

3 **CLOSING ARGUMENT**

4 BY MS. SIMPKINS:

5 Good afternoon, Ladies and Gentlemen. If you didn't know
6 my name is Melinda Simpkins and I am helping to represent Mr. McNair
7 over here. It's my first opportunity to talk to you and that kind of signals
8 to you that we're getting closer, there's a light at the end of the tunnel,
9 we're almost done. And we would like to take this opportunity to thank
10 you for your service and thank you for paying attention. And I know it's
11 been a long haul, but we'll get through it.

12 I want to start off by reminding that there is a presumption of
13 innocence in this case that just doesn't stop. And it hasn't stopped from
14 the beginning and it has carried all the way through and it will carry all
15 the way through your deliberations.

16 There are elements, and I think Mr. Rogan hit on some it, to
17 every crime charged and every element here must be proved beyond a
18 reasonable doubt. And if you remember Mr. Pike showing you
19 reasonable doubt on the witness stand over here, they have to meet
20 every single element. If it's, you know, they meet one element, they
21 miss one element, it's -- it has to be finding in Mr. McNair's favor. If they
22 have half an element, again, finding in Mr. McNair's favor. That's the
23 presumption of innocence.

24 The Court gave you the law in the form of jury instructions and
25 it's your job as jurors -- he instructed you to determine what the facts are

1 and how to apply the law to those facts. You're the sole judge of the
2 facts in the case. And if you'll remember when Detective Hoffman was
3 on the stand, he was commenting on the video and the same thing when
4 Mr. Rogan was commenting on the video saying that Mr. McNair had a
5 gun and he was pointing it forward, that like the Judge instructed you, is
6 up to you to determine. That's their opinion, but it's your job to make
7 that determination.

8 You are to judge -- you are the sole judge of the facts in the
9 case and you take those facts and determine whether the elements of
10 the crimes have been proved, again, beyond a reasonable doubt. How
11 do you apply the facts as you determine the law? As you determine
12 them -- how do you apply the facts to the law?

13 Each -- again, each crime has an element. Murder, the
14 unlawful killing of another human being with malice aforethought, either
15 express or implied. Now you kind of just break that down. Let me put
16 that instruction up for you so you can kind of see what I'm talking about.

17 Just break it down. You've got an unlawful killing, not justified,
18 of another human being, Gordon Phillips, obviously he meets that, with
19 malice aforethought; either express or implied malice. Now what the
20 heck is malice aforethought? Again, we're going to get an instruction on
21 that and you have been given the instruction.

22 Deliberate intention to unlawfully take away the life of a human
23 being, manifested by external circumstances capable of proof.

24 And the instruction gives examples. That's express malice,
25 I'm sorry. I take that back.

1 This instruction gives that example. Sorry about that.

2 So you apply -- in applying the facts, we know that Gordon
3 Phillips, a human being was killed by gunshot wounds to his body. Our
4 position in this case is that the State has failed to prove that there was
5 malice aforethought. We know that McNair -- Mr. McNair was standing
6 in the parking lot, minding his own business when Gordon Phillips
7 walked up to him and started an altercation. We know that from the
8 video.

9 Mr. Razo testified to you that Phillips threatened to come over
10 the fence at Michael McNair and Phillips had a knife behind his back.
11 Although Mr. McNair didn't see it, you can still take that into
12 consideration as a play on the state of mind of Mr. Phillips.

13 Now once that altercation is over we know from the video that
14 Michael goes inside and he gets Ramiro Romero. Ramiro Romero
15 testified having a bad day that day because the crackheads in the
16 parking lot had busted out his -- the window to his car. He didn't go out
17 and have a bad day after the altercation with Mr. Phillips, he was having
18 a bad day before he went out there.

19 And they go to the loading dock, where supposedly Michael
20 was pointing the weapon, again, your determination, but Ramiro states
21 that Michael was telling the crackheads, you know, back away. We're at
22 work, go away. You need to move on, go away. That's what he testified
23 to on the stand.

24 And then Ramiro testified that Michael pointed something at
25 the crackheads. And I'm using his word, crackheads. The State wants

1 you to believe it was a gun. Obviously Detective Hoffman wants you to
2 believe it was a gun. You look at the video, make a determination.
3 Ramiro at the preliminary hearing, he testified it was a gun. But when
4 you saw him testify here he indicated and he looked at the video, he
5 said, you really can't tell from the video what it might be. But again,
6 determination.

7 Credibility, obviously is very -- is a very big issue in this case.
8 I don't have to tell you that. You saw the jury, you saw -- I mean, you
9 saw the witnesses. Credibility, again, is defined in the jury instructions.
10 You look at the witnesses' manner up on the stand, his relationship to
11 the parties, et cetera, et cetera. You can take into consideration things
12 of that nature.

13 Ramiro, by the time his testimony was over, he would have
14 said anything the attorneys wanted him to say. And let me give you an
15 example. Mr. Pike asked him, do you know Mitchell Johnson? Yes, I
16 know Mitchell Johnson; that was his response. Is this a picture of
17 Mitchell Johnson? Yes, that's a picture of Mitchell Johnson.

18 And then when Mr. Rogan got up to redirect, he said you know
19 Mitchell Johnson? Ramiro Romero's like no, I don't know Mitchell
20 Johnson. Well, isn't this a picture -- you just said this was a picture of
21 Mitchell Johnson. No, I thought that was a picture of Michael McNair.
22 Again, Ramiro would have said anything to get off the stand.

23 But I'd also like you to keep in mind that Ramiro testified about
24 his interview with the police. And when Ramiro testified about his
25 interview with the police he talked about being involved in a murder. He

1 was detained by the police at the time, he had been searched, he had
2 been photographed, and he had been given a choice, do you want to be
3 a suspect or do you want to be a witness.

4 And although the police officer says you know, I'm not trying to
5 threaten you, what's Ramiro going to do? He's going to tell the police
6 officer -- Ramiro Romero would be telling the police officer what the
7 police officer wanted to hear. He wanted off the stand, he didn't want to
8 talk to the cops, he's going to tell you what you want to hear, and then
9 he's out.

10 But he did admit -- he made an admission that his intent when
11 he went out with Michael McNair was to beat up the crackheads. Now
12 that's an admission against interest. It indicates he was intending to
13 commit a crime.

14 Security is right there, you can see from the video, and
15 security is following them as they are walking out to the corner. Ramiro
16 Romero is hyped up, walking out to the corner and they walk to the
17 corner and Michael McNair brings Ramiro Romero right back. They
18 don't go any further. What does that establish?

19 Michael McNair has just been in an altercation with Gordon
20 Phillips. Michael McNair had the opportunity through Ramiro Romero to
21 hurt Gordon Phillips. Ramiro Romero was both willing and able to hurt
22 Gordon Phillips at the time and Michael McNair did nothing but walk to
23 the corner and come right back. And that evidence, Ladies and
24 Gentlemen would at that point negate malice aforethought.

25 That negates he didn't act on his anger, his hatred, his ill will,

1 or any grudge. So that's how you kind of look at and you apply the facts
2 to the law. If one element is missing then it is not guilty and cannot be
3 murder.

4 I'm going to continue with the facts here. We know that
5 Ramiro Romero goes back into work and Mr. Johnson shows up to get
6 his \$10 so that he can smoke his weed. And again, back to the
7 credibility of witnesses, credibility or believability. He is high as a kite
8 when he testifies on the stand. He's so high he can't even hold his head
9 up. He's -- he can't sit still, he can't move -- he can't sit still, he can't
10 answer in a normal voice, he can't open his eyes fully, and he's grinning
11 from ear to ear, if you noticed that. He's grinning from ear to ear sitting
12 here testifying against his brother who is standing trial for murder, as if it
13 is some kind of joke.

14 And according to Mitchell Johnson, when he gets to Flavors,
15 Michael says walk with me and they go down the street to confront
16 Gordon Phillips. Now Mitchell Johnson is an accomplice. And you are
17 going to get jury instruction -- or you have Jury Instructions 19 and 20
18 that require you to look at his testimony with an extra grain of salt, with a
19 special brand of skepticism. His testimony has to be corroborated and
20 that is independent from any -- independent from his testimony. So the
21 corroboration required is independent.

22 So you can't just take Mitchell Johnson at his word when
23 you're making a determination as to the guilt or innocence of Michael
24 McNair. You can take into consideration, however, that Mitchell
25 Johnson admitted guilt when he was on the stand. He stated they

1 walked up the street, Gordon Phillips approached them, and when
2 Gordon Phillips got too close, Michael Johnson [sic] hit him with his right
3 hand, on the right side of Gordon Phillips' neck, which is a physical
4 impossibility if they were supposedly facing each other but consider the
5 source.

6 There is absolutely no evidence that Michael knew that
7 Mitchell was going to hit Gordon Phillips. There is no evidence that
8 Michael intended Mitchell to hit Gordon Phillips. There's no evidence
9 that Michael agreed with Mitchell to hit Gordon Phillips. And remember,
10 Ramiro Romero, when he intended to beat up Gordon Phillips, Michael's
11 response was to walk him back.

12 And at this point that is when Mitchell Johnson pulls out a gun
13 and shoots Gordon Phillips dead. And we know this, we know this
14 through the testimony of Kenneth Saldana. Kenneth Saldana was there
15 that night. He was five feet away from Gordon Phillips when he was
16 shot. And he doesn't just say that the shorter guy fired the gun. He
17 says --and I quote: The guy that was in the white Suburban truck starts
18 hitting Gordon, punching him in his face, five/ten times, steps back three
19 feet, pulls a gun, and shoots Gordon, end quote.

20 Now Kenneth Saldana might be a drunk, but there was
21 absolutely no indication that he was intoxicated the night he saw Mitchell
22 Johnson shoot Gordon Phillips. And in fact, he was asked that question
23 on the stand, were you intoxicated? No, I was not. And there was
24 absolutely no evidence that he was intoxicated at the time he gave that
25 testimony at the preliminary hearing. We cannot say the same for

1 Mitchell Johnson.

2 But you compare that to the other testimony in the case.
3 We've got Bret Lesh, he was the first gentleman that we had to testify.
4 And he testifies on the stand that he was 75 to 100 feet away from
5 Gordon at the time. And he told police that he was 100 yards away; a
6 football field away from Gordon. That's what he told the police a year
7 and a half ago when this first happened.

8 And we know he was awakened by yelling. And he says two
9 black males were arguing with Gordon Phillips, one taller, one shorter.
10 He says the taller one was wearing a blue sweatshirt and shorts, which
11 we know if Michael McNair is the taller individual, we know that's not
12 true, you've seen pictures. The shorter one was wearing a light blue
13 shirt, which, again, we know is not true.

14 The same two males come back. Well we know, again, it
15 wasn't the same two males. The first set was Ramiro Romero and
16 Michael McNair and the second set, Mitchell Johnson. One on the
17 street, one on the sidewalk. And we know from Mitchell Johnson's
18 testimony, let me just take a minute, he's 5'7, Michael McNair's about
19 six-feet tall. One was on the sidewalk, one was on the street. If you're
20 lying down, everybody's sleeping at night, you're lying down and you're
21 looking up at what this is happening, you're going to get a skewed
22 determination of who's taller and who's shorter.

23 But the taller guy, according to Mr. Lesh, is in a fight with
24 Gordon and falls to the ground and the shorter guy helps him up. Well
25 he's the only witness that ever said this. There are no injuries, you've

1 seen the pictures, to Michael McNair's hands or his face that are
2 consistent with him being in a fight. And this is also inconsistent with
3 Mitchell Johnson's testimony that we're trying to corroborate here, when
4 Mitchell Johnson says I was the one that hit Gordon Phillips.

5 Then Mr. Lesh says the tall guy shoots. And when he's asked
6 a little further, a little more questions about that, he says well, I presume
7 that the tall guy was shooting because he was the one that was closer to
8 Gordon. I didn't really see who shot. And he's shown a photo of
9 Michael McNair in court a year and a half later for the first time. There
10 was no identification at the scene, they had Michael in custody, there
11 was no identification at the scene. And he says yeah, that's the guy.
12 But he also admits that he's seen Michael at Flavors before too, so he
13 has a previous familiarity with him.

14 Next we have Anthony Razo and he's the one that sees the
15 argument between Gordon Phillips and the guy who's playing the music.
16 And he sees Gordon Phillips with a knife behind his back. And he's 50
17 to 75 feet away from the argument and he sees that guy playing the
18 music walk quickly away to where Gordon Phillips was and then he
19 leaves and he never sees anyone with a gun. Although he initially tells
20 police that the guy playing music had a gun, when he is recorded, when
21 he testifies under oath at the preliminary hearing and when he testifies
22 under oath in front of you he says, the guy didn't have a gun. The guy
23 not only didn't have a gun, he didn't make a motion like he had a gun.

24 Then we have Deanna Lopez. Ms. Lopez has some issues,
25 but she was pretty clear that she was 24 feet away from Gordon Phillips.

1 Not 23, not 25, it was 24 feet away. I'm going to show you the crime
2 scene diagram. I'm going to zoom out a little bit here. Hopefully we can
3 get that, there we go.

4 Now if you will recall Ms. Lopez's testimony, we talked about
5 where she was staying and she mentioned that she was staying up here
6 next to Flavors, in front of Flavors. In that area, she was so far north her
7 testimony was that she couldn't see the trucks that would come in and
8 out of Flavors in this area.

9 Now we know also from the crime scene diagram where,
10 approximately, Gordon Phillips was when he was shot. That is a little bit
11 more than 24 feet. When you -- you'll have this -- this is the crime scene
12 diagram, it's State's Exhibit 4. You'll have this in front of you. If you look
13 down here on the bottom, it's got a measurement and that's zero to one
14 hundred feet. So I would submit, Ladies and Gentlemen, that Ms. Lopez
15 wasn't as close as she told you that she was.

16 And now she's hearing arguing and she says she's lying down
17 when she starts hearing the arguing and she gets up to her knees to see
18 what's going on. On cross-examination, she admits that she told police
19 that she was lying down and that was looking at this from under a
20 stroller, which she characterized as a granny cart. And she sees two
21 Black guys walk away and then come back -- again, inconsistent,
22 Ramiro Romero was not Black.

23 The same two guys leave and then come back. Again, we
24 know it's not the same two guys. The taller guy is a blue shirt, black
25 pants, short hair, and skinny but he has nothing on his head. Michael

1 McNair, they made a big deal about it, had a do-rag on. And she says
2 the tall guy starts shooting Gordon. But then she also admits that, you
3 know, she has difficulty seeing. She has what she characterized as
4 night blindness. She needs glasses. And if you notice her on the
5 witness stand, she was sitting very close to that screen and squinting to
6 look at the screen when they were playing the videos for her, and
7 showing her the exhibits.

8 And then she also admits that it's true she told police that she
9 was watching from under the stroller or the granny cart. Again, we're
10 looking at things to corroborate Mitchell's allegation that Michael was the
11 one that did the shooting.

12 So now we're up to Joshua Brennan. He's the security guard
13 from Palm Mortuary. And he hears the altercation and he sees two men
14 scuffle. He says one's tall, 6'1, around 200 pounds. Well, Ladies and
15 Gentlemen, you've seen Michael McNair, he's not 200 pounds soaking
16 wet. We've got a navy blue shirt, he says, and his uniform's light blue.
17 He says the guy's wearing shorts but we know Michael McNair's not
18 wearing shorts.

19 He said the second guy, he's shorter, he's 5'6, shaved head,
20 and Hispanic. Again, we know that's not true. But he admits that it
21 happens at night and he's far away when he sees this. And there are
22 trees and shrubs and a fence that are blocking his view. And he says
23 when he starts heading towards the scuffle, he hears the gunshots, but
24 he doesn't see any shooting.

25 And, again, none of these witnesses that we're discussing

1 were ever shown a photo of Michael McNair, there was never a show-up
2 where Michael McNair is brought out to the witnesses at the time of the
3 shooting. There was never a line-up done like you see on TV, there was
4 never a photo line-up.

5 Mitchell Johnson claims that Michael McNair was the shooter
6 and his testimony has to be corroborated. And the State is attempting to
7 corroborate the testimony with these eyewitnesses. But the problem is
8 the eye witnesses are all over the place. We got the tall guy was the
9 shooter but I can't see because I'm looking out from under the stroller. I
10 didn't see the shooter. The tall guy might have been the shooter
11 because he was standing the closest. The short guy was the shooter.
12 Again, not corroboration from Mitchell Johnson's version of events.

13 Ladies and Gentlemen, Mitchell Johnson was the aggressor.
14 He admitted hitting Gordon Phillips for standing too close to him. He
15 says why would I feel threatened by him? Michael -- I'm sorry, Mitchell
16 then after he hits Gordon Phillips and shoots him, flees the area. Flight
17 is evidence of guilt and you can take that into consideration. Michael
18 goes back to work. Mitchell doesn't even take the time to walk back into
19 the Flavors parking lot, he has his wife come and pick him up.

20 And when he's asked, why did you leave? And this is his
21 response. A shooting happened and I was involved. He states I might
22 have been charged. And then on top of it he repeatedly lies to police. I
23 wasn't there, I sent Bianca to Unified Containers, I didn't go. I went to
24 Circle K to get a soda. I was at Unified Container, but I didn't get out of
25 the car. I got out of the car, but I only went halfway. I didn't get all the

1 way to the corner, I never left Searles. And I didn't punch Gordon
2 Phillips, which is completely opposite of what he told you.

3 And when asked whether he was afraid of the homeless
4 people, he states they wasn't dangerous to me. Well I guarantee you --
5 well, I would submit to you that they weren't dangerous to him because
6 he had the gun and he was the shooter.

7 Now the State said to you it makes no difference, but I submit,
8 Ladies and Gentlemen, yes, it does make a difference who the shooter
9 was. And the reason is this, because if Michael McNair wasn't the
10 shooter, and Mitchell Johnson was the shooter, the State has to prove
11 that there was a conspiracy. There's more elements that they have to
12 establish. The State has to prove or -- that Michael aided and abetted
13 Mitchell Johnson by counseling him, encouraging him, hiring him,
14 inducing him, commanding him, or procuring him to commit the crime.

15 And let me take a minute here to talk about the Information.
16 This is Instruction Number 3 that you're going to see. The other
17 unknown person. The other unknown person. That's the allegation
18 there. They know exactly who that other unknown person was.

19 Let's talk about inferences. We know when Mitchell arrived at
20 the scene, it's on the video. We know when Mitchell left the scene on
21 foot, it's on the video. We know when the 9-1-1 call came in. Detective
22 Hoffman testified about that. We know when Mitchell fled the scene.
23 You can infer from that that Mitchell is the unknown person, the other
24 unknown person.

25 So if you make that determination that Mitchell was the

1 shooter as we're asking you to do, conspiracy -- the State has to submit
2 sufficient evidence for you to find that there was an agreement, an illegal
3 agreement between Mitchell Johnson and Michael McNair to kill Gordon
4 Phillips. And they also have to submit evidence that Michael intended
5 that Mitchell kill Gordon Phillips.

6 And you have to look at this case, what's missing. Well there
7 was a phone call about money so that Mitchell could buy weed. And
8 Mitchell testified and says Michael told me to walk with him. But again,
9 no corroboration of that fact. If Mitchell's the accomplice, we need
10 corroboration. And there's no evidence that Michael said anything on
11 the way over to Gordon Phillips.

12 Michael would have to have some kind of knowledge ahead of
13 time and it doesn't have to be, you know, sufficient -- a long time ahead
14 of time but it can be almost right exactly at the same time, but Michael
15 has to have some kind of knowledge that Mitchell is going to shoot
16 Gordon Phillips and there was no evidence that Michael counseled him,
17 encouraged him, hired, commanded, procured, or otherwise induced him
18 to commit the crime.

19 I'll tell you what the evidence does show. The evidence
20 shows mere presence at the scene of a crime or knowledge that a crime
21 is being committed. It's not sufficient to establish that a defendant is
22 guilty of an offense unless you find beyond a reasonable doubt that the
23 Defendant was a participant and not merely a knowing spectator.

24 That's why it's important who the shooter was. The State has
25 to provide evidence of additional crime and additional elements beyond

1 a reasonable doubt. Here the evidence was that Michael McNair was
2 simply a knowing spectator. Mitchell Johnson was the one that pulled
3 out the gun and he shot and he killed Gordon Phillips.

4 First versus second-degree murder, very briefly. Murder --
5 second-degree murder is malice aforethought -- murder with malice
6 aforethought without premeditation or deliberation. And you, as a part of
7 your -- part of this case have to determine the degree of the crime.

8 Now Mitchell had no altercation prior to with Gordon Phillips.
9 Mitchell hit the man because he got too close. Mitchell then pulled out a
10 gun and shot him. That's what Kenneth Saldana said, he was five feet
11 away. And there was no evidence that he had a plan, no evidence he
12 had sufficient time to weigh the reasons for and against.

13 So if you do find that Mitchell is the shooter, the fact that
14 Mitchell may not have committed first-degree murder also applies to
15 Michael, if you find that Michael was the accomplice.

16 A few other issues that I want to hit before I sit down. Red
17 shirt, red herring. Okay, let's talk about that red shirt for a while. How
18 do you know that he just didn't rehang that red shirt on the rack that was
19 in there? How do you know that it was his shirt -- the shirt that he was
20 wearing that was in that laundry basket? We don't. There was no DNA
21 testing done on that shirt.

22 Now we know from the video, although much was made of
23 him -- he has on the red shirt and he's trying avoid detection, we know
24 that he changed his shirt back to the blue shirt within ten minutes before
25 the police arrived. If you're trying to avoid detection, you would have left

1 the shirt on, but he didn't.

2 Washing the hands and the gunshot residue. Again, Glenn
3 Davis, the firearms guy, he said washing your hands destroys gunshot
4 residue. Michael washed his hands, but Michael washed his hands you
5 heard -- you heard from several of those witnesses that worked there,
6 that owned the place said no, he's supposed to be washing his hands
7 and this is a clean area. He worked in a clean area, he's required by his
8 job to wash his hands.

9 But then you heard Detective Hoffman testify about Metro's
10 policy on this. And he said Metro's policy is take gunshot residue even if
11 the person washes their hands. And he said the only problem with the
12 gunshot residue issue here was that it was four hours later -- it was over
13 four hours. Four hours is our cutoff, we don't gunshot residue testing
14 after four hours.

15 Well, I would submit other witnesses testified, if you will recall,
16 when we walked out of Flavors and Michael was already standing at the
17 end of his vehicle, he was separated from everybody else, I would
18 submit to you that the police had Michael in custody before four hours
19 had elapsed. And they not only never tested his hands, they never
20 tested his clothing either.

21 DNA on the gun. You can talk about ratios all you want to,
22 bottom line is there was more than one person's DNA on that gun. And
23 most important, Mitchell Johnson could not be excluded as a contributor
24 to that DNA. Remember I asked her, there are three. There's included,
25 excluded, and inconclusive. They don't have enough to make a

1 conclusive determination, but they can't exclude him either.

2 And then take a minute and think about the swab that they
3 took off that gun. They took the DNA in three areas on the gun, the slide
4 serrations, the grip, and the trigger. All on one swab. And I would
5 submit to you, Ladies and Gentlemen, that the connotations of the DNA
6 being on the trigger are much more damning then the connotations of
7 DNA being on the grip of the gun. But we don't know what part of the
8 gun that DNA was located because of the way they took that DNA. And
9 you heard a lot of evidence about the dangers of cross-contamination.

10 Flight is evidence of guilt. Again, Mitchell Johnson ran from
11 the scene, he didn't even take the time to come back on property, and
12 Michael McNair stayed at work. And the gun itself and where it was
13 found. Now we know a search warrant was executed -- or a search was
14 executed. There was a firearm sniffing dog that was run through the
15 property. Now the dog did not alert to the presence of any gun. And if
16 you believe the prosecution, it was the gun that was used in a murder
17 that was freshly fired.

18 Now according to the video, Michael changed his clothes and
19 he put on the red shirt after he supposedly shot Gordon Phillips. We
20 don't have any evidence that the dog alerted to the red shirt if there was
21 gunshot residue on Michael's body. And police officer told you --
22 Detective Hoffman told you, gunshot residue is easily transferred, so
23 much so that Metro officers, once we put them in the back of the police
24 officer because we deal with guns all the time, we transfer residue and
25 you're going to get a false positive. So you don't test the -- I'm sorry, the

1 dog doesn't alert to any gunshot residue that was on the red shirt.

2 All we know was that they found this gun in a backpack that
3 had property belonging to Michael and it was found several hours later
4 after the police already left. But I'd also like you to keep in mind that
5 they also searched Michael's truck and they also searched Michael's
6 residence and they found no evidence that a gun had ever been there.

7 Ladies and Gentlemen, the presumption of innocence still applies.

8 Now, I'm about to wrap this up and the State is going to be up
9 here to rebut everything I just said. And they're probably not going to be
10 very easy on me and they're not going to be very easy on Michael
11 because, you know, they have the burden of proof here and I expect
12 that. However, the presumption of innocence still applies. It has applied
13 throughout trial, it applies at the close of evidence, and it applies in your
14 deliberation.

15 Remember at the beginning when Mr. Pike was over here and
16 he was telling you that the presumption of innocence puts you on this
17 side of the room. This side -- he said -- and he said you're not a neutral
18 fact finder, you don't start here, the presumption of innocence starts you
19 over here. And based on this evidence that the State has provided to
20 you, Ladies and Gentlemen, they would have to walk you completely
21 across the room. And based on the evidence that they have provided, I
22 urge you, this is not a walk that you should be making. And the reason
23 is because Michael McNair is not guilty. Thank you.

24 THE COURT: Thank you, Ms. Simpkins.

25 On behalf of the State?

1 MS. BLUTH: Yes, Judge, thanks. If you'd just give me one
2 second to set up.

3 THE COURT: Okay.

4 **REBUTTAL CLOSING ARGUMENT**

5 BY MS. BLUTH:

6 Gordon Phillips lost his life because he asked Michael McNair
7 to turn down his music. And the last words that Gordon Phillips said
8 when he was being approached by those two men is man, let's just
9 leave it alone. But he was still shot eight times by Michael McNair.

10 Now one thing that you were told and I think it was in the very
11 beginning of the trial was when Judge was reading the opening
12 instructions he cautioned you hey, what attorneys say in opening and
13 closing arguments, that's not evidence. What you see in the courtroom,
14 what witnesses testify to, and the pictures, and the video, that is
15 evidence. And let me give you a few examples of what I mean when I
16 say that.

17 At one point in opening, the Defense stated, you know,
18 Michael was a nice guy, he fed the homeless, he went out there, fed
19 them snacks, things like that. But what was the testimony that you
20 heard? That he -- there were two individuals that said they had seen Mr.
21 McNair have interactions with homeless people and that that both of
22 those were negative. You did not hear from one witness that Michael
23 McNair ever left those gates and went out there and was out there
24 feeding the homeless. Not one.

25 You also heard in opening that Ramiro is an individual that is

1 prone to fight. They go out, Mr. Romero says there was going to be a
2 fight, he's good for a fight, let's go. He gets all the way and it's --
3 Michael says no, okay, we're not here to fight anybody, we're not here to
4 hurt anybody, and Ms. Simpkins just said to you Mike brought Ramiro
5 back.

6 Mike didn't -- what did Ramiro Romero say? He said my boss
7 told me yeah, let's go, let's go get them, and I had to do what my boss
8 told me to do. There was no testimony that Ramiro Romero said
9 something like Mike told me let's leave this guy alone, he doesn't mean
10 any harm. Let's just go, let's call it in, let's call it a day. You never heard
11 those words come out of Ramiro Romero's mouth.

12 When you go home tonight, all this stuff is going to be flying
13 through your head. And you just heard Judge read all, I think there's 42
14 or 44 jury instructions, right? And it's a lot, it's a lot to take in. What the
15 State would ask you to do and I'm sure the Defense would ask you too,
16 take your time. Go through the jury instructions. Read what the law is.
17 Read how it is applied. Go through each one of those instructions
18 because they will help you in regards to the deliberation process.

19 And a couple of ones that I want to talk to you about is
20 Instruction Number 10. And what it talks about is: When a witness fails
21 for whatever reasons to remember a previous statement made by that
22 witness, the failure of recollection constitutes a denial of the prior
23 statement, makes it a prior inconsistent communication. The previous
24 statement is not hearsay and may be considered both substantively and
25 for impeachment.

1 So this is what that means. So let's say Witness A is on the
2 stand and they say oh, I don't remember or I didn't say that. And then
3 you saw it happen, right? One of the attorneys gets up there, well, isn't
4 it true on page 23 you said, dah, dah, dah, dah? What this instruction is
5 telling you is that you can consider that.

6 So for instance, when Ramiro Romero says well I don't know
7 what he was pointing at. It could have been a -- it could have been his
8 phone that he was pointing at the victim, it could have been just him
9 pointing his finger. And then Mr. Rogan gets up there and says isn't it
10 true on page 34 of your preliminary hearing transcript that you said it
11 was a gun? You can consider that previous testimony. It was a gun.
12 So that's what Instruction 10 is talking about.

13 We're going to talk about the credibility of a witness in a
14 second. Both parties have already talked about that but I'm going to talk
15 about it in regards to specific witnesses in a second.

16 But the other thing that I wanted to talk to you about is Ms.
17 Simpkins just said to you that Mitchell Johnson is an accomplice. If
18 Mitchell Johnson is an accomplice, what does that make Michael
19 McNair?

20 Jury Instruction Number 19 says: An accomplice is thereby --
21 is hereby defined as one who is liable for prosecution for the identical
22 offense charged against the Defendant on trial in the cause in which the
23 testimony of the accomplice has given.

24 Ms. Simpkins just told you that Mitchell Johnson is an
25 accomplice. Well if he's an accomplice, who is he an accomplice to?

1 He's an accomplice to his brother, Michael McNair.

2 In a moment we're going to -- I'm going to turn my attention to
3 Mitchell Johnson, but before I get there, I want to talk about a few other
4 things. So we didn't play the CDs in closing arguments just because I'm
5 sure you're tired of seeing the same clips over and over again. But I do
6 kind of want to walk you through these CDs because when you get back
7 there we're not back there with you and so it might -- you might get a lost
8 a little bit in regards to what these exhibits are, okay?

9 So each CD has an exhibit number on them, so you'll know
10 what I'm talking about. This is State's Proposed Exhibit 129, this big
11 packet, it's filled with 14 CDs. This has every camera angle between the
12 hours of -- well it's really between the hours of 9:00 and 10:00 p.m. but it
13 will say on the camera 12:00 to 1:00. So if you -- no matter what camera
14 angle you want to look at, you got them here, okay?

15 Now State's Exhibit -- State's -- I said proposed but these are
16 actually in evidence. State's 125 is if you just want to follow Ramiro
17 Romero's actions, that's what's on 125, it's just Ramiro Romero.

18 All right. So then we're left with State's 1 and State's 127.
19 State's 1 and State's 127 follow Mr. McNair throughout the entire
20 process. The only difference between 1 and 127 is actually just a few
21 seconds and what that difference is, is in State's 1, if you remember
22 that -- the time period where Michael McNair and Mitchell Johnson walk
23 across the street and they cross Las Vegas Boulevard, State's 1 shoots
24 back to the Suburban, so you can see who's in the Suburban, so you
25 don't get to see what's going on on the street. State's 127, we don't

1 flash back to the Suburban, we keep the -- we keep the view on the
2 street. So basically they're the exact same CD, with just that small
3 change of when the two -- when Mitchell Johnson and Michael McNair
4 cross the street, all right?

5 And then the very last one, it's State's 128. If you remember
6 when I was speaking with Detective Hoffman, when we cut these CDs
7 and we continued to copy them and copy them, the actual picture it gets
8 degraded each time. So what we did with State's 128 is we actually cut
9 and pasted the absolute first copy of that -- of the 30 minutes on the
10 steps.

11 So the State would ask you if you are wondering, hey, what
12 was in Michael McNair's hand when he's standing on those steps with
13 Ramiro Romero and the hand goes up, State's 128 is the actual copy of
14 that. This is the best -- it would be the best CD of those because it's not
15 degraded. So that's kind of your walk-through of the CDs in this case.
16 So just refer to your notes when you're -- you know, when you get back
17 there.

18 There's a few different time periods. Now you're free to watch
19 the video however many times that you want but there's a few specific
20 minutes and seconds that if you're not going to watch through all of it,
21 the State would submit to you that these are the ones the State would
22 ask you to look at.

23 The argument between the two individuals, and when I say the
24 two, between Gordon and the Defendant, that doesn't even get started
25 until about 13 minutes in. Up until that, you can see the Defendant -- his

1 music -- or -- you can't see his music obviously but he's outside his
2 truck, walking in and out, and you see the security guard walk up. But it
3 isn't about 13 -- until 13 minutes in that you see Gordon Phillips walking
4 across the street. So that'll save you some time if you don't want to
5 have to go through the whole thing.

6 Then at 16 minutes and 4 seconds is when the Defendant
7 pulls up his vehicle after he's done the donuts and looks over at Gordon
8 Phillips and points at him.

9 Also at that point in time, you'll watch the Defendant walk in --
10 open the door and walk in. You will see in his right hand a black object
11 when he's walking in and that's right after he gets out of the car at 16:04.

12 At 26:42 is when the murder has already happened and the
13 Defendant walks in and shows the firearm to Ramiro Romero. And then
14 just one minute later, at 27:42, you will see the camera -- Defendant's
15 walking into the locker room. You will see his left shoulder is kind of
16 tucked in, you can't see what's in his left hand. He bends down to the
17 locker and very quickly you will see something black that he sticks into
18 the backpack. So the State would ask you to consider those.

19 So there was many questions during trial and then Ms.
20 Simpkins talked about a few things in regards to hey, what the police did
21 and what the police didn't do. So I want to talk to you a little bit about
22 forensics. So what Detective Hoffman talked to you about is look, the
23 reason why we do forensic testing, the reason why we do fingerprints,
24 the reason why we do DNA, things like that is because we need to
25 gather information that we don't know. We don't submit for DNA or for

1 fingerprints or for things like that on stuff we already know, that's a waste
2 of resources.

3 So let's look about what the information that we did get. Well,
4 we obviously know -- we discussed the DNA and the proportions. Mr.
5 Rogan discussed the fact that Forensic Scientist Tiffany Adams talked
6 about 93 percent of the pie, right? She talks about it like a pizza pie. 93
7 percent of the pie of that DNA belongs to the Defendant. The other 7
8 percent belongs to this unknown person. But she can't even tell you if
9 that person is male or female. There's literally no information that she
10 has, she can't even tell you if that other person is male or female. So
11 this idea of well Mitchell Johnson can't be excluded, yeah, that's true.
12 But neither can the other people and she can't even tell you that he's --
13 that that person's DNA is a male or a female.

14 And then obviously the detective submitted the guns -- the gun
15 and made sure that it was a direct match to the bullets and the cartridge
16 case, even though when they went into and got the gun, they saw that
17 the markings on the back of the bullets, if you remember, I think it says
18 like CBC 45, those were that -- the exact same cartridge cases as those
19 found at the scene but to do due diligence they still compared the gun to
20 the cartridge cases and the bullets. Those were the forensics that they
21 had done.

22 Now in regards to cell phone forensics. Now this is what I was
23 talking about when I said look, they submit for forensics to find out
24 information that they don't already have. What did the cell phone
25 records show? Number one, the cell phone records showed that during

1 that couple hour's period there were no text messages between the two.
2 There was two phone calls, one from the Defendant to Mitchell, and one
3 from Mitchell to the Defendant that -- both of them lasted about ten
4 seconds. So what was going into those phones going to show us?
5 Phone records showed there were no text messages and we knew that
6 the telephone calls, there were two, was only -- they were only ten
7 seconds.

8 More importantly, the State would ask you to consider this.
9 The Defendant hadn't spoken to his brother since the 9th. So it's not like
10 these two were meeting up every day or speaking every day, multiple
11 times. He hadn't spoken to his brother on the 9th, so the State would
12 submit to you on the 14th, he had a reason. He had a reason to call his
13 brother and what was that reason? Because he needed help.

14 We've talked a lot about gunshot residue. So the four hours,
15 right, we -- there were a couple different guidelines that Detective
16 Hoffman talked about. One of those is the four hours. Once four hours
17 is gone, you can't get it back, you can't do GSR, okay? So what did
18 Detective Hoffman tell you? It was already two hours past the shooting
19 by the time he arrived, okay? He hadn't even talked to any witnesses at
20 that point, he hadn't even gone through the video.

21 So by the time he's gone through the vid -- by the time he's
22 gotten there and gone through the video, what did he tell you he still has
23 to do? He has to get a search warrant. You don't just get to go up to
24 people and just start swabbing people's hands, you have to get a search
25 warrant. The four hours at that point in time have come and gone.

1 But it -- the four hours, it doesn't even matter because what
2 else is the second guideline? If you have proof that someone has
3 handled a firearm, you cannot test them. You can't test them. So when
4 that video shows Michael McNair with a gun before the murder and a
5 gun after the murder, it's done. No GSR can be done at all. So those --
6 this whole thing about the GSR wasn't done, it can't be done.

7 And then obviously, I mean, Mitchell Johnson can't have any
8 GSR done on himself or his clothes because we're talking about four
9 days later. So that would be obviously outside of the four hours.

10 You heard Detective Hoffman discuss the fact that, you know,
11 cartridge cases and little bullets, the DNA and fingerprint labs at the Las
12 Vegas Metropolitan Police Department it is their policy they do not --
13 they not -- do not do DNA or fingerprints on bullets, so that's not
14 something that can be done.

15 Now what about this DNA on this red shirt? Again, what
16 information is that going to give us? If we tested that red shirt and it
17 came back with the Defendant's DNA, would anybody be surprised at
18 that, right? The video shows him clearly putting on a red shirt. And
19 what did Mr. Coon discuss about the shirts? That they had just been
20 freshly laundered that they were -- you'll see the pictures, that they were
21 all up on that steel or on that metal bar. And that none of them had been
22 used. There was only one that was in that laundry -- that was in the
23 laundry, not basket, but the little bag. So testing that shirt would not
24 have given us any additional information.

25 You heard a lot about hey, both -- both Defense Counsel

1 would ask the witnesses multiple times, hey did the cops do a photo
2 lineup with you, did the cops do a photo lineup with you? The video
3 clearly shows that two individuals walked over at minute 26 -- at -- not --
4 basically it's at 9:24 and 9:25, two individuals walk over. All the
5 witnesses talk about one being tall and one being short. Nobody said
6 hey, if I saw the person's face I could pick them out. No, they talked
7 about hey, it was dark but I saw very clearly a tall person and a short
8 person. So the video shows us exactly who those two people are. So
9 there's no need for these photo lineups because we know who the two
10 people are. We're just looking for which of the two is the shooter.

11 You know, this is kind of a cast of characters, all of the
12 witnesses in this case. You know, many of which were homeless.
13 Yeah, I mean, they're a cast of characters, right? Ramiro Romero,
14 Mitchell Johnson, Bret Lesh. There's a common saying in court that
15 talks about you can't cast a play in hell and have angels as the actors.
16 We don't get to pick our witnesses, we don't get to pick our victims, we
17 don't get to pick our Defendants; they come as they come.

18 And when you think of Ramiro Romero and think of his
19 attitude -- and I mean, he said it multiple times, like I've got a bad
20 attitude, I'm an angry kid. He'll tell you how it is. I mean, it's clear as
21 day he doesn't want to be here and he had to be impeached over and
22 over and over again. And he even told the Judge, I don't want to be
23 here, I've been here for four or five hours.

24 But the State would ask you when you're looking at Ramiro
25 Romero's testimony to look at that jury instruction that I talked about that

1 just says if someone had to have been impeached with a prior
2 statement, you can still consider that prior statement as evidence. For
3 instance, like when he said he pointed the gun at the victim, when he
4 testified to that at the preliminary hearing.

5 Now Kenneth Saldana. You heard from the State's
6 investigator, Jamie Honaker, I mean, no one's trying to hide Kenneth
7 Saldana from you. Nobody can find Kenneth Saldana. He's a homeless
8 individual. They checked the jails, they checked the morgues, they
9 checked the hospitals. And you heard his testimony at the preliminary
10 hearing.

11 But what the State would ask you to consider is just what you
12 heard about him, about -- from Mr. Honaker and from Deanna Lopez,
13 just about how he had issues with drinking, how he didn't want to be
14 cooperative in regards to this. And the State would submit to you that
15 Kenneth Saldana simply got it wrong. He got it wrong.

16 And if you think about from where any of these individuals are
17 sitting, you -- he could easily be down -- he could see -- he sees the
18 punching going on and he sees the person step back and shoot. But
19 from his point of view behind a tree, we didn't really get to know -- I
20 mean, was the tree in the way when you saw this? Where was the other
21 person when the shooter stepped back? So those are things that we
22 didn't get to ask Mr. Saldana. So we would just ask you to consider in
23 regards to his comments about being behind the tree.

24 But also, think about his comments in regards to what you
25 heard, especially in regards to Deanna and -- it's either Deanna or

1 Deanna, but Ms. Lopez, what did she say? She was the one who ran to
2 Gordon as soon as he got shot and was holding him and trying to stop
3 the bleeding. And when you look at what she's saying she says I saw
4 them get up there, I saw them argue, I saw the short guy punch him, and
5 I saw the taller guy pull out a gun and shoot. She was very clear in all of
6 the things that she said and in regards to the positioning.

7 The Defense has stated that basically the cops got the wrong
8 brother. It's the wrong brother. Mitchell Johnson is the true shooter
9 responsible in this case. Why didn't Detective Hoffman arrest Mitchell
10 Johnson? Well the State would ask you when you're back there
11 deliberating, what evidence, besides Kenneth Saldana -- what evidence,
12 not Deanna, not Bret, not Mr. Brennan, did the police have that Mitchell
13 Johnson either knew what was about to happen or was the shooter?

14 If the video shows -- if you watch that video and you believe
15 that the Defendant has that gun, I believe it's at 17 minutes and 4
16 seconds. If you believe the Defendant has that gun before the murder,
17 at 17:04, and you see that gun after the murder in his hands when he
18 walked in to show it to Ramiro Romero, what evidence do you have that
19 Mitchell Johnson is the shooter? The person with really no dog in this
20 fight. He wasn't even there for the argument, for the beef between his
21 brother and the Defendant.

22 Another thing the State would ask you to consider at is the
23 timing. You know, from the moment the Defendant and Mitchell
24 Johnson start walking across the street and then come back is anywhere
25 between one minute and two minutes. Now maybe if Mitchell Johnson

1 had come on to the property and they had sat and they talked for like 30
2 minutes, they could have had this conversation where Michael could
3 have said hey man, you're not going to believe it, this guy is giving me
4 so many problems. He did this to me, he said this to me, and then the
5 two walk over. But concentrate on the timeframe of how fast this
6 happened. Mitchell gets out of the truck, he runs to his brother, and
7 they're already on the way. And they're back within 90 seconds.

8 When would they have had this conversation where they
9 would have been able to say okay, here, I've got this gun, this guy's
10 giving me a bunch of problems, here's the gun, you go shoot him and
11 then I'll take the gun back. There's simply not enough time for those
12 transactions to happen within the 90 seconds -- or within that 90
13 seconds that Mitchell leaves and then comes back.

14 The State would also ask you, if Mitchell Johnson, if he is the
15 shooter -- if Mitchell's the one that pulled the trigger, why wouldn't he
16 leave with that gun and get rid of it? Why would he give the gun to his
17 brother and have that gun stay on scene? I mean, a man has just been
18 gunned down is either dying or is already dead across the street. Why
19 would Mitchell Johnson leave the murder weapon with his brother? He's
20 gone. He's got a means to go. He's in a Suburban. Him and his wife
21 could have taken that gun and dumped anywhere around this county.
22 But he didn't. Because it's not his gun. Because it's Michael McNair's
23 gun and we know that because it's his wife's cousin's gun.

24 Ms. Simpkins just put on the overhead that picture of Mitchell
25 Johnson and if you remember it said I'm not going to say that I wasn't

1 involved. It had that in the big writings across the picture. But if you
2 remember the rest of that statement that was read in with -- when
3 Mitchell was on the stand said I'm not going to say that I wasn't involved
4 in it, but I didn't know this was going to happen. He's not saying he
5 wasn't there. He's not saying he didn't punch him. He's telling you I
6 went over there, I didn't know exactly what was going down. Yeah, the
7 guy got up, got close to me, I didn't like it, I punched him. But I didn't
8 know my brother was going to pull out a gun and fill that guy's body with
9 lead.

10 Ms. Simpkins also discussed the fact that, you know, Mitchell
11 Johnson lied and lied and lied through his interview. What was Mr.
12 McNair's statement? What was in his statement? What did he do? He
13 stated, I went across the street and then I came back and I never left
14 again. You know that that's not true because you know the video shows
15 that that's not true.

16 You know, in the beginning of that interview with Mr. Johnson
17 you'll remember the police haven't seen the part of the video yet where
18 the gun is in McNair's hands before the murder. So in that video they're
19 going after Mitchell Johnson hard. Like you brought the gun, you
20 brought the gun, didn't you bring the gun, why did you bring the gun.
21 And Mitchell Johnson's saying I didn't bring the gun. I don't know what
22 you guys are talking about, I didn't bring the gun. It's not until later that
23 they see the video at that 17:04 mark that shows Mitchell Johnson really
24 didn't bring the gun; that his brother had it all along beforehand.

25 If you remember, I asked Mitchell Johnson you were

1 dishonest. You were dishonest with the police multiple times and what
2 did he say yeah, I was. And my question was is that because you were
3 protecting your brother? And he said yeah, partly. I said what was the
4 other part? And his response was because I don't like the police. That's
5 what he said, I don't do police. Yeah, he was dishonest. We're not
6 hiding from that. In fact, we went through all of his dishonesty.

7 You have to weigh credibility of a witness on your own, right?
8 And so Ms. Simpkins said that she felt that the Defendant -- that while
9 Mitchell was testifying that he was grinning ear to ear and that he was
10 smiling and that he thought that this was some type of joke. The State
11 would disagree but it's up to you to weigh how you felt that was.

12 But if you remember, I mean, he got up here, just like every
13 other witness, raised his hand, swore to tell the truth, and he sat there.
14 And he didn't want to be here. It's not like he was ready to go, got that
15 subpoena. No, he said I have to come here, I don't have a choice. It's
16 not easy to come in here and testify against your older brother. These
17 two human beings were raised together by the same mother. Do you
18 think it's easy to come in here and say yeah, my older brother shot and
19 killed a man? That's not easy.

20 But what do you expect him to do, get up there and take the
21 blame? No. He said, I'm not saying I didn't do things, I punched him.
22 I'm just telling you I didn't kill him, I didn't shoot him eight times.

23 This idea that he fled the scene or that he hid. He lives .2
24 miles from the murder scene. I mean, he didn't go flee to Mexico. He
25 didn't go row on this excursion, he went home, where he was when the

1 police went to find him four days later in the truck that's on the video.

2 He openly spoke to the police, told them -- of course lied
3 multiple times in the beginning but ultimately told them. And what did he
4 tell them just like he said here on -- when he testified? Guy got up on
5 me, I wasn't threatened by him, he did -- I never saw a knife, I didn't feel
6 like I was not safe. But he got too close to me and I punched him in his
7 neck. And the next thing I know, I'm hearing gunshots, I turn and I see
8 him fall to the ground, meaning Gordon Phillips, and I see my brother
9 putting away a firearm.

10 I'd like you to consider motive but in two different ways.
11 Number one, what motive does Mitchell Johnson have to come in here
12 and testify? We've made no deals with him, we've made no promises to
13 him --

14 MR. PIKE: Objection, Your Honor, vouching.

15 THE COURT: Well, I think that was part of the testimony, so
16 I'll overrule that. But you'll rely the testimony yourselves, Ladies and
17 Gentlemen.

18 BY MS. BLUTH:

19 The State made no -- you heard the testimony. He said we've
20 made no deals, no promises, no benefit. He is getting nothing from
21 coming in here and testifying.

22 Okay, now let's consider a different motive. What motive does
23 he have to kill Gordon Phillips? He got called into a fight basically. His
24 brother called him and he got called in and he walked over there. But
25 what animosity, what anger would he be filled with to pull out a gun and

1 shoot Gordon Phillips? He simply lacks the motive to do that.

2 Mr. Rogan talked about this a little bit but I -- the State would
3 ask you to go back and look at your notes. And one thing to do -- we
4 talked about credibility, but the other thing to talk about is corroboration.
5 So the State would ask you to look at what Mitchell Johnson said and
6 look at how that compares to Deanna, Razo, how does that compare to
7 Lesh.

8 And especially in regards to like location and distances when
9 you look at what Lesh says. Lesh says very specifically, the shooter
10 was up on the curb, just barely. The smaller guy was back. And what
11 does Mitchell say? Mitchell says the exact same thing. My brother was
12 barely up on the curb. He was kind of coming off the curb and I was
13 back. So just look at your notes. We've been watching you, I've noticed
14 how many notes you've been taking. Just look at your notes in
15 compared to hey what does Mitchell say and what do the other
16 witnesses say? And what does the video show?

17 Really quickly I'd just like to talk about Mr. Razo briefly. You
18 know, Mr. Razo before tape he obviously mentions this gun and then he
19 goes on tape and he doesn't mention the gun, right? And the cops say
20 to him, hey man, before tape you were clearly talking about a gun. And
21 Mr. Razo says yeah, I did, but I don't know why I said that. I don't know
22 why I said that. Do you think maybe it's nerve wracking -- maybe when
23 he's speaking to police and there's no recording and -- it's a little bit
24 more comfortable than hey, here's my recorder, I'm going to turn it on
25 and now you're going to say about how you saw a gun in somebody's

1 hand who just murdered somebody. The State would ask you to
2 consider that.

3 But also, he talks about hey man, I saw him walking and I
4 think the exact words he used was hot pursuit. I saw him in a hot
5 pursuit. And he's like and I hightailed it out of there. I knew something
6 bad was going to happen. Well, would you hightail it out of there or be
7 so scared to leave if you hadn't seen a gun? Wouldn't you be more
8 likely to leave where you've been staying and get the heck out of there if
9 you saw someone walking with a gun?

10 And then also, the last thing about Mr. Razo is, is you heard
11 with, I believe it was Detective Hoffman who discussed the fact that not
12 only did Mr. Razo do a statement where you could hear what he's saying
13 but he also wrote out a statement. And in his written statement he
14 described the shooter as the taller male with the blue shirt on.

15 When you consider the actions of the Defendant, the State
16 would ask you to consider before, during, and after. Obviously look at
17 the totality of it, but look at those three stages. And if you look at before,
18 you kind of understand a bigger picture, right? With Mitchell Johnson,
19 we have this quick like two-minute interaction. But if you look at the
20 Defendant, you have this before, during, and after.

21 Before you see the argument, right, what other witnesses say
22 the argument. But you see the interaction at the fence. You see the
23 Defendant drive off, you see him park all catawampus. You see him
24 pointing over at Gordon Phillips. And then you see him go get Mr.
25 Romero. You see him pointing the gun. Consider all of the actions. Not

1 just during but look at before, look at during, look at after. The changing
2 of the shirt. The hiding of the backpack. Those things. And consider,
3 does that make sense? Do those actions make sense? They make
4 sense if you just killed somebody and you're trying to get away with it.

5 So Ms. Simpkins just talked to you a little bit, hey, these
6 witnesses are -- they're all over the place, right? I mean -- and she
7 talked about Mr. Lesh said, you know, it was the same two people that
8 came over, the first and second time. You can tear apart witnesses
9 every day of the week and point the inconsistencies here and there, but
10 if you think about it, almost every single witness -- or actually no, every
11 single witness describes the taller and the short person. The taller
12 person never changes. It's always the tall guy, with a blue shirt or blue
13 sweatshirt on.

14 But what you can't ever tear apart is the video. The video
15 doesn't lie, right? It has not motives, it has no reason to hide anything,
16 no reason to say anything. The video clearly shows which two people
17 are over there at the time of the shooting.

18 So, you know, we have been spending hours here, right,
19 arguing over about how was the shooter? Who was the shooter? Is it
20 Mitchell, is it Michael, is it Mitchell, is it Michael? It doesn't matter, right?
21 The biggest question in this entire case and it does not matter legally.

22 And Mr. Rogan gave an example and I'd like to give another
23 one and that is is if I want to go rob a bank and I know the teller or I
24 know the lady who has, you know, all the money in the back safe, and
25 she tells me hey, okay, the drops at 2:00, that's where the most money

1 is and I say okay, got you. So I go in at 2:00 and I commit the robbery.
2 I'm the one who committed the robbery but she's the one who helped
3 me do it. We're both on the hook.

4 If I want to go rob somebody at 7-Eleven, and I send my
5 friend in to go do the robbery but I'm going nto drive the truck home,
6 we're both on the hook for the robbery, that's how murder works too.

7 So the State's theory has been and is always going to be that
8 Michael McNair is the shooter in this case. That's what the evidence
9 shows. That's what the State's believes the evidence shows; that
10 Michael McNair is the shooter in this case.

11 But let's say, you know, five of you think that, that Michael is
12 the shooter and seven of you think well, no, Mitchell is the shooter. I'd
13 ask the seven of you to consider this, if Michael's the one in the beef and
14 he has the gun in his possession, that's the biggest and most important
15 thing. If he has that gun in his possession before that murder and his
16 brother comes and he tells his brother about this beef and he gives that
17 gun to his brother, his -- they walk over there and his brother uses that
18 gun, it's done. Michael McNair is guilty of murder; whether he shot that
19 gun or whether his brother shot that gun.

20 So we can spend hours debating on who the shooter is but at
21 the end of the day it doesn't matter about your verdict, he is guilty of
22 first-degree murder.

23 Now, the charging document, right, it has that -- you can either
24 do it because you're directly -- directly you pulled the trigger, or you
25 conspired, or you aided and abetted with this unknown person. I mean,

1 obviously at this point in time we all know who the unknown person is;
2 the unknown person is Mitchell Johnson. The police hadn't confirmed
3 exactly who that unknown person was for four days later. But as we all
4 sit here today we know that that unknown person is Mitchell Johnson.
5 And we're not trying to hide that from you. We brought Mitchell Johnson
6 to discuss he is the unknown person.

7 But the reason why the language is the way it is, is what I was
8 just explaining. Seven of you might think it's Michael but five of you
9 might think that it's Mitchell. So it's either he directly did it or he
10 conspired or aided and abetted with this unknown person, which is
11 Mitchell. It's not some -- you know, some phantom person out there.
12 The unknown person is Mitchell.

13 Lastly, I want to leave you with this. Michael McNair tried a
14 few different ways to get somebody else to do his work for him. He tried
15 Ramiro Romero. He got him all amped up, you could see Ramiro, he's
16 acting like a crazy person. He's punching cardboard, he's screaming,
17 flexing his muscles, and he gets him and he goes over. But Ramiro
18 stops, right? They stop -- they both stop and they go back. So it didn't
19 happen. Nothing happens. Gordon doesn't have to pay the price for
20 telling him to turn down the music.

21 So he calls his brother. His brother goes over there, asks his
22 brother to do his work for him. And his brother gets up there, Gordon
23 tried -- starts to approach him, hey man, let's leave it alone. Leave it
24 alone. But he -- Gordon gets too close, so Mitchell punches him. But
25 that's not enough. It's not enough that Gordon got punched. Michael

1 McNair pulls out a gun and shoots him eight times. Some of which are
2 in the back. Some of those bullets entered him through the back.

3 Mr. Pike says that in the beginning of this case that the
4 evidence will show you that to Mitchell Johnson, Michael McNair is
5 disposable. Michael McNair's disposable? Michael McNair called his
6 little brother to a crime scene, then shot somebody, and now is saying
7 his brother is the one that did it. That's disposable. There's somebody
8 who's disposable and that is Mitchell Johnson.

9 If Michael McNair would have just stayed on his side of the
10 fence. If he would have just stayed inside the Flavors' fence, but he
11 didn't. He walked up the street. And if he would have just stayed on
12 that corner, if he would have not crossed Las Vegas Boulevard, he
13 would have gone home that night to his family and Gordon Phillips would
14 have lived another day. But that's not what happened. That's not what
15 happened. He made decisions. And because of those decisions, there
16 is accountability.

17 And the State is asking you to find him accountable for killing
18 Gordon Phillips. And the way you find him accountable for those actions
19 is to find him guilty of first-degree murder, which is what he committed.
20 Thank you.

21 THE COURT: Thank you. All right. We are going to swear
22 our officers to take charge of our jury.

23 [The Clerk swore in the officers to take charge of
24 the jury during deliberations]

25 THE COURT: All right. So you can gather all your

1 belongings, Ladies and Gentlemen, including your clipboards and
2 notepads. We're going to get you back to the deliberation room. I know
3 it's 5:00. I don't have any expectations for what you're going to do this
4 evening, other than I would ask you to get together and get a foreperson
5 elected. From here on out I'm not telling you when to come back or
6 anything. You'll give me direction as to, for instance, what time you want
7 to come back tomorrow and continue deliberations, anything like that.

8 Except for Ms. Trinidad, Ms. Trinidad, you're going to be our
9 alternate. So we kind of randomly select that seat. So when you go
10 back with everybody, you're going to kind of peel off with Jacque, my law
11 clerk, she's going to get some information from you and we're going to
12 release you right now. You're under that same admonition that you
13 cannot talk to anybody about the case until we let you know the jury's
14 finished their deliberations, okay?

15 And everybody go ahead and gather yourself and head on out
16 with JR. Thank you.

17 THE MARSHAL: All rise for the marshals -- I mean, for the
18 jury.

19 THE COURT: All rise for the marshals? Long day.

20 [The jury retired to deliberate at 5:05 p.m.]

21 THE COURT: Do you guys have anything outside the
22 presence?

23 MR. PIKE: Briefly, Your Honor, if I may?

24 THE COURT: Yeah.

25 MR. PIKE: I appreciate the Court attempting to alleviate the

1 issues prior to the Defendant's arguments and that the Court would be
2 loathe to grant a motion of mistrial and wait until after a verdict comes in.
3 I did not cite any case authority in reference to that. And just what I
4 would like to cite is *William versus Ford*, 139 F.3d -- Federal 3rd, 737.
5 It's a Ninth Circuit, 1998. And I do that because -- in order to preserve
6 the issue for any Federal review.

7 THE COURT: Is that a case dealing with like disparagement
8 of Counsel? Yeah?

9 MR. PIKE: It's my understanding, yes.

10 THE COURT: Navid's nodding his head yes, so. Yeah,
11 look --

12 MR. PIKE: My thesaurus or --

13 THE COURT: -- I didn't think you would probably find any
14 kind of case law on -- you'll find reams of case law, obviously on
15 disparaging Counsel -- I mean, directly disparaging Counsel. And this
16 kind of is something that I know you took exception to it but I don't think
17 anybody believes that Mr. Rogan intentionally meant that to be
18 disparaging to you, just was a bad choice of analogy.

19 So you're probably not going to find any case law but I
20 certainly understand what your concern was and I echo that as well, so.

21 MR. AFSHAR: Your Honor, if I could just add one last thing
22 for the record?

23 THE COURT: Sure.

24 MR. AFSHAR: Again, I really appreciate the Court's
25 admonishment and I know Mr. Rogan is extremely ethical, he had not

1 bad intention. But that being said, I feel like this is one of this situations
2 where the bell can't be unrung and although I appreciate the Court's
3 admonishment, I mean, talking about killing Defense Counsel because
4 of raising objections, how -- like I mean, we might not find reams of case
5 law because I don't think that's ever happened.

6 THE COURT: Yeah, I don't --

7 MS. BLUTH: Judge --

8 THE COURT: -- disagree with you. And I think that in all of
9 these situations, arguably a bell can never be unrung. But case law
10 suggests that there are situations where we admonish the jury and the
11 Appellate Courts accept the admonishment as being curative to a
12 particular problem. So I thought that was appropriate here and that's
13 why I asked for some input on what to do. I don't think that you all
14 providing that input waives that issue for you at all but I just didn't think
15 in the totality of what we were doing with that it was appropriate to grant
16 a mistrial. Somebody else may disagree with that though --

17 MS. BLUTH: Judge, can --

18 THE COURT: -- in looking at what it was that was said, I
19 know.

20 MR. PIKE: I appreciate that. I just needed to federalize it.

21 THE COURT: Okay.

22 MS. BLUTH: Can we just -- can I say one thing in regards to
23 that --

24 THE COURT: Sure.

25 MS. BLUTH: -- Judge?

1 So we're not saying that it wasn't a good analogy. We're
2 agreeing that it was a bad analogy.

3 THE COURT: Right.

4 MS. BLUTH: And, you know, we'll have the transcripts to talk
5 about specifically what Mr. Rogan said, but he -- what I believe he said
6 was he said let's say I'm angry -- let's say I'm really upset with Mr. Pike
7 for making so many objections, it's not -- I don't think it rose to the level
8 of a I want to kill Mr. Pike because he's made -- no, he just said let's say
9 hypothetically I am annoyed or I'm upset with Mister -- you -- do you
10 know what I mean?

11 THE COURT: No, what he said was let's assume that or
12 hypothetically that I am upset with Mr. Pike for raising objections during
13 my closing --

14 MS. BLUTH: Yes.

15 THE COURT: -- argument and I decide to kill him. So I mean,
16 it is what it is. I mean, there's no real sugar coating what was said.

17 MS. BLUTH: No, and I'm not trying to.

18 THE COURT: As I said I don't -- I don't believe it came from
19 any malicious intent whatsoever. I think Jeff probably said it best when
20 he said it was just a spur of the moment analogy and it was a bad
21 analogy. But it doesn't change what it was that was said and so how
22 somebody else is going to view that, I mean, that's -- like I said that's up
23 to the Appellate Court.

24 I didn't think in the totality of the context that it warranted a
25 mistrial --

1 MS. BLUTH: Okay.

2 THE COURT: -- so yeah.

3 MS. BLUTH: Okay.

4 THE COURT: All right. So I don't --

5 Did they tell you anything already?

6 Okay. So they're going to leave.

7 Did they elect a foreperson? Pardon?

8 Oh, Mr. Gustilo, okay. So they're coming back at 9:00.

9 MS. BLUTH: Sounds great.

10 THE COURT: If we have any word from them, I'll let you

11 know, but obviously I've got this massive calendar and day of hearings

12 tomorrow, so we'll fit something in if we get questions or anything like

13 that, okay?

14 MR. AFSHAR: And, Your Honor, I'm so sorry about this but

15 one thing I wanted add -- to add to the objection as well as why I think a

16 mistrial is appropriate is that it also inflamed the jury. I think that that it's

17 not just disparaging, it was so out of -- that it would have inflamed the

18 passion of the jury. It makes us seem like we're worthy of being killed

19 because we're doing our job.

20 THE COURT: Well, I think that's part and parcel of the

21 problem with the disparagement is --

22 MR. AFSHAR: Right.

23 THE COURT: -- the effect that it has on the --

24 MR. AFSHAR: Right. That's what I mean.

25 THE COURT: -- jury. Nobody's worried about the effect it has

1 on you --

2 MR. AFSHAR: Yeah.

3 THE COURT: -- quite honestly.

4 MR. AFSHAR: Right.

5 THE COURT: Nobody's worried about the effect it has on
6 prosecutors or the Court. It's always the effect that it potentially -- that
7 kind of stuff has on jurors, so.

8 All right.

9 MR. AFSHAR: All right. Thank you, Your Honor.

10 THE COURT: All right, guys. No problem.

11 MS. BLUTH: Thank you.

12 [Evening recess at 5:11 p.m.]

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

23

24

25



Brittany Mangelson
Independent Transcriber

1 INST

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

MAR 07 2019

BY: Kory Schlitz
KORY SCHLITZ, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 MICHAEL MCNAIR,

11 Defendant.

CASE NO: C-17-327395-1

DEPT NO: III

12 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

13 MEMBERS OF THE JURY:

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

17 You must not be concerned with the wisdom of any rule of law stated in these
18 instructions. Regardless of any opinion you may have as to what the law ought to be, it
19 would be a violation of your oath to base a verdict upon any other view of the law than that
20 given in the instructions of the Court.
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26 C-17-327395-1
INST
Instructions to the Jury
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If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

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

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

In this case, it is charged in an Information that on or about the 14th day of September, 2017 the Defendant committed the offense of MURDER WITH USE OF A DEADLY WEAPON and CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON.

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

did willfully, unlawfully, feloniously and with malice aforethought, kill GORDON PHILLIPS, a human being, with use of a deadly weapon, to wit: a firearm, by shooting into the body of the said GORDON PHILLIPS with said firearm, the said killing having been willful, deliberate and premeditated. Defendant being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other unknown person to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendant and unknown person aiding or abetting and/or conspiring by acting in concert throughout.

COUNT 2 - CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON

did then and there willfully, intentionally, unlawfully and feloniously carry concealed upon his person, a firearm or other deadly weapon, to wit: a firearm.

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

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

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

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

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

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

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

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

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

1
2 You are here to determine whether the Defendant is guilty or not guilty from the
3 evidence in the case. You are not called upon to return a verdict as to whether any other
4 person is guilty or not guilty. So, if the evidence in the case convinces you beyond a
5 reasonable doubt of the guilt of the Defendant, you should so find, even though you may
6 believe one or more other persons are also guilty.

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

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

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

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

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

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

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

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

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

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

When a witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement makes it a prior inconsistent statement. The previous statement is not hearsay and may be considered both substantively and for impeachment.

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

The defendant is not required to present any evidence or prove his innocence. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

A conspiracy is an agreement between two or more persons for an unlawful purpose. To be guilty of conspiracy, a defendant must intend to commit the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not.

Mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy. Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. In particular, a conspiracy may be supported by a coordinated series of acts, in furtherance of the underlying offense, sufficient to infer the existence of an agreement.

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2 It is not necessary in proving a conspiracy to show a meeting of the alleged
3 conspirators or the making of an express or formal agreement. The formation and existence
4 of a conspiracy may be inferred from all circumstances tending to show the common intent
5 and may be proved in the same way as any other fact may be proved, either by direct
6 testimony of the fact or by circumstantial evidence, or by both direct and circumstantial
7 evidence.
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Where several parties knowingly and with criminal intent join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his co-conspirator committed in furtherance of the conspiracy. In contemplation of law, the act of one is the act of all.

However, a defendant cannot be liable under a conspiracy theory of liability for acts committed by a co-conspirator unless the defendant also had the intent necessary for the particular crime.

A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully gotten away and concealed the crime.

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

While a verdict must be unanimous, the jurors need not be unanimous on the means or the theory of liability in arriving at the verdict. In other words, you do not need to be unanimous in deciding whether the defendant is responsible by directly committing an offense or by conspiring or aiding and abetting, so long as all of you agree that the defendant is guilty of committing the crime beyond a reasonable doubt.

The conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense of the circumstances thereof.

An accomplice is hereby defined as one who is liable for prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the evidence of the corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect the defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

In this case the defendant is accused in an Information alleging an open charge of Murder. This charge includes and encompasses Murder of the First Degree and Murder of the Second Degree.

The jury must decide if the defendant is guilty of any offense and, if so, of which offense.

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

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

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

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

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

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

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

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

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

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

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

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

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

All murder which is not Murder of the First Degree is Murder of the Second Degree.
Murder of the Second Degree is murder with malice aforethought, but without the admixture
of premeditation and deliberation.

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

You are instructed that if you find that the State has established that the defendant has committed First Degree Murder you shall select First Degree Murder as your verdict. The crime of First Degree Murder includes the lesser offense of Second Degree Murder. You may find the defendant guilty of Second Degree Murder if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

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

5 If you find beyond a reasonable doubt that a deadly weapon was used in the
6 commission of such an offense, then you shall return the appropriate guilty verdict reflecting
7 "With Use of a Deadly Weapon."

8 If, however, you find that a deadly weapon was not used in the commission of such an
9 offense, but you find that it was committed, then you shall return the appropriate guilty
10 verdict reflecting that a deadly weapon was not used.

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2 A deadly weapon is any instrumentality which is inherently dangerous. Inherently
3 dangerous means that the instrumentality itself, if used in the ordinary manner contemplated
4 by its design and construction, will, or is likely to, cause a life-threatening injury or death or
5 any weapon, device, instrument, material or substance which, under the circumstance sin
6 which it is used, attempted to be used or threatened to be used, is readily capable of causing
7 substantial bodily harm or death.

8 You are instructed that a firearm is a deadly weapon.
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A person who carries concealed upon his or her person a pistol, revolver, or other firearm, or other dangerous or deadly weapon is guilty of Carrying Concealed Firearm or Other Deadly Weapon.

"Concealed weapon" means a weapon described in these instructions that is carried upon a person in such a manner as not to be discernible by ordinary observation.

If you find that the defendant was not the person who directly committed a crime and/or that he did not conspire to commit it and/or aid and abet in its commission, then you must find him not guilty of the crime.

In relation to the crime of murder, in order to find the defendant criminally liable for the acts of another you must find that the State has proven beyond a reasonable doubt that the Defendant had the specific intent to commit the crime of murder.

Mere presence at the scene of a crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

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

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

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of whether the Defendant is guilty or not guilty.

During the course of this trial, and your deliberations, you are not to:

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

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

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

8 Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it
9 signed and dated by your foreperson and then return with it to this room.
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2 If, during your deliberation, you should desire to be further informed on any point of
3 law or hear again portions of the testimony, you must reduce your request to writing signed
4 by the foreperson. The officer will then return you to court where the information sought
5 will be given you in the presence of, and after notice to, the district attorney and the
6 Defendant and his/her counsel.

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

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

GIVEN: 

DISTRICT JUDGE



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

MICHAEL MCNAIR,
Defendant.

CASE NO. C-17-327395-1
DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,
DISTRICT COURT JUDGE

THURSDAY, MARCH 07, 2019

RECORDER'S TRANSCRIPT OF HEARING
JURY TRIAL - DAY 8
VOLUME VIII

APPEARANCES:

For the State:

JACQUELINE M. BLUTH, ESQ.
JEFFREY S. ROGAN, ESQ.
Chief Deputy District Attorneys

For the Defendant:

RANDALL H. PIKE, ESQ.
MELINDA E. SIMPKINS, ESQ.
NAVID AFSHAR, ESQ.
Chief Deputy Special Public Defenders

RECORDED BY: SARA RICHARDSON, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

1 Las Vegas, Nevada, Thursday, March 07, 2019

2
3 [Trial began at 3:37 p.m.]

4 [Outside the presence of the jury]

5 THE COURT: All right. We will be on the record in Mr.
6 McNair's case, who is present with his attorneys, State's attorneys are
7 present.

8 Do you guys have anything outside the presence of our jury?

9 MR. PIKE: No, Your Honor, other than fact that we have all
10 executed an agreement that the Court would be handling the sentencing
11 in the event that they did come back with the first-degree.

12 THE COURT: Okay. All right. So you can go ahead and go
13 get them?

14 And I just made copies of that. I'm going to file it with the
15 Court.

16 So Mr. McNair, my understanding is that you had a chance --
17 and you guys can remain seated. You had a chance to discuss with
18 your attorneys the idea of, either moving forward with the penalty phase
19 and allowing the jury to decide your punishment if you're convicted of
20 first degree murder, versus waiving that and allowing the Court to sit in
21 judgment of that punishment, is that correct?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you're comfortable that you understand
24 the wisdom of both of those options?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And I believe you signed off on a form that was
2 signed by your attorney and the State as well, indicating that you were
3 going to waive your right to have the jury sit and hear your -- any
4 potential phase, correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. Any questions you have for me about
7 that?

8 THE DEFENDANT: No, sir.

9 THE COURT: Okay. All right. We will be at ease until we get
10 our jurors here.

11 [Pause in proceedings]

12 [In the presence of the jury]

13 THE MARSHAL: All rise for the jurors.

14 THE COURT: You all can be seated, thank you.

15 We will back on the record. Mr. McNair is here with his
16 attorneys. State's attorneys are present. All of our jurors are present.

17 Mr. Gustilo, my understanding is that you're the foreperson of
18 my jury, is that correct?

19 THE FOREPERSON: Yes.

20 THE COURT: All right. And my understanding is further that
21 the jury's reached a verdict?

22 THE FOREPERSON: Yes.

23 THE COURT: All right. Could you hand that to the marshal
24 for me, please?

25 Thank you very much.

1 All right. We're going to have the Clerk read the verdict into
2 the Minutes of the Court.

3 THE CLERK: District -- excuse me. District Court, Clark
4 County, Nevada. State of Nevada, Plaintiff, versus Michael McNair,
5 Defendant. Case Number C-17-327395-1, Department III.

6 Verdict: We, the Jury in the above entitled case, find the
7 Defendant, Michael McNair, aka, Michael Deangelo McNair as follows:

8 Count 1, Murder with use of a deadly weapon; guilty of first
9 degree murder with use of a deadly weapon.

10 Count 2, Carrying a concealed firearm or other deadly
11 weapon; guilty of carrying a concealed firearm or other deadly weapon.

12 Dated this 7th Day of March, 2019, by Paul Gustilo.

13 Ladies and Gentlemen of the Jury, is these your verdicts as
14 read? So say you one, so say you all?

15 THE JURY: Yes.

16 THE COURT: Either side wish to have the jury polled?

17 MS. BLUTH: No, Your Honor.

18 MR. PIKE: The Defense does, Your Honor.

19 THE COURT: Yes. Okay. By number, if you would.

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 10, is this your verdict as read?
12 JUROR NUMBER 10: Yes.
13 THE CLERK: Juror Number 11, is this your verdict as read?
14 JUROR NUMBER 11: Yes.
15 THE CLERK: Juror Number 12, is this your verdict as read?
16 JUROR NUMBER 12: Yes.
17 THE CLERK: Juror Number 13, is this your verdict as read?
18 JUROR NUMBER 13: Yes.
19 THE COURT: All right. We will officially record the verdict
20 into the Minutes of the Court. And actually, Ladies and Gentlemen,
21 that's going to conclude your service.
22 There is a mechanism under the law that allows folks if they
23 agree, and both sides in this case have agreed to allow the Court to sit
24 in judgment of the potential penalty, rather than having that jury do that.
25 Sometimes that happens at the end of a case, so the attorneys and Mr.

1 McNair have agreed to do that. So your duty is complete with your
2 verdict. I'm going to back to talk to you in just a moment before you take
3 off.

4 But before we do that, I just kind of publically wanted to say
5 thank you very much for your service. I know any case when you're
6 talking about high level criminal cases are difficult, particularly if you've
7 never been involved in the justice process and you come in as a juror
8 and have to, you know, give up the convenience of your life and sit in
9 judgment of issues for us.

10 You all have been incredibly patient and incredibly
11 professional, despite the fact that I don't think I started on time once
12 during the course of this trial. So I appreciate your patience
13 nonetheless. And on behalf of everybody in the community, I thank you
14 very much for your jury duty.

15 One of the things that I'm not going to tell you now is that
16 admonition about talking to people; that means you're free to talk to
17 whomever you want to, but you don't have to talk to anybody. There's a
18 reason when you go back and deliberate that we close the door and
19 nobody gets to go in there. That's because your deliberations are
20 private to you all as a collective body.

21 I'm guessing the attorneys may want to chat with you after I
22 have a chance to talk to you. It's very valuable for them to chat with
23 jurors to learn a little bit about how they did their jobs so that they can
24 learn a little more because we all learn a little more every day. So if any
25 of you have a few moments to stick around, I would bring you back in

1 the courtroom with just the attorneys and myself, nobody else, so that
2 you can ask them questions, they can ask you some questions, and then
3 obviously at any time you want to leave, you can leave.

4 If you don't want to talk to them, then you can take off right
5 after I get a chance to chat with you as well, you don't have to stick
6 around.

7 Once you're gone from us, if anybody persists in trying to talk
8 to you after you let them know that you do not want to talk about your
9 jury service, then call my chambers and we'll do what we need to do to
10 help you out with that as well, okay?

11 But with that, I'm going to let you go back to the deliberation
12 room with JR, and I'll be back there in just a moment, okay?

13 Thank you very much.

14 THE MARSHAL: All rise for the jurors.

15 [Outside the presence of the jury]

16 THE COURT: You all have anything outside of the presence?

17 MS. BLUTH: No, Your Honor.

18 MR. PIKE: No, Your Honor.

19 THE COURT: No. All right. So we were going -- we'll return
20 Mr. McNair's matter to the Department of Parole and Probation for
21 preparation of a pre-sentence report. Set it down for sentencing in --

22 THE CLERK: April --

23 THE COURT: -- 50 days, which would be what?

24 THE CLERK: April 17th at 9:30.

25 Not that day -- March -- or May 1st?

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THE COURT: Yeah, let's do May 1st.
THE CLERK: May 1st.
THE COURT: I'm not sure if I'll be here that day.
May 1st at 9:30. Is everybody available on that date?
MS. BLUTH: Yes, Judge.
MR. PIKE: Yes, Your Honor.
THE COURT: Yes, okay.
All right. I'm going to go chat with your jurors. Are one or
more of you going to want to stick around and talk with --
MR. ROGAN: Yes.
THE COURT: Okay. All right. I'll get them back in here as
quick as I can.

[Trial concluded at 3:45 p.m.]

* * * * *

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



Brittany Mangelson
Independent Transcriber

ORIGINAL

SAO

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACQUELINE BLUTH
Chief Deputy District Attorney
Nevada Bar #010625
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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

MAR 07 2019

BY, Kory Schlitz
KORY SCHLITZ, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

MICHAEL MCNAIR,
#1959573

Defendant.

CASE NO: C-17-327395-1

DEPT NO: III

STIPULATION AND ORDER

COMES NOW, the Defendant, MICHAEL MCNAIR, by and through his counsel, RANDY PIKE, ESQ., and the State of Nevada, by and through JACQUELINE BLUTH, Chief Deputy District Attorney, and pursuant to NRS 175.552(2), hereby agree and stipulate to the following:

1. Should the jury in the above-captioned case return a verdict of guilty on any offense, including First Degree Murder, the parties hereby waive the penalty hearing before the jury as normally required under NRS 175.552(1)(a);
2. Pursuant to NRS 175.552(2), both parties agree that the sentence on any charge for which the Defendant may be convicted shall be imposed by this Honorable Court after a pre-sentence investigation is conducted by the Department of Parole and Probation;

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C-17-327395-1
SAO
Stipulation and Order
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- 1 3. That as a result of the foregoing, counsel shall not discuss or mention
2 the issue of penalty or punishment in the voir dire, opening statements
3 or closing arguments, or otherwise discuss the nature of penalty or
4 punishment at any time before the jury.

5 DATED this 7 day of March 2019.

6 ATTORNEY FOR DEFENDANT

7 BY: 

8 RANDY PIKE, ESQ.
9 Attorney for Defendant
Nevada Bar #07974

CLARK COUNTY DISTRICT ATTORNEY

BY: 

JACQUELINE BLUTH
Chief Deputy District Attorney
Nevada Bar #010625

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11 
12 MICHAEL MCNAIR
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15 IT IS SO ORDERED.

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17 DISTRICT JUDGE
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13F00476B/saj/MVU

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@3:42pm
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

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6 DISTRICT COURT
CLARK COUNTY, NEVADA

MAR 07 2019
BY Kory Schlitz
KORY SCHLITZ, DEPUTY

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 MICHAEL MCNAIR,

11 Defendant.

CASE NO: C-17-327395-1

DEPT NO: III

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14 VERDICT

15 We, the jury in the above entitled case, find the defendant MICHAEL MCNAIR aka
16 Michael Deangelo McNair, as follows:

17
18 **COUNT 1** – MURDER WITH USE OF A DEADLY WEAPON

19 *(Please check the appropriate box, select only one)*

- 20
21 ☒ Guilty of First Degree Murder with Use of a Deadly Weapon
22 ☐ Guilty of First Degree Murder
23 ☐ Guilty of Second Degree Murder with Use of a Deadly Weapon
24 ☐ Guilty of Second Degree Murder
25 ☐ Not Guilty

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C - 17 - 327395 - 1
VER
Verdict
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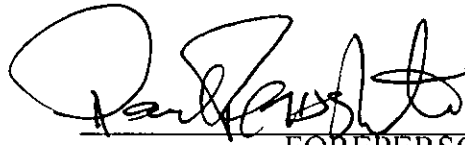
1 **COUNT 2** – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON

2 *(Please check the appropriate box, select only one)*

3
4 ☒ Guilty of Carrying Concealed Firearm or Other Deadly Weapon

5 ☐ Not Guilty

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8 DATED this 7 day of March, 2019.

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11 FOREPERSON