



## BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE



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### **Generals**

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

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

Nothing that counsel say during the trial is evidence in the case.

The evidence in a case consists of the testimony of the witnesses and all physical or documentary evidence which has been admitted.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not admissible.

When the court has sustained an objection to a question, the jury is to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness.

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of you have agreed upon a verdict, the foreman should sign and date the same and request the Bailiff to return you to court.

It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

The penalty provided by law for the offense charged is not to be considered by the jury in arriving at a verdict.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of a state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

The burden rests upon the prosecution to establish every element of the crime with which the defendant is charged, and every element of the crime must be established beyond a reasonable doubt.

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say

they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable, must be actual, not mere possibility or speculation.

Every person charged with the commission of a crime shall be presumed innocent unless the contrary is proved by competent evidence beyond a reasonable doubt.

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

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

### **Miscellaneous Generals**

#1 A proximate cause of an injury is a cause, which in natural and continuous sequence produces the injury without which the injury would not have occurred.

#2 A person is not guilty of crime when he or she commits an act or engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

1. Where the threats and menaces are such that they would create in the mind of a reasonable person the fear that his or her life would be in imminent and immediate danger if he did not commit the act or engage in the conduct charged, and

2. If such person then believed that his or her life would be so endangered.

This rule does not apply to threats, menaces, and fear of future danger to his or her life.

CALJIC 4.40

#3 A person is not guilty of a crime when he/she commits an act or engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

1. The peril must be present, active and immediate.

2. The danger must not be one of future violence but of present and immediate violence at the time of the commission of the forbidden act.

#4 An act or omission committed under an ignorance or mistake of fact under circumstances which disprove any criminal intent is not criminal. Where a person in good faith believes in the existence of certain facts and acts or omits to act with reference to such believed facts in a manner which would be lawful if such facts were as he or she believes them to be, he is not guilty of a crime even though his act or omission is such that, if committed by one who knew the true facts, it would constitute a criminal offense.

Mistake of fact is not, however, a defense where a person intends to do an act the commission of which is a criminal offense and the result of which act produces a result different from that intended but which also constitutes a crime.

In considering mistake of fact as a possible defense it must always be borne in mind that, when a person voluntarily does that which the law declares punishable as a crime, the element of criminal intent exists and the defense is not tenable and that it is only where the ignorance or mistake of fact operates as proof of a lack of criminal intent that this defense can succeed.

California Criminal Law

Fricke, Alarm, 10th Ed.

#5           Where a person has committed an unlawful act, and where that person, at the time the act was committed, had the intent necessary to make the crime complete, the fact that he or she might at some later time have repented and not had the unlawful intent, is no defense.

#6           The #Information itself is a mere charge or accusation against the defendant(s) and is not of itself any evidence of the defendant'(s) guilt and no juror in this case should permit himself or herself to be to any extent whatsoever influenced against the defendant(s) because of or account of the #Information.

#7           You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

CALJIC 1.02

#8           The word "willfully," when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage Childers v. State 100 Nev. 280 (1984)

CALJIC 1.20

#9 "Knowingly" imports a knowledge that the fact exists which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person on inquiry.

NRS 193.010-12

#10 In every crime or public offense, there must exist a union or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

#11 It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the court has sustained an objection to a question, the jury is to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

#12 It is not necessary for the prosecution to prove each and every factual statement contained in the bill of particulars. So long as the State proves all of the essential elements of the particular crime charged, then the evidence is sufficient to convict regardless of whether every statement in the bill of particulars is proved. State v. Frames, 515 P.2d 751 at 755 (Kan. 1973)

#13 Where a defendant is charged with committing a single offense by one or more specified means, the State need only prove one of those means in order to sustain a conviction.

State v. Kirkpatrick, 94 Nev.

A.O. 177 (9/28/77);  
Gerberding v. U.S., 471 F.2d 55 (8<sup>th</sup>  
Cir.1973);  
U.S. v. Conti, 361 F.2d 153 (2D Cir. 1966)

#14 Substantial bodily harm is:

1. Bodily injury which creates a substantial risk of death or which causes serious,  
permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

or

2. Prolonged physical pain.

Gibson v. State of Nevada,  
95 Nev.Adv.Op. 23, 1979,  
and NRS 193.015

#15 Identity is not an element of the crime charged.  
However, identity of the defendant as the perpetrator of the  
offense must be proved beyond a reasonable doubt.

In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator  
of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to  
pass upon the strength or weakness of the identification and the certainty or uncertainty of the witnesses in  
giving testimony.

Collins v. State, 88 Nev.  
Williams v. State, 93 Nev.

## ACCESSORY

#1

Every person who after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

People v. Wallin, 32 Cal. 2d 803

#2

Nevada Revised Statute 195.030 as far as applicable to this case provides: Who are accessories. Every person not standing in the relation of husband or wife, brother or sister parent or grandparent, child or grandchild, to the offender, who:

1. After the commission of a felony harbors, conceals or aids such offender with intent that he/she may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest is an accessory to the felony.

## ARSON

#1

Any person shall be deemed to have set fire to or caused to be burned any personal property, whenever any part thereof or any part therein shall be scorched, charred or burned.

#2

Nevada Revised Statutes 205.020 provides that: "Any person who willfully and maliciously sets fire to or burns or causes to be burned any unoccupied personal property of a value of \$25.00 or more and the property of another is guilty of Arson in the Third Degree."

Submitted by Don Nomura in

State v. Larry Dennis Lauderbaugh

Instruction No. \_\_\_

Submitted by Don Nomura in

State v. Larry Dennis  
Lauderbaugh

## ASSAULT

#1 Words of abuse, insult or reproach addressed to person, without any threat of injury or attempt to inflict injury, will not justify an assault with the use of a deadly weapon.

#2 Assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another, with the use of a deadly weapon.

#3 It is lawful for a person who is being assaulted to defend himself or herself from attack if, as a reasonable person, he or she has grounds for believing and does believe that bodily injury is about to be inflicted upon him or her. In doing so he or she may use all force and means which he or she believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

#4 An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him or her.

#5 Assault and battery is defined as any willful and lawful use of force or violence upon the person of another.

#6 Assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

#7 Any person convicted of assault with a deadly weapon or the present ability to use a deadly weapon shall be guilty of a gross misdemeanor.

#8 Assault with a deadly weapon is a lesser included offense of attempted murder.

The court instructs the jury that you may find the defendant guilty of this lesser included offense of assault with a deadly weapon if you do not find the defendant guilty of attempted murder.

Assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another, with the use of a deadly weapon.

#### **ASSOCIATION**

#1           A person's social associations with those accused of committing a crime will not, in and of itself, support an inference that that person was involved with the crime, but may be considered in the light of all the other facts and circumstances in evidence.

## ATTEMPT

#1           It is immaterial whether or not the crime attempted was impossible of completion if you find that it was apparently possible of completion to the defendant so acting with the necessary intent.

#2           An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed" on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the criminal design.

#3           Nevada Revised Statutes, Chapter 193, Section 193.330, defines an "attempt" as follows: "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."

In an attempt to commit a crime, three elements are involved:

1.   The intent to commit the crime.
2.   Performance of some act toward its commission.
3.   Failure to consummate its commission.

#4           When a person has once committed acts which constitute an attempt to commit a crime, he or she cannot avoid responsibility by not proceeding further with his or her intent to commit the crime, either by reason of voluntarily abandoning his purpose or because of a fact which prevented or interfered with his or her completing the crime.

#5 Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt.

#6 NRS 193.330 defines an "attempt" as follows: "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.

**ATTEMPTED MURDER**

The elements of the crime of attempted murder are:

1. The defendant did willfully and unlawfully
2. Perform an act or acts
3. With the deliberate intention to kill a human being; and
4. Said acts or acts tended to, but failed to accomplish the killing

NRS 193.330

With

## **BATTERY**

#1 Battery means any willful and unlawful use of force or violence upon the person of another.

#2 Battery with a deadly weapon is the willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon.

#3 The Court instructs the jury that they may find the defendant guilty of a necessary included offense, without finding the defendant guilty of battery with a deadly weapon.

Battery is such an offense, and is defined as any willful and unlawful use of force or violence upon the person of another.

#4 Battery with intent to commit robbery is any willful and unlawful use of force or violence upon the person of another with the intent to commit robbery.

#5 Battery with a Deadly Weapon means any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon. Any harmful or offensive unconsented touching, however slight, constitutes sufficient force or violence upon the person of another.

#6 Battery means any willful and unlawful use of force or violence upon the person of another. Any harmful or offensive unconsented touching, however slight, constitutes sufficient force or violence upon the person of another.

Battery means any willful and unlawful use of force or violence upon the person of another. Any harmful or offensive unconsented touching, however slight, constitutes sufficient force or violence upon the person of another.

NRS 200.400  
Stokes v. State,  
115 N.E. 2nd 442 (1953)

#7 If you find from the evidence that at the time of the alleged battery, the defendant did not intend to rape the victim, then you cannot find him or her guilty of the crime of Battery With Intent to Commit Rape Causing Substantial Bodily Harm; however, it is within your province to find him or her guilty of the offense of Battery Causing Substantial

#8 In the crime charged, Battery With a Deadly Weapon, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not

necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he or she is acting with general criminal intent, even though he or she may not know that his or her act or conduct is unlawful.

In the crime charged, Battery With a Deadly Weapon, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he or she is acting with general criminal intent, even though he or she may not know that his or her act or conduct is unlawful.

#9 A person who commits a battery with the specific intent to commit rape is guilty of a crime.

Before you may find the defendant guilty of this crime, you must find from the evidence that he or she committed a battery, and further, that in committing such battery he/she intended to commit rape. The crime of battery with intent to commit rape is complete if a battery is made, and if at any moment during the battery, the aggressor intends to commit rape.

NRS 200.400(3)

#10 Words alone, no matter how insulting, will never justify acts of a physical nature to be inflicted upon a person using such words.

Submitted by M.B. Lane  
State v. Messick, 10/11/78  
Prell Hotel Corp. v Instruction  
Antonacci, 86 Nv. 390 (1970)

#11 Battery with a Deadly Weapon is a lesser included offense of Attempted Murder.

The Court instructs the jury that you may find the defendant guilty of this lesser included offense of Battery with a Deadly Weapon if you do not find the defendant guilty of Attempted Murder.

Battery with a Deadly Weapon means any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon. Any harmful or offensive unconsented touching with the deadly weapon, however slight, constitutes sufficient force or violence upon the person of another.

## **BURGLARY**

#1            Every person who, either by day or night, enters any house, room, apartment, tenement, or other building, with intent to commit grand or petit larceny, or any felony, is guilty of burglary.

#2            Every person who shall unlawfully break and enter or unlawfully enter any house, room, apartment, tenement, or other building, shall be deemed to have broken and entered or entered the same with intent to commit grand or petit larceny, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent.

NRS 205.065

#3            Every person who shall unlawfully enter any warehouse or other building shall be deemed to have entered the same with the intent to commit grand or petit larceny or a felony therein, unless such unlawful entry shall be explained by testimony satisfactory to the jury to have been made without Criminal intent. NRS 205.065

#4            Nevada Revised Statutes 205.070 provides that "Every person who, in the commission of a burglary, shall commit any other crime, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

#5            Nevada Revised Statutes, §205.060, insofar as applicable to this case, provides:

"Every person who enters any building, with intent to commit grand or petit larceny, is guilty of burglary."

#6            The essence of a burglary is entering such a place with such specific intent, and the crime of burglary is complete as soon as the entry is made, regardless of whether the intent thereafter is carried out. CALJIC 14.50

#7            Entry in a burglary is not confined to the intrusion of the whole body, but is accomplished by the insertion of any portion of the body into the building.

#8 Section 205.060 of the Nevada Revised Statutes provides in part as follows:

Every person who, either by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary.

#9 The mere fact that a person was in conscious possession of recently stolen property is not enough to justify his or her conviction of burglary. It is, however, a circumstance to be considered in connection with other evidence. To warrant a finding of guilty, there must be proof of other circumstances tending of themselves to establish guilt.

In this connection you may consider the defendant's conduct, his or her false or contradictory statements, if any, and any other statements he or she may have made with reference to the property. If a person gives a false account of how he or she acquired possession of stolen property this is a circumstance that tends to show guilt.

#10 Every person who shall have in his or her possession in the day or nighttime any tool or implement adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same is intended to be so used, shall be guilty of Possession of Tools Designed for Commission of Burglary.

#11 Every person who shall unlawfully break and enter or unlawfully enter any house, room, apartment, tenement, shop warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, or railroad car, shall be deemed to have broken and entered or entered the same with intent to commit Grand or Petit Larceny, or a felony therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent. NRS 205.065

#12            The unlawful entry of a   raises a presumption that the unlawful entry was made with the intent to commit larceny.

                 This means that the jury may regard the fact of the unlawful entry as sufficient evidence of the unlawful intent, but is not required to do so.

                 In any event, the existence of all elements of the offense must, on all the evidence, be proved beyond a reasonable doubt.

## **CONFESSION/ADMISSION**

#1           A statement made by a defendant other than at his or her trial may be either an admission or a confession.

          An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

          A confession is a statement by a defendant, which discloses his or her intentional participation in the criminal act for which he or she is on trial and which discloses his or her guilt of that crime.

          You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

          Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution.

#2           An alleged confession of the defendant has been admitted into evidence. Before the Jury may take a confession into consideration, it must decide whether or not it was a voluntary confession. If the Jury decides that the confession was not made voluntarily, the Jury must disregard the confession and not consider it for any purpose.

#3           A statement made by a defendant other than at his trial may be either an admission or a confession.

          An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

          A confession is a statement by a defendant, which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

CALJIC 2.70

#4 No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial.

The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. Such identity or degree of the crime may be established by an admission or confession.

#5 There has been admitted in evidence the testimony of a medical expert of statements made to him by the defendant in the course of an examination of the defendant which was made for the purpose of diagnosis. The testimony of such statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based his opinion. Such testimony is not to be considered by you as evidence of the truth of the facts disclosed by defendant's statements.

#6 A confession of the defendant has been admitted into evidence. Before the Jury may take such confession into consideration it must decide whether or not it was given voluntarily then it may consider it in determining the guilt or innocence of the defendant.

Submitted by Coppa in State v. Conlin, Trial  
3/5/79

#7 Voluntariness is based on the totality of circumstances, no one factor being controlling. If you decide that a statement was made voluntarily, then you may consider it in determining the guilt or innocence of the defendant making the statement.

It is the prosecution's burden to prove by a preponderance of the evidence that the defendants' statements were voluntary. If you are not so convinced, then you may not consider the statements for any reason against the defendant making the statement.

A preponderance of the evidence means to prove that something is more likely than not.

Parker v. Randolph, 442 U.S. 62 (1979); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972); Quiriconi v. State, 96 Nev. 766 (1980); Arkansas v. Hayes, 598 S.W.2d 91

## CONSCIOUSNESS OF GUILT

#1 If there is evidence that efforts to procure false or fabricated evidence were made by another person on behalf of the defendant, you may not consider this as tending to show the

CALJIC 2.05

#2 Evidence that a defendant attempted to persuade a witness to testify falsely or tried to manufacture evidence to be produced at the trial, may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination.

CALJIC 2.04

#3 Evidence that a defendant attempted to suppress evidence against himself or herself in any manner, such as 1 by the intimidation of a witness 2 by an offer to compensate a witness 3 by destroying evidence may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration. CALJIC 2.06

#4 Evidences of flight are received as admissions by conduct, constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself.

McCormick on Evidence 2nd Ed.  
P. 655 §271

#5 If you find that before this trial the defendant made false or deliberately misleading statements concerning the charge upon which he or she is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such circumstance and its significance, if any, are matters for your determination.

CALJIC 2.03

#6 "Flight" signifies something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding arrest. Evidence that the defendant ran from the scene of the crime may be considered by you as flight to show a consciousness of guilt. However,

such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination.

Thierault v. State, 92 Nev.  
185 (1976), Potter v. State,  
96 Nev. 875 (1980)

## CHILD ABUSE

#1 NRS 200.508 provides: Any adult person who willfully causes or permits a child who is less than eighteen years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect is guilty of child abuse.

#2 NRS 200.508 provides: Any person who willfully causes a child who is less than eighteen years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect is guilty of child abuse.

#3 As used in NRS 200.508, the child abuse or neglect statute,  
"Abuse or neglect" means physical or mental injury of a non-accidental nature, negligent treatment or maltreatment of a child under the age of 18 years.

"Allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected.

"Permit" means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody or control of a minor child.

A child is not abused or neglected, nor is his health or welfare harmed or threatened for the sole reason that his parent or guardian, in good faith, selects and depends upon nonmedical remedial treatment for such child, if such treatment is recognized and permitted under the laws of this state in lieu of medical treatment.

NRS 200.5085

## CONSPIRACY

#1           There is none.

#2           Conspiracy is an agreement between two or more persons to commit the offenses charged or to aid, abet, counsel or encourage, or otherwise procure their commission and with the specific intent to commit such offenses, followed by an overt act committed in this State by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.CALJIC 6.10  
Modified

#3           Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy. NRS 51.035(3) (e)

#4           It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

#5           It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

#6           Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.

          The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not intended as part of the original plan and even if he or she was not present at the time of the commission of such act.

#7           If a number of persons enter into an agreement to commit an illegal act then that agreement is known in law as conspiracy. If a conspiracy is established, and the purpose thereof is to commit a dangerous felony, then each member of the conspiracy is responsible and liable for the acts of the other member or members.

McKinney v. Sheriff, 93 Nev.  
70 (1977); Goldsmith v. Sheriff,  
85 Nev. 295 (1969)

## CONTROLLED SUBSTANCE

#1            One is guilty of the crime of possession of a controlled substance or of the crime of sale of a controlled substance if he or she commits the offense himself or herself, or if he or she acts as a principal in aiding, abetting, counseling, commanding, inducing, encouraging, or procuring its commission.

#2            Nevada Revised Statutes, Section 453.321 provides that it is unlawful for any person to sell, exchange, barter, supply or give away a controlled substance.            is a controlled substance.

#3            The law recognizes two kinds of possession; actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

If you find from the evidence beyond a reasonable doubt that the accused, either alone or jointly with others, had actual or constructive possession of the controlled substance described in the Information, then you may find that such controlled substance was in the possession of the accused within the meaning of the word "possession" as used in these instructions.

#4            To constitute the illegal sale of a controlled substance, the acts of selling, exchanging, bartering, supplying, or giving away must be accompanied by knowledge on the part of the accused of;

1. The presence of the drug, and;
2.     Of its nature as a controlled substance. Unless such knowledge exists, the crime of illegal sale of a narcotic drug is not committed.

The knowledge required by law may be shown by circumstantial evidence; it is manifested by the circumstances attending the sale, the manner in which it is exercised, the means used, and the sound mind and discretion of the person committing the act.

#5 The elements of the unlawful possession of a controlled substance are:

1. The acts of dominion and control, and
2. Accompanied by knowledge on the part of the accused of;
  - (a) the presence of the controlled substance, and
  - (b) of its nature as a controlled substance.

The knowledge required by law may be shown by circumstantial evidence, and reasonably drawn inferences.

#6 To constitute the unlawful possession of a controlled substance, the acts of dominion and control must be accompanied by knowledge on the part of the accused of:

1. The presence of the controlled substance, and;
2. Of its nature as a controlled substance.

The knowledge required by law may be shown by circumstantial evidence, and reasonably drawn inferences therefrom.

#7 It is unlawful for any person knowingly to use or be under the influence of a controlled substance except in accordance with a prescription issued to such person by a physician, podiatrist or dentist, or when administered to such person at a rehabilitation clinic established or licensed by the Health Division of the Department of Human Resources, a hospital certified by the Department.

#8 Nevada Revised Statute 453.336 provides that it is unlawful for any person to knowingly and willfully have in his or her possession and under his or her dominion and control a controlled substance. is a controlled substance.

#9 Possession of a controlled substance is a necessarily lesser included offense when incident to an alleged sale, both occurring on the same date and concerning the same substance, and only one conviction can be had for either the sale or the possession, but not for both. That is, more than one conviction of the offense charged and of those necessarily included within the offense charged, is precluded.

#10 The elements of the illegal sale of a controlled substance are:

1. The acts of selling, exchanging, bartering, supplying or giving away, and
2. Accompanied by knowledge on the part of the accused of;
  - (a) the presence of the drug, and
  - (b) of its nature as a controlled substance.

Unless such knowledge exists the offense of illegal sale of a controlled substance is not committed.

The knowledge required by law may be shown by circumstantial evidence; it is manifested by the circumstances attending the sale, the manner in which it is exercised, the means used, and the sound mind and discretion of the person committing the act.

#11 Playing upon the defendant's sympathies by telling him or her that narcotics were for addicts badly in need is no defense.

Lisby v. State, 82 Nev.  
183, 186 (1966).

#12 The word "knowingly," as used in my instructions, imports only a knowledge of the existence of the facts in question, when those facts are such as bring the act within the provision of the law. The word does not require in its meaning any knowledge of the unlawfulness of such act.

CALJIC 1.21

#13 One is guilty of the crime of possession of a controlled substance or of the crime of sale of a controlled substance if he commits the offense himself or herself, or if he or she acts as a principal in aiding, abetting, counseling, commanding, inducing, encouraging, or procuring its commission.

#14 It is not required that sole and exclusive possession is necessary to establish defendant's guilt of unlawful possession of a controlled substance.

#15 Marijuana does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

#16 The Court instructs the jury that it is unlawful for any person to manufacture, possess, have under control, sell, prescribe, administer, dispense, furnish, or compound any controlled substance, except as authorized by law.

# is a controlled substance.

#17 Nevada Revised Statutes, so far as applicable to this case, provide that it is unlawful for any person knowingly or intentionally to possess a controlled substance.

As a matter of law, cannabis sativa marijuana hashish oil honey oil are\is a controlled substances within the terms of the applicable statute.

#18 The Nevada Revised Statute defining "sale of a controlled substance" is broad. A "sale" includes barter, exchange, a gift, or offer therefor, and each such transaction. Thus, it is not essential for the State to show that the defendant profited from the transaction.

Glosen v. Sheriff

85 Nev. 145, 148 (1969)

#19 A person cannot be found guilty of sale of a controlled substance if that person acted solely on behalf of the buyer, but if the person participates in the sale in behalf of himself or herself or on the behalf of a seller, he or she can be found guilty.

Roy v. State

#20 Possession for sale of a controlled substance consists of the following elements:

1. Possession either actual or constructive of a controlled substance;
2. Knowledge of its nature;
3. Intent to sell, exchange or supply the controlled substance.

The intent mentioned above may be inferred from all circumstances and evidence admitted in the case.

#21 Nevada Revised Statute 453.337 provides that it is unlawful for any person to possess for the purpose of sale, any controlled substance.

is a controlled substance.

#22 For purposes of the Trafficking statutes, NRS 453.3383 provides that the weight of the controlled substance as represented by the person selling or delivering it is determinative if the weight as represented is greater than the actual weight of the controlled substance

#23 Insofar as applicable to this case, NRS 453.3395 provides that any person who knowingly or intentionally sells, manufactures, delivers or brings into this state, or who is knowingly or intentionally in actual or constructive possession of a controlled substance which is listed in Schedule I, or any mixture which contains any such controlled substance, is guilty of Trafficking in a Controlled Substance if the

quantity involved is 4 grams or more, but less than 14 grams. is 14 grams or more, but less than 28 grams.  
is 28 grams or more.

Cocaine is a Schedule I controlled substance.

#24 NRS 453.570 provides:

The amount of a controlled substance needed to sustain a conviction of a person for an offense prohibited by the provisions of NRS 453.011 to 453.552, inclusive, is that amount necessary for identification as a controlled substance by a witness qualified to make such identification.

#25 Insofar as applicable to this case, NRS 453.3385 provides that any person who is knowingly or intentionally in actual or constructive possession of a controlled substance which is listed in Schedule I, or any mixture which contains any such controlled substance, is guilty of Trafficking in a Controlled Substance if the quantity involved is grams but less than grams.

is a Schedule I controlled substance.

## **CORROBORATION**

#1           The necessary corroboration of an accomplice's testimony need not be found in a single fact or circumstance, rather several circumstances in combination may satisfy the law. If evidence from sources other than the testimony of the accomplice tend on the whole to connect the accused with the crime charged, the accomplice's testimony is lawfully corroborated.

#2           Corroborative evidence is evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

#3           The conviction shall not be had on the testimony of an accomplice unless he or she is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendants on trial in the cause in which the testimony of the accomplice is given.

#4 A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial.

#5 If the crime of , the commission of which is charged against the defendant, was committed by anyone, the witness, , was an accomplice as a matter of law and his or her testimony is subject to the rule requiring corroboration.

#6 The corroboration of the testimony of an accomplice required by law may not be supplied by the testimony of any all of his/her accomplices, but must come from other evidence.

#### CALJIC 3.13

#7 Mere association alone is insufficient to corroborate the testimony of an accomplice. However, it is a single fact or circumstance which may be combined with others to provide the necessary corroboration required by law.

#8 Association between an accomplice and the accused is a fact or circumstance which may be combined with other facts or circumstances to provide the necessary corroboration of the accomplice's testimony which is required by law. However, mere association alone is insufficient to corroborate the testimony of an accomplice.

#9 Merely assenting to or aiding or assisting in the commission of a crime without guilty knowledge or intent is not criminal, and a person so assenting to, or aiding, or assisting in, the commission of a crime without guilty knowledge or intent in respect thereto, is not an accomplice in the commission of such crime. CALJIC 3.14

#10            A conviction can not be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

CALJIC 3.11

#11            It is not essential to a conviction in this case that the testimony of the prosecutrix be corroborated by her evidence. It is sufficient if, from all the evidence, you believe beyond a reasonable doubt that the crime of rape was committed by the defendant as alleged.

## **CREDIBILITY**

#1            You are the exclusive judges of the credibility of the witnesses who have testified in this case, which means that you must decide which witnesses are to be believed and how much weight, if any, is to be given to the testimony of each witness.

                 In determining the credibility of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude and manner while testifying; whether the facts testified to by him or her are inherently believable or unbelievable; his or her capacity to hear or see that about which he testified and his ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him or her not to tell the truth; any statement previously made by him or her that was consistent with his or her testimony or, conversely, any statement previously made by him or her that was inconsistent with his or her testimony; his or her character for honesty or veracity or for dishonesty or untruthfulness; any admission by him or her that he or she did not tell the truth; his or her prior conviction of a felony.

                 If you believe that a witness willfully lied as to a material fact, you should distrust the rest of his or her testimony and you may, but are not obliged, to disregard all of his or her testimony.

                 However, you should bear in mind that discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that you should disbelieve the witness, as failure of recollection is a common experience and innocent misrecollection is not uncommon. You are all certainly aware of the fact that two persons witnessing the same incident often will see or hear it differently.

                 Also, in considering a discrepancy in a witness's testimony, you should consider whether such discrepancy concerns an important fact or only a trivial detail.

#2                   A witness may be impeached by contradictory evidence. The impeachment of a witness does not necessarily mean that his or her testimony is deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

#3                   You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given any witness you must take into account his or her ability and opportunity to observe, his or her memory, his or her manner while testifying, any interest, bias or prejudice he or she may have, and the reasonableness of his or her testimony considered in the light of all the evidence in the case.

#4                   You are the sole judges of the credibility of the witnesses who have testified in this case, which means that you must decide which witnesses are to be believed and how much weight, if any, is to be given to the testimony of each witness.

                  In determining the credibility of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his or her conduct, attitude and manner while testifying; whether the facts testified to by him or her are inherently believable or unbelievable; his or her ability and opportunity to hear or see that about which he or she testified; his or her memory; his or her ability to relate such matters; whether or not there was any bias, interest or other motive for him or her not to tell the truth; any statement previously made by him or her that was consistent with his or her testimony or, conversely, any statement previously made by him or her that was inconsistent with his or her testimony; any admission by him or her that he or she did not tell the truth; and the reasonableness of his or her testimony considered in light of all the evidence in the case.

                  Also, in considering a discrepancy in a witness's testimony, you should consider whether such discrepancy concerns an important fact or only a trivial detail.

## **CRIMINAL INTENT**

#1                   Criminal intent can only be proven as a deduction from declarations or acts; when the acts are established, the natural and logical deduction is that the defendant intended to do what he did do.

#2                   If an individual has the intent to commit a criminal act and commits criminal acts consistent with that intent, the crime is complete. The fact that he or she might at some later time decide not to do the criminal act is no defense.

## **DEADLY WEAPON**

#1           A dangerous or deadly weapon means any weapon that is capable of being used to inflict great bodily injury or death.

A weapon such as a gun, may be said as a matter of law to be a dangerous or deadly weapon. It is not necessary that such a weapon be used or be visible, nor is necessary to show that the possessor intended to use it in the robbery.

CALJIC 9.13

#2           A deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

#3           A deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

A is capable of being used as a deadly weapon.

#4           A dangerous or deadly weapon means any weapon that is capable of being used to inflict great bodily injury or death.

A weapon such as a gun, dirk or blackjack may be said as a matter of law to be a dangerous or deadly weapon. It is not necessary that such a weapon be used or be visible, or is it necessary to show that the possessor intended to use it in the robbery. CALJIC 9.13

#5           If a person, without legal justification or excuse, intentionally used a deadly weapon upon the person of another at a vital part, and inflicts a mortal wound, under circumstances showing no considerable provocation, then intent to kill may be presumed or implied as an inference of fact from the act itself.

#6           Words alone, no matter how insulting, will never justify the use of a deadly weapon upon the person using such words.

#7                    The participation of a defendant by aiding and abetting the actual shooter in the unlawful use of the weapon, makes a defendant equally subject to the added weapon enhancement available to the shooter who commits a crime through the use of a deadly weapon.

Anderson v. State, 95 Nev. at  
p.629 (1979)

## **DEFENDANT – MORE THAN ONE**

#1

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his or her case determined from his or her own acts and statements and the other evidence in the case which may be applicable to him or her.

#2

In this case, you must decide separately whether each of the two defendants is guilty or not guilty. If you cannot agree upon a verdict as to all the defendants, but do agree upon a verdict as to one of them, you must render a verdict as to the one upon which you agree.

#3 Unless otherwise indicated, each instruction given should be considered by you as referring separately and individually to all defendants on trial.

## **DEFENDANT TESTIFYING**

#1

It is a constitutional right of a defendant in a criminal trial that he or she may not be compelled to testify. Thus the decision as to whether he or she should testify is left to the defendant on the advice and counsel of his or her attorney.

You must not draw any inference of guilt from the fact that he or she does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

#2

It is a constitutional right of a defendant in a criminal trial that he or she may not be compelled to testify. Thus, the decision as to whether he or she should testify is left to the defendant, acting with the advice and assistance of his or her attorney.

You must not draw any inference of guilt from the fact that he or she does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

#3      Statements of the defendants not made in court have been admitted in evidence. Before the Jury may take such a statement into consideration, it must first decide whether or not it was given voluntarily. If the Jury decides the statement was made voluntarily, it may use the statement in its deliberations. If the Jury decides that a statement was not made voluntarily, the Jury must disregard it.

A defendant's testimony in court is to be treated the same as the testimony of any other witness and may be considered for all purposes.

## DEFRAUDING

#1 Every person who obtains food, foodstuffs, lodging, merchandise or other accommodations at any hotel, inn, or restaurant, without paying therefor, with the intent to defraud the proprietor or manager thereof is guilty of the crime of Defrauding an Innkeeper.

NRS 205.445, §1(a)

#2 NRS 205.445, §1(c), insofar as applicable to this case, provides:

That it is unlawful for any person, after obtaining credit, food, lodging, merchandise or other accommodations at a hotel, inn, or restaurant, to abscond or surreptitiously remove any part of his baggage therefrom, without paying for his food or accommodations.

NRS 205.445, §3, further provides:

That proof that lodging, food, foodstuffs, merchandise or other accommodations were obtained by false pretenses by absconding without paying or offering to pay for such food, foodstuffs, lodging, merchandise or other accommodations, or that he surreptitiously removed or attempted to remove his baggage, shall be prima facie evidence of the fraudulent intent mentioned in this section.

## DUI

#1

Nevada Revised Statutes Section 484.381(1) insofar as applicable to this case, provides:

1. In any criminal prosecution for a violation of NRS 484.379 relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions:

(a) If there was at that time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor.

(b) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(c) If there was at that time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating

#2

It is generally recognized that persons may be under the influence of intoxicating liquor within the meaning of the statutes . . . without being affected to the extent commonly associated with "intoxication" or "drunkenness."

People v. Haeussler (1953),  
41 Cal.2d 252, 262.

#3

Nevada Revised Statute 484.381 provides, in part, as follows:

"2. In any criminal prosecution for a violation of NRS 484.379 relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions:

- (c) If there was at that time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor."

#4

The elements of the crime of Causing Substantial Injury to Another While Driving a Motor Vehicle Under the influence of Intoxicating Liquor requires proof beyond a reasonable doubt that:

1. The defendant drove a vehicle upon a public highway.
2. The defendant was then and there under the influence of intoxicating liquor.
3. Defendant did some act forbidden by law and neglected a duty imposed by law in driving such vehicle.
4. Such act and neglect proximately caused substantial bodily injury to a person other than himself or herself.

#5

A person is under the influence of intoxicating liquor when as a result of drinking such liquor his or her physical and mental abilities are impaired so that he or she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.

#6 The manner in which a vehicle is being driven is a factor to be considered in light of all the proved circumstances in deciding whether the driver is or is not under the influence of intoxicating liquor.

However, the term "under the influence of intoxicating liquor" relates to the physical or mental condition of the driver, that is, his or her ability to drive, and not to the manner in which his or her vehicle is being driven.

CALJIC 16.832

#7

In this case evidence has been presented regarding the amount, by weight, of alcohol in the defendant's blood. If you find that this evidence establishes beyond a reasonable doubt that the amount, by weight, of alcohol in the defendant's blood was one-tenth of one percent (0.10%) or more at the time of the test as shown by a chemical analysis of his or her , then you should find that the defendant was under the influence of intoxicating liquor at the time of the alleged offense, unless the other evidence in the case raises a reasonable doubt that he or she was in fact under the influence of intoxicating liquor at the time of the alleged offense.

CALJIC 16.834

#8

The manner in which a vehicle is being operated does not itself establish that the driver of the vehicle either is or is not under the influence of intoxicating liquor.

However, the manner in which the vehicle is being operated is a factor to be considered in light of all the proved surrounding circumstances in deciding whether the person operating the vehicle was or was not under the influence of intoxicating liquor.

CALJIC 16.832

#9

If the evidence establishes beyond a reasonable doubt that the amount, by weight, of alcohol in the defendant's blood was one-tenth of one percent (0.10%) or more at the time of the test as shown by a chemical analysis of his or her blood, breath, or urine, you should find that the defendant was under the influence of intoxicating liquor at the time of the alleged offense, unless from all the evidence you have a reasonable doubt that he or she was in fact under the influence of intoxicating liquor at the time of the alleged offense.

CALJIC 16.834

#10

The elements of driving under the influence of an intoxicating liquor include:

1. Driving an automobile within Washoe County.
2. While he or she was driving the automobile, he or she was in fact under the influence of intoxicating liquor.

#11 An exception to the rule that opinions ordinarily are not received is that any person is entitled to give an opinion as to whether a person was under the influence of intoxicating liquor or was not.

In determining the weight to give the opinion, consider the experience and background of the witness, his or her opportunity to observe the defendant, and all the facts upon which the opinion is based.

#12

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he or she may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged, if the evidence is sufficient to establish his or her guilt of such lesser offense beyond a reasonable doubt.

The offense of felony drunk driving with which the defendant is charged necessarily includes the lesser offense of driving while under the influence of intoxicating liquor, a misdemeanor.

#13

Actual physical control has been defined as exclusive physical power and present ability to operate, move, park or direct whatever use or non-use is to be made of the vehicle at that moment. Factors to be considered include 1) active or constructive possession of the ignition keys; 2) the position of the person charged in the driver's seat, behind the steering wheel, and in such a condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move; and 3) a vehicle that is operable to some extent. Actual movement of the vehicle is not required as long as it is reasonably capable of being rendered operable.

The focus, however, need not necessarily be on the mechanical condition of the vehicle when it comes to rest. You can also consider the status of the occupant and the nature of authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. The term encompasses those situations where circumstantial evidence permits a legitimate inference that the vehicle was where it was because of the individual's choice.

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*State v. Smelter*, 647  
P.2d 690 (Ct. App. Wash. 1984)

## **EMBEZZLEMENT**

#1

Nevada Revised Statutes, Section 205.300, provides in pertinent part:

1. Any bailee of any money, goods or property, who shall convert the same to his or her own use, with the intent to steal the same or to defraud the owner or owners thereof and any agent, manager or clerk of any person, corporation, association or partnership; or any person with whom any money, property or effects shall have been deposited or entrusted, who shall use or appropriate such money, property or effects or any part thereof in any manner or for any other purpose than that for which the same was deposited or entrusted, shall be guilty of embezzlement, and shall be punished in the manner prescribed by law for the stealing or larceny of property of the kind and name of the money, goods, property or effects so taken, converted, stolen, used or appropriated.

2. ....

3. Any use of the money, goods or property by any bailee thereof, other than that for which the same was borrowed, hired, deposited, carried, received or collected, shall be prima facie evidence of conversion and of intent to steal the same and defraud the owner or owners thereof.

4. The term "bailee," as used in this section, shall be construed to include and mean all persons with whom any money, goods or property has been deposited, and all persons to whom any goods or property has been loaned or hired, and all persons to whom any goods or property shall be delivered, for any purpose whatsoever, and all persons who shall, either as agent, collector or servant, be empowered, authorized or entrusted to carry, collect or receive any money, goods or property of another.

#2

Any person with whom any property of the value of Two Hundred Fifty Dollars (\$250.00) or more shall have been entrusted, who shall use or appropriate such property or any part thereof in any manner or for any other purpose than that for which the same was entrusted, shall be guilty of embezzlement.

#3

Whenever any person who has leased or rented a vehicle willfully and intentionally fails to return the vehicle to its owner within 72 hours after the lease or rental agreement has expired, such person shall be presumed to have embezzled the vehicle.

## ENTRAPMENT

#1

The evidence in this case shows that a police undercover agent was used. You are hereby instructed that the law and the courts approve of the use of police undercover agents in the investigation of criminal activities.

#2

Entrapment is the seduction or improper inducement to commit a crime for the purpose of instituting a criminal prosecution, but if a person in good faith and for the purpose of detecting or discovering a crime or offense, furnishes the opportunity for the commission thereof by one who has the requisite criminal intent, it is not entrapment.

In Re Wright, 68 Nev. 329;

232 P.2d 398

#3

A person is not guilty of a crime when he or she commits an act or engages in conduct, otherwise criminal, when the idea to commit the crime did not originate in the mind of the defendant but originated in the mind of another and was suggested to the defendant for the purpose of inducing him or her to commit a crime which he or she was not predisposed to commit in order to entrap him or her and cause his or her arrest.

#4

One may be the agent of a selling party in a narcotic sales transaction although a police agent might have initiated one's participation in said transaction.

#5

All peace officers, while investigating violations of the provisions of the State of Nevada Controlled Substances Act, in the performance of their official duties, and any person working under their immediate direction, supervision or instruction are immune from prosecution under the provisions of such selections for acts which would otherwise be unlawful under such provisions but which are reasonably necessary in the performance of their official duties.

NRS 453.551

#6

Notwithstanding the fact that the defendant's participation in this transaction may have been initiated by police agent, you may still find that defendant may have been acting as an agent of the selling party in a narcotic sales transaction.

#7

The law recognizes that in drug related offenses, law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of apprehension.

#8

A person is not guilty of a crime when he or she commits an act or engages in conduct, otherwise criminal, when the idea to commit the crime did not originate in the mind of the defendant but originated in the mind of another and was suggested to the defendant for the purpose of inducing him or her to commit the crime in order to entrap him or her and cause his or her arrest.

#9

The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat prosecution.<sup>1</sup> Nor will the mere fact of deceit defeat a

prosecution,<sup>2</sup> for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

1. Sorrells, 287 U.S. at 441  
Sherman, 356 U.S. at 372  
Russell, 93 S.Ct. at 1644
2. Russell, 93 S.Ct. at 1645  
Lewis v. U.S., 385 U.S. 206,  
208-209
3. Russell, 93 S.Ct. at 1645

#10

The fact that officers of the State afford opportunities or facilities for the commission of an offense does not constitute entrapment. Nor will the use of deceit constitute entrapment, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the State's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment is applicable.

#11

An officer may, when acting in good faith with a view to detecting crime, make use of deception, trickery, or artifice; and so it is not a defense that decoys were used to present an opportunity for the commission of the crime or that detectives or others feigning complicity in the act were present and apparently assisting in its commission.

In re Davidson, 64 Nev. 520

#12

Law enforcement officers may provide opportunity for the commission of crime and extend their apparent cooperation for the purpose of detecting the offender. If the suspect, originally and independently of the officers had the intent, whenever the opportunity arose, to commit the acts constituting the crime charged, and if he or she does acts necessary to constitute the crime, he or her is guilty of the crime

committed. He or she has no defense in the fact that officers engaged in detecting crime were present and provided the opportunity, or aided or encouraged the commission of the offense.

CALJIC 4.61

#13

A person who is predisposed to do an act which is illegal, and does in fact commit such an act has not been entrapped even if the State supplies the necessary ingredient to the defendant for the purpose of his committing the act.

Hampton v. United States, 96  
S.Ct. 1646 - Decided April 27,  
1976

#14

The defendant has the burden of proving by a preponderance of the evidence that he or she was entrapped into the commission of the crime. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

#15

When law enforcement officers are informed that a person intends to commit a crime, the law permits the officers to afford opportunity for the commission of the offense, and to lend the apparent cooperation of themselves or of a third person for the purpose of detecting the offender. When officers do this, if the suspect himself or herself, originally and independently of the officer, intends to commit the acts constituting a crime, and if he does acts necessary to constitute the crime, he or she is guilty of the crime committed. He or she has no defense to the fact that an officer or other person engaged in detecting crime was present and provided the opportunity, or aided or encouraged the commission of the offense.

CALJIC 4.61

#16

The law of entrapment is to prevent law enforcement officials from instigating criminal acts by otherwise innocent persons so as to lure them into committing crimes and punishing them. The defense of

entrapment is not established if the defendant was engaged in similar crimes, or was ready and willing to violate the law and the law enforcement officers or their agents merely afforded such defendant the opportunity of committing the crime. Under these circumstances there is no entrapment, even though the law officers may have used ruse or otherwise concealed their identity.

#17

When the police target a specific individual for an undercover operation, they must generally have reasonable cause to believe that the individual is predisposed to commit the crime. This predisposition or intent to commit crime may be shown by evidence or testimony that the individual had already committed a similar offense on at least one other occasion. The mere furnishing of an opportunity for apprehending an individual already engaged in criminal conduct is an approved law enforcement practice.

Shrader v. State, 101 Nev.

Ad. Op. 109 (9/24/85)

## **ESCAPE**

#1

Every person in the lawful custody of any police officer who escapes or attempts to escape from the lawful custody of such officer is guilty of a crime.

NRS 212.090

#2

Pursuant to NRS 212.090, every prisoner convicted of a crime who is confined in any jail or prison or engaged in any program under the lawful custody of any officer or person, who escapes from such jail or prison or the lawful custody of such officer or person is guilty of the crime of escape.

#3

Pursuant to NRS 212.095, any unauthorized absence from the place of assignment by an offender who is participating in a work release program constitutes an escape from prison, as provided in NRS 212.090.

## **EXTORTION**

#1 In the crime of sending a threatening letter with intent to extort, it is not essential that the person who sends or delivers the letter was also its author or that he or she had any part in dictating, writing, or wording it. The crime consists in sending or delivering to another person such a letter with the intent previously described, regardless of its authorship.

#2

Every person who, with the intent to extort or gain any money or property from another, threatens either directly or indirectly to do injury to such person, or to his or her property, shall be guilty of the crime of extortion whether or not such purpose is accomplished.

NRS 205.320

#3

Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, a threat to do an injury to any person or to any property, is guilty of a crime.

#4

Fear, such as is required as a necessary element of extortion, may be induced by a threat to do an unlawful injury to the person or property of the individual threatened.

## EVIDENCE

#1.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which, juries may lawfully find the accused guilty of crime. One is direct or positive testimony of an eyewitness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence.

Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less competent for your consideration than any other class of evidence.

It is well established that the defendant's guilt may be established, beyond a reasonable doubt, by circumstantial evidence, as well as direct evidence. If you are satisfied of defendant's guilt, beyond a reasonable doubt, it matters not whether your judgment of his guilt is based upon direct and positive evidence or on indirect and circumstantial evidence or both.

#2

Evidence has been received tending to show that the defendant committed crimes other than that for which he or she is on trial.

Such evidence was not received and may not be considered by you to prove that he or she is a person of bad character or that he or she has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purposes of determining if it tends to show absence of mistake or accident on the part of the defendant.

For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purposes.

#3

Evidence of the defendant's character as to those traits which ordinarily would be involved in the commission of a crime such as that charged in this case is relevant to the question of the defendant's guilt or innocence because it may be reasoned that a person of good character as to such traits would not be likely to commit the crime of which the defendant is charged.

Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, which doubt otherwise would not exist.

#4

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any act, science or profession, and who is called as a witness, may give his or her opinion as to any such matter in which he or she is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

#5

Corroborative evidence is evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

#6

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

You are again instructed that you must not consider such evidence for any purpose except the limited purpose for which it was admitted.

CALJIC 2.09

#7

Evidence that a defendant conspired with others to suppress evidence against himself or herself in any manner, such as by intimidating a witness, or by destroying evidence, may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration.

#8

If there is evidence that efforts to procure false or fabricated evidence were made by another person on behalf of the defendant, you may not consider this as tending to show the defendant's consciousness of guilt unless you find that the defendant authorized those efforts.

CALJIC 2.05

#9

If the evidence shows that a defendant attempted to persuade a witness to testify falsely, that may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination.

CALJIC 2.03

#10

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

CALJIC 604

### **EX-FELON IN POSSESSION**

Nevada Revised Statute 202.360 as it applies to this case makes it illegal for any person who has been convicted of a felony in the State of Nevada, or any one of the other states in the United States, to own or have in his or her possession or to have under his or her custody or control any firearm. A firearm means any weapon with a caliber of .177 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air or other force.

NRS 202.360

NRS 202.253

## EXPERT WITNESS

#1           A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his or her testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

#2

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his or her opinion as to any such matter in which he or she is versed and which is material to the case. You should consider such expert opinion and should weight the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

## EXPOSURE

#1

In order for conduct to be indecent or obscene, it must affront the standards of decency accepted in the community and be patently offensive.

#2

Obscene conduct means any physical activity performed or engaged in alone or with other persons where taken as a whole the predominant appeal of such conduct to the average person applying contemporary standards is a shameful interest in nudity and is conduct which taken as whole goes substantially beyond customary limits of candor and is conduct which taken as a whole is utterly without redeeming social importance.

#3 Nevada Revised Statute 201.220 provides as follows:

Every person who makes any open and indecent or obscene exposure of his person or of the person of another is guilty:

- a. For the first offense of a gross misdemeanor.
- b. For any subsequent offense, of a felony.

No person convicted of violating any of the provisions of Subsection 1 of this section may be:

- a. Paroled unless a board consisting of the Administrator of the Mental Hygiene and Mental Retardation Division of the Department of Human Resources or his or her designee, the Warden of the State Prison and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in the State Prison and is not a menace to the health, safety or welfare of others.
- b. Released on probation unless the psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety or morals of others.

#4 An exposure becomes indecent when it occurs at such a time and place where a reasonable man knows or should know his or her act will be open to the observation of others. The required criminal intent is usually established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be seen by others.

Hearn v. District of Columbia,  
178 A.2d 434; Peyton v. District  
of Columbia, 100 A.2d 36, 37;  
Selph v. District of Columbia,  
188 A.2d 344; Davenport v.  
United States, 56 A.2d 851

#5 The well-settled and generally known significance of the phrase "indecent and obscene exposure of the person" is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others.

People of Michigan v. Kratz,  
203 N.W. 114; State v. Baugness,  
(Iowa) 76 N.W. 508, 509

#6 Indecent exposure, to amount to a crime, must have been done intentionally. Intent may be inferred from the conduct of the accused and the circumstances and environment of the occurrence.

An exposure becomes indecent, and a crime, when the defendant exposes himself or herself at such a time and place that, as a reasonable man, he or she knows or should know his or her act will be open to the observation of others.

Messina v. State of Maryland,  
130 A.2d 578 at 580; State of  
Iowa v. Martin, 101 N.W. 637;  
Peyton v. District of Columbia,  
100 A.2d 36, 37

#7

One may not knowingly expose his or her person in a public place under circumstances which make it probable that he or she will be observed and then assert that if he or she was observed the exposure was unintentional and accidental.

Davenport v. United States,  
56 A.2d 851

**Eyewitness** testimony has been received in this trial for the purpose of identifying the defendants as the perpetrators of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as the other factors which bear upon the accuracy of the witness's identification of the defendants, including, but not limited to, any of the following:

The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The length of time the witnesses had to make their original observations;

The suddenness and unexpectedness of the event;

The stress, if any, to which the witness was subjected at the time of the observation;

The presence of weapons, and whether the witness's attention was diverted to the weapon, or weapons, at the time of

their observations;

The witness's ability, following the observation, to provide a description of the perpetrator of the act;

The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness's capacity to make an identification;

Evidence relating to the witness's ability to identify other alleged perpetrators of the criminal act;

Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness's identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness's identification is in fact the product of his or her own recollection; and

Any other evidence relating to the witness's ability to make an identification.

## FALSE PRETENSES

#1 It is not necessary that the defrauded party rely entirely upon the defendant's misrepresentation in parting with his or her property. The false pretense or representation must have materially influenced the owner to part with his or her property, but the false pretense need not be the sole inducing cause.

Perry v. Sup.Ct. of Los Angeles

County, 19 Cal. Rptr. 1 (1962);  
People v. Ashley, 42 Cal. 2d 246  
(1954); State v. Cooke, 371  
P2d 39,  
S.Ct. Wn. 1962.

#2

When the other elements of the offense are present an attempt to obtain money by false pretenses is committed even though the intended victim did not rely on the false representation, or did not pass title to the property or did not suffer any injury as a result of the false pretenses.

#3

An essential element of the crime of obtaining money by false pretenses is that the false representation or promise was believed and relied upon by the owner of the money and was a material cause of inducing him or her to part with his or her money. CALJIC

14.10

#4

To find an accused guilty of the crime of obtaining money by false pretenses, you must find that the owner parted with his or her money intending to divest himself or herself of title as well as possession thereof, thereby causing him or her to sustain injury or damage.

CALJIC 14.10  
Watkins v. Sheriff, 85  
Nev. 246 (1969)  
NRS 205.380

#5

A false pretense may be defined as a representation of some fact or circumstance which is not true and is calculated to mislead. The representation may be implied from conduct or may consist of concealment or nondisclosure where there is a duty to speak. A false pretense may consist of any act, word, symbol or token

calculated and intended to deceive. It may be made either expressly or by implication. Generally any words or conduct which create any false circumstance will satisfy the statute.

90 Nev. 168  
521 P.2d 371 (1974)

#6

Nevada Revised Statutes Section 205.380 provides in pertinent part as follows:

Every person who shall knowingly and designedly and by any false pretense or pretenses obtain from any person or persons money of a value in excess of One Hundred Dollars (\$100.00) with the intent to cheat or defraud any person or persons of the same is guilty of Obtaining Money by False Pretenses.

#7

It is not a necessary element of the crime of obtaining money or property by false pretenses that the person against whom the offense is directed suffer a pecuniary loss or permanently be deprived of his or her money or property.

1 Witkin, Calif. Crimes § 418



## **FORGERY/UTTERING**

#1 In the crime of uttering a forged instrument of which the defendant is accused in this case in Count of the Information, the specific intent to defraud is a necessary element of the crime.

Thus, the defendant may not be found guilty of the crime of uttering a forged instrument charged against him or her in Count of the Information, unless you can and do find from the evidence, beyond a reasonable doubt, that the defendant did utter (a) certain forged instrument(s) with the intent to defraud and knowing the same to be forged. This fact requires an inquiry into the state of mind under which the defendant committed the act charged, if he or she did commit it. The weight to be given the evidence on that question and the significance to attach to it, in relation to all other evidence, are exclusively within your province.

#2

In the crime of uttering a forged instrument of which the defendant is accused in this case, the specific intent to defraud is a necessary element of the crime.

Thus, the defendant may not be found guilty of the crime of uttering a forged instrument, unless you can and do find from the evidence, beyond a reasonable doubt, that the defendant did utter certain forged instruments with the intent to defraud and knowing the same to be forged. This fact requires an inquiry into the state of mind under which the defendant committed the act charged, if he did commit it. The weight to be given the evidence on that question and the significance to attach to it, in relation to all other evidence, are exclusively within your province.

#3

Forgery may be committed by altering a valid and genuine instrument, paper, or document, with intent to defraud, and by either adding, erasing, or changing a material part thereof, and thus causing it to appear different from what it originally was intended to be, and changing its apparent legal effect.

#4

The existence of an intent to defraud is an essential element of the crime of forgery.

An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over him or her or to induce him or her to part with property or to alter his or her position to his or her injury or risk, and to accomplish that purpose by some false statement, false pretenses, wrongful concealment or suppression of truth, or by any other artifice or act fitted to deceive.

#5

Nevada Revised Statutes, Section 205.090, insofar as applicable to this case, provides:

That every person who shall falsely make, alter, forge or counterfeit any check with intent to damage or defraud any person or persons shall be guilty of forgery.

It also provides that every person who shall utter, publish, pass, or attempt to pass, as true and genuine, the above-named false, altered, forged or counterfeited check, knowing the same to be false, altered, forged, or counterfeited with the intent to damage or defraud any person, persons, or business shall be guilty of forgery.

#6

In the crime of forgery there are three essential elements, and to justify a finding of guilty each of those elements must be established by evidence which convinces the jury beyond a reasonable doubt.

First, some act must be done that is included among those constituting forgery under the instructions previously given you.

Secondly, the party committing that act must do so with an intent to defraud.

Thirdly, the paper, instrument or document which is the creation or the vehicle of that act and intent must be such that upon its face it is capable of being used to defraud persons who might act upon it as genuine or the person in whose name it is forged.

#7

Every person who, knowing the handwriting of another to be forged on an instrument, and with intent to defraud, shall utter or put off as true the said instrument, shall be guilty of uttering a forged instrument.

#8

The existence of an intent to defraud is an essential element of the crime of uttering a forged instrument.

An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over him or her or to induce him or her to part with property or to alter his or her position to his or her injury or risk, and to accomplish that purpose by some false statement, false pretense, wrongful concealment or suppression of truth, or by any other artifice or act fitted to deceive.

#9

The Court instructs the jury that in proving the knowledge that handwriting is forged on an instrument, the State is not required to establish the element of guilty knowledge by direct evidence, such as the defendant witnessing the forging of the handwriting, or being told that it is forged, but, on the other hand, it may be shown by circumstantial evidence. If a forged instrument is received by a person under such conditions and circumstances as to lead him or her to believe that the same is forged, then, in the contemplation of the law, he or she has guilty knowledge to the same extent as though he or she had personally witnessed the actual forging thereof.

Therefore, if you believe from the evidence, beyond a reasonable doubt, in this case that the instruments in question was\were forged as in the information specified, and if you further believe from the evidence, beyond a reasonable doubt, that circumstances presented and manifest to the defendant at the time of the receipt or purchase of the instruments in question -- if you believe from the evidence, beyond a reasonable doubt, that he or she did receive or buy the same -- were such as to have induced him or her to believe, and that he or she did therefrom believe, that the instruments was\were forged, then, I charge you, as a matter of law, that the State has established the element of guilty knowledge.

#10

NRS 205.110 insofar as applicable to this case provides:

That every person who shall have in his or her possession a false, altered, forged, or counterfeited check or checks knowing the same to be false, altered, forged, or counterfeited, with the intent to damage or defraud any person or business, shall be guilty of Possessing Forged Instruments With the Intent to Utter.

#11

NRS 205.110 insofar as applicable to this case provides:

That every person who shall utter, offer, pass, or attempt to pass, as true and genuine a false, altered, or forged or counterfeit check knowing the same to be false, altered, forged, or counterfeited with the intent to damage or defraud any person or business, shall be guilty of uttering a forged instrument.

## **HEARSAY**

#1           Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein.

          In order to encourage witnesses to put forth their best efforts and to expose inaccuracies which might be present, tradition evolved three conditions under which witnesses ordinarily will be required to testify: Under oath, personal presence at the trial and cross-examination. The rule against hearsay is designed to insure compliance with these ideal conditions, and when one of them is absent the hearsay objection is pertinent.

First Paragraph: McCormick on  
Evidence 2d Ed. P. 584; Second  
Para.: McCormick on Evidence  
P. 581

## HOMICIDE

#1 The Court instructs the jury that to justify homicide on the ground of self-defense, it must appear that the slayer was reasonably without fault in bringing on the difficulty, and that he or she believed as a reasonable person at the time that he or she was in such immediate danger of losing his or her life, or receiving great bodily harm as rendered it necessary to take the life of his or her assailant to save himself or herself therefrom; and it must appear therefrom that the defendant, acting as a reasonable person, upon the appearance of the existing conditions at the time of the encounter, believed at the time that it was necessary for him or her to commit the act to protect himself or herself, and the inquiry for the jury is not whether the harm apprehended was actually intended by the assailant, but was it actual and real to the defendant as a reasonable person as compared with danger remote or contingent, and bare fear that a person is in danger of his or her life or receiving great bodily harm will not justify him or her in taking life, but it must appear that the circumstances were such as to excite the fears of a reasonable person, and that the party killing really acted under the influence of his or her fears and not in a spirit of revenge.

#2 Justifiable homicide is the killing of a human being in necessary self-defense against one who manifestly intends, or endeavors, by violence of surprise, to commit a felony.

A bare fear of the offense mentioned above to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.

Homicide is also justifiable when committed either in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer and there is imminent danger of such design being accomplished or in the actual resistance of an attempt to commit a felony upon the slayer in his or her presence.

Assault is not a felony and battery is not a felony.

#3 The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his or her own standard of conduct and to justify or excuse himself or herself because his or her passions were aroused unless the circumstances in which he or she was placed and the facts that confronted him or her were such as also would have aroused the passion of the ordinarily reasonable person, if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

## **IMMUNITY**

#1            All peace officers, while investigating violations of the provisions of the State of Nevada Controlled substance Act, in the performance of their official duties, and any person working under their immediate direction, supervision or instruction are immune from prosecution under the provisions of such sections for acts which would otherwise be unlawful under such provisions but which are reasonably necessary in the performance of their official duties.

NRS 453.551

## INTOXICATION

#1 No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such purpose, motive, or intent.

#2 Our law provides that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition."

This provision of the law means that if the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the offense charged, his intoxication is not a defense to such charge.

CALJIC 4.20

#3 A person is under the influence of intoxicating liquor when as a result of drinking such liquor his or her physical and mental abilities are impaired so that he or she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.

#4 Voluntary intoxication is no excuse to a crime committed under its influence, and this is so even when the intoxication is so extreme as to make the person unconscious of what he or she is doing or to create temporary insanity.

State v. Arellano, 68 Nev.

134, 227 P.2d 963

#5 Except as provided in the crime of murder, our law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition.

#6 Intoxication of a person is voluntary if it results from his or her willing partaking of any intoxicating liquor, drug or other substance when he knows that it is capable of an intoxicating effect or when he or she willingly assumes the risk of that effect as a possibility.

CALJIC 4.22

#7 If the evidence shows that the defendant was voluntarily intoxicated when allegedly he or she committed the lesser included offenses of voluntary manslaughter and involuntary manslaughter, his or her intoxication is not a defense to such lesser included charges.

#8 In the crime of \_\_\_\_\_ of which the defendant is accused (in Count \_\_\_\_ of the Information), a necessary element is the existence in the mind of the defendant of the specific intent to \_\_\_\_\_.

If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his or her state of intoxication in determining if defendant had such specific intent.

CALJIC 4.21

#9 Except as provided in the crime of murder in the first degree, our law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition.

#10 It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime. Temporary insanity produced by intoxication does not destroy responsibility, when the party, when sane and responsible, made himself or herself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him or her to avail himself or herself of his or her own gross vice and misconduct to shelter himself or herself from the legal consequences of such crime. Evidence of drunkenness can only be

considered by the jury for the purpose of determining the degree of the crime, and for this purpose, it must be received with great caution.

State v. Johnny, 29 Nev.

203, 87 Pac. 3 (1906)

#11 It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime. Temporary insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose, it must be received with great caution. You should discriminate between the conditions of mind merely excited by intoxicating drink yet capable of forming a specific and deliberate intent to take life, and such a prostration of the faculties as renders a person incapable of forming intent or of deliberation or premeditation. In a prosecution for murder evidence of intoxication of the accused is relevant for the purpose of a determination whether the defendant lacked the capacity to deliberate and premeditate required of first degree murder. If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of the crime that he was intoxicated when conceiving such intent or that he conceived it more suddenly by reason of his intoxication.

#12 If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his or her crime that he or she was induced to conceive it, or to conceive it more suddenly by reason of his or her intoxication.

State v. Johnny, 20 Nev. 203,

State v. Jukich, 49 Nev. 217,

State v. Fiske, 58 Nev. 65

#15 No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such purpose, motive or intent.

NRS 193.220

#16 The burden of proof is upon the defendant to show by a preponderance of the evidence that he or she was intoxicated to such an extent that he or she did not premeditate or deliberate.

#17 If a person premeditates and deliberates upon the crime of murder and forms a specific intent to commit that crime and thereafter becomes intoxicated, then such intoxication will not serve as a defense in order to reduce the degree of the murder.

State v. Johnny, 9 Nev. 203(1906)

#18 Sexual assault is a general intent crime. Therefore, any claim, or evidence, of drinking alcohol or voluntary intoxication by the defendant is no excuse for the criminal conduct and is no defense to a charge of sexual assault.

Henry v. U.S., 432 F.2d 114

(9th Cir. 1970)

## JUVENILE PROSECUTION

#1 An offense falling within the statutory limitations will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or -- even though less serious -- if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures or if the public needs the protection afforded by such action. Lewis v. State, 86 Nev. 893

#2 If a child 16 years of age or older is charged with an offense which would be a felony if committed by an adult, the court, after full investigation, may in its discretion retain jurisdiction or certify the child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult; but no child under 16 years of age shall be so certified. NRS 62.080

## **KIDNAPPING**

#1 NRS 200.310 insofar as applicable to this case provides as follows, every person who leads, takes, entices, or carries away and detains any minor with the intent to keep, imprison, or confine it from its parents, guardians, or any other person having lawful custody of such minor, or with the intent to hold such minor to unlawful service, or perpetrate upon the person of such minor any unlawful act shall be deemed guilty of kidnapping in the first degree.

#2 To support the charge of kidnapping it is the fact of moving the victim, not the distance, which is controlling. In other words, there does not have to be any appreciable movement as long as the victim was taken from one place to another.

Eckert v. State  
552 P.2d 1151

#2a with the intent to keep the victim secretly imprisoned within the state.

#2b for the purpose of conveying the victim out of the state without authority of law.

#2c with the intent to hold the victim to service, in the following manner, to wit, .

#2d with the intent to detain the victim against # will.

#3 As applies to this case NRS 200.310 defines Kidnapping as follows:

Every person who shall willfully lead, take, entice, carry away and detain any minor with the intent to hold such minor to unlawful service or perpetrate upon the person of such minor any unlawful act shall be deemed guilty of kidnapping in the first degree.

#4 Kidnapping in the second degree is defined as follows:

Every person who shall willfully and without authority of law seize, inveigle, take, carry away or kidnap another person with the intent to keep such person secretly imprisoned within the state, or for the purpose of conveying such person out of the state without authority of law, or in any manner held to service or detained against his will, shall be deemed guilty of kidnapping in the second degree.

NRS 200.310

#5 Kidnapping in the first degree is defined as follows:

Every person who shall willfully seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap or carry away any individual human being by any means whatsoever with the intent to hold or detain, or who holds or detains, such individual for ransom, or reward, or for the purpose of committing extortion or robbery upon or from such individual, or to exact from relatives, friends, or other person any money or valuable thing for the return or disposition of such kidnapped person, and every person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine it from its parents, guardians, or any other person having lawful custody of such minor, or with the intent to hold such minor to unlawful service, or perpetrate upon the person of such minor any unlawful act shall be deemed guilty of kidnapping in the first degree.

NRS 200.310

#6 False Imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority.

## **LARCENY**

#1 Every person who shall unlawfully enter any building shall be deemed to have entered the same with intent to commit grand or petit larceny therein, unless such unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent.

#2 Petit larceny consists of unlawful stealing, taking and carrying away the personal goods or property of another under the value of One Hundred Dollars.

#3 Grand larceny consists of unlawful stealing, taking and carrying away the personal goods or property of another of the value of Two Hundred Fifty Dollars or more.

#4 Any person who steals personal property of another in excess of Two Hundred Fifty Dollars (\$250.00) shall be guilty of Grand Larceny.

#5 Grand Larceny is the theft of personal property in excess of Two Hundred Fifty Dollars  
Petit larceny is the theft of personal property less than One Hundred Dollars.

#6 Larceny consists of unlawful stealing, taking and carrying away the personal goods or property of another.

#7 Recent and exclusive possession of stolen property by an accused person gives rise to an inference of guilt which may be sufficient to convict in the absence of other facts and circumstances which leave a reasonable doubt in the minds of the jury. It is the fact of possession that provides the inference of guilt, an inference which is founded on the manifest reason that when goods have been taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter.

#8 Grand Larceny consists of the unlawful stealing, taking, and carrying away the personal goods or property of another of a value of Two Hundred Fifty Dollars or more, with the intent to permanently deprive the owner of the possession of such personal goods or property.

#9 Every person who, under circumstances not amounting to robbery, shall, with intent to steal or appropriate to his own use, take from the person of another, without his consent, any money, property or thing of value, shall be guilty of larceny from the person, not amounting to robbery.

#10 The two elements necessary to constitute theft by larceny are:

First, at the time of the taking of the property, there must exist in the mind of the perpetrator the specific intent to deprive the owner permanently of his property having some value; and

Second, a carrying away of such property.

In order to constitute a carrying away, the property need not be retained in the possession of the perpetrator, nor need it be actually removed from the premises of the owner. Any removal of the property from the place where it is kept or placed by the owner, done with the specific intent described, whereby the perpetrator obtains possession and control of the property for any period of time, is sufficient to constitute the element of carrying away.

CALJIC 14.03

## Lesser Included Offenses

The crime of \_\_\_\_\_, which is charged in the indictment in this case, necessarily includes the lesser offense of

United States v. Tsanas, 572 F.2d 340, 346, 98 S.Ct. 1647  
Catches v. United States 582 F.2d 453 (8<sup>th</sup> Circuit Ct. 1978)

## LEWDNESS

#1 To constitute a lewd or lascivious act it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.

CAL.JIC. 10.32

#2 It is no defense to this charge that a child under the age of fourteen years may have consented to the alleged lewd or lascivious act.

CALJIC 10.34

#3 Although an essential element of the offense(s) charged against the defendant in is a specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of either the person committing the acts or the child, the law does not require as an essential element of the crime that the lust, passions or sexual desires of either of such persons be actually aroused, appealed to, or gratified.

CAL.JIC. 10.33

#4 A lewd or lascivious act is defined as any touching of the body of a person under the age of fourteen years with the specific intent to arouse, appeal to, or gratify the lust, passions or sexual desires of either party.

CALJIC 10.31 modified to NRS  
10.31

#5 A lewd or lascivious act is defined as any touching of the body of a person under the age of fourteen years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party.

CALJIC 10.31

#6 Every person who willfully and lewdly commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the specific intent of

arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, is guilty of a crime.

CALJIC 10.30

#7 NRS 201.230 provides as follows: Any person who shall willfully and lewdly commit any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of lewdness with a child under the age of fourteen years.

#8 In the crime of Lewdness With a Minor Under the Age of 14 Years, it is no defense to the charge that the child may have consented to the alleged lewd or lascivious act.

## **MALICE**

#1 Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. It is not confined to homicide in cold blood with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is one under such cruel circumstances as are the ordinary symptoms of a wicked, depraved and evil spirit. The condition of mind described by malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation, or the lapse of any considerable time between the malicious intention, but denotes rather an unlawful purpose and design in contra-distinction to accident and mischance.

#2 NRS 200.020 defines malice, express and implied, as follows:

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

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

#3 NRS 200.020 defines express malice as follows:

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

#4 NRS 200.020 provides: Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#5 Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#6 NRS 200.020 provides: Implied malice is when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#7 NRS 200.020 defines implied malice as follows:

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

#8 Malice as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.

*Theford v. Sheriff*, 86 Nev.

741 at 744 (1970).

## **MANSLAUGHTER**

#1            In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for, if there should appear to have been an interval between the assault or provocation given for the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

NRS 200.050  
NRS 200.060

#2            Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without a mixture of deliberation.

Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or, involuntary, in the commission of the unlawful act, or a lawful act without due caution or circumspection.

NRS 200.040

#3            Involuntary manslaughter is the killing of a human being, without any intent so to do, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner; but where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

NRS 200.070

#4            The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his or her own standard of conduct and to justify or excuse himself or

herself because his or her passions were aroused unless the circumstances in which he or she was placed and the facts that confronted him or her were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

CALJIC 8.43

## **MAYHEM**

#1 N.R.S. 200.280, in pertinent part, provides that:

Mayhem consists of unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall cut out or disable the tongue, put out an eye, slit the nose, ear or lip, or disable any limb or member of another, or shall voluntarily or of purpose put out an eye or eyes, every such person shall be guilty of mayhem.

#2 N.R.S. 200.290, provides:

To constitute mayhem it is immaterial by what means or instrument or by what manner the injury was inflicted.

## **MOTIVE**

#1 Motive is not an element of the crime charged and need not be shown. However, you may consider motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

## **MULTIPLE COUNTS**

#1 Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted on either or both of the offenses charged.

#2 Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict.

## **MURDER**

#1 I understand that the consequences of my plea of guilty are that I may be imprisoned for a period of life with or without the possibility of parole; that if the penalty is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served. I understand that the matter of sentencing is to be determined solely by the Court

#2 A mind capable of knowing right from wrong is a mind capable of entertaining intent, and of deliberating and premeditating.

#3 NRS 200.030 provides: A murder which shall be perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person charged with murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree.

#4 If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of first degree murder, or is not perpetrated by means of poison, or lying in wait, or torture, and is not committed in the perpetration or intent to perpetrate arson, rape, robbery, or burglary, then the offense is murder in the second degree.

In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second

degree when the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

#5           It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime. Temporary insanity produced by intoxication does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose, it must be received with great caution. You should discriminate between the conditions of mind merely excited by intoxicating drink yet capable of forming a specific and deliberate intent to take life, and such a prostration of the faculties as renders a person incapable of forming intent or of deliberation or premeditation. In a prosecution for murder evidence of intoxication of the accused is relevant for the purpose of a determination whether the defendant lacked the capacity to deliberate and premeditate required of first degree murder. If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of the crime that he was intoxicated when conceiving such intent or that he conceived it more suddenly by reason of his intoxication.

#6           In the crime of murder in the first degree, a necessary element is the existence in the mind of the defendant of a willful, premeditated, and deliberate intent to take way the life of another.

          If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his or her state of intoxication in determining if the defendant had such specific intent.

#7 As applies to this case, NRS 200.030 provides any murder which is not willful, deliberate or premeditated is murder of the second degree.

#8 Murder which is immediately preceded by lying in wait is murder of the first degree.

The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

To constitute murder by means of lying in wait there must be, in addition to the aforesaid conduct by the defendant, an intentional infliction upon the person killed of bodily harm involving a high degree of probability that it will result in death and which shows a wanton disregard for human life. CALJIC 8.25

#9 The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation.

There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer and, if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

The element of intention alone, as an element of the offense, may be ascertained or deduced from the facts and circumstances of the killing.

#10 The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer and, if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

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

#11 The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime of murder in the first degree, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously find the accused "Not Guilty" of the crime of murder in the first degree, then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime of murder in the first degree.

The crime of murder in the first degree necessarily includes the lesser offense of murder in the second degree, the lesser still offense of voluntary manslaughter, and the lesser still offense of involuntary manslaughter.

The jury will bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in the crime charged in the indictment.

#12 In the crime of murder in the first degree, a necessary element is the existence in the mind of the defendant of a willful, premeditated, and deliberate intent to take away the life of another.

If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his or her state of intoxication in determining if defendant had such specific intent.

If from all the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

#13 As jurors, it is your exclusive duty to decide all questions of fact submitted to you.

Death is the cessation of life. A person may be pronounced dead if based on usual and customary standards of medical practice, it is determined that the person has suffered irreversible cessation of brain function.

The usual and customary standards of medical practice involving determination of life or death, in light of recent developments in medical knowledge, was, in this case, the subject of testimony of preeminent medical experts. All of the experts who testified were in agreement that the time of death of the victim was determined as established under usual and customary standards of medical practice. They were all in agreement that \_\_\_\_\_ was dead prior to \_\_\_\_\_ when respiratory support was discontinued. There was not a scintilla of evidence to the contrary. Thus as applied to this case, there remains no issue of fact.

You are instructed as a matter of law, that \_\_\_\_\_ suffered an irreversible cessation of brain function prior to \_\_\_\_\_ when the respirator and other medical assistance was discontinued and, therefore, prior to \_\_\_\_\_ death had occurred.

#14 Where a killing takes place in the course of an unbroken chain of events leading from a robbery to the killing itself and is committed for the purpose of avoiding detection, that killing is to be deemed a murder committed during the perpetration of a robbery.

State v. Fouquette, 67

Nev. 05, 527-530 (1950)  
State v. Williams, 28 Nev.  
295, 407 (1905)

#15 In this state the crime of murder is divided into two degrees, murder of the first degree and murder of the second degree, both of which have been defined for you in other instructions.

Whenever a crime is distinguished into degrees, the Jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

It is, therefore, your duty if you find the defendant guilty of murder, to find either murder of the first degree or murder of the second degree. In determining the degree of the crime, if there is reasonable ground for doubt as to whether the defendant is guilty of murder in the first degree or murder in the second degree, he can be convicted only of the lowest degree, to-wit: murder in the second degree.

#16 In the crime of murder in the first degree, a necessary element is the existence in the mind of the defendant of a willful, premeditated, and deliberate intent to take away the life of another.

In the crime of murder in the second degree, a necessary element is the existence in the mind of the defendant of malice aforethought.

If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such specific intent.

If from all the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

#17 Murder of the second degree is also the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

#18 The unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree when the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his or her conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

#19 The possible punishments provided by law for murder in the second degree, voluntary manslaughter, and involuntary manslaughter are not to be considered by the jury in arriving at a verdict of guilt or innocence.

#20 Where one intends to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed.

CALJIC 8.65

#21 If a person, without legal justification or excuse, intentionally uses a deadly weapon upon the person of another at a vital part, and inflicts a mortal wound, under circumstances showing no considerable provocation, then intent to kill may be implied as an inference of fact from the act itself.

#22 NRS 200.130 provides: A bare fear of any of the offenses mentioned in NRS 200.120, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.

#23 Words alone, regardless of how insulting or inflammatory those words may be, are never sufficient to reduce murder to manslaughter unless those words are accompanied by the commission of or attempted commission of a serious and highly provoking injury on the person killing.

#26 The penalty provided by law for the offense charged is not to be considered by the jury in arriving at a verdict. In the event that the jury should find the defendant guilty of first degree murder, then there will be a penalty hearing following the return of the verdict, and this jury will thereafter decide upon the penalty to be imposed upon the defendant after being instructed by the court concerning the various penalties available.

#27 The punishment provided by law for second degree murder is not to be considered by the jury in arriving at a verdict of guilt or innocence.

#28 NRS 200.030 provides in pertinent part as follows:

A murder which shall be perpetrated in a willful, deliberate and premeditated manner shall be murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person charged with murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree.

#29 If you find the defendant guilty of the offense of murder, but have a reasonable doubt as to whether it is of the first or second degree, it is your duty to find him guilty of that crime in the second degree.

#30 If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, caused by intoxication, you must consider what effect, if any, this impaired capacity had on the defendant's ability to form any of the specific mental states essential to the commission of willful, deliberate and premeditated murder.

Thus, if you find the defendant's mental capacity was impaired to the extent that you have a reasonable doubt whether he or she did premeditate and deliberate upon the gravity of his or her

contemplated act or whether he or she was able to form an intent to kill a human being, you cannot find that the murder was willful, deliberate and premeditated.

CALJIC 8.86 (1976 Revision)

#31 In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. If you return a verdict of guilty of murder in the first degree, then the matter of penalty or punishment will be considered and determined in a separate proceeding. If you return a verdict of guilty of murder in the second degree or of any lesser offense, the matter of penalty or punishment will be determined in the manner provided by law.

#32 Intent to kill, as well as premeditation, may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a deadly weapon calculated to produce death, the manner and use, and the attendant circumstances.

Dearman v. State, 93 Nev.  
A.O. 127

#33 NRS 200.060 is defined as follows:

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

#35 NRS 200.030 provides that Murder of the First Degree is murder which is:

(a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary or sexual molestation of a child under the age of 14 years; or

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody.

As used in this subsection, sexual molestation is any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

#36 All verdicts returned in this case must be unanimous. In considering the offense of Murder of the First Degree, however, you need not be unanimous in finding that the murder was premeditated and deliberate, or that it was perpetrated in the course and furtherance of an attempted perpetration of sexual assault, kidnapping, or sexual molestation of a child under the age of 14 years, or both. It is sufficient that each of you finds beyond a reasonable doubt that the murder, under either theory, was murder of the first degree.

#37 Premeditate means to conceive or deliberate beforehand.

Ogden v. State, 96 Nev. 258,  
263 (1980)

#38 Deliberate means to think upon or consider.

Ogden v. State, 96 Nev. 258,  
263 (1980)

#39 The burden of proof is upon the defendant to show by a preponderance of the evidence that he or she was intoxicated to such an extent that he or she did not premeditate or deliberate.

#40 You are instructed that a person with a mind capable of knowing right from wrong must be regarded as capable of entertaining intent and of deliberating and premeditating.

Ogden v. State, 96 Nev. 258,  
261 (1980)

#41 If a person premeditates and deliberates upon the crime of murder and forms a specific intent to commit that crime and thereafter becomes intoxicated, then such intoxication will not serve as a defense in order to reduce the degree of the murder.

State v. Johnny, 29 Nev. 203  
(1906)

#42 Attempted murder is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the specific intention unlawfully to kill.

Keys v. State, 104 Ad. Op.  
123 (12/29/88)

#43 Battery with a Deadly Weapon is a lesser included offense of Attempted Murder.

The Court instructs the jury that you may find the defendant guilty of this lesser included offense of Battery with a Deadly Weapon if you do not find the defendant guilty of Attempted Murder.

Battery with a Deadly Weapon means any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon. Any harmful or offensive unconsented touching with the deadly weapon, however slight, constitutes sufficient force or violence upon the person of another.

#44 If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditation, that is without the willful, deliberate and premeditated intent to take life which is an essential element of first degree murder, or is not perpetrated by means of torture, or child abuse, then the offense is murder in the second degree.

In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree when the killing results from an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another, even though the person has not specifically formed an intention to kill.

#45

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

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

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

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

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

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the

result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

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

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

Byford v. State, Nev. Adv.  
Op.  
23, (February 28, 2000)

**TRIED AND TRUE MURDER/MANSLAUGHTER INSTRUCTIONS**

**A.**

The elements of the crime of Murder are:

- 1) The defendant did willfully and unlawfully;
- 2) kill a human being;
- 3) with malice aforethought, either express or implied.

N

RS  
200.010

**B.**

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

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

NRS 200.020.

**C.**

Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may also result from

any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means the required mental state must precede rather than follow the act.

Guy v. State, 108 Nev.  
770, 839  
P.2d 578 (1992), citing  
Theford v. Sheriff, 86  
Nev. 741; 476  
P.2d 25, 27 (1970)

**D.**

Murder is divided into two degrees.

Murder of the first degree is murder which is willful, deliberate and premeditated.

Murder of the second degree is all other kinds of murder.

N

RS

200.030

**E.**

Murder of the first degree is murder which is perpetrated by mean of any kind of willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation, and premeditation--must be proven beyond a

reasonable doubt before an accused can be convicted of first-degree murder.

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

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

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

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

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been

preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

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

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

Byford v. State, Nev. Adv.

Op.

23, filed February 28,

2000.

**THIS IS A CASE SPECIFIC INSTRUCTION NAD MUST BE TAILORED TO EACH THEORY OF A CASE.**

**F.**

All verdicts returned in this case must be unanimous.

In considering Counts I and II, Murder, the State has alleged three theories of First Degree Murder. The three theories of Murder in the First Degree alleged by the State in Counts I and II are:

1) Premeditated and deliberate murder by means of violence to the person; or

2) Premeditated and deliberate murder by means of suffocation; or

3) That the murder was perpetrated in the furtherance of a kidnapping (felony-murder).

However, you need not be unanimous in finding that the murder was premeditated and deliberate by means of violence to the person, or premeditated and deliberate by means of suffocation, or that it was perpetrated in the furtherance of a kidnapping.

Thus, you do not have to agree on the theory of Murder in the First Degree, it is sufficient that each of you find beyond a reasonable doubt that the murder, under any one of the three theories, was murder of the first degree.

**G.**

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

Manslaughter may be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or, involuntary, in the commission of the unlawful act, or a lawful act without due caution or circumspection.

N

RS  
200.040

**H.**

In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for, if there should appear to have been an interval between the assault or provocation given for the killing, sufficient for the voice of reason and humanity to be

heard, the killing shall be attributed to deliberate revenge and punished as murder.

NRS 200.050  
NRS 200.060

**I.**

Involuntary manslaughter is the killing of a human being, without any intent so to do, in the commission of an unlawful act, or in the commission of a lawful act which probably might produce such a consequence in an unlawful manner.

NRS 200.070

**J.**

The Information in this case charges Open Murder which includes the offense of Murder in the First Degree, and also necessarily includes the lesser included offenses of Murder in the Second Degree, Voluntary Manslaughter and Involuntary Manslaughter. The defendant may only be convicted of one of these offenses.

You should first examine the evidence as it applies to Murder in the First Degree. If you unanimously agree that the defendant is guilty of Murder in the First Degree, you should sign the appropriate Verdict form and request the bailiff to return you to court.

If you can not agree that the defendant is guilty of Murder in the First Degree, you should then examine the evidence as it applies to Murder in the Second Degree. If you unanimously agree that the defendant is guilty of Murder in the Second Degree, you should sign the appropriate Verdict form and **ask the** bailiff to return you to court.

If you can not unanimously agree that the defendant is guilty of Murder in the Second Degree, then you should examine the evidence as it applies to Voluntary Manslaughter. If you unanimously agree that the defendant is guilty of the crime of Voluntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.

If you can not unanimously agree that the defendant is guilty of Murder in the Second Degree, then you should examine the evidence as it applies to Involuntary Manslaughter. If you unanimously agree that the defendant is guilty of the crime of Involuntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.

The defendant, of course, can be found Not Guilty of all the offenses enumerated.

**K.**

If you find the defendant committed the offense of Murder in the First Degree, Murder in the Second Degree, or Voluntary Manslaughter, or Attempted Murder, then you must further determine whether the defendant used a firearm during the commission of the offense. You should indicate your finding by checking the appropriate box on the Verdict form. The burden is on the State to prove this element beyond a reasonable doubt.

NRS 193.165

**L.**

The defendant has offered evidence of having acted in self-defense or defense of others when the crime was committed. Use of force is justified when a person honestly and reasonably believes that it is necessary for the defense of that person or others against imminent unlawful force about to be used against them.

But force which is likely to cause death or great bodily harm is justified in self-defense or defense of others only if 1) the defendant honestly believes that such force is necessary to prevent imminent death or great

bodily harm, and 2) a reasonable person, standing in defendant's shoes, would believe that such force is necessary to prevent imminent death or great bodily harm.

The State must prove lack of self-defense beyond a reasonable doubt.

NRS 200.120, 200.130,  
200.160  
Hill V. State, 98 Nev.  
295 (1982)

## **MURDER-MALICE**

#1 Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. It is not confined to homicide in cold blood with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is one under such cruel circumstances as are the ordinary symptoms of a wicked, depraved and evil spirit. The condition of mind described by malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation, or the lapse of any considerable time between the malicious intention, but denotes rather an unlawful purpose and design in contra-distinction to accident and mischance.

#2 NRS 200.020 defines malice, express and implied, as follows:

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

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

#3 NRS 200.020 defines express malice as follows:

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

#4 NRS 200.020 provides: Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#5 Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#6 NRS 200.020 provides: Implied malice is when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

#7 NRS 200.020 defines implied malice as follows:

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

#8 Malice as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.

Theford v. Sheriff, 86 Nev.

741 at 744 (1970).

#9 There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. The perpetration or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

In other words, whenever death occurs during the perpetration or attempted perpetration of certain enumerated felonies, our statutes define this as first degree murder. The felonious intent involved in the

underlying felony may be transferred to supply the malice necessary to characterize the death a first-degree murder.

Ford v. State, 99 Nev. 214

**MURDER-PENALTY**

#1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.

Dept. No.

Defendant.

\_\_\_\_\_/

LADIES AND GENTLEMEN OF THE JURY:

It now becomes my duty as Judge to instruct you in the law that applies to the fixing of penalty in this case, and it is your duty as jurors to follow the law as I shall state it to you, regardless of what you may think the law is or ought to be.

#2

The defendant in this case has been found guilty of murder in the first degree.

Under the law of this State, you must now determine the sentence to be imposed upon the defendant.

Murder in the first degree is punishable by imprisonment in the state prison for life with or without the possibility of parole.

#3

The defendant in this case has been found guilty of murder in the first degree.

Under the law of this State, you must now determine the sentence to be imposed upon the defendant. First degree murder is punishable by death only if the jury finds one or more aggravating circumstances have been proved beyond a reasonable doubt and the jury further finds that any mitigating circumstances do not outweigh the aggravating circumstances.

Otherwise, murder in the first degree is punishable by imprisonment in the state prison for life with or without the possibility of parole.

#4

If, during the trial and penalty hearing, I have said or done anything which has suggested to you that I am inclined to favor the position of either party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, what inference should be drawn from the evidence, or what penalty should be imposed upon the defendant. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

#5

In determining which of the several available sentences is appropriate, you are entitled to consider all evidence presented during

the trial as well as such evidence as may have been presented in the penalty hearing.

The evidence in this case consists of the sworn testimony of the witnesses and all exhibits which have been received in evidence.

#6

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant would be eligible for parole after a period of ten years. This does not mean that the Defendant would be paroled after ten years, but only that he would be eligible after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.

If you sentence the Defendant to death you must assume that the sentence will be carried out.

Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

Petrocelli v. State, 101 Nev.

46, 692 P2d 503 (1985)

#6a

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the defendant would be eligible for parole after a period of ten years. This does not mean

that the defendant would be paroled after ten years, but only that the defendant would be eligible after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole.

Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

Petrocelli v. State, 101 Nev. 46, 692 P2d 503 (1985)

#6b

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.

Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

Petrocelli v. State, 101 Nev. 12  
January 4, 1985

#7

The jury may impose a sentence of death only if it finds beyond a reasonable doubt that there is at least one aggravating circumstance and further finds that there are no mitigating circumstances which outweigh the aggravating circumstances.

The circumstance by which murder of the first degree may be aggravated, as may be applicable to the imposition of a death penalty in this case, is:

#8

If the jury returns a verdict setting the penalty at death, the jury shall render a written verdict signed by the foreman. The verdict shall designate the aggravating circumstance which is found beyond a reasonable doubt, and shall state that there are no mitigating circumstances which outweigh the aggravating circumstance.

#9

When all twelve (12) of you have agreed upon the verdict setting sentence, the Foreman should sign and date the same and request the Bailiff to return you to court.

#11

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.

Dept. No.

Defendant.

\_\_\_\_\_ /

V E R D I C T

We, the jury in the above-entitled matter, having previously found the defendant, , guilty of murder in the first degree, set the penalty to be imposed at LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

\_\_\_\_\_  
FOREMAN

#12

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.

Dept. No.

Defendant.

\_\_\_\_\_ /

V E R D I C T

We, the jury in the above-entitled matter, having previously found the defendant, , guilty of murder in the first degree,

set the penalty to be imposed at LIFE IN PRISON WITH THE POSSIBILITY OF PAROLE.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

---

FOREMAN

#13 NRS 200.035 provides that murder of the first degree may be mitigated by any of the following circumstances:

1. The defendant has no significant history of prior criminal activity.

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim was a participant in the defendant's criminal conduct or consented to the act.

4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

5. The defendant acted under duress or under the domination of another person.

6. The youth of the defendant at the time of the crime.

7. Any other mitigating circumstance.

#15

Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim was a participant in the defendant's criminal conduct or consented to the act.

4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

5. The defendant acted under duress or under the domination of another person.

6. The youth of the defendant at the time of the crime.

7. Any other mitigating circumstance.

**THE FOLLOWING DEATH PENALTY SET OF INSTRUCTIONS HAS BEEN  
USED SUCCESSFULLY IN THE MAJORITY OF THE DEPARTMENTS IN THE  
SECOND JUDICIAL DISTRICT COURT AND HAVE WITHSTOOD  
CHALLENGE. WORD PROCESSING MAINTAINS THEM AS THE GRECO  
SET.**

O - 0 - 0

**A.**

Case No.

Dept. No.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

Defendant.

\_\_\_\_\_ /

LADIES AND GENTLEMEN OF THE JURY:

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

You must not be concerned with the wisdom of any rule of law stated in these instructions, regardless of any opinion you may have as to what the law is or ought to be.

**B.**

If in these instructions, any rule, direction or idea is repeated or stated in different way, no emphasis thereon is intended by me and none may be inferred by you. For that

reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

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

**c.**

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

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

**D.**

The evidence presented both during the trial and during this hearing may be considered by the jury in deciding the proper and appropriate sentence in this case.

This evidence consists of the sworn testimony of the witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits which have been introduced into evidence and any facts to which the lawyers have agreed or stipulated.

NRS 175.554

**E.**

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you would find that another fact exists, even though it has been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence.

It is for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense and experience.

You should not be concerned with the type of evidence but rather the relative convincing force of the evidence.

State v. Crane, 88 Nev.

684, 504 P.2d 12 (1972)

**F.**

In reaching your verdict you may consider only the testimony of witnesses and the exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the proper and appropriate sentence should be in this case.

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from what the lawyers have stated, then your memory controls.

Questions and objections by lawyers are not evidence.

Attorneys have a duty to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or the court's ruling on it.

Testimony excluded or stricken by the court or testimony which you have been instructed to disregard is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the proper

punishment solely on the evidence received at the trial and  
at this hearing.

**G.**

The State has alleged an aggravating circumstance is present in this case.

The defendant has alleged certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) whether an aggravating circumstance has been proven beyond a reasonable doubt;

(b) whether a mitigating circumstance or circumstances are found to exist; and,

(c) based upon these findings, whether the defendant should be sentenced to death, or one of the alternatives less than death.

The jury may impose a sentence of death only if you find an aggravating circumstance and further find there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

NRS 200.030

**H.**

The following is the only circumstance applicable in this case by which murder of the first degree may be aggravated:

1. The murder of \_\_\_\_\_ was committed by the defendant who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

**I.**

The State has the burden of proving beyond a reasonable doubt the aggravating circumstance in this case.

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

If you have a reasonable doubt as to the aggravating circumstance in this case, or if you find the mitigating circumstance or circumstances are sufficient to outweigh the aggravating circumstance found, or for any other reason decline to impose the death penalty, the Defendant is entitled to a verdict of one of the alternatives less than death.

**J.**

Murder of the first degree may be mitigated by any of the following circumstances:

1. The defendant has no significant history of prior criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's criminal conduct or consented to the act.
4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
5. The defendant acted under duress or under the domination of another person.
6. The youth of the defendant at the time of the crime.
7. Any other mitigating circumstances.

NRS

200.035

**K.**

The mitigating circumstances which I have read for your consideration are given as examples of some of the factors you may take into account as reasons for deciding not to impose a death sentence on the defendant. Anyone of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. In balancing aggravating and mitigating circumstances, it is not the mere number of aggravating circumstances or mitigating circumstances that controls. You must consider each aggravating circumstance and each mitigating circumstance separately and carefully to determine what weight should be given.

NRS 200.035  
Bishop v. State, 95 Nev.  
511, 597 P.2d 273 (1979)

**L.**

You have found the defendant in this case to be guilty of Murder in the First Degree; therefore, under the law of this state, you must determine the sentence to be imposed upon the defendant.

First Degree Murder is punishable:

(1) by death, only if an aggravating circumstance is found, and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance,

(2) by imprisonment in the Nevada State Prison for life without the possibility of parole, or

(3) by imprisonment in the Nevada State Prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of twenty (20) years has been served, or

(4) for a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether an aggravating circumstance exists is not necessary in the event you determine to impose a sentence less than death.

NRS 200.030(4)

**M.**

A prison term of fifty years with eligibility for parole beginning when a minimum of twenty years has been served does not mean that the defendant would be paroled after twenty years but only that he or she would be eligible for parole after that period of time.

Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the defendant would be eligible for parole after a period of twenty years. This does not mean that he or she would be paroled after twenty years but only that he or she would be eligible for parole after that period of time.

Life imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole.

If you sentence the defendant to death, you must assume that the sentence will be carried out.

Sonner v. State, 114 Nev.Ad.Op. 40, filed  
April 2, 1998, (mandatory  
instruction).

**N.**

Any person who uses a firearm in the commission of a crime, or who commits the crime to promote the activities of a criminal gang, shall be punished by imprisonment in the Nevada State Prison for a term equal to and in addition to the term of imprisonment prescribed for the underlying crime, and said sentence shall run consecutively with the sentence prescribed for the underlying crime.

Because you have found the defendant committed the offense with the use of a firearm, and to promote the activities of a criminal gang, if you sentence him to life in prison with the possibility of parole, his earliest parole eligibility would be forty years. Likewise, if you sentence him to a term of fifty years, his earliest parole eligibility would be forty years.

NRS

193.165

O.

The law never compels the imposition of the death penalty. Even if you find that the aggravating circumstance has been proven beyond a reasonable doubt, and even if you also do not find that any mitigating circumstances exist, you are not required to return a verdict of the sentence of death as punishment, but may instead sentence the defendant to one of the alternatives less than death.

**P.**

During your deliberations, you will have all the exhibits which were admitted into evidence during the trial and during this hearing, these written instructions and forms of verdict which have been prepared for your convenience. Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your presiding juror and return with it to this room.

**Q.**

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

NRS 175.161

**R.**

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of you have agreed upon a verdict, the foreperson should sign and date the same and request the Bailiff to return you to court.

**SAMPLE VERDICT FORMS FOR DEADLY WEAPON AND GANG ENHANCEMENT**

We, the jury in the above-entitled action, find beyond a reasonable doubt that the murder of \_\_\_\_\_, as alleged in Count I, was aggravated by the following circumstance which has been checked below.

1. The murder of \_\_\_\_\_ was committed by the defendant who \_\_\_\_\_ knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which normally would be hazardous to the lives of more than one \_\_\_\_\_ person.

We, the jury in the above-entitled action find the following mitigating circumstance or circumstances which are \_\_\_\_\_

\_\_\_\_\_ existing in this case and have checked the same below.

\_\_\_\_\_1. The defendant has no significant history of prior criminal activity.

\_\_\_\_\_2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

\_\_\_\_\_3. The victim was a participant in the defendant's criminal conduct or consented to the act.

\_\_\_\_\_4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

\_\_\_\_\_5. The defendant acted under duress or under the domination of another person.

\_\_\_\_\_6. The youth of the defendant at the time of the crime.

\_\_\_\_\_7. Any other mitigating circumstance.

We, the jury in the above-entitled action, having previously found the defendant, \_\_\_\_\_, guilty of Count I, MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, and having found beyond a reasonable doubt that an aggravating circumstance exists in this case, and that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance found, therefore, by reason thereof, set the penalty of sentence to be imposed at Death.

We, the jury in the above-entitled action, having previously found the defendant, \_\_\_\_\_, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at life in the Nevada State Prison without the possibility of parole, plus a consecutive term of life in the Nevada State Prison without the possibility of parole, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, having found the defendant, \_\_\_\_\_, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at life in the Nevada State Prison with the possibility of parole, plus a consecutive term of life in the Nevada State Prison with the possibility of parole, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, having found the defendant, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at a definite term of fifty (50) years in the Nevada State Prison, with eligibility for parole beginning when a minimum of twenty (20) years has been served, plus a consecutive term of fifty (50) years in the Nevada State Prison, with eligibility for parole beginning when a minimum of twenty (20) years has been served, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, having previously found the defendant, \_\_\_\_\_, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at life in the Nevada State Prison without the possibility of parole, plus a consecutive term of life in the Nevada State Prison without the possibility of parole, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, having found the defendant, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at life in the Nevada State Prison with the possibility of parole, plus a consecutive term of life in the Nevada State Prison with the possibility of parole, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, having found the defendant, guilty of MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, set the penalty to be imposed at a definite term of fifty (50) years in the Nevada State Prison, with eligibility for parole beginning when a minimum of twenty (20) years has been served, plus a consecutive term of fifty (50) years in the Nevada State Prison, with eligibility for parole beginning when a minimum of twenty (20) years has been served, because the crime was committed with the use of a firearm and to promote the activities of a criminal gang.

We, the jury in the above-entitled action, find beyond a reasonable doubt that the murder, of \_\_\_\_\_, as alleged in Count I, was aggravated by the following circumstance which has been checked below.

\_\_\_ 1. The murder of \_\_\_\_\_ was committed by the defendant who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which normally would be hazardous to the lives of more than one person.

We, the jury in the above-entitled action find the following mitigating circumstance or circumstances which are existing in this case and have checked the same below.

\_\_\_ 1. The defendant has no significant history of prior criminal activity.

\_\_\_ 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

\_\_\_ 3. The victim was a participant in the defendant's criminal conduct or consented to the act.

\_\_\_ 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

\_\_\_ 5. The defendant acted under duress or under the domination of another person.

\_\_\_ 6. The youth of the defendant at the time of the crime.

\_\_\_7. Any other mitigating circumstance.

We, the jury in the above-entitled action, having previously found the defendant, , guilty of Count I, MURDER IN THE FIRST DEGREE WITH THE USE OF A FIREARM AND TO PROMOTE THE ACTIVITIES OF A CRIMINAL GANG, and having found beyond a reasonable doubt that an aggravating circumstance exists in this case, and that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance found, therefore, by reason thereof, set the penalty of sentence to be imposed at Death.

## **PARTIES TO A CRIME**

#1 The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

Every person who thus willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and purposely and with a specific intent to do some act the law forbids.

#2 Every person concerned in the commission of a felony, whether he or she directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony is a principal, and shall be proceeded against and punished as such.

## **PERJURY**

#1 NRS 199.120, insofar as applicable to this case, provides as follows: Every person having taken a lawful oath, or made affirmation in a judicial proceeding, or in any other matter where, by law, an oath or affirmation is required, who shall willfully and corruptly make an unqualified statement of that which he or she does not know to be true, or who shall swear or affirm willfully, corruptly and falsely, in a matter material to the issue or point in question, shall be deemed guilty of perjury.

#2 NRS 199.150 provides:

Every person who, without giving, offering or promising a bribe, shall incite or attempt to procure another to commit perjury, or to offer any false evidence, or to withhold true testimony, though no perjury be committed or false evidence offered or true testimony withheld, shall be guilty of a gross misdemeanor.

## POSSESSION OF STOLEN PROPERTY

#1 Every person who, for his or her own gain, or to prevent the owner from again possessing his, the owner's property, shall buy, receive, possess, or withhold stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery, burglary or embezzlement, knowing the same so to have been obtained, is guilty of the offense of Possession of Stolen Property.

NRS 205.275

#2 The Court instructs the jury in proving the receipt of stolen goods with the knowledge that the same were stolen, the State is not required to establish the element of guilty knowledge by direct evidence, such as the defendant himself or herself witnessing the stealing of the goods, or being told that they were stolen, but, on the other hand, it may be shown by circumstantial evidence. If stolen goods are received by a person under such conditions and circumstances as to lead him or her to believe that the same were stolen, then, in the contemplation of the law, he or she had guilty knowledge to the same extent as though he or she had personally witnessed the actual stealing thereof.

Therefore, if you believe from the evidence, beyond a reasonable doubt, in this case that the property in question was stolen as in the information specified, and if you further believe from the evidence, beyond a reasonable doubt, that circumstances presented and manifest to the defendant at the time of the reception or purchase of the property in question -- if you believe from the evidence, beyond a reasonable doubt, that he or she did receive or buy the same -- were such as to have induced him or her to believe, and that he or she did therefrom believe, that the property was stolen, then I charge you, as a matter of law, that the State has established the element of guilty knowledge.

#3 Within the meaning of the law, a person is in possession of stolen property when it is under his dominion and control and to his or her knowledge either is carried on his or her person or is in his or her presence and custody, or, if not on his or her person or in his or her presence, the possession thereof is immediate, accessible, and exclusive to him or her.

#5 Mere possession of stolen property without knowledge or notice that it is stolen property does not constitute the crime of receiving stolen property.

Hamilton v. State, 129 Fla.  
219 176 SO. 89, 112 ALR

1013

People v. Levison, 16 Cal. 98  
68 ALR 178

#7 While it is necessary to show that the property was the product of theft, it is neither necessary to plead nor to prove the identity of the person who so obtained the property.

#8 The fact that a person was in possession of property recently stolen is not in and of itself alone enough to justify his conviction of burglary. It is, however, a circumstance which may be taken into consideration by the jury to be considered in arriving at its verdict.

#10 In proving the receipt of stolen goods with the knowledge that the same were stolen, the State is not required to establish the element of guilty knowledge by direct evidence, such as the defendant witnessing the stealing of the goods, or being told that they were stolen, but, on the other hand, it may be shown by circumstantial evidence. If stolen goods are received by a person under such conditions and circumstances as to lead him or her to believe that the same were stolen, then, in the contemplation of the law, he or she had guilty knowledge to the same extent as though he or she had personally witnessed the actual stealing thereof.

#11 Checks shall be considered personal goods, of which larceny may be committed; and the money due thereon shall be deemed the value of the article stolen.

NRS 205.260; Boley v. State,  
85 Nev. 466 (1969).

#12      Recent and exclusive possession of stolen property by an accused person may give rise to an inference of guilt sufficient to convict in the absence of other facts and circumstances which leave a reasonable doubt in the minds of the jury.

## **PRESUMPTION**

#1 Every person charged with the commission of a crime shall be presumed innocent until the contrary is proven by competent evidence beyond a reasonable doubt, and in case of a reasonable doubt, whether his or her guilt be satisfactorily shown, he or she is entitled to be acquitted.

#2 You are instructed that the fact that the evidence may show that the defendant caused the death of does not itself raise a presumption of premeditation; however, the nature and the effect of the wounds inflicted are competent evidence for your consideration on the issue of existence of the intent necessary to support any specific charge.

#3 The unlawful entry of a raises a presumption that the unlawful entry was made with the intent to commit larceny.

This means that the jury may regard the fact of the unlawful entry as sufficient evidence of the unlawful intent, but is not required to do so.

In any event, the existence of all elements of the offense must, on all the evidence, be proved beyond a reasonable doubt.

## **PRINCIPAL**

#1 A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he or she aids, abets, counsels, encourages or instigates by act or advice the commission of such crime.

Liability for aiding and abetting must be based on more than mere presence at the scene and prior association with the perpetrator.

#2 Every person concerned in the commission of a felony, whether he or she directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony is a principal, and shall be proceeded against and punished as such.

#3 In Nevada there are only two classifications of parties to crimes: (1) principals, and (2) accessories.

Every person concerned in the commission of a felony, whether he or she directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony is a principal, and shall be proceeded against and punished as such.

The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.

## **PRIOR CONVICTION/PBA**

#1 The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

CALJIC 2.23

#2 Evidence of a defendant's previous conviction of a felony is to be considered by you only insofar as it may affect his credibility as a witness, and must not be considered by you as evidence of his guilt of the crime with which he is charged.

#3 The fact that a witness has been convicted of a felony may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

#4 NRS 48.045 as applicable in this case, provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith and is not to be considered by you for that purpose. However, it may be considered by you for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

#5 Evidence has been introduced involving the defendant's prior conviction of a felony.

You may consider that evidence for the purpose of determining the credibility of the defendant as a witness.

As applies to this case you may also consider that evidence in determining the intent of the defendant when the acts were committed.

#6 Evidence of other crimes, wrongs or acts is admissible to prove motive, intent, preparation, the existence of a common scheme or plan, identity, or absence of mistake or accident. However, such evidence is not admissible simply to prove the character of a person in order to show he acted in conformity therewith and is not to be considered by you for that purpose.

Allan v. State, 92 Nev. 318  
(1976) (Motive and common scheme  
or plan); McMichael v. State,  
94 Nev. Adv. Opn. 59 (1978);  
Findley v. State, 94 Nev. Adv.  
Opn. 64 (1978) (Both on intent -  
absence of mistake or accident);  
Reed v. State, 95 Nev. Adv. Opn.  
47 (1979) (Identity)

**OTHER ACT EVIDENCE THESE ARE NOT IN WORD PROCESSING**

Evidence has been received tending to show that the defendant committed sexual acts against children other than that for which he is on trial.

Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

At the time this evidence was admitted you were admonished that such evidence was received and may be considered by you only for the limited purposes of determining if it tends to show a common scheme or plan, opportunity, intent or absence of mistake or accident on the part of the defendant.

For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purposes.

NRS 48.045

## Procuring Agent

A procuring agent is a person who acts, not on one's own behalf or for a supplier, but solely for a recipient.

The procuring agent defense can be maintained only if the defendant was merely a conduit for the purchase and in no way benefited from the transaction. The procuring agent defense does not apply when the defendant obtains drugs from a person with whom the defendant is associated in selling drugs and has a predisposition to sell drugs. Nor does the procuring agent defense apply if the defendant already had possession of the drugs at the time the buyer requested delivery of them.

The burden is on the State to prove beyond a reasonable doubt that the defendant had a profit motive or other direct interest when he obtained drugs for the recipient.

\* \* \*

A procuring agent cannot be found guilty of Count I Trafficking in a Controlled Substance, Count II Unlawful Sale of a Controlled Substance or Count III Possession of a Controlled Substance for the Purpose of Sale. However the procuring agent defense does not apply to Count IV, Possession of a Controlled Substance.

If you believe that the defendant was merely a procuring agent in this case, then you must return verdicts of not guilty on Counts I, II, and III. Proceed to Count IV, Possession of a Controlled Substance and examine the evidence independent of your previous finding of procuring agency.

If you find that the defendant was not a procuring agent, then you may disregard this instruction and conduct your Deliberations in accordance with the law set forth in Instruction No. pertaining to lesser included offenses.

## PUBLIC OFFICERS

#1 For the purposes of this case, the City of Reno can be a victim of grand larceny, embezzlement or misappropriation of property.

#2 As defined by Nevada Revised Statutes, a "public officer" is a person elected or appointed to a position which:

1. Is established by the constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and

2. Involves the continuous exercise, as a part of the regular and permanent administration of a government, of a public power, trust or duty.

NRS. 169.164

#3 As defined by Nevada Revised Statutes, "officer" and "public officer" include all officers, members and employees of:

(a) The State of Nevada;

(b) Any political subdivision of this state;

(c) Any other special district, public corporation or quasi-public corporation of this state;  
and

(d) Any agency, board or commission established by this state or any of its political subdivisions, and all persons exercising or assuming to exercise any of the powers or functions of a public officer.

NRS 193.010 §16

#4 As applies to this case every officer who shall fraudulently appropriate to his or her own use any property entrusted to him or her by virtue of his or her office, where the value of such property exceeds One Hundred Dollars (\$100.00) is guilty of a felony.

NRS 197.210

## **ROBBERY**

#1 Robbery which is perpetrated by a person being armed with a firearm or deadly weapon is armed robbery.

If you should find the defendant guilty of robbery, it will be your duty to determine whether such robbery amounts to armed robbery and to state that in your verdict.

#2 Robbery is the unlawful taking of personal property from the person of another, or in his or her presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, at the time of the taking.

#3 The crime of robbery does not in any degree depend upon the amount or value of the property taken and, the other elements of the offense being present, the crime of robbery is made out even though the property taken be of slight value.

#4 It is unnecessary to prove both violence and intimidation. If the fact be attended with circumstances of threatening word or gesture as in common experience is likely to create an apprehension of danger and induce a person to part with his or her property for the safety of his or her person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such a case.

Hayden v. State, 91 Nev. 476

#5 In order to constitute robbery, the taking must be accomplished either by force or intimidation, this element being the gist and distinguishing characteristic of the offense; but there need not be both force and intimidation, either being sufficient without the other.

#6 Section 200.380 of the Nevada Revised Statutes provides in part as follows:

Robbery is the unlawful taking of personal property from the person or another, or in his presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

#7 In the crime of robbery, there is the lesser included offense of assault and battery. The jury, if it finds that a robbery was not committed, may, if the evidence warrants, find the defendant guilty of assault and battery.

#8 Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

#9 In the crime of robbery it is the fact of the taking of the person's property which is an essential element, it is not the distance the property was taken which is controlling. In other words, any taking of another person's property, no matter how far it was taken from the person, is sufficient to constitute the crime of robbery if such taking was committed by means of force or violence.

#10 A purse and contents belonging to a person is in law that person's personal property.

#11 As it applies to this case NRS 200.380 provides:

Robbery is the unlawful taking of personal property from the person of another or in his or her presence against his or her will by means of force or violence.

#12 Robbery is the unlawful taking of personal property from the person of another or in his or her presence against his or her will by means of force or violence or fear of injury. The use of a firearm or other deadly weapon is not essential to proof of robbery. NRS 200.380

Hayden v. State, 91 Nev. 474,  
476 (1975)

#13 Robbery with the use of a deadly weapon is robbery which is perpetrated by a person armed with any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If you should find the defendant guilty of robbery, it will be your duty to determine whether such robbery amounts to robbery with the use of a deadly weapon, and to state that in your verdict.

#14 A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.

#15 A weapon such as a gun, may be said as a matter of law to be a firearm or deadly weapon, but proof of its deadly capabilities is not required, and the use of which is required to

## **SANITY/INSANITY**

#1 To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the defendant was laboring under such a defect of reason, from disease of the mind, as not to know it, that he or she did not know that what he or she was doing was wrong.

#2 The burden of proving insanity is on the defendant, that is to say, it is incumbent upon him or her to establish by a preponderance of evidence that he or she was insane at the time of committing the offense charged.

The law presumes that the defendant was sane. That presumption may be rebutted, but is controlling until overcome by a preponderance of evidence.

A preponderance of evidence is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

#3 Insanity is no excuse for the commission of a crime unless there exists such defect of reason from disease of the mind that the person charged did not know the nature and quality of his or her act, or, if he or she did know it, that he or she did not know he or she was doing wrong.

#4 In determining the issue of insanity, the sole issue is whether or not the defendant was sane or insane at the time of the commission of said offense. You must determine the condition of his or her mind at the precise time of the offense. Although you may consider evidence of his mental state before and after that time for this purpose, such evidence is to be considered only for the purpose of throwing light upon his or her mental condition as it was when the offense was committed.

Temporary insanity as a defense to crime is as fully recognized by law as is insanity of long duration. The test is as I have previously stated, and applies to the time when the act charged was committed. If at that time the defendant was insane, he or she must be found not guilty of the crime charged, even if he or she was sane at earlier and later times or at any earlier or later period.

#5 A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her an expert on the subject to which his or her testimony relates.

A duly qualified expert may give his or her opinion as to the defendant's sanity if the defendant's sanity is in controversy at trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

You are not bound to accept an expert opinion as conclusive, but should give it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

#6 In determining the weight to be given to an opinion as to the defendant's sanity expressed by any witness who did not testify as an expert witness, you should consider his or her credibility, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight, if any, to which you find it entitled.

#7 If you find the defendant herein not guilty by reason of insanity, your verdict shall have the same force and effect as if he or she were regularly adjudged insane as now provided by law, and the judge thereupon shall forthwith order that the defendant be committed to the custody of the administrator of the mental hygiene and mental retardation division of the department of human resources until he is regularly discharged therefrom in accordance with the law.

In the event the defendant is so committed, he or she may be discharged therefrom at any time, if, in the opinion of the appropriate personnel at said agency, the defendant has recovered from his or her mental illness.

#8 If the jury should find the defendant not guilty by reason of insanity, the finding of the jury shall have the same forces and effect as if he or she were regularly adjudged insane as now provided by law, and the judge thereupon shall forthwith order that the defendant be confined in the Nevada State Hospital until he or she is regularly discharged therefrom in accordance with law.

In the event the defendant is so confined in the Nevada State Hospital he or she may be discharged therefrom at any time, if, in the opinion of the superintendent of the hospital, the defendant has recovered from his mental illness.

#9 Mental illness is not necessarily synonymous with the legal definition of insanity. Mental illness in whatever other form it may appear is not a defense to crime unless it meets the specific test of insanity heretofore stated to you.

#10 You are instructed that a person with a mind capable of knowing right from wrong must be regarded as capable of entertaining intent and of deliberating and premeditating.

Ogden v. State, 96 Nev. 258,  
261 (1980)

## SELF DEFENSE

#1 NRS 200.200 provides that if a person kills another in self-defense, it must appear that

1. The danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and

2. The person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

#2 NRS 200.130 provides that a bare fear of any of the offenses mentioned in NRS 200.120, to

prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing.

It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.

#4 The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

CALJIC 5.55

#5 If a person kills another in self-defense, it must appear that: 1. The danger was so urgent and pressing

that, in order to save his or her own life, or to prevent his or her receiving great bodily harm, the killing of the other was absolutely necessary and, 2. The person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline in any further struggle before the mortal blow as given. NRS 200.200

#6 NRS 200.120 provides: Justifiable homicide is the killing of a human being in necessary self-defense.

#7 NRS 200.120 provides that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

#8 An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person reasonably believes that the assault is likely to inflict great bodily injury upon him or her.

## SEXUAL ASSAULT

#1           The Court instructs the jury that it is your province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a sexual assault has been committed, and who testifies to the facts and circumstances of such sexual assault as of any other witness testifying in this case. And if such testimony creates in the minds of the jury a satisfactory conviction and belief, beyond a reasonable doubt of the defendant's guilt, it is sufficient in and of itself without other corroborating circumstances or evidence to justify a verdict of guilty of sexual assault upon the trial of the case.

May v. State, 89 Nev. 277

#2           It is not essential to a conviction of a charge of sexual assault that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.

CALJIC 10.60

#3           A victim of sexual assault is not required to do more than her age, strength, surrounding facts and all attending circumstances make it reasonable for her to do in order to manifest her opposition.

Dinkens v. State, 92 Nev. 74,  
546 P.2d 228 (1976)

#4           A person who subjects another person to sexual penetration against the victim's will is guilty of sexual assault.

#5           Sexual assault does not require a showing that the defendant employed force to achieve his objective, but only that the act was committed against the will of the victim.

Dinkens v. State, 92 Nev. 74,  
546 P.2d 228 (1976)

#6           NRS 200.366 provides as follows:

A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

#7           NRS 200.364 defines "Sexual Penetration" as follows:

cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning.

#8           If you find from the evidence in this case beyond a reasonable doubt that at the time of the alleged commission of the offense in this information, the victim was, on account of tender years or on account of exceptional want of mental or physical development,

incapable of knowing the nature of the act, her consent would be no protection to the defendant.

Fields v. State, 159 S.W.2d 745

#9 Evidence of sexual assaults other than the one with which the defendant has been charged has been admitted, on the limited question of whether or not the defendant intended to engage in sexual activity with the alleged victim against her will, and should not be considered for any other purpose.

#10 As applied to this case, sexual penetration means sexual intercourse.

#11 Any sexual penetration, however slight, is sufficient to complete sexual intercourse. NRS 200.370

#12 Physical force is not a necessary ingredient in the commission of the crime of sexual assault. The crucial question is not whether the victim was "forced" to engage in sexual intercourse, but whether the act was committed without her consent. There is no consent where the victim is induced to submit to the sexual act through fear of death or serious bodily injury.

Dinkins v. State, 92 Nev. 74,  
546 P.2d 228 (1976)

#13            Consent to an act of sexual intercourse does not exist where the female is induced to submit to the sexual act through fear of death or serious bodily injury.

Dinkens v. State, 92 Nev. 74,  
546 P.2d 228 (1976)

#14            Any sexual penetration, however slight, is sufficient to complete the crime of sexual assault.

NRS 200.370

#15            Sexual assault does not require a showing that the defendant employed force to achieve his objective, but only that the act was committed against the will of the victim. There is no consent where the victim is induced to submit to the sexual act through fear of death or serious bodily injury.

#16            As applies to this case, sexual penetration means sexual intercourse, and any penetration, however slight, is sufficient for sexual intercourse to have taken place.

#17            Any sexual penetration, however slight, is sufficient to complete the crime of sexual assault.

#18            A person who subjects another person to sexual penetration against the victim's will is guilty of sexual assault. Sexual penetration means any intrusion, however slight, of any part of a person's body, including sexual intercourse in its ordinary meaning.

#19 Evidence of a previous alleged sexual assault may not be considered by you to prove the character of the defendant in order to show that he acted in conformity therewith, however, it may be considered by you on the question of intent or plan.

#20 It is your province to determine the weight and credibility to be given the testimony of a victim upon whom it is alleged in an Information Indictment that a sexual assault has been committed. A victim who testifies to the facts and circumstances of a sexual assault is to be treated the same as any other witness testifying in this case. And if such testimony creates in the minds of the jury a satisfactory conviction and belief, beyond a reasonable doubt of the defendant's guilt, it is sufficient in and of itself without other corroborating circumstances or evidence to justify a verdict of guilty of sexual assault upon the trial of the case.

#21 Sexual assault is a general intent crime. Therefore, any claim, or evidence, of drinking alcohol or voluntary intoxication by the defendant is no excuse for the criminal conduct and is no defense to a charge of sexual assault.

Henry v. U.S., 432 F.2d 114  
(9th Cir. 1970)

#22 NRS 200.364 defines "sexual penetration" as follows:  
cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning.

The definition of "sexual penetration" is stated in the disjunctive, which means the State is required to prove only one method to satisfy the definition. In the facts of this case the State has alleged fellatio as the means to satisfy the definition.

Fellatio is defined as any act of sex committed with the male sexual organ and the mouth; or it is also defined as the practice of obtaining sexual satisfaction by any oral stimulation of the penis.

Fellatio by definition does not require penetration. Thus, penetration of the mouth is not an essential element of the use of the mouth on the sexual parts of another human being for the purpose of the crime of sexual assault

Maes v. Sheriff, 94 Nev.  
at 716 (1978)

#### **TRIED AND TRUE SEXUAL ASSAULT INSTRUCTIONS**

##### **A.**

The elements of the crime of Sexual Assault are:

- 1) The defendant did willfully and unlawfully;
- 2) subject another person to sexual penetration;
- 3) against the victim's will.

##### **B.**

The elements of the crime of Sexual Assault on a child are:

- 1) The defendant did willfully and unlawfully
- 2) Subject a child under the age of 14 years
- 3) To sexual penetration
- 4) Against the victims will

NRS 200.366

**C.**

"Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another including sexual intercourse in its ordinary meaning.

NRS 200.366

**D.**

In order to sustain a conviction for Sexual Assault, the State is not required to prove that the defendant used force in perpetrating the alleged crime. The State is only required to prove that the sexual penetration was against the will of the victim.

105 Nev. 782, 790 (1989);

Shannon v. State,

McNair v. State,  
108 Nev. 53, 57, (1992)

**E.**

A sexual assault victim is not required to do more than her age, strength, surrounding facts and all attending circumstances make it reasonable for her to do in order to manifest her opposition.

Dinkens v. State, 92 Nev. Nev. 74, 78 (1976) , cites, Haury v. State, 533 P. 2d 991 (Okl. 1975), McNair v. State, 108 Nev. 53, 57 (1992)

## SEXUAL SEDUCTION

#1 It is not essential to a conviction of a charge of statutory sexual seduction that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.

CALJIC 10.21 (1970 Rev.)

#2 The Court instructs the jury that it is your province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a statutory sexual seduction has been committed, and who testifies to the facts and circumstances of such statutory sexual seduction as of any other witness testifying in this case. And if such testimony creates in the minds of the jury a satisfactory conviction and belief, beyond a reasonable doubt of the defendant's guilt, it is sufficient in and of itself without other corroborating circumstances or evidence to justify a verdict of guilty of statutory sexual seduction upon the trial of the case.

May v. State, 89 Nev. 277

#3 Statutory sexual seduction is the carnal knowledge of a female minor child under the age of sixteen (16) years.

#4 The crime of statutory sexual seduction as charged against the defendant in this case is an act of sexual intercourse with a female person who is under the age of sixteen (16) years.

Such a female is incapable of consenting to an act of sexual intercourse as a matter of law. Therefore, in a prosecution for statutory sexual seduction, it is no defense that she may have consented to the act of intercourse.

CALJIC 10.10 (1970 Rev.)

#5 NRS 200.364 defines "Statutory Sexual Seduction" as being ordinary sexual intercourse and intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a consenting person under the age of 16 years.

## **SLOT MACHINES**

#1 Nevada Revised Statutes, Section 465.080-2(a), insofar as applicable to this case provides: It is unlawful for any person, in playing or using any slot machine designed to receive or be operated by lawful coin of the United States of America, or coin not of the same denomination as the coin intended to be used in such slot machine

#2 You are instructed that under the laws of Nevada a slot machine is classified as and considered to be a gambling game.

#3 You are instructed that a "slot machine" means any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or anything of value whatsoever, whether the payoff is made automatically from the machine or in any other manner whatsoever.

#4 Slot cheating is defined in NRS 465.080 as follows:

It is unlawful for any person, in playing or using any slot machine designed to receive or be operated by lawful coin of the United States of America:

To use any cheating or thieving device, including, but not limited to, tools, drills, wires, coins attached to strings or wires or electronic or magnetic devices, to unlawfully facilitate aligning any winning combination or removing from any slot machine any money or other contents thereof.

#5 Possession of a cheating device is defined in NRS 465.080 as follows:

It is unlawful for any person, not a duly authorized employee of a licensed gaming establishment acting in furtherance of his employment within such establishment, to have on his person or in his possession while on the premises of such establishment any cheating or thieving device, including, but not limited to, tools, wires, drills, coins attached to strings or wires, electronic or magnetic devices to facilitate removing from any slot machine any money or other contents thereof.

#6 Nevada Revised Statutes, Section 465.080-1(c), insofar as applicable to this case provides: It is unlawful for any person playing any licensed gambling game to use any fraudulent scheme or technique to facilitate the alignment of any winning combination.

#7 Any physical object used for a purpose for which it was not intended, and in such a manner so as to cheat, deceive, or defraud, is a cheating device.

Laney v. State, 86 Nev. 173  
(1990)

## STATEMENTS

#1 Evidence has been presented that statements accusing the defendant of the crimes charged in the Information were made in his or her presence at a time when he or she was not under arrest or in custody, and that such statements were neither denied, nor objected to by him or her. If the jury finds that the defendant actually heard and understood the accusatory statements, and that they were made under such circumstances that the defendant might be expected to have denied them if they were not true, then the jury should consider whether the defendant's silence was an admission of the truth of the statements

NRS 51.035(3)(b)

#2 If you find that before this trial the defendant made false or deliberately misleading statements concerning the charge upon which he or she is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

CALJIC 2.03

#3 A statement by the Defendant admitting the act of intercourse has been admitted into evidence. Before the jury may take this statement into consideration, the jury must decide whether or not it was voluntarily made.

#4 Articles or statements in newspapers, radio statements and all like matters are not evidence, and are not to be considered at all in arriving at your determination. If you have read or heard any such articles or statements, you must give them no consideration whatsoever and completely disregard them in arriving at your verdict, which must be determined solely and only from the evidence as adduced from witnesses on the stand and the law as given you by the Court.

#5 Evidence that on some former occasion, a witness made a statement or statements that were inconsistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion. CALJIC 2.13

#6 Voluntariness is based on the totality of circumstances, no one factor being controlling. If you decide that a statement was made voluntarily, then you may consider it in determining the guilt or innocence of the defendant making the statement.

It is the prosecution's burden to prove by a preponderance of the evidence that the defendant's statements were voluntary. If you are not so convinced, then you may not consider the statements for any reason against the defendant.

A preponderance of the evidence means to prove that something is more likely than not.

Parker v. Randolph, 442 U.S. 62 (1979); Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L.Ed. 2d 618 (1972); Quiriconi v. State, 96 Nev. 766 (1980); Arkansas v. Hayes, 598 S.W. 2d 91

#7 Statements of the defendant not made in court have been admitted in evidence. Before the Jury may take such a statement into consideration, it must first decide whether or not it was given voluntarily. If the Jury decides the statement was made voluntarily, it may use the statement in its deliberations. If the Jury decides that a statement was not made voluntarily, the Jury must disregard it.

A defendant's testimony in court is to be treated the same as the testimony of any other witness and may be considered for all purposes.

#8                   An admission is a statement made by the defendant other than at her trial which does not by itself acknowledge her trial which does not by itself acknowledge her guilt of the crime for which such defendant is on trial, but which statement tends to prove her guilt when considered with the rest of the evidence.

                  You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

**SUBSTANTIAL BODILY HARM - THESE ARE NOT IN WORD PROCESSING**

The crime of Causing Substantial Bodily Harm to Another by Driving a Vehicle Under the Influence consists of the following elements:

1. The defendant drove a vehicle on or off highways of this state;
2. While he was under the influence of intoxicating liquor;
3. And while driving, the defendant did some act forbidden by law or neglected a duty imposed by law;
4. Which act or neglect proximately caused substantial bodily harm to a person other than the defendant.

\* \* \*

The crime of Causing Substantial Bodily Harm to Another by Driving While Having 0.10 Percent or More by Weight of Alcohol in the Blood consists of the following elements:

1. The defendant drove a vehicle on or off highways of this state;
2. While having a 0.10 percent or more by weight of alcohol in his blood;
3. And while driving, the defendant did some act forbidden by law or neglected a duty imposed by law;
4. Which act or neglect proximately caused substantial bodily harm to a person other than the defendant.

\* \* \*

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon by a highway, except devices moved by human power or used exclusively upon stationary rails.

"Highway" means the entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public

for the purpose of vehicular traffic, whether or not the public authority is maintaining the way.

\* \* \*

A person is under the influence of intoxicating liquor when as a result of drinking such liquor his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive a vehicle safely.

\* \* \*

The driver of a vehicle has a duty imposed by law:

1. To drive a vehicle within the posted speed limit;
2. Not to drive at a rate of speed greater than is reasonable or proper, having due regard for the traffic, surface and width of the highway, the weather and other highway conditions;
3. Not to drive at such a rate of speed as to endanger the life, limb or property of any person;
4. To operate the vehicle with due regard of the safety of persons or property;
5. To maintain his travel lane; and
6. To exercise due care and decrease speed when approaching and going around a curve or when traveling upon any narrow or winding road or highway.

\* \* \*

Proximate cause is that cause which is a natural and a continuous sequence, unbroken by any other intervening cause, that produces the injury and without which the injury would not have occurred.

A proximate cause of an injury can be said to be that which necessarily sets in operation the factors that accomplish the injury.

The contributory negligence of another does not exonerate the defendant unless the other's negligence was

the sole cause of the injury. In other words, an intervening act will supercede the original culpable act where the intervening act is an unforeseeable, independent, non-concurrent cause of the injury.

“Substantial Bodily Harm” means bodily injury:

1. Which creates a substantial risk of death; or
2. Which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
3. Prolonged physical pain.

**SUBSTANTIAL BODILY HARM - THESE ARE NOT IN WORD PROCESSING**

The crime of Causing Substantial Bodily Harm to Another by Driving a Vehicle Under the Influence consists of the following elements:

1. The defendant drove a vehicle on or off highways of this state;
2. While he was under the influence of intoxicating liquor;
3. And while driving, the defendant did some act forbidden by law or neglected a duty imposed by law;
4. Which act or neglect proximately caused substantial bodily harm to a person other than the defendant.

\* \* \*

The crime of Causing Substantial Bodily Harm to Another by Driving While Having 0.10 Percent or More by Weight of Alcohol in the Blood consists of the following elements:

1. The defendant drove a vehicle on or off highways of this state;
2. While having a 0.10 percent or more by weight of alcohol in his blood;
3. And while driving, the defendant did some act forbidden by law or neglected a duty imposed by law;
4. Which act or neglect proximately caused substantial bodily harm to a person other than the defendant.

\* \* \*

"Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon by a highway, except devices moved by human power or used exclusively upon stationary rails.

"Highway" means the entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public

for the purpose of vehicular traffic, whether or not the public authority is maintaining the way.

\* \* \*

A person is under the influence of intoxicating liquor when as a result of drinking such liquor his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive a vehicle safely.

\* \* \*

The driver of a vehicle has a duty imposed by law:

1. To drive a vehicle within the posted speed limit;

2. Not to drive at a rate of speed greater than is reasonable or proper, having due regard for the traffic, surface and width of the highway, the weather and other highway conditions;

3. Not to drive at such a rate of speed as to endanger the life, limb or property of any person;

4. To operate the vehicle with due regard of the safety of persons or property;

5. To maintain his travel lane; and

6. To exercise due care and decrease speed when approaching and going around a curve or when traveling upon any narrow or winding road or highway.

\* \* \*

Proximate cause is that cause which is a natural and a continuous sequence, unbroken by any other intervening cause, that produces the injury and without which the injury would not have occurred.

A proximate cause of an injury can be said to be that which necessarily sets in operation the factors that accomplish the injury.

The contributory negligence of another does not exonerate the defendant unless the other's negligence was

the sole cause of the injury. In other words, an intervening act will supercede the original culpable act where the intervening act is an unforeseeable, independent, non-concurrent cause of the injury.

“Substantial Bodily Harm” means bodily injury:

1. Which creates a substantial risk of death; or
2. Which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
3. Prolonged physical pain.

## **SWINDLING**

#1 NRS 465.070 provides that every person who, by color, or aid of any trick or sleight-of-hand performance, or by any fraud or fraudulent scheme, cards, dice or device, shall win for himself or for another any money or property or representative of either shall be guilty of swindling.

#2 It is not necessary that the defendant win money, for himself or herself or another, as a result of the sleight-of-hand performance or fraudulent scheme, as any attempt to do so constitutes the crime of swindling as defined in NRS 465.070.

#3 NRS 465.070 provides that every person who, by color, or aid of any trick or sleight-of-hand performance, or by any fraud or fraudulent scheme, cards, dice or device, wins or attempts to win for himself or for another any money or property or representative of either shall be guilty of swindling.

## TESTIMONY/WITNESSES

#1           The testimony of one witness which you believe is sufficient to prove any fact.  
  
              You should not decide any issue merely by counting the number of witnesses who have testified on the opposing sides.

              The final test in weighing conflicting testimony is the relative convincing force of the evidence and not the relative number of witnesses who have testified on different sides of an issue.

#2           If you believe from the evidence that any witness has willfully sworn falsely as to any matter or thing material to the issues in this case, you may disregard his entire testimony.

#3           Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently; an innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

#4           You are further instructed that if you as jurors believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then you as jurors are at liberty to disregard his entire testimony, except insofar as it has been corroborated by other credible evidence, or by facts or circumstances proved on the trial.

## **VEHICLE**

#1 NRS 484.291 provides that upon all highways of sufficient width a vehicle shall be driven upon the right half of that highway.

#2 The registered owner of a motor vehicle is presumed to be the driver thereof unless the contrary is more probably shown by evidence satisfactory to the jury.

Privette v. Faulkner  
92 Nev. 353 (1976)

#3 The driver of any vehicle involved in an accident, resulting in injury to any person, shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible, and shall forthwith return to, and in every event shall remain at the scene of the accident, as required by law.

NRS 484.219

## VERDICT

#1 Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict.

#2 The defendant is charged in Count I with the crime of \_\_\_\_\_ and in Count II with the crime of \_\_\_\_\_. These charges are made in the alternative and in effect allege that the defendant committed an unlawful act which constitutes either the crime of \_\_\_\_\_ or the crime of \_\_\_\_\_. If you find that the defendant committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses so charged was thereby committed.

In order to find the defendant guilty, you must all agree as to the particular offense committed and if you find the defendant guilty of one of such offenses, you must find him or her not guilty of the other.

### CALJIC. 17.03

#3 In this case there are \_\_\_\_\_ possible verdicts. These various possible verdicts are set forth in the forms of verdict which you will receive. Only one of the possible verdicts may be returned by you for each count. If you all have agreed upon one verdict for each count, the corresponding form are the only verdict form to be signed. The other form are to be left unsigned.

#4 The charges against each defendant are separate and distinct, and the jury may find either or both defendants guilty or not guilty.

#5 On arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment as that is a matter which will be decided later, and must not in any way affect your decision as to the innocence or guilt of the defendant.

#6 It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or affect of evidence solely because of the opinion of your fellow jurors, or for the purpose of returning a verdict.

#7 The penalty provided by law for the offense charged in the In is a matter exclusively within the province of the Court, under statutes enacted by the Legislature, and is not to be considered by the jury in arriving at a verdict.

#8 You are not called upon to return a verdict as to the guilt or innocence of any other person other than the defendant. If the evidence convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty.

#9 If you find that the defendant, did the acts as alleged in Count of the Information/Indictment, and if you further find that consented to said acts with a full understanding of the nature and quality of his/her acts, then you are instructed that as a matter of law, Defendant is guilty of the lesser included offense of .