

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALISHA BURNS,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Case No. 82686

RESPONDENT'S APPENDIX
Volume 3

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1 THE COURT: Anything else you want to put on
2 the record?

3 MR. WOMMER: Yes, your Honor.

4 THE COURT: That's the Court's Exhibit 1.

5 THE COURT CLERK: Right. You only wanted it
6 read once.

12:44P 7 MR. WOMMER: And I'd ask the Court to make a
8 finding that this motion was done contemporaneous with
9 the state resting its case. We had an off the record
10 discussion at the bench indicating that the motion
11 could be made at this point in time.

12 THE COURT: That is correct. There was a
13 side bar, and the state did agree; is that correct?

14 MR. GUYMON: Yes.

15 MR. WOMMER: Yes, I'm sorry.

16 THE COURT: Anything else.

17 MR. WOMMER: Yes. I would make the motion
18 for directed verdict as to Count Three, your Honor,
19 which is the first degree kidnapping with the
20 assistance of a child. That count alleges that
21 Mr. Kaczmarek along with Ms. Burns confined,
22 inveigled, enticed, decoyed, abducted, concealed,
23 kidnapped, or carried away Pedro Villareal.

24 My motion would be that based upon two cases,

1 one a Nevada State Court Case and a Federal Case
2 specifically the case of Wright versus State.

12:45P

3 THE COURT: I'm familiar with the case.

4 MR. WOMMER: Yes, which is found at 94 Nevada
5 415 and Turner versus Houseright, which is found at
6 599, Fed 2nd 1358. There's the language of both those
7 decisions indicate that if there is any movement of
8 the victim which is incidental to the associated
9 offense, in the case the associated offense would be
10 either the robbery or the murder, then kidnapping does
11 not lie.

12 Based upon the fact that any movement of
13 Pedro Villareal in this case was incident to this
14 murder or robbery, I believe that a directed verdict
15 should be given as to the kidnapping charge.

16 THE COURT: State's position?

17 MR. GUYMON: Judge, he's clearly missing -- I
18 believe it's the Cagel case, and I'll bring that down
19 for the Court, but the Cagel case say where there's
20 physical restraint there need not be any movement.
21 Remember it is movement that heightens the risk of
22 harm or physical restraint.

12:46P

23 We definitely have physical restrain in this
24 case. There's a case directly on point in the state

1 of Nevada that talks about not needing movement or
2 actually physical restrain.

3 THE COURT: How do you answer Cagel?

4 MR. WOMMER: I haven't seen Cagel.

5 THE COURT: Bring it down, and we'll rule on
6 it before we bring the jury back at 2:30.

7 MR. GUYMON: And, Judge, if I could make my
8 record as well. And that is this: I'll bring Cagel,
9 and I'm happy to do that. It stands for what I
10 believe it stands for.

11 THE COURT: By the way what is that citation
12 again?

13 MR. GUYMON: I told you I didn't have it,
14 Judge, because I didn't have it.

15 THE COURT: What year is it?

16 MR. GUYMON: Judge, I don't have the case. I
17 mean.

18 THE COURT: Okay.

19 MR. GUYMON: I wish I had a memory like that.
20 I will bring it down. I don't have a memory like
21 that, Judge. But, Judge, let's not forget that.
22 After he was restrained he was then moved into the
23 bathtub and ultimately one of the causes of death was
24 drowning. Certainly this Court will -- can find, and

1 I believe it's a question of fact for the jury too,
2 after he is bound and the robbery is over at that
3 point, Judge. So it's no longer incidental to the
4 robbery, and he's now bound and moved into the tub
5 where he drowns. Certainly that amounts to even the
6 movement, but I'm going to bring the case for the
7 Court.

12:47P 8 MR. WOMMER: But it would be incidental to
9 the charge of murder at that point.

10 THE COURT: That's what we'll argue. See you
11 at 2:30.

2:56P 12

13 (LUNCH RECESS)

14 THE COURT: Let the record reflect we're back
15 in session of the matter of State versus Steven
16 Kaczmarek. Let the record reflect the presence of the
17 defendant, his counsel, the states attorneys, the
18 absence of the jury and the alternates.

19 The record should further reflect the Court
20 met in chambers with counsel to go over the jury
21 instructions.

22 All right. For the record I have
23 instructions 1 through 49.

24 Does the state wish to propose any additional

1 instructions?

2 MR. GUYMON: No, your Honor.

3 THE COURT: Does the state object to the
4 giving of any of the instructions?

5 MR. GUYMON: No, your Honor.

6 THE COURT: Does the defense object to giving
7 of any of the instructions.

8 MR. WOMMER: No, your Honor.

9 THE COURT: Does the state propose any
10 additional instructions?

11 MR. WOMMER: In that regard, your Honor, so
12 the record is clear, I was going to propose four
13 separate instructions on second degree felony murder.
14 Based upon the conversation that we had in the
15 chambers, one of my instructions with a supplement was
16 given. The other three proposed instructions I
17 withdrew based upon our discussion.

2:57P 18 THE COURT: Basically that was because they
19 were incorporated in other instructions, Counsel?

20 MR. WOMMER: That's correct.

21 THE COURT: The one that you withdrew was
22 because -- do you have that case, Counsel?

23 MR. WOMMER: Mars -- oh, Clem.

24 THE COURT: Clem.

1 MR. WOMMER: Yeah, I --

2 THE COURT: I wonder if the state has it.

3 MR. GUYMON: Actually, Judge, I do have that
4 case, and the issue on that is, Judge, as you know
5 they made a record that they wanted to perhaps strike
6 our counts regarding kidnapping. And I indicated to
7 the Court that there was a case that I felt was
8 controlling. It was Clem State 1.04 Nevada 351. It's
9 a 1988 case which the pertinent language was in
10 paragraph number -- well, keynote number one. It
11 indicates that where there was physical restraint that
12 physical restraint alone was sufficient. And I'll
13 quote the actual language. It says, moreover the
14 kidnap was not incident ditch will the extortion
15 because the restraint increased the risk of harm. It
16 also indicated that --

2:58P 17 THE COURT: The restraint itself was
18 kidnapping.

19 MR. GUYMON: Right. The restraint itself was
20 kidnapping.

21 THE COURT: Do you have that quote right
22 there some place?

23 MR. WOMMER: The quote is: The restraint had
24 an independent purpose and significance as it was

1 essential to the accomplishment of the mayhem in that
2 case.

3 THE COURT: Okay.

4 MR. WOMMER: Based upon counsel's and the
5 Court's reading of Clem we agreed to submit the matter
6 to the discretion of the Court.

7 THE COURT: All right. Fine.

8 Thank you.

9 Anything else before we bring the jury in and
10 read the jury instructions?

11 MR. GUYMON: And, Judge, they might -- I
12 don't mean to speak for them, just so the record is
13 clear, their instructions that they got in was now
14 numbered number twenty-five.

15 MR. WOMMER: That's correct.

16 THE COURT: Okay. Anything else before we
17 bring the jury in?

18 MR. WOMMER: No.

19 THE COURT: All right. Bring them in, Bill.

20 THE BAILIFF: Yes, your Honor.

3:00P 21 THE COURT: Let the record reflect that the
22 jury and the two alternates have returned to the
23 courtroom.

24 (Whereupon, the following

1 proceedings were had in
2 the presence of the jury.)

3 THE COURT: Good afternoon, ladies and
4 gentlemen of the jury.

5 THE JURY: Good afternoon.

6 THE COURT: I will confess I saw two of the
7 jurors at lunch time. I said hello to them.

8 All right. Everybody, it looks like they're
9 settled.

10 Members of the jury, it is now my duty as
11 judge to instruct you in the law that applies to this
12 case. It is your duty as jurors to follow these
13 instructions and to apply the rules of law from the
14 facts as you find them in the evidence.

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

3:01P 21 Instruction number Two.

22 If in these instructions any rule, direction,
23 or idea is repeated or stated in different ways, no
24 emphasis thereon is intended by me and none may be

1 inferred by you.

2 For that reason you're not to single out any
3 certain sentence or any individual point or
4 instruction and ignore the others, but you are to
5 consider all the instructions as a whole and regard
6 each in the light of all the others.

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

9 Instruction number three.

10 The information is but a formal method of
11 accusing a person of a crime. It is not of itself any
12 evidence of his guilt. In this case it is charged in
13 an information on or about the 25th day of September,
14 2002, the defendant committed the offense of burglary
15 with the assistance of a child; robbery with the
16 assistance of a child; first degree kidnapping with
17 assistance of a child; and murder with the assistance
18 of a child, all felonies within the County of Clark,
19 State of Nevada, contrary to the form, effect, and
20 force of laws or statutes in such cases made, provided
21 for and against the peace and dignity of the State of
22 Nevada.

3:02P 23 Count One.

24 Burglary with the assistance of a child did

1 then and there willfully, unlawfully, feloniously
2 enter with an intent to commit a felony, to wit,
3 robbery, and/or murder, and/or with the intent to
4 commit larceny, a certain building occupied by Pedro
5 Villareal, located at 813 Ogden Street, apartment
6 number twenty-five, Las Vegas, Clark County, State of
7 Nevada. Said defendant being over eighteen years of
8 age committed the crime with the assistance of a
9 child, to wit, Alicia Burns, who was less than
10 eighteen years of age at the time of the said crime.

11 Count two.

12 Robbery with the assistance of a child, did
13 then and there, willfully, unlawfully, feloniously,
14 take personal property, to wit, a leather jacket,
15 and/or a VCR, and/or a gold bracelet, and/or a gold
16 ring, and/or a pair of socks, and/or a comb, and/or a
17 cellular telephone, and/or \$20 lawful money of United
18 States, and/or a state quarter collection, and/or a
19 wallet, taking including the contents of Pedro
20 Villareal or in his presence by means of force or
21 violence or fear of injury thereto without the consent
22 and against the will of the said Pedro Villareal.

23 Said defendant being eighteen years of age
24 committing the crime with the assistance of a child,

1 to wit, Alisha Burns who a less than eighteen years of
2 age at the time of said crime.

3 The defendant being responsible in one of the
4 following theories of criminal responsibility:

5 One, by defendant himself taking said
6 property from Pedro Villareal by force or violence or
7 fear;

8 And/or, two, the defendant aiding and
9 abetting Alisha Burns and/or an unidentified third
10 party by counsel, encouragement throughout the
11 commission of the crime by entering into a course of
12 conduct whereby they lured Pedro Villareal into his
13 room or they overpowered Pedro Villareal and did rob
14 him.

15 And/or, three, by defendant conspiring with
16 Alisha Burns and/or an unidentified accomplice to
17 commit the offense of robbery and/or a larceny and/or
18 kidnapping and/or murder whereby each is vicariously
19 liable for the foreseeable acts of the other
20 co-conspirator and the acts in the furtherance of the
21 conspiracy.

3:05P 22 Count Three.

23 First degree kidnapping with the assistance
24 of a child, did willfully, unlawfully, feloniously

1 without authority of law seize, confine, inveigle,
2 entice, decoy, abduct, conceal, kidnap, and carry away
3 Pedro Villareal, a human being with the intent to
4 hold, detain the same Pedro Villareal against his will
5 and without his consent for the purpose of any robbery
6 and/or murder against the said Pedro Villareal, said
7 Pedro Villareal suffering substantial bodily harm, to
8 wit, death, during the kidnapping, during the act of
9 the kidnapping, or subsequent detention and
10 confinement, said defendant being over eighteen years
11 of age, committing the crime with the assistance of a
12 child, to wit, Alicia Burns who was less than eighteen
13 years of age at the time of said crime.

14 Defendant being responsible under one of the
15 following theories of criminal responsibility:

16 One, by defendant himself kidnapping the said
17 Pedro Villareal for the purposes of committing robbery
18 and/or murder;

19 And/or two, by defendant aiding and abetting
20 Alisha Burns and/or an unidentified third party by
21 counsel and encouraging throughout the commission of
22 crime by entering into a course of conduct whereby
23 they lured Pedro Villareal into his room where they
24 overpowered Pedro Villareal and did kidnap him for the

1 purpose of robbery and/or murder.

2 And/or, three, by defendant conspiring with
3 Alicia Burns and/or an unidentified accomplice to the
4 commit the offense of larceny and/or a robbery and/or
5 a kidnapping and/or murder whereby each is vicariously
6 liable for the foreseeable acts of the co-conspirator
7 where the acts are in furtherance of the conspiracy.

3:06P 8 Count four,

9 Murder with the assistance of a child, did
10 then and there willfully, feloniously, without
11 authority of law and with premeditation and
12 deliberation with malice aforethought did kill Pedro
13 Villareal, a human being by asphyxiation said
14 defendant being over 18 years of age, committing the
15 crime with the assistance of a child, to wit,
16 Alicia Burns, who is less than eighteen years of age
17 at the time of said crime.

18 Defendant being responsible under one of the
19 following theories of criminal responsibility:

20 One,

21 By defendant himself murdering Pedro
22 Villareal by asphyxiation.

23 And/or two,

24 Defendant aiding and abetting Alisha Burns

1 and/or an unidentified third party by counsel and
2 encouragement throughout the commission of the crime
3 by entering into a course of conduct whereby they
4 lured Pedro Villareal into his room where they
5 overpowered Pedro Villareal and murdered him;

6 And/or three, by defendant conspiring with
7 Alicia Burns and/or an unidentified accomplice to
8 commit the offense of robbery and/or kidnapping and/or
9 murder, whereby each is vicariously liable for the
10 foreseeable acts of the other co-conspirator where the
11 acts are in the furtherance of the conspiracy.

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

16 Each charge, the evidence pertaining to it
17 should be considered separately. The fact that you
18 may find a defendant guilty or not guilty is one of
19 the offenses charge should not control your verdict to
20 any other defendant or offense charged.

3:08P 21 Four,

22 Any person who by day or night enters any
23 building with intent to commit larceny and/or -- or
24 any and/or robbery and/or kidnap and/or murder is

1 guilty of burglary.

2 Five,

3 You're instructed that the offense of
4 burglary is complete if you find that the entry is
5 made into the building or apartment with the intent to
6 commit larceny and/or robbery and/or a kidnapping
7 and/or murder.

8 The entry is deemed to be complete when any
9 portion of intruder's body, however slight, penetrates
10 space within the building. Every person who in the
11 commission of a burglary commits any other crime may
12 be prosecuted for each crime separately.

13 Six,

14 Consent to enter is not a defense to the
15 crime of burglary nor need there be a breaking into or
16 a forced entry so long as it is shown that entry was
17 made with the specific intent to commit a robbery
18 and/or a kidnapping and/or murder or with a larcenous
19 intent.

3:09P 20 The intention with which entry is made is a
21 question of fact which may be inferred from the
22 defendant's conduct and all other circumstances
23 disclosed by the evidence.

24 Instruction seven.

1 You are further instructed that in order to
2 constitute the crime of burglary it is not necessary
3 to prove that the defendant actually stole any of the
4 articles, goods, or money contained in the building.
5 The gist of the crime of burglary is the unlawful
6 entering of the building with the intent to commit a
7 larceny and/or robbery and/or kidnapping and/or
8 murder.

9 Eight.

10 Robbery is the unlawful taking of personal
11 property from the person of another or in his presence
12 against his will by means of force or violence or fear
13 of injury immediate or future to his person or
14 property.

15 Such force or fear must be used to:

16 One, obtain, retain position of the property;

17 Two, to prevent or overcome resistance to the
18 taking of the property;

19 Or three, to facilitate escape with the
20 property.

3:10P 21 In any case the degree of force is immaterial
22 if used to compel acquiescence to the taking of or
23 escaping with the property. Such taking constitutes
24 robbery whenever it appears that although the taking

1 was fully completed without the knowledge of the
2 person from whom taken, such knowledge was prevented
3 by the use of force or fear.

4 The value of property, the money taken, is
5 not an element of crime of burglary. Strike that.
6 The value of property or money taken is not an element
7 of the crime of robbery, and is only necessary that
8 the state prove the taking of some property or money.

9 Nine,

10 Personal property is in the presence of a
11 person with respect to robbery when it was within the
12 person's reach, inspection, observation, or control.
13 The person could, if not prevented by force or
14 violence or fear of injury, retain possession of the
15 property.

16 Ten.

17 Robbery is not confined to a fixed locust but
18 may be spread over consider able and varying amounts
19 of time. All matters immediately antecedent to and
20 having direct causal connection to the robbery are
21 deemed so closely connected with it as to form in
22 reality a part of the occurrence. Thus, although the
23 acts of violence and intimidation preceding the actual
24 taking of the property and may have been primarily

1 intended to another purpose. Strike that.

3:11P 2 Thus, although acts of violence and
3 intimidation preceding the actual taking of the
4 property --

5 Counsel, would you assist the Court in
6 correcting that particular -- I'm not comfortable with
7 that.

8 MR. GUYMON: What number, Judge?

9 THE COURT: Ten. Lines five and six.

10 MR. GUYMON: Judge, I think it actually --

11 THE COURT: Please approach.

3:12P 12 (Whereupon, discussion was had
13 at bench, not reported.)

14 THE COURT: Thank you, Counsel. Gremlins
15 slipped into the computer. I'm striking, Counsel,
16 lines five and six: Thus, through to, purpose.

17 Let me start that instruction over again.

18 Instruction number ten.

19 Robbery is not confined to a fixed locust and
20 may be spread over considerable and varying amounts of
21 time or periods of time. All matters immediately
22 antecedent and have direct causal connection with the
23 robbery are deemed so closely connected as to form in
24 reality a part of the occurrence.

1 It is enough to support the charge of robbery
2 when a person takes a property by taking advantage of
3 the terrifying situation he created.

4 Eleven,

5 Every person who willfully seizes, confines,
6 inveigles, entices, decoys, abducts, conceals, kidnaps
7 or carries away any person by any means whatsoever
8 with the intent to hold or detain or holds or detains
9 the person:

10 One, for the purpose of committing robbery
11 upon him -- upon or from the person;

12 Or two, for the purpose of killing a person
13 or inflicting substantially bodily harm upon him is
14 guilty of kidnapping in the first degree.

15 The law does not require the person being
16 kidnapped to be carried away, for any minimal
17 distance.

18 The term inveigle means to lead astray by
19 trickery or deceitful persuasion.

20 Twelve,

21 In order to find the defendant guilty of both
22 first degree kidnapping and associated offense of
23 robbery and/or a murder, you must also find beyond a
24 reasonable doubt he either:

3:14P

1 One, that the movement of the victim was not
2 incidental to the robbery and/or murder. And that the
3 movement of the victim substantially increased the
4 risk of harm to the victim over and above that
5 necessarily present in the robbery and/or murder;

6 Or two, that the victim was physically
7 restrained;

8 Or three, that the victim was restrained and
9 such restraints increased the risk of harm to the
10 victim and had an independent purpose or significance.

11 Physically restrained includes but is not
12 limited to tying, binding, taping, handcuffing or
13 chains.

14 Instruction number thirteen.

15 Every person who willfully without authority
16 of law seizes, inveigles, takes, carries away, or
17 kidnaps another person with the intent to keep the
18 person imprisoned within the state or any manner held
19 to service or detained against his will is guilty of
20 kidnapping in the second degree.

3:15P 21 Fourteen.

22 You are instructed that if you find that the
23 state has established that the defendant has committed
24 first degree kidnapping, you shall select first degree

1 kidnapping as your verdict.

2 The crime of first degree kidnapping may
3 include the crime of second degree kidnapping.

4 You shall find the defendant guilty of second
5 degree kidnapping if:

6 One, some of you are not convinced beyond a
7 reasonable doubt that the defendant is guilty of first
8 degree kidnapping;

9 And two, all twelve of you are convinced
10 beyond a reasonable doubt that the defendant is guilty
11 of the crime of second degree kidnapping.

12 If you're convinced beyond a reasonable doubt
13 that the crime of kidnapping has been committed by the
14 defendant, but you have a reasonable doubt whether
15 such kidnapping was of the first or second degree, you
16 must give the defendant the benefit of the doubt and
17 return a verdict of kidnapping of the second degree.

18 Instruction number fifteen.

19 In this case the defendant is accused in an
20 information alleging an open charge of murder. This
21 charge may include murder of the first degree, murder
22 of the second degree, and involuntary manslaughter.

3:16P 23 The jury must decide if the defendant is
24 guilty of any offense and, if so, on which offense.

1 Sixteen.

2 Murder is the unlawful killing of a human
3 being with malice aforethought either express or
4 implied.

5 Number seventeen.

6 Malice aforethought means the intentional
7 doing of a wrongful act without legal cause or excuse.
8 What the law considers inadequate -- strike that -- or
9 what the law considers adequate provocation.

10 The condition of mind described as malice
11 aforethought may arise from anger, hatred, revenge, or
12 from particular ill will, spite, or grudge toward the
13 person killed. It may also arise from any
14 unjustifiable or unlawful motive or purpose to injure
15 another proceeding from a heart fatally bent on
16 mischief or with reckless disregard of consequences
17 and social duty.

18 Malice aforethought does not imply
19 deliberation or the lapse of any considerable time
20 between the malicious intention to injure another and
21 the actual execution of the intent denotes an unlawful
22 purpose and design as opposed to accident and
23 mischance.

24 Eighteen.

3:17P 1 Express malice said deliberate intention
2 unlawfully to take away the life of a human being
3 which is manifested by external circumstances capable
4 of proof. Malice may be implied when no considerable
5 provocation appears when all the circumstances of the
6 killing show an abandoned malignant heart.

7 Nineteen,

8 The prosecution is not required to present
9 direct evidence of the defendant's state of mind as it
10 existed during the commission of a crime.

11 The jury may infer the existence of a
12 particular state of mind where a witness -- let me
13 read that back. The jury may infer the existence of a
14 particular state of mind of a party or a witness from
15 the circumstances disclosed by the evidence.

16 Twenty,

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

3:18P 23 Willfulness is the intent to act. There need
24 be no appreciable space of time between formation of

1 the intent to kill and the act of killing.

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

7 A deliberate determination may be arrived at
8 in a short period of time. But in all cases the
9 determination must not be formed in passion or if
10 formed in passion must be carried out after there has
11 been time for the passion to subside and deliberation
12 to occur.

13 A mere unconsidered and rash impulse is not
14 deliberate even though it includes the intent to kill.

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

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

3:19P

1 Twenty-one.

2 The law does not intend to measure any use of
3 time the length of period during which the thought
4 must be pondered before it can ripen into intent to
5 kill which is truly deliberate or premeditated. The
6 time will vary with different individuals under
7 varying circumstances.

8 The true test is not the duration of time but
9 rather the extent of the reflection.

10 A cold calculated judgment and decision may
11 be arrived at in a short period of time.

12 But a mere unconsidered and rash impulse,
13 even though it includes an intent to kill, is not
14 deliberation and premeditation as will affix an
15 unlawful killing as murder of the first degree.

16 Twenty-two.

17 There is a kind of murder which carries with
18 it conclusive evidence of premeditation and malice
19 aforethought. This class of murder is murder
20 committed in the perpetration or attempted
21 perpetration of kidnapping and/or robbery and/or
22 burglary.

23 Therefore, a killing which is committed in
24 the perpetration of such kidnapping or robbery or

1 burglary is deemed to be murder of the first degree,
2 whether the killing was intentional or unintentional
3 or accidental, this is called the felony murder rule.

4 The intent to perpetrate or attempt to
5 perpetrate kidnapping and/or a robbery ad or burglary
6 must be proven beyond a reasonable doubt.

3:21P 7 Twenty-three.

8 The crime of burglary and/or robbery and/or
9 kidnapping subjects a person to the felony murder rule
10 when the killing is linked to or part of the series of
11 incidents related to the burglary and/or robbery
12 and/or a kidnapping so as to be one continuous
13 transaction.

14 Twenty-four.

15 All murder which is not murder in the first
16 degree is murder of the second degree.

17 Murder of the second degree is:

18 A, murder with malice aforethought without
19 the admixture of premeditation and deliberation, or;

20 B, where an involuntary killing occurs in the
21 commission of an unlawful act which in the
22 consequences naturally tends to take the life of a
23 human being or is committed in the prosecution of a
24 felonious intent.

1 Twenty-five.

2 Second degree felony murder applies if the
3 felony is one which is inherently dangerous and
4 abstract but can not include felonies which are
5 delineated as felony first degree murder so that the
6 defendant could foresee the possibility of death or
7 injury and there is an immediate and direct causal
8 relationship between the actions of the defendant and
9 the death of the victim.

3:22P 10 Twenty-six.

11 You're instructed that if you find that the
12 state has established that the defendant has committed
13 first degree murder, you shall select first degree
14 murder as your verdict. The crime of first degree
15 murder includes the crime of second degree murder.

16 You may find the defendant guilty of second
17 degree murder if:

18 One, some of you are not convinced beyond a
19 reasonable doubt that the defendant is guilty of first
20 degree -- of murder in the first degree;

21 And two, all twelve of you are convinced
22 beyond a reasonable doubt that the defendant is guilty
23 of the crime of second degree murder.

24 In you're convinced beyond a reasonable doubt

1 that the crime of murder has been committed by the
2 defendant but you have reasonable doubt whether such
3 murder was in the first or second degree, you must
4 give the defendant the benefit of that doubt and
5 return a verdict of murder of the second degree.

6 Twenty-seven.

7 Manslaughter is the unlawful killing of a
8 person of a human being without malice express or
9 implied and without mixture of deliberation.

10 Voluntary manslaughter is the voluntary
11 killing upon a sudden heat of passion caused by a
12 provocation apparently sufficient to make the passion
13 irresistible. The provocation required for voluntary
14 manslaughter must either consist of a serious and
15 highly provoked injury inflicted on person killing
16 sufficient to excite irresistible passion in a
17 reasonable person or intent by the person killed to
18 commit a serious personal injury on the person killed.

3:24P 19 The serious and highly provoking injury which
20 causes in the sudden heat of passion can occur without
21 direct physical contact.

22 For the sudden violent impulse of passion to
23 be irresistible resulting in the killing which is
24 voluntary manslaughter there must not have been an

1 interval between the assault and provocation and the
2 killing sufficient for the voice of reason and
3 humanity to be heard or if there should have been an
4 interval between the assault and provocation given in
5 the killing sufficient for the voice of reason and
6 humanity to be heard then the killing shall be
7 determined by you to be murder.

8 The law assigns no fixed period of time for
9 such an interval but leaves the determination to the
10 jury under the facts and circumstances of the case.

11 Instruction twenty-eight.

12 The heat of passion which will reduce a
13 homicide to voluntary manslaughter must be such
14 irresistible passion as naturally would be aroused in
15 the mind of an ordinary reasonable person in the same
16 circumstances.

3:25P 17 A defendant is not permitted to set up his
18 own standard of conduct and did justify or excuse
19 himself because the passions were aroused unless the
20 circumstances in which he was placed and the facts
21 that confronted him were such as would also have
22 aroused the irresistible passion of the ordinary
23 reasonable person if likewise situated.

24 The basic inquiry is whether or not at the

1 time of killing the reason of the accused was obscure
2 and disturbed by passion to such an extent as would
3 cause the ordinarily reasonable person of average
4 disposition to act rationally without deliberation and
5 reflection and from such passion rather than from
6 judgment.

7 Twenty-nine.

8 Your verdict must be unanimous as to the
9 charge. You do not have to be unanimous on the
10 principle of the criminal liability. It is sufficient
11 that each of you find beyond a reasonable doubt that
12 the murder under any one of the principles of criminal
13 liability was murder of the first degree.

14 Thirty.

15 Conspiracy is an agreement or mutual
16 understanding between two or more persons to commit a
17 crime. Each conspirator and conspiracy is criminally
18 responsible for any crime committed by any
19 co-conspirator during the course and in furtherance of
20 the conspiracy.

3:26P 21 Express agreement is not required. A
22 mutually implied understanding is sufficient to
23 constitute a common design. And the understanding or
24 agreement may be a matter of inference deduced from

1 the acts of the person, the accused person, and the
2 circumstances of the offense.

3 Thirty-one,

4 Each member of criminal conspiracy is liable
5 for each act and bound by each declaration of every
6 other member of the conspiracy if the act of the
7 declaration is in furtherance of the object of the
8 conspiracy.

9 The act of one conspirator pursuant to or in
10 furtherance of common design of the conspiracy is the
11 act of all conspirators. Each conspirator is legally
12 responsible for an act of the co-conspirator following
13 as one of the probably and natural consequences of the
14 object of the conspiracy even if it's not intended as
15 part of the original plan and even if he was not
16 present at the time of the commission of such act.

17 Thirty-two.

18 It is not necessary in proving a conspiracy
19 to show a meeting of alleged conspirators or the
20 making of an express or formal agreement. The
21 formation and existence of a conspiracy may be
22 inferred from all circumstances tending to show the
23 common intent and may be proved in the same way as any
24 other fact may be proved, either by direct testimony

1 of the fact or by circumstantial evidence, or by both
2 direct and circumstantial evidence.

3:27P 3 Thirty-three.

4 Every person concerned in the commission of a
5 crime who directly commits the act constituting the
6 offense or aid or abets in its commission or whether
7 present or absent every person is directly or
8 indirectly counsels, encourages, hires, commands,
9 induces or otherwise procures another to commit the
10 crime is a principal and shall be proceeded against
11 and punished as such.

12 The fact that the person aided, abetted,
13 counseled, encouraged, hired, commanded, induced or
14 otherwise procures another is not --

15 Counsel, you take a look at that
16 thirty-three. Second paragraph.

17 MR. GUYMON: Strike 7 and 8, Judge.

18 MR. WOMMER: I'd recommend that, your Honor.

19 THE COURT: All right. Pursuant to
20 stipulation striking that.

3:28P 21 Instruction number thirty-four.

22 To aid and abet is to assist or support the
23 efforts of another in the commission of a crime.

24 You're instructed that to aid and abet is to find as

1 follows:

2 The word aid means to help assist or
3 strengthen.

4 The word abet means to encourage, counsel,
5 induce or assist.

6 Thirty-five.

7 You're instructed that presence,
8 companionship and conduct before or after the offense
9 are circumstances from which ones participation in the
10 criminal intent may be inferred. However, mere
11 presence and companionship before and after the
12 offense in and of itself is not sufficient to support
13 a conviction.

14 Thirty-six.

15 Mere presence at the scene of a crime,
16 knowledge of a crime is being committed, are not
17 sufficient to establish that a defendant aided and
18 abetted the crime unless you find beyond a reasonable
19 doubt that the defendant is a participant and not
20 merely a knowing spectator. Mere knowledge that a
21 crime is being committed and failure to prevent it
22 without more does not amount to aiding and abetting.

3:29P 23 Thirty-seven,

24 You're instructed and child is a person that

1 is less than eighteen years of age.

2 Thirty-eight.

3 If you find the defendant has committed the
4 crime of burglary, you must also determine whether he
5 did so with the assistance of a child. If so,
6 burglary with the assistance of a child is the
7 appropriate verdict.

8 If you find the defendant has committed the
9 crime of robbery, you must also determine whether he
10 did so with the assistance of a child. If so, robbery
11 with the assistance of a child is the appropriate
12 verdict.

13 If you find the defendant committed the crime
14 of kidnapping, you must also determine whether or not
15 he did so with the assistance of a child. If so,
16 kidnapping with assistance of a child is the
17 appropriate verdict.

18 If you find the defendant has committed
19 murder you must also determine whether or not he did
20 so with the assistance of a child.

21 This is a separate finding apart from aiding
22 and abetting as it bears on criminal liability.

23 Thirty-nine.

24 To constitute the crime charged there must

1 exist a union or joint operation of an act forbidden
2 by law and the intent to do the act. The intent with
3 which the act is done is shown by the facts and
4 circumstances surrounding the case.

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

3:31P 8 Motive is not an element of the crime
9 charged, and the state is not required to prove a
10 motive on the part of the defendant in order to
11 convict.

12 However, you may consider evidence of motive
13 or lack of motive as a circumstance in the case.

14 Forty.

15 The defendant is presumed innocent until the
16 contrary is proved. This presumption places upon the
17 state the burden of proving beyond a reasonable doubt
18 every material element of the crime charged that the
19 defendant is the person who committed the offense.

20 Reasonable doubt is one based on reason. It
21 is not mere possible doubt but such a doubt as would
22 govern and control a person in the more weighty
23 affairs of life if the minds of the jurors after the
24 entire comparison and consideration of all the

1 evidence are in such a condition that they say they
2 feel an abiding conviction of the truth of the charge,
3 there is not a reasonable doubt.

4 Doubt to be reasonable must be actual, not
5 mere possibility or speculation. If you have a
6 reasonable doubt as to the guilt of the defendant, he
7 is entitled to a verdict of not guilty.

3:32P

8 Forty-one,

9 You are here to determine the guilt or
10 innocence of the defendant from the evidence in the
11 case. You're not called upon to return a verdict to
12 the guilt or innocence of any other person. So if the
13 evidence in the case convinces you beyond a reasonable
14 doubt of the guilt of the defendant, you should so
15 find even though you believe one or more persons are
16 also guilty.

17 Forty-two.

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

22 There are two kinds of evidence or two types
23 of evidence direct or circumstantial. Direct evidence
24 is the testimony of a person claiming to have personal

1 knowledge of the commission of a crime such as an eye
2 witness of the crime charged.

3 Circumstantial evidence is the proof of a
4 chain of facts and circumstances which tend to show
5 whether or not the defendant is guilty or not guilty.

6 The law makes no distinction between the
7 weight to be given either direct or circumstantial
8 evidence.

9 Therefore all of the evidence in the case
10 including the circumstantial evidence may be
11 considered by you in arriving at your verdict.

3:33P 12 Statements, arguments, and opinions of
13 counsel are not evidence in the case.

14 However, if the attorneys stipulate to the
15 existence of a fact, you must accept the stipulation
16 as evidence and regard that fact as proved.

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

21 You must disregard any evidence which -- to
22 which an objection was sustained from the Court and
23 any evidence ordered stricken by the Court.

24 Anything you may have seen or heard outside

1 the courtroom is not evidence and must also be
2 disregarded.

3 Forty-one.

4 The credibility or believability of a witness
5 should be determined by his manner upon the stand, his
6 relationship to the parties, his fears, motives,
7 interests, or feelings, his opportunity to observe the
8 matter to which he testified, the reasonableness of
9 his statements and strengths or weaknesses of his
10 recollections.

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

3:34P 15 Forty-four.

16 A witness who has special knowledge, skill,
17 experience, training, or education in a particular
18 science, profession, or occupation is an expert
19 witness.

20 An expert witness may give his opinion to the
21 matter in which he's skilled. You should consider
22 such expert opinion and weigh the reasons, if any,
23 given for it.

24 You are not bound, however, by such an

1 opinion. Give it the weight to which you deem it
2 entitled whether it be great or slight, and you may
3 reject it if in your judgment reasons given for it are
4 unsound.

5 Forty-five.

6 Although you are to consider only the
7 evidence in the case in reaching a verdict, you must
8 bring to the consideration of the evidence your
9 everyday common sense as reasonable men and women.
10 Thus, you're not limited solely to what you see and
11 hear as the witnesses testify.

12 You may draw reasonable inferences from the
13 evidence which you feel are justified in the light of
14 common experience. Keeping in mind that such
15 inference should not be based on speculation or guess.

3:35P 16 A verdict may never be influenced by
17 sympathy, prejudice, or public opinion. Your decision
18 should be the product of sincere judgment and sound
19 discretion in accordance with these rules of law.

20 Forty-six.

21 In your deliberation you must not discuss or
22 consider the subject of punishment.

23 MR. GUYMON: Perhaps, Judge, you can strike
24 the next.

1 THE COURT: I'm going to strike the second
2 half of that sentence.

3 Any objection?

4 MR. WOMMER: No.

5 THE COURT: Again, in your deliberation you
6 may not discuss or consider the subject of punishment.
7 Your duty is confined to the determination of the
8 guilt or innocence of the defendant.

9 Forty-seven.

10 When you retire to consider your verdict you
11 must select one of your number to act as your
12 foreperson and preside over your deliberations and
13 will be spokesperson here in court.

14 During your deliberations you'll have all the
15 exhibits which were admitted into evidence and these
16 written instructions and forms of verdict which have
17 been prepared for your convenience.

18 Your verdict must be unanimous.

19 As soon as you've agreed upon a verdict, have
20 it signed and dated by your foreperson and then return
21 with it to this room.

3:36P 22 Forty-eight.

23 If during your deliberations you should
24 desire to be further informed on any point of law or

1 hear again portions of the testimony, you must reduce
2 your request to writing signed by the foreperson.

3 The officer will then return you to court
4 where the information sought will be given to you in
5 the presence of and after notice to the district
6 attorney and to the defendant and his counsel.

7 Read backs of testimony are time consuming
8 and are not encouraged unless you deem it a necessity.
9 Should you require a read back, you must carefully
10 describe the testimony to be read back so that the
11 court reporter can arrange her notes.

12 Remember the Court is not at liberty to
13 supplement the evidence.

14 Forty-nine.

15 Now, you will listen to the arguments of
16 counsel who will endeavor to aid you to reach a proper
17 verdict by refreshing in your minds the evidence by
18 showing the application thereof to the law.

19 Whatever counsel may say, you will bear in
20 mind that it is your duty to be governed in your
21 deliberations by the evidence as you understand it and
22 remember it to be with the fixed sole and steadfast
23 purpose of doing equal and exact justice between the
24 defendant and the State of Nevada.

1 Thank you.

2 MS. BROWN: Good afternoon, ladies and
3 gentlemen of the jury.

4 THE JURY: Good afternoon.

3:38P 5 MS. BROWN: I know it's been a long week, and
6 I know we spent a lot of energy focusing on the
7 testimony and the evidence that's been presented to
8 you. And I just ask you to hold on for a little while
9 longer while we review the evidence and the law for
10 you and with you.

11 So let's start with: Who was Pedro
12 Villareal? Pedro Villareal was an ordinary guy. He
13 was described by his neighbors as quiet and private.
14 He never would have let just anybody into his
15 apartment. Pedro was a creature of habit perhaps. He
16 had the same job for nearly ten years, and he never
17 missed a day of work. He lived in the same apartment
18 for nearly ten years.

19 And it is there that he died at the hands of
20 the defendant Steven Kaczmarek.

21 September 25th of last year probably started
22 as an ordinary day for Mr. Villareal. He got up and
23 he saw Deloris Kramer. They greeted each other, and
24 he went off to breakfast.

1 And that was the last time she or any of his
2 friends or loved ones saw him alive.

3 That evening he went to the Fremont Street
4 Experience and, yes, he had a couple of beers.

3:40P 5 And then he met an attractive young woman.
6 He befriended her because she was in need. He took
7 her to McDonald's, and he bought her a soda because
8 she was hungry.

9 They had a conversation. And eventually they
10 agreed to exchange money for sex.

11 But she said she couldn't go alone. There
12 was somebody who needed to go with her to make sure
13 she was safe.

14 Enter Mr. Steven Kaczmarek. We don't know
15 what happened at that table. But we do know this
16 ordinarily cautious man allowed this defendant and
17 Alicia Burns into his apartment. Are they
18 charismatic? Are they persuasive? It appears so.

3:41P 19 Perhaps he gave Mr. Pedro Villareal the same
20 hard luck story that he gave in court today.

21 But Pedro didn't know. What he didn't know
22 was behind the hard luck story was, what Mr. Kaczmarek
23 has described as a plan, they have a plan.

24 And that plan is to rob and to assault and

1 perhaps murder Pedro Villareal.

2 So Pedro takes them into his graces and takes
3 them back to the apartment where they're all sitting
4 around drinking beers and relaxing as friends.

5 But behind his back they're communicating in
6 secret code. The defendant's words, secret code.
7 When are you going to attack him?

8 After this beer.

3:42P 9 So the defendant Steven Kaczmarek, creates a
10 rouse. He says, Pedro, c'mere. Or maybe, Pete, maybe
11 knew him by Pete. Most people did. Come look at
12 this.

13 And when Pedro has his back to him he puts
14 his armed around his neck, throws him to the ground,
15 and chokes him to the point of unconsciousness.

16 Did Pete struggle? Yeah, he probably does.
17 For a short time. While he can.

18 Does he have the signs of that struggle on
19 his face? On his body? His rib? He does.

20 But does he have the sign of him being the
21 aggressor on his hands? On his arms? No. He
22 doesn't.

3:44P 23 That's because he wasn't struggling to hurt
24 anybody, just trying to save his own life.

1 But as we all know now, he failed.

2 And so then the defendant and Ms. Burns
3 working as a team alternating choking Pedro, robbing
4 him, and cleaning up behind themselves for
5 fingerprints and the like.

6 But who was running the show? In the first
7 interview that Mr. Kaczmarek gave to the police, I. I
8 told her. I attacked Pedro from behind. I choked
9 him.

3:45P 10 The defendant. I held him until he passed
11 out. I told Alisha to get the property. I told
12 Alisha to clean up. I told Alisha to cut the cord. I
13 stuffed the sock into Pedro's mouth so hard that there
14 were lacerations all inside his mouth to the extent
15 that it soaked that sock through. Not Alisha, Steven
16 Kaczmarek.

17 Steven Kaczmarek tied those bindings around
18 Pedro Villareal's arms, and his legs. Steven
19 Kaczmarek struggled with the defendant.

3:46P 20 He doesn't choke him out just once though.
21 Not just once the way he describes it today. Not just
22 once the way he wants you to believe it was. But in
23 CCDC when he's describing that to the officers, he
24 said he choked him out not once but three separate

1 times.

2 Chokes him out until he passes out, and then
3 he waits for him to recover. And then he chokes him
4 out again.

5 He then ties him up. Takes him into the
6 bathtub. Shoves the sock in his mouth. Puts the
7 pillowcase over his head.

8 And this isn't a crime of passion, ladies and
9 gentlemen. This man is thinking. This man thinks
10 this has been a struggle. I've sweated. There's DNA
11 on that shirt, the shirt of Pedro Villareal.

3:47P 12 So what does he do? He cuts that shirt off,
13 and he takes it with him. But then we know he did
14 that. Because he left behind the buttons.

15 He leaves him in the tub. His hands tied
16 behind his back, his legs tied up, unable to defend
17 himself, and then in a last moment of indignation, he
18 turns on the water.

19 Pedro Villareal can't call out for help. He
20 can't even help himself because of what was done to
21 him by Steven Kaczmarek.

22 And he laid there and he waited, and he
23 waited to die.

3:48P 24 Perhaps he felt the water rising, and he

1 wondered when. When would be the moment that the
2 water overtook him and he could breath no more.

3 Those were Pedro Villareal's last minutes
4 before he succumbed. That's what Mr. Villareal looked
5 like as he succumbed.

6 In an ordinary criminal case, we look at two
7 questions. What crime was committed and who committed
8 it?

9 And we still have to look at those two
10 questions, but let's start with a preliminary question
11 first. Which is who's responsible? What theories of
12 criminal liability can we hold someone responsible
13 under?

3:50P 14 Direct liability. Every person is
15 responsible for their own conduct under the law absent
16 some justification or excuse. That's direct
17 liability.

18 Steven Kaczmarek is responsible for his own
19 conduct. But there are two other ways you can find
20 him liable. As a co-conspirator or as an aider and
21 abettor.

22 Conspiracy is an agreement or mutual
23 understanding between two or more persons to commit a
24 crime.

1 And a co-conspirator is liable for the acts
2 of all of his co-conspirators, all of his
3 co-conspirators that are done in the course of the
4 conspiracy and which are foreseeable as a result of
5 the conspiracy.

3:51P 6 So even if Steven Kaczmarek had never stepped
7 foot into that apartment, even if he never went in,
8 if he conspired with Alisha and Alisha murdered Pedro
9 and that was a foreseeable result of that conspiracy,
10 he's liable. He's liable as a co-conspirator.

11 Now we know that's not the case, but just to
12 be clear.

13 Aiding and abetting. If you encourage,
14 assist, entice, directly or indirectly, someone else
15 in their commission of a crime you are responsible for
16 their acts which are a foreseeable result -- that are
17 a foreseeable result.

3:52P 18 So what does that tell us? Well,
19 Mr. Kaczmarek has told us two different stories,
20 hasn't he? He told the story to the police that, I
21 did it all. It was me. And he's told us today, well,
22 it wasn't really me. It was really Alisha.

23 But what this law tells us is it doesn't
24 matter. It doesn't matter whose hands were the last

1 ones around Pedro Villareal's neck. It doesn't matter
2 who struck the fatal blow as it were. Because they
3 were acting together. Part of a conspiracy, part of a
4 joint operation.

5 Let's look at the crimes. What crimes did
6 Steven Kaczmarek and Alicia Burns commit?

3:53P 7 Did they commit a burglary? Absolutely.
8 Burglary is entering a building or a storage shed or a
9 store, residence, any kind of structure with the
10 intent to commit either larceny or a felony therein.

11 Did Steven Kaczmarek enter Pedro Villareal's
12 apartment with the intent to commit either robbery,
13 kidnapping, or murder? Absolutely, he did.

14 How do we know what was in his mind, though?
15 I mean, we can't read minds. Well, first we look at
16 his behavior. Let's look at the behavior.

17 They attacked Pedro Villareal shortly after
18 they entered. They took his property. They left and
19 they immediately went to the pawn shop to get cash

3:54P 20 The timing of the sequence of events shows
21 what his intent was when he entered. And the intent
22 at a minimum was to rob.

23 How else do we know? He told us. He told us
24 in his voluntary statement and he told you on the

1 stand. We went there to rob him. Oh, we didn't mean
2 to kill him, but we went there to rob him.

3 Is he guilty of burglary? Absolutely, he is.
4 So then you got to look at the second half of the
5 question. Did he commit this with the assistance of a
6 minor?

7 Well, Alisha is fifteen years old, and she
8 was the bait. Without the bait, the defendant never
9 would have had access to Pedro Villareal.

3:55P 10 Did he use her to effect the burglary? Did
11 he commit the burglary with the assistance of a child?
12 Absolutely.

13 And for -- I know you heard this, but consent
14 is not a defense to burglary. The fact that Pedro
15 voluntarily let them into the apartment is irrelevant
16 because they entered with the intent.

17 For burglary to occur you don't have to break
18 a window. You don't have to pry open a door. All you
19 have to do is enter with the intent, and we know he
20 did because he told us he did.

21 So let's look at robbery. Did the defendant
22 commit a robbery? Well, robbery is essentially taking
23 the personal property of another from their person or
24 presence by force or fear.

3:56P 1 Did he commit a robbery? Absolutely. He put
2 his arm around Pedro Villareal's neck, and he choked
3 him until he passed out.

4 And why did he tell you he did that? He did
5 that in order to incapacitate him so that he could
6 then take his property and get away.

7 That, ladies and gentlemen, is a robbery.

8 Did he kidnap -- before I get there, I'm
9 sorry.

10 Did he rob Pedro Villareal with the
11 assistance of a minor? Absolutely. He's choking the
12 defendant -- the victim out. He's choking Pedro until
13 he passes out while he calls out instructions to
14 Alisha. Alisha, get all his valuables. Wipe down the
15 prints. Can't find the wallet? Look under the bed.
16 I bet it's under the bed.

3:58P 17 Is he doing it with the assistance of a
18 minor? Absolutely. They're working as a team.

19 So was there a kidnapping? Well, the Judge
20 told you what kidnapping is. Kidnapping is willfully
21 seizing, confining, inveigling, enticing, decoy
22 abduct, conceal, kidnap, or carry away any person by
23 any means whatsoever with the intent to hold or
24 detain. That's kidnapping.

1 If you do it for the purposes of committing a
2 robbery, or the purposes of killing a person, or
3 inflicting substantial bodily harm, that's kidnapping
4 in the first degree. Every other type of kidnapping
5 is kidnapping in the second degree.

3:59P 6 Did Steven Kaczmarek kidnap Pedro Villareal?
7 Yes.

8 Steven Kaczmarek choked him, bound his hands,
9 bound his feet, gagged him, put a pillowcase over his
10 head, and then moved Pedro from the living room into
11 the tub. For kidnapping the binding of the victim or
12 the movement alone if they increase the risk of harm
13 to the victim is sufficient in and of itself to commit
14 kidnap.

4:00P 15 Why did the defendant tell you that he tied
16 Pedro Villareal's hands and legs? Because he wouldn't
17 stop moving. He wouldn't stop struggling.

18 By tying the hands and the feet, did he
19 increase the risk of harm? Absolutely. By tying the
20 hands and feet he made sure that there was nothing
21 that Pedro Villareal could do to save himself as he
22 lay in that tub with the water rising.

23 Now instruction number twelve tells you that
24 if the movement or the tying up is just part of the

1 robbery, that you can't find kidnapping and robbery.
2 And that's to prevent situations like this one.

4:01P 3 A person goes into a bank to rob it. He goes
4 to the manager and says, open the safe over there or
5 I'm going to do harm to you.

6 Well for the manager to open the safe he
7 needs to go from where he is to where the safe is to
8 get the money. So it wouldn't be fair in that
9 situation to hold it for both kidnapping and robbery
10 because the movement was necessary to the completion
11 of the robbery.

12 But there was no need to put Pedro Villareal
13 in the tub. There was no need in this case to bind
14 his hands and feet.

15 The defendant, Steven Kaczmarek, told you he
16 had time while Pedro Villareal was unconscious to get
17 out of that apartment. He had time. That wasn't his
18 goal.

4:02P 19 Did he use the assistance of a child in
20 committing that kidnapping? Absolutely. What could
21 be more clear? His statement to the police in Clark
22 County Detention Center says he instructed her to cut
23 the very cord that he tied Pedro Villareal up with.

24 Is that with the assistance of a child?

1 Absolutely.

2 So then we come down to our final charge.
3 The killing. What kind of killing is it? Because on
4 your verdict form you're going to get a lot of
5 choices. So let's start at the bottom and work our
6 way up.

7 You're going to have choices of first degree
8 murder, second degree murder, and voluntary
9 manslaughter.

4:03P 10 The difference between murder and
11 manslaughter is malice. Murder is the killing of a
12 human being with malice aforethought.

13 Manslaughter is the killing of a human being
14 without malice aforethought.

15 And the reason why in manslaughter it's
16 different is because they're the heat of passion. A
17 heat of passion which negates the malice.

18 And the judge instructed you on what malice
19 is, and I'm not going to read the whole thing over
20 again. But let's just look at whether voluntary
21 manslaughter applies.

22 Voluntary manslaughter is a heat of passion
23 defense. Man or woman who, unbeknownst to them, their
24 spouse was having an affair walks in to their spouse

1 in bed with someone else. Heat of passion? Maybe.
2 Man enters into an agreement with girlfriend to
3 pretend to engage with sexual relations with a man in
4 order to rob him. Heat of passion? No.

4:05P 5 No heat of passion.

6 The defendant admits he went there to rob
7 him. He and Alisha went there to rob this man. The
8 prostitution angle was just a rouse. It was a game
9 when they were communicating with their secret code.

10 There was no heat of passion here. He
11 attacked Pedro from behind. He brought him to the
12 ground. He choked him until he passed out.

13 There was no fight. A fight requires two
14 people. A fight is not one person killing another and
15 the other struggling for their life. The evidence is
16 consistent with the defendant's statement he went
17 there to rob him. There was no passion.

18 What we have here, ladies and gentlemen, is
19 murder.

4:06P 20 MR. GUYMON: I got it. You're driving me
21 crazy.

22 MS. BROWN: Thank you.

23 MS. BROWN: So we already discussed murder is
24 a killing with malice. What is malice? Well, there

1 are two types of malice. There's express and there is
2 implied malice.

3 Express malice is an intent to kill. Implied
4 malice is a recklessness showing an abandoned or
5 malignant heart.

6 Here this wasn't a fast murder. This wasn't
7 something that just happened. They choked him out
8 three separate times. They bound him. They gagged
9 him. They blindfolded him with the pillowcase. They
10 put him in a tub. They turned on the water. And they
11 left him there to drown.

4:08P 12 That, ladies and gentlemen, is express
13 malice.

14 At a very minimum it is a cruel prolonged
15 attack which evidences an abandoned or malignant
16 heart.

17 So now we know there was a murder. What
18 degree? What degree of murder was this? Well, the
19 way the statute reads, they kind of define what is
20 first degree murder, and then everything else is
21 second degree.

22 So if it fits within the definition of first
23 degree murder, we don't really need to go to second
24 degree murder.

1 And here this is first degree murder for two
2 separate reasons. The first, and this is a
3 premeditated deliberate murder. It was an intended
4 killing after a consideration of the consequences.
5 They thought about it. They planned it. They did it.

6 The judge explained what premeditation and
7 deliberation are to you in his instruction.
8 Deliberation doesn't mean you have to take someone out
9 for coffee, talk about the pros and cons, write out a
10 pro and con list before you commit the murder.

11 All it means is that you have to have
12 considered the consequences.

13 Here this was a long deliberate murder based
14 on a stated plan which they had talked about all the
15 time. They talked about it all the time. According
16 to the defendant.

17 They attacked him from behind. And Steven
18 Kaczmarek choked him until he passed out.

19 Now Dr. Telgenhoff told you that doesn't
20 happen immediately. It takes a little while. It
21 takes some time.

22 Time for the defendant to reflect, for him to
23 think, for him to deliberate.

24 The release -- the choke hold is then

1 released and he comes to again. A period of time for
2 him to come to. Time to think. Time to reflect.

3 But the defendant, Steven Kaczmarek, goes
4 back and chokes him out again and again. It's not
5 immediate. It takes time. Time to think, time to
6 reflect.

4:11P 7 And a third time. A time to think. Time to
8 reflect.

9 Steven Kaczmarek ties the hands of Pedro
10 Villareal in multiple square knots. Multiple times.
11 Tying someone up like that takes time. Time to think,
12 time to reflect.

13 He then goes and ties his feet. Same thing.
14 Moves him into the tub.

15 How do we know he's thinking? I sweated on
16 him. I'm going to leave DNA behind. He's thinking.
17 It's not passion though. He's planning. He's
18 considering consequences. He's going to get caught.
19 That's a consequence, and that, ladies and gentlemen,
20 is deliberation.

4:12P 21 This was a well planned, well executed, well
22 thought-out murder, and but for the fact that Steven
23 Kaczmarek couldn't help but brag in jail, he never
24 would have been found. This was a premeditated

1 deliberated murder.

2 Set that aside -- thank you -- because
3 there's another reason it's first degree murder. It's
4 not just first degree murder because it's premeditated
5 and deliberated. Even if we set that aside it's still
6 first degree murder.

7 And why is that? Because it was done in the
8 course of a robbery. Any killing, intentional or
9 unintentional, done in the course of a robbery, or a
10 kidnapping, or a burglary is first degree murder.

11 Steven Kaczmarek sat on that stand and told
12 you he was choking the defendant out and he did what
13 he did in order to rob him while in the apartment that
14 he was burglarizing.

4:14P 15 He told you he died after being put in the
16 tub, his hands tied behind his back and the water
17 turned on.

18 Pedro Villareal died in the course of a
19 robbery. He died in the course of a burglary. And he
20 died in the course of a kidnapping.

21 And as a result this has to be first degree
22 murder by statute. And they can say, well, I didn't
23 mean it. I didn't mean to kill him. But it doesn't
24 matter. Because this applies to both intentional and

1 unintentional killings.

2 Now, the defense may talk to you about second
3 degree felony murder.

4:15P 4 Second degree felony murder is when someone
5 dies in the commission of an unenumerated felony which
6 is inherently dangerous in the abstract. So if he's
7 committing a felony that's inherently dangerous and a
8 person dies as a result that can be second degree
9 felony murder.

10 But if it's one of the enumerated felonies in
11 the first degree killing statute robbery, burglary, or
12 kidnapping, it can not be second degree felony murder
13 because it is de facto first degree murder.

4:16P 14 So this was not second degree felony murder.
15 It was committed in the course of a robbery, and we
16 know that because the defendant told us.

17 Was the murder done with the assistance of a
18 minor? Yes, it was. She was looking for his
19 valuables. She was wiping down the apartment. She
20 was cutting the cord for Steven Kaczmarek to bind.
21 She found the sock in the pillowcase for him to stuff
22 the mouth and cover the head. And she did so at his
23 direction.

24 That is first degree murder.

4:17P 1 Now they may come up here and say, well,
2 Pedro wasn't all that. And you know what? Maybe
3 Pedro wasn't a perfect person. Maybe you wouldn't
4 have had him at your house for dinner. Maybe I
5 wouldn't have had him at mine.

6 But he was an ordinary man living in an
7 ordinary life. And the evidence shows he died a
8 horrible death, and he did so at the hands of is
9 Steven Kaczmarek.

10 The evidence shows that the defendant
11 committed burglary with the assistance of a minor,
12 robbery with the assistance of a minor, and kidnapping
13 with the assistance of a minor, and murder with the
14 assistance of a minor.

15 And at the close of arguments today, we will
16 ask you to return guilty verdicts on each one of those
17 counts.

18 Thank you.

4:18P 19 THE COURT: Bill.

20 MR. DENUE: I'm going to need that.

21 THE BAILIFF: You want it?

22 MR. DENUE: No. I'm kidding.

23 Your Honor, may I proceed?

24 THE COURT: Set up the podium wherever you

1 like it.

2 MR. DENUE: It's fine there, Judge.

3 THE COURT: Okay. Fine. Wait for Bill to
4 get.

5 MR. DENUE: Are you going it take a break,
6 Judge, or am I going to go right through?

7 THE COURT: I'm just letting him get out of
8 the way so the jury won't be distracted.

4:19P 9 THE BAILIFF: You want me to move anything
10 else? Where would you like the podium?

11 MR. DENUE: I got a chase lounge at home.

12 THE COURT: You said the podium is right
13 where it's at.

14 MR. DENUE: That's fine, your Honor.

15 THE COURT: Go ahead, Counsel.

16 MR. DENUE: May it please the Court, and
17 counsel, and ladies and gentlemen of the jury. I
18 don't know if it's just me, but it seems that people
19 are sort of missing the point. I could have sworn
20 Mr. Kaczmarek took the stand and confessed to robbery.

21 And it seems we've gotten a somewhat of a
22 larger production, and I know the state is doing its
23 job, and it has to do it, and it's done a good job.
24 And they've done a very good job.

1 In fact, they wouldn't even be here if they
2 weren't good in this type of case. It doesn't get any
3 better.

4 But Mr. Kaczmarek did take the stand. He
5 hasn't lied. He confessed to committing robbery. And
6 what the evidence has shown is that Steven and
7 Alicia Burns came to Las Vegas, Nevada. He came here
8 to marry her. And you know what? Life got in the
9 way.

10 Life got in their way. They couldn't handle
11 life. They panhandled. You heard from Steven. You
12 heard it from all the witnesses. He came. He made a
13 living the way he knew how. That was it. He asked
14 for money. He sent her out to ask for money.

4:20P 15 Under the scheme that the state has provided,
16 the jury instruction on felony murder about sums it
17 up. I mean, if he has confessed to robbery and a
18 murder occurred, then the state is telling you you
19 don't have a choice.

20 And then I'm asking myself and maybe you're
21 asking yourself the same thing: Why are there all the
22 other jury instructions? Why are there jury
23 instructions on premeditation? Why are there jury
24 instructions on deliberation.

1 That's your job. It's your job to review the
2 evidence. It's not theirs to dictate to you how to
3 decide. You can get to decide that. Not the state,
4 no matter how good they are.

5 That's the purview of the jury. And you're
6 to hold them to every element of every charged offense
7 that's been claimed against Mr. Kaczmarek.

8 And what happened in this case? I think what
9 the evidence shows is there was a crime of
10 opportunity. What I'm suggesting, and we never do
11 that, if death was as a result of.

12 As the state's attorney said, maybe Pedro,
13 you know, wouldn't have been invited to our house, or
14 done the things that we wanted to do. He
15 propositioned Alisha. He should not have died for
16 that. Nobody deserved that kind of a death. No
17 matter what happened to lead up to it.

18 But what you have here, what you see is what
19 you get. You saw Mr. Kaczmarek. You heard him on the
20 stand. He had no intent to commit a murder. And I
21 don't want you to lose focus us on that. That's the
22 whole ball frame from our perspective.

23 He had no intent. I don't think he had the
24 capacity to form the intent to do. In the sense of

1 scheming and being full of guile, there's no guile to
2 him.

3 You saw him. His voice is inflict. The way
4 he spoke was the same as you heard on the tape. He
5 gave us confession. I really -- I mean during some of
6 this trial I was really at a loss to understand why
7 we're asking people about different parts of the
8 evidence.

9 I know the state has to do their job, but
10 he's confessed. You heard the tape. He confessed to
11 the robbery, but he told the police he didn't intend
12 to kill anybody.

4:22P 13 He looked at you while he was on the stand
14 and said, but I didn't intend to kill anyone.

15 Now the state wants to pick and choose. But
16 in my suggesting to you is you get everything that you
17 get with Mr. Kaczmarek. If he confesses to the crime,
18 and that's a major confession, he's making -- he's
19 taking the stand. He's not saying it wasn't me.
20 Mr. Wommer, in opening statement, said your evidence
21 will be here that he put his arm around Mr. Villareal
22 and choked him. He was there. We said that from the
23 beginning.

24 And then we spent about an hour looking at

1 photos of the crime scene. When he already confessed
2 to robbery.

3 But he did say he didn't intend to kill, and
4 none of the jailhouse informants that were brought in,
5 none of them, said that he told them, yeah, I meant to
6 kill this guy. None.

7 His story is basically congruent with the
8 confession that he gave to the detectives and what he
9 told you on the stand.

10 Not in every single respect, no, but in the
11 essence congruent. None of those witnesses said while
12 he's hold up in module in cells with him, yeah, he
13 told me he intended to kill him. He told me they were
14 going to lure him up there and kill him. Yes, rob
15 him. He admitted that. He took the stand and took
16 responsibility for that.

4:24P 17 But he didn't ever say he intended to kill
18 him because he didn't. And the testimony in this
19 regard I think kind of speaks for itself.

20 You heard testimony that Mr. Villareal had in
21 Steven's word beau coup knives. knives everywhere.
22 The coroner testified no stab wound. Nobody was
23 stabbed. He could have stabbed him with all the
24 knives around. He could have done that. That didn't

1 happen.

2 They did tie him up, did put him in the tub.
3 But the testimony as you've heard when Steven said he
4 left the T.V. on. Why did he leave the T.V. on.
5 Well, because when Mr. Villareal woke he'd think
6 somebody was in the other room.

7 Now, again, this individual -- I mean, the
8 state said it in its closing that he was able to
9 understand the consequences of his acts. Now, you
10 know, that's not true. This is a man who thought he
11 could come to Las Vegas and marry a fifteen year old.
12 He really believed that.

13 I mean, you saw him. Yeah. They are going
14 to get married and live happily ever after. This is
15 not a post hock manufactured reason to save himself.
16 He didn't sit here and say, you know, if I come up and
17 say I didn't intend to kill, I'm going to walk.

18 We know that's going no happened in either
19 event. But what he said at the time was the truth,
20 and what he told those detectives at the time was the
21 truth. He didn't intend to kill, and no one else, no
22 one else has come forward and said he said that in all
23 the difference confessions that he's allegedly given
24 and talked to individuals. He spoke to them. They

1 testified you heard what they said. That part never
2 happened.

3 It was a crime of opportunity. And again,
4 I'm going to focus in on some of the jury instructions
5 here because if, as the state says, it's felony murder
6 and you must come back. Well that's the law. Well,
7 the law also imposes upon you a duty to determine
8 whether there's premeditation deliberation. That
9 admixture is required for first degree murder or else
10 why are you even being given these instructions?

4:26P 11 If it's that simple, why did they spend all
12 this time. They could have just held up the felony
13 murder rule after he confessed, and that's it. And
14 you're deliberating by now in the jury room.

15 What I'm going to ask you to focus on is
16 these jury instructions. And one of the jury
17 instructions you're going to have in the jury room is
18 a mere unconsidered and rash impulse, even though it
19 includes an intent to kill, is not deliberation and
20 premeditation as will fix an unlawful killing as first
21 degree murder.

22 I think what the state's attorney was
23 suggesting was there premeditation for the robbery.
24 There may have been deliberations, yes. She said they

1 talked all the time about robbery. Not murder. They
2 didn't talk all the time about murder.

3 And the three factors that you defined for
4 first degree murder a willfulness, deliberation, and
5 premeditation. And I'm not going to waste your time.
6 I'm going to focus in on one deliberation.

7 Deliberation is the process of determining
8 upon a course of action, weighing the reasons for and
9 against the action, and considering the consequences
10 of the action. I don't think Mr. Kaczmarek can
11 consider the consequences of what's going to happen
12 about an hour from now. In the world he lives in it's
13 minute by minute, day by day, dog eat dog on the
14 street surviving.

15 I don't by any stretch of the imagination he
16 could sit in that Mr. Villareal's room and think about
17 what was going to happen more than a half an hour
18 later.

4:27P 19 Not for purposes of first degree murder,
20 there's not. A plan, perhaps the robbery he confessed
21 to it. He took the stand and took responsibility for
22 that.

23 And the other instruction you get is without
24 the admixture of premeditation or deliberation,

1 without that, you have a second degree murder, not
2 first degree.

3 All murder which is not murder in the first
4 degree is murder of the second degree. Which is
5 murder with malice aforethought, without premeditation
6 and deliberation. There's no deliberation. This just
7 happened. You heard what happened.

8 You heard about his past crimes, heinous
9 crimes. Heinous crimes of violence. Violence and
10 theft.

11 You heard those. But I'll submit to you in
12 this particular case the state hasn't met the burden
13 on first degree murder. And they're going to attempt
14 to tell you we don't have to meet you're burden on
15 first degree murder because we can't get into his mind
16 and show intent.

17 And in either intent the legislature has
18 provided you the intent. We don't have to prove the
19 intent. The legislature has done that job for you.
20 And I'm just going to say this. That I don't think
21 your job, you don't get off that easy. The
22 legislature hasn't provided the intent.

23 We have jury instructions on second degree
24 murder, voluntary manslaughter. You're to consider

1 all those. And the question really is the intent.
2 It's your job. It's your job to determine the intent.

3 And in this case when Steven and Alisha left
4 that apartment with Mr. Villareal, I don't believe
5 that there -- they had the intent to kill him. I
6 don't believe that they had an intent.

4:29P 7 And then you said during the voir dire when
8 we questioned you that you would hold the state to
9 each and every element of each and every offense
10 charged. And I'll submit another thing.

11 If they don't want to take Steven's word for
12 on what we believe and he robbed him, but we don't
13 believe him when he said he didn't intend to kill.
14 They're picking and choosing. I know what he said.
15 He took the stand. He confessed to robbery. You take
16 all of it or nothing. He confessed to that.

17 And if you're not going to believe everything
18 he says, then I'll tell you this. The state hasn't
19 met its burden on all counts alleging assistance of
20 the child because the only evidence we have that
21 Alisha is under eighteen is Mr. Kaczmarek's. He told
22 you that.

23 Nobody came in with a birth certificate.
24 Nobody came in with any other evidence. She didn't

1 testify as to her age.

2 Now if the law means what it says, and I'm
3 sure Mr. Guymon is going to come up here and tell you
4 that the law means what it says in regards to felony
5 murder, and that you have to hold him to each and
6 every element, and the only testimony I recall that
7 Mr. Kaczmarek gave her age. There's no other evidence
8 of that. So if they want you to pick and choose --

4:30P

9 MR. GUYMON: Judge, that misstates the
10 evidence. The detective testified that Alicia Burns
11 was fifteen years old.

12 MR. DENUÉ: That's fine. But that's
13 obviously based on -- well, you determine that.
14 There's no competent evidence in my opinion.

15 MR. GUYMON: Judge, I'm going to object to
16 his opinions. He's not to interject what his opinion
17 as to what the --

18 THE COURT: I agree.

19 MR. DENUÉ: Well my point is they want us to
20 pick and choose. There's been no evidence. No one
21 came in here with birth certificate saying how old she
22 was.

23 There's been no evidence other than -- other
24 people saying what they were told or believed to be.

1 My point is, and I'm not trying to nitpick on
2 that issue, what I'm saying is if they want to have a
3 cafeteria style component to whether Steven's correct
4 on this and wrong on that, take the whole ball of wax.

5 I mean, he took the stand. He confessed.
6 But I don't think he has the guile to come up with the
7 I-didn't-intend-to-kill-after-the-fact. He didn't.

8 If he wanted to intend to kill him, if he
9 intended to kill Pedro, I think you can ask yourself
10 this. When they turned the water on, why didn't they
11 stuff a sock in the drain the way they stuffed a sock
12 in that poor man's mouth? It wasn't.

13 That's somebody who is really thinking.
14 Stuff the drain. Then we'll be sure he's dead.
15 There's been no evidence that that ever happened.

16 Thank you for your service. I appreciate it.

4:32P 17 MR. GUYMON: Ladies and gentlemen of the
18 jury, it's getting late. I'm going to keep this
19 short, and I'm going to make it simple.

20 On September 25th, 2002, the defendant used
21 Pedro Villareal's apartment as though it was his
22 personal jungle. And Villareal became Steven
23 Kaczmarek's chosen prey.

24 This becomes very very simple for you people.

1 The defense has conceded, as has the defendant
2 himself, that this was a robbery. And if this was a
3 robbery, this is first degree felony murder.

4:33P 4 There's moments when I'm just not proud to be
5 a lawyer because we stand here and listen to all this
6 mumbo jumbo and this nonsense. But your deliberations
7 are to be guided by the facts and governed by the law.

8 The law is crystal clear. First degree
9 felony murder is any murder or any killing that
10 happens during a kidnapping, a burglary, and a
11 robbery.

12 And so I ask you does apartment twenty-five
13 at 813 Ogden look like it was burglarized? When the
14 stuff was thrown all over the ground and things were
15 missing? Do you say to yourself, this is a burglary?
16 Well, of course, you do. Of course you do.

17 Because what we now know is burglary is any
18 time you enter a room, a building, a house, an
19 apartment, with the intent to commit a crime, that's
20 burglary. You don't have to break into it.

21 Mrs. Brown is right. A burglary is entering
22 with the intent to commit a crime. Did this man enter
23 into the apartment with the intent to commit a crime?
24 Absolutely. He told you that.

1 He told you clearly he had a plan to rob this
2 man. They were going to go back and enter into the
3 apartment and commit this crime. That's a burglary.

4:34P 4 It's real simple. Did he plan on robbing the
5 person? Absolutely. He told you that time and time
6 again.

7 You know, for a minute I was ashamed of
8 myself today when I kept going over and over and over,
9 did you make a plan? How often was the plan? Did you
10 talk about it two times a week? Three times a week?
11 Four times a week? How many weeks did you talk about
12 it?

13 Well, define all the time.

14 Well, the reason I was doing that, folks, is
15 because I wanted you to know that they had a plan to
16 rob him. Because if you know beyond a reasonable
17 doubt that this is a robbery, then you know it's first
18 degree murder pursuant to the jury instructions.

19 The defense indicated that what you see is
20 what you get. And I submit to you that what you have
21 here is a burglar, a robber, a kidnapper, and a person
22 guilty of first degree murder with use of a deadly
23 weapon. What you have here and what you get is a
24 murderer, the murderer of Pedro Villareal. That's

1 what you get when you follow the law and when you look
2 to the instructions.

3 And so I'm going to quickly show you the jury
4 instructions and see if I can't have you guided by the
5 law. Jury instruction four through seven are the
6 instructions that address what a burglary is.

7 Mrs. Brown went through them. I will submit
8 to you that there is ample evidence. There is
9 evidence beyond a reasonable doubt that this man's
10 apartment was burglarized and the appropriate verdict
11 is guilty of burglary with the assistance of a child.

12 And we can talk until we are blue in the face
13 about the fact that Alicia Burns didn't come into this
14 courtroom and tell you that she was fifteen years old,
15 but she has a Fifth amendment right to silence. She's
16 charged with a murder.

17 The state can't call her in this case because
18 she's charged with a murder, and her trial is for
19 another day. It's for another proceeding.

20 And you're not to concern yourselves with
21 whatever punishment is going to be. But the state
22 can't call her to have her say I'm fifteen years. But
23 is there any doubt in your mind that this girl right
24 here is fifteen years old? Is there any doubt in your

1 mind that she exists?

2 The detective says she exists. The defendant
3 says she exists. Torrence heard about her. Edd Pryor
4 heard about her. And they all told you that the
5 defendant said she is fifteen years old.

4:37P 6 And, in fact, she had to get a fake I.D. so
7 that she could sell her foster mother's car. Is there
8 any question that she's under eighteen years old when
9 the defendant himself under oath told you that she's
10 fifteen? That the detective told you that, Torrence
11 told you and that, Edd Pryor told you she's under
12 fifteen.

13 I submit to you that it's been proven beyond
14 a reasonable doubt that she was present, that she
15 participated, and that she's under the age of eighteen
16 years old. So the appropriate verdict is guilty as to
17 Count One.

18 We move to Count Two. Instructions on
19 robbery if you need some guidance, because after all
20 you're governed by the law in these proceedings. And
21 you each said you'd follow it. You ask yourself
22 what's a robbery.

23 We know by now what a robbery is. Did that
24 robbery occur at the apartment? Was Alicia Burns

1 there? Did the defendant participate? If the answer
2 to each one of those questions is yes, then your
3 verdict is guilty of robbery with assistance of a
4 child. .

5 Count Three, kidnapping. The instructions
6 that govern what a kidnapping is are instructions
7 Eleven through Fourteen.

4:38P 8 So when you get back there and you want to
9 take a look and you all say, well gee, what's a
10 kidnapping? And some of you might have come to court
11 at the outset and thought, hey, you know what,
12 kidnapping is a -- kidnapping is when a young child is
13 at the school bus and up comes the villain in the van,
14 grabs that child, throws him in the van, and off they
15 go.

16 But what you know because you have
17 Instructions Eleven through Fourteen, you now know
18 what the kidnapping is. The kidnapping is any time
19 you restrain a man or a woman.

20 Does it appear to you that Pedro was
21 restrained? Is there any question in your mind? Or
22 has that been proven beyond a reasonable doubt? I
23 submit to you that he was physically retrained and
24 that this is a kidnapping. When you follow the law,

1 the appropriate verdict is guilty of first degree
2 kidnapping with the assistance of a child.

4:39P 3 Turn now to Count Number Four. The count
4 that really is the easiest because it's summed up with
5 two instructions. I'm going to get to those
6 instructions, and then I'll be done.

7 But just so that you understand, voluntary
8 manslaughter. You have an example of that. Is this
9 voluntary manslaughter? Absolutely not.

10 Voluntary manslaughter, classic example given
11 to you today, husband comes home, or wife comes home,
12 finds his spouse in bed. Without even thinking, grabs
13 the gun, and boom, shots the person. That is a sudden
14 heat of passion. Didn't think about it. Wasn't
15 deliberate. Didn't spend any time planning it. Heat
16 of passion, voluntary manslaughter. This is not that.

4:40P 17 Second degree murder. What's second degree
18 murder? Well, second degree murder is the
19 unintentional act where you don't intend on killing
20 anybody but ultimately a death occurs.

21 Has to be unlawful act. That it's
22 unintentional. Well what's an unlawful act? What if
23 it's second degree murder? How about this? Somebody
24 driving recklessly. That's an unlawful act. You're

1 driving recklessly up and down the streets, and low
2 and behold you hit another car.

3 You didn't mean to hit the car. You killed
4 the person in the other car though. You didn't mean
5 to get in the accident. You didn't mean to kill them,
6 but you were involved in unintentional yet reckless
7 act, an unlawful act where you didn't intend to kill
8 anybody, but you did. That becomes second degree
9 murder. That would be an example.

10 Let me assure you without even an example why
11 this is first degree murder. And it's instructions
12 Twenty-two and Twenty-three, and then I'll be
13 finished.

14 And I hope you can read that from where
15 you're at because I want you to be able to read if you
16 can. It says there is a kind of murder which carries
17 with it conclusive evidence of premeditation and
18 malice aforethought.

19 This class of murder is murder committed in
20 the perpetration or attempted perpetration of
21 kidnapping and/or robbery and/or burglary.

22 This is the law, folks. Therefore, a killing
23 which is committed in the perpetration of such a
24 kidnapping and/or robbery and/or burglary is deemed to

1 be murder in the first degree or of the first degree.
2 Whether the killing was intentional or unintentional
3 or accidental this is called the felony murder rule.

4:42P 4 The intent to perpetrate or attempt to
5 perpetrate kidnapping and/or robbery and/or burglary
6 must be proven beyond a reasonable doubt.

7 Ladies and gentlemen of the jury, let me go
8 back to that. If we've proven to you beyond a
9 reasonable doubt that is a robbery, and by the way,
10 the state says it's robbery all the evidence says its
11 a robbery, the defendant said it was a robbery, his
12 attorneys said it was a robbery. Guess what? There
13 is no doubt that this is a robbery. And if there's no
14 doubt that this is a robbery, then there's no doubt
15 that this is murder of the first degree.

16 Skip the argument about whether or not this
17 is deliberate. I won't argue about whether or not
18 it's deliberate. You place your arm around a man's
19 neck and you squeeze it tighter and tighter until you
20 take him to the ground and you struggle with him, and
21 you put your weight on him, and you hold him there.
22 We don't have to discuss whether or not that's
23 deliberate. We don't have to discuss with you whether
24 it's deliberate when you take his hands and you put

1 them behind his back, and you wrap him with knots
2 again and again and again.

4:44P 3 And then you turn him and grab his feet and
4 you tie the knots. Not once, but twice or three
5 times. We don't have to argue to you that that's
6 deliberate, but I submit to you that those are
7 deliberate acts.

8 We don't have to argue to you that it's
9 deliberate when you pick a man up, dead weight, and
10 you bring him over and you put him in the bathtub, and
11 you lay him there face down as though he's less than
12 human. And you tear his shirt off of him, and you
13 turn the water on.

14 Are those deliberate acts? I submit to you
15 they are. And Pedro Villareal was a human being.

16 This is not the defendant's personal jungle,
17 and Pedro Villareal was not his chosen prey or should
18 not have been his chosen prey.

19 But the rules changed when Steven Kaczmarek
20 entered into that building. But skip all that for a
21 minute. Skip whether or not that is deliberate and
22 follow the law.

23 Because in doing so, it is first degree
24 murder whether we like it or not, and the wisdom

1 behind that is this. The legislators don't want
2 robbers and burglars and kidnappers to engage in that
3 kind of conduct. And so the legislatures say, listen,
4 if you're going to engage in that kind of conduct and
5 if somebody dies, darn it, the price of playing poker
6 goes up. It becomes first degree murder. Because
7 somehow we want the law to be dissuade would be
8 burglars and would be robbers, would be kidnappers
9 from engaging in this kind of conduct.

10 And when we engage in it, we want there to be
11 consequence. And the consequence become as serious as
12 first degree murder.

4:45P 13 Instruction number twenty-five, I mean
14 twenty-three if you have it.

15 MS. BROWN: I think it's up there.

16 MR. GUYMON: The last one I want is
17 twenty-three. And I apologize for the delay. Hope
18 you can read it from where you're at. The crime of
19 burglary and/or robbery and/or kidnapping subjects a
20 person to the felony murder rule when the killing is
21 linked to or part of the series of incidents related
22 to the burglary and/or kidnapping and/or robbery so as
23 to be one continuous transaction.

24 And I submit to you this was one continuous

1 transaction from the moment Steven Kaczmarek entered
2 into the room until he left this was one continuous
3 chain of events. The party didn't stop until is
4 Steven Kaczmarek left.

5 Once you know beyond a reasonable doubt that
6 a robbery occurred, we're done, folks. At that point
7 you know that this is first degree felony murder. You
8 have to know as you look at the evidence that this was
9 a burglary. Pedro was kidnapped. It was a robbery.
10 And it becomes first degree felony murder, and so I
11 submit to you that the appropriate verdict on Count
12 four, no matter how difficult it is, is guilty of
13 first degree murder with the assistance of a child.

4:47P 14 I submit to you at time it's not easy to pass
15 judgment on another human being. The subject of
16 murder is not an easy subject. But I disagree with
17 defense counsel when they say things just happened.
18 Pedro Villareal didn't just lose his life. The
19 defendant took Pedro Villareal's life, and for that
20 you people need to hold him accountable.

21 The evidence is clear. And by your verdicts
22 of guilty of burglary, kidnapping, robbery and first
23 degree murder with the assistance of a child, you hold
24 him accountable, and the law takes on some meaning and

1 I thank you.

2 THE COURT: Thank you. All right. Ladies
3 and gentlemen of the jury, what we're going to do now
4 is swear in the officers to take charge of you during
5 the deliberation. We're going to ask that you retire
6 to the jury room. First order of business will be to
7 select the foreperson, and then we're going to send
8 you home. Okay.

4:48P 9 My bailiff will collect your note pads and
10 give them to you when you come back on Monday.

11 (Whereupon the jury officers and
12 alternate jury officer were sworn
13 In to take charge of the jury.)

14 THE BAILIFF: okay. Jurors follow me.

15 THE COURT: Have a good weekend. See you on
16 Monday.

17 THE COURT CLERK: What time, Judge?

18 THE COURT: Bill, 8:30.

4:49P 19 THE BAILIFF: Yes.

20 THE COURT: Jury lounge.

21 THE BAILIFF: no. I will have --

22 THE COURT: You'll talk to them.

23 (Whereupon, the following
24 proceedings were had outside

1 the presence of the jury.)

2 THE COURT: All right. Let the record
3 reflect that the jury and two alternates have left the
4 courtroom. Anything else out of the presence?

5 MR. WOMMER: Just one thing, should the jury
6 return a verdict of first degree when would you like
7 to start the penalty phase?

8 THE COURT: How long do you need?

9 MR. WOMMER: My guess is the state's probably
10 going to need a couple of hours.

11 MR. GUYMON: Yes.

12 THE COURT: Okay. And you?

13 MR. WOMMER: Probably an hour or so.

14 THE COURT: All right. So we'll just play it
15 by ear as to when we have the penalty hearing in the
16 event they come back with first degree.

4:50P 17 MR. GUYMON: Judge, can we -- so we can
18 schedule some out of the state's, can we tentatively
19 plan if we have a verdict on Monday that we'd start on
20 Tuesday?

21 THE COURT: Sure.

22 MR. GUYMON: Is that reasonable, gentleman?

23 MR. DENUE: Yeah, I think it is. I'm going
24 to talking to Mr. Kaczmarek's mother tonight at six

1 o'clock Las Vegas time to see if she is in fact going
2 to be coming and when, your Honor.

3 MR. GUYMON: And, Judge, if there's
4 scheduling problems with regard to his mother too, we
5 have no problem with regarding his mother. We have no
6 objection to calling them out of order, in other
7 words, if we weren't finished with in our case and in
8 fact if we stated our case --

9 MR. DENUE: I appreciate that.

10 MR. GUYMON: - to accommodate the mother.

11 MR. DENUE: State should be very
12 accommodating, we appreciate it.

13 MR. WOMMER: Could we start as early as
14 Monday afternoon if the come back Monday morning?

15 MR. GUYMON: I can.

16 THE COURT: Sure? You said four hours?

17 MR. WOMMER: Yes.

18 THE COURT: Three, four hours.

19 MR. WOMMER: Yes.

4:52P 20 THE COURT: All right. Counsel, these
21 proffered instructions were not given.

22 MR. WOMMER: Yes. These were the four, three
23 of which I withdrew, and the one original unamended
24 one. They should be Defense A, B, C.

1 THE COURT CLERK: Actually, we don't mark
2 them that way. We mark them -- we don't mark them as
3 Court's exhibit. We just use them and instruction.
4 We mark them as instructions given but not used.

5 MR. WOMMER: Okay.

6 THE COURT: No, proffered.

7 THE COURT CLERK: Proffered. Proffered.

8 MR. WOMMER: Thank you.

9 THE COURT: Okay. Anything else before we
10 break?

11 MR. GUYMON: No, Judge. Just thank you for
12 the Court's time.

13 THE COURT: Thank you.

14 (WHEREUPON, THE PROCEEDINGS WERE
15 CONCLUDED AT 4:52 P.M.)

16 * * * * *

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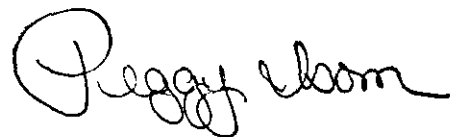
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REPORTER'S CERTIFICATE

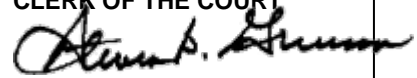
STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND
REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN
STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE
BEFORE-ENTITLED MATTER AT THE TIME AND PLACE
INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES
WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY
DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT
CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE
BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF
CLARK, STATE OF NEVADA.



PEGGY ISOM, RMR, CCR 541



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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,)	CASE NO.: 03C191253
)	
Plaintiff,)	DEPT.NO.: X
)	
vs.)	
)	
ALISHA BURNS,)	
Defendant.)	

REPLY IN SUPPORT OF RENEWED MOTION FOR LIMITED DISCOVERY

COMES NOW, ALISHA BURNS, by and through her attorney, ANTHONY L. ABBATANGELO, ESQ., and hereby submits her Reply in Support to her Renewed Motion for Limited Discovery.

Dated this 25th day of June 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The State is not addressing a main and substantive contention of the Defense. The coercion and manipulation by Kaczmarek of Alisha Burns regarding the three “confessions.” Ms. Burns was a mere 15 years old at the time of the incident. Kaczmarek was in his early thirties and a convicted felon. Ms. Burns was a victim, what is known today as, of sex trafficking, and submitted a statement that was the product of Kaczmarek’s mind control over her. Kaczmarek claimed at his trial Alisha was the mastermind of all the events. This is a reflection of Kaczmarek would say and do anything to avoid his role in the case.

The Information to which the Petitioner plead alleges the date of the robbery occurring on September 27, 2002. This is two days after the robbery. The record clearly reflects there was activity in the residence on September 26th and 27th, 2002. This is two days after the pawning of the items, two days after the interactions of Petitioner and victim. The state fails to address this immovable, stubborn fact , and instead uses in part Kaczmarek’s testimony as a form of confession by Ms. Burns. The states murder case is fundamentally flawed, as will be borne out. Her Petition is meritorious, as will be amply established.

This Court has granted an evidentiary hearing, limited discovery is warranted.

FACTS IN SUPPORT OF REPLY

In response to the State’s Response, Petitioner’s trial counsel failed to explain to the Petitioner the glaring and fatal flaw in the State’s charges, Petitioner was not made aware that

1 the robbery and her interactions with the victim were **two days prior** to the offense date stated
2 in the Information attached in support of the GPA. In addressing their argument The State is
3 positing an impossible construct; namely, that Petitioner cannot “allege (d) with any
4 specificity how these fingerprints could accomplish such a feat...” (State’s Response, P.
5 3) Instead, the State opts to stand on the statements of Ms. Burns and completely overlook the
6 immovable elephant(s) in the room:

7
8 *There was human activity in the victim’s residence from the inside one and two days*
9 *after the Petitioner was present, and after the items were pawned.*

10 This is established from the original discovery. A voluntary statement was made by the
11 maintenance man, Thomas Riddle, that there was running water in the residence next door to
12 another tenant. The door of the unit victim was found had was chain locked from the inside two
13 days after Kazmerck and Ms. Burns wiped down the unit. Mr. Riddle returned later, and the
14 chain was removed from the door. The obvious and only conclusion is there were person or
15 persons present on the 26th and 27th of September 2002

16
17 Kazmerck and Alisha Burns stated in the original discovery they had wiped the unit
18 clean before leaving the residence. Running the fingerprints can be matched with someone who
19 is in the system now but was not in the system in 2002. This could be accomplished with little
20 effort on behalf of the State.

21
22 It doesn’t pass the smell test that State contorted/fast forwarded the date of the robbery
23 to September 27, 2002, in order to gloss over the fact that 1), the victim was alive on September
24 25, 2002, and 2), the murder occurred two days after the robbery, as established by the BOTH
25 the Medical Examiner and by Dr. Thomas Bennett, MD. There was not the physical
26 decomposition that would exist if the victim had been murdered on September 25, 2002 The
27
28

fact that the chain lock was engaged, and later was disengaged, conclusively establishes that person or persons were in the residence on the 26th and 27th.

This proceeding is not moot court, it is not some intellectual exercise; in this case BOTH Dr. Thomas Bennett and the State's Medical Examiner agree that the murder occurred on September 27, 2002, TWO DAYS after the Petitioner was present.

THERE EXISTS AS A MATTER OF LAW UNDUE INFLUENCE OF KAZMERCK ON BURNS "CONFESSIONS"

The State uses the hearsay transcript of Kaczmarek, and does not address whatsoever the presumption of undue influence upon Ms. Burns.

"Moreover, the application note for § 2G1.3 provides for a rebuttable presumption of undue influence "[i]n a case in which a participant is at least 10 years older than the minor." The district court stated at sentencing that Anderson was 29 years old. His victims were minors, at least under 18, though evidence at trial suggested they were considerably younger. Thus, undue influence was both presumed and supported by evidence." U.S. v. Anderson, 560 F.3d 275, 283 (5th Cir. 2009)

This undue influence culminated in an actual in person to person visit while both Kaczmarek and Alisha Burns were housed in the Clark County Detention Center. This visit was approved by Court Order. The meeting resulted in the fifteen (15) years old, Ms. Burns writing a false confession. The Petitioner confessed, and plead to, robbing a person two days after the robbery actually occurred.

As to the alleged "confession" to Teresa Daka, Petitioner was not informed of the fact that the homicide occurred two days later, much less the comings and goings of persons in and out of the residence after the robbery. Ms. Burns had been in solitary confinement as well. The isolation of solitary confinement for a minor lead to precisely what occurred, a confession.

1 Lastly, Kaczmarek would inundate Ms. Burns with letters, as witnessed by Bridget Pasqua, a
2 fellow inmate. The jail made no attempts to block this correspondence.

3 Since this evidentiary hearing involves ineffective counsel, Petitioner reminds the Court that
4 the State has not denied the fact she was incorrectly advised that she could receive the death
5 penalty during the negotiation process.
6

7
8 **ARGUMENT**

9 **THE STATE HAS FAILED TO RESPOND WITH ANY AUTHORITY TO SUPPORT**
10 **ITS POSITION**

11 With respect to a movant, “A party filing a motion must also serve and file with it a
12 memorandum of points and authorities in support of each ground thereof. The absence of such
13 memorandum may be construed as an admission that the motion is not meritorious, as cause for
14 its denial or as a waiver of all grounds not so supported.” NV ST 8 DIST CT Rule 3.20

15 There apparently is no requirement that a responding party provide points and authorities, but
16 this Court could treat this failure “an admission that the motion is meritorious and a consent to
17 granting of the same.” NV ST 8 DIST CT Rule 3.20.
18

19 **THIS REQUEST FOR FINGERPRINTS IS MERITORIOUS**

20
21 In this case, the Petitioner is factually innocent, and the advice to plead to avoid a possible
22 death penalty is a recipe for an innocent person to plead, especially a fifteen year old girl
23 already under the extreme undue influence of Kaczmarek. The ineffective assistance of counsel,
24 counsels who did not know that a fifteen-year-old was never eligible for the death penalty must
25 be deemed to have played a substantial role. See Mazzan v. Whitley, 921 P.2d 920, 922 (Nev.
26 1996) “Judicial review of Mazzan's claims for relief would nevertheless be required if Mazzan
27 demonstrated that failure to consider them would result in a fundamental miscarriage of
28

1 justice.” This court should exercise discretion and allow the prints to be run. Ms. Burns has
2 presented more than a colorable claim of innocence. *See Pellegrini, v. State*, 117 Nev.860, 887,
3 34 P.3d 519, 537 (2001). A fundamental miscarriage of justice requires “a colorable showing”
4 that the petitioner “is actually innocent of the crime or is ineligible for the death penalty.”

5 “This generally requires the petitioner to present new evidence of (her) innocence, *House v.*
6 *Bell*, 547 U.S. 518, 536–37, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Schlup v. Delo*, 513 U.S.
7 298, 316, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Alisha has certainly presented new evidence
8 of her innocence, and the State cannot in good conscious make a relevance claim to rerunning
9 of the prints, which now may contain a match.

10
11 **LIMITED DISCOVERY IS WARRANTED**

12 NRS 34.780 establishes the rule for discovery in post-conviction cases. NRS 34.780(2) states
13 as follows:
14

15
16 2. After the writ has been granted and a date set for the hearing, a party may invoke any
17 method of discovery available under the Nevada Rules of Civil Procedure if, and to the
18 extent that, the judge or justice for good cause shown grants leave to do so. Nev. Rev.
19 Stat. Ann. § 34.780 (West)

20 “Good cause” is broad in scope...*Intermountain Lumber & Builders Supply, Inc. v.*
21 *Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967). The Petitioner asks that the
22 State be ordered to produce an updated analysis on the fingerprints recovered at the scene, which
23 would require a very minimal effort on the part of the State. Good cause exists for this request.

24 Additionally, since this evidentiary hearing addresses ineffective assistance of counsel,
25 Petitioner asks that she be permitted to take the depositions of her prior attorney, Mr. Kohn, and
26 possibly Mr. Gary Guymon, Esq and Mr. Craig Heinrichs, Esq.

1 - WHEREFORE, Petitioner prays as follows:

- 2 1. That this matter be set down for hearing,
3 2. That this Court permit limited discovery as requested, and,
4 3. For any further relief that is fair and just.

5 Dated this 25th day of June, 2020.
6
7

8 /s/ Tony L. Abbatangelo, Esq.
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CERTIFICATE OF SERVICE

A copy of this Motion was electronically served on all parties of record this 25th day of June, 2020

/s/Tony L. Abbatangelo, Esq
Tony L. Abbatangelo, Esq.