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JOSE PENA,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MS. JOHNSON) Good afternoon, Officer.

A. Afternoon.

Q. Would you please introduce yourself to the jury?

A. My name is Jose Pena, and I work for the Houston Police Department. I have been with the Houston Police Department for 13 years, and I have been a crime scene officer for five years.

Q. If you could explain to the jury a little bit of your training and experience that qualifies you to be a crime scene unit officer. And, basically, what is a crime scene unit officer?

A. A crime scene officer is somebody that assists homicide investigators with processing murder scenes, suicide scenes, or anywhere where somebody either got killed or there is a questionable murder involved.

And what we do is go out -- what I mean by documenting the scene is we go out and take photographs, take videos of the scene, and take measurements for a diagram and collect evidence and tag the evidence and preserve evidence and -- for

1 future trials like this.

2 Q. Is your job anything like the TV show CSI?

3 A. It's not. No, ma'am. Sorry.

4 Q. Do you ride around in a Hummer?

5 A. I do not, no.

6 Q. Would you like to?

7 A. Yes. Currently we've got Suburbans. We
8 got rid of the Fords and got new Suburbans. So,
9 that's a little better.

10 Q. So, you have been in the crime scene unit
11 for about five years. What is some of the training
12 that you had to go through to become a crime scene
13 unit officer?

14 A. First, you take any class you can get your
15 hands on that's either offered outside the department
16 or within the department that has to do with any type
17 of homicide investigations, suicides, ballistic type
18 class, blood spatter, analysis classes, bone
19 identification classes, and such.

20 When you apply to be a crime scene
21 officer and you get selected, there is a ranking
22 structure. And once you get selected, you go up to
23 the CSU unit. You are trained by seasoned CSU
24 investigators. And for about six months, you take a
25 couple of months on day shift, couple of months on

1 evening shift, and couple of months on night shift.

2 Once that happens, you're still on
3 probation. They cut you lose, but you're still on
4 probation for an additional six months. And within
5 that year period, if they see you're having some type
6 of issues with your work, you get kicked out of the
7 unit. So, that's basically the short of it.

8 Q. Let me interrupt you for a second. So,
9 approximately how many hours of training do you think
10 you, yourself, have done the last five years?

11 A. I have about 14 hours of training and I
12 have been part of over 400 homicide investigations
13 and I assisted in about over 150 homicide
14 investigations.

15 Q. And do you work by yourself or with a
16 partner?

17 A. No. I work by myself.

18 Q. And you said earlier that you drive a
19 Suburban. Do you keep all your equipment and
20 supplies in that Suburban when you go to a scene?

21 A. Yes, ma'am.

22 Q. Now, how do you get dispatched to a scene
23 or to a call?

24 A. I receive a call. All calls are filtered
25 through the homicide division and the homicide

1 division calls us up to our offices and gives us
2 preliminary details of the incidents and that's how
3 we get dispatched.

4 Q. And let me take you back to August of 2009.
5 Were you on duty on August 31, 2009?

6 A. I was, yes, ma'am.

7 Q. What shift were you working?

8 A. I worked the night shift. That's
9 11:00 p.m. to 7:00 in the morning.

10 Q. And were you dispatched to a scene located
11 at 390 Aldine Bender?

12 A. I was. I came in early that day, and I was
13 dispatched at 10:45.

14 Q. And what type of -- what was -- what was at
15 that location?

16 A. At the location I was given the information
17 there was a shooting and there was a dead person at
18 the scene.

19 Q. And where was the location?

20 A. The location was on Aldine Bender. If I
21 remember correctly, it was 390 Aldine Bender.

22 Q. And was it a convenience store?

23 A. Yes. When I arrived, I found out it was
24 called the Siesta Food Mart.

25 Q. And so, you stated before you were

1 dispatched, you were aware of what kind of scene that
2 was going to be there?

3 A. I was, yes, ma'am.

4 Q. So, what time did you arrive at the scene?

5 A. I arrived there at about 11:22.

6 Q. And when you arrived, were there other
7 police officers there?

8 A. Yes. There was patrol officers. The
9 primary officer was Officer Hensley, who was already
10 at the location.

11 Q. When you arrived and -- at the scene, did
12 you speak with Officer Hensley?

13 A. I did, yes. It's protocol.

14 Q. And why do you do that?

15 A. To get an idea of where I'm going to start
16 my investigation. Usually what the primary first
17 responder does for us is they identify some of the
18 evidence, and they basically take us to where it's
19 at, and we continue our investigation from there. We
20 do what is called -- we tour the scene with the
21 officer.

22 Q. And what does that mean?

23 A. Meaning we scan the parking lot. We
24 scanned -- in this case we had the parking lot. We
25 had evidence down the street; and we had evidence, of

1 course, inside the convenience store. So, we
2 basically walked the whole scene and made note of
3 evidence that they have identified at that point or
4 additional evidence that I identify as we're walking
5 through the scene.

6 Q. When you're dispatched to the scene, were
7 you aware that this was involving a robbery?

8 A. I was, yes, ma'am.

9 Q. And so, what types of evidence -- because
10 it is a robbery, what types of evidence are you
11 looking for?

12 A. I'm looking for guns, spent shell casings,
13 any type of clothing articles that might get dropped
14 along the way when somebody is running out of the
15 location. I'm also looking for video cameras that
16 might be at the location that documented the event,
17 and also recording devices that might be at the
18 location, as well.

19 Q. When you arrived at 309 Aldine Bender, were
20 homicide investigators already there?

21 A. We arrived basically about the same time,
22 yes, ma'am.

23 Q. Do you recall the names of the homicide
24 investigators that were there that night?

25 A. I was working with Investigator Lopez. She

1 has now been married, and her last name is Meek. And
2 Officer Figueroa, Investigator Smith.

3 Q. And do you meet with the homicide
4 investigators before you actually start documenting
5 the scene?

6 A. I do, yes, ma'am.

7 Q. And why do you do that?

8 A. Protocol. Same thing I did with the
9 responding officer I do with them. We tour the scene
10 together, look at the evidence that has been
11 identified up to that point, look at different
12 angles. They give me certain ideas and certain
13 instructions on what they want me to photograph or
14 videotape, or if they see any of the other evidence
15 that I missed.

16 And, basically, we come down to one
17 address that we're going to use for the location and
18 the direction that the store, in this case, would
19 face; and in this case it was north.

20 Q. And now, when you start your investigation,
21 what is the first thing you do?

22 A. The first thing I do is go out -- once I
23 tour the scene with the officer, with the
24 investigator, I go out; and I place out tent markers.
25 And those are the little numbers you see on the news,

1 white ones or yellow ones, with a 1, 2, and so on.
2 And I identify the evidence. Once that happens, I
3 start videotaping the scene.

4 Q. What type of camera do you use?

5 A. In this case we had an 8-millimeter Sony
6 handheld battery operated camera.

7 Q. And so, at the Siesta Food Mart, how many
8 tent markers did you use?

9 A. At this location I only used two, the
10 number 1 and number 2.

11 Q. And so, you took a video of the scene?

12 A. I did, yes, ma'am.

13 Q. Do you also take photographs of the scene?

14 A. I do, yes, ma'am.

15 Q. Why do you do both?

16 A. We -- to cover all the basis; and what we
17 might miss on the video, we document with the
18 photographs.

19 Q. And did you take photographs and video at
20 the Siesta Food Mart on August 31, 2009?

21 A. I did, yes, ma'am.

22 Q. Officer Pena, I'm showing you what's been
23 marked as State's Exhibits No. 11 through 39. Would
24 you take a look at these?

25 A. These are all photos I took that day of the

1 scene on the outside and the inside of the
2 convenience store.

3 Q. And do those photos, State's Exhibits
4 No. 11 through 39, fairly and accurately depict the
5 scene as it appeared on August 31, 2009?

6 A. They do, yes, ma'am.

7 Q. And showing you State's Exhibit No. 41, do
8 you recognize that?

9 A. Yes. I guess this is a copy of my video.
10 We shoot on 8-millimeter tape. This is a digital
11 copy.

12 Q. And have you seen State's Exhibit No. 41?

13 A. I have this morning, yes, ma'am.

14 Q. And has it been changed or altered in any
15 way since August 31, 2009?

16 A. Not that I could tell, no, ma'am.

17 Q. And does it fairly and accurately depict
18 the scene as it appeared to you on that date?

19 A. It does, yes, ma'am.

20 **MS. JOHNSON:** At this time we offer
21 State's Exhibit Nos. 11 through 39 into evidence and
22 State's Exhibit No. 41. Tender to opposing counsel.

23 **MR. HAMM:** Judge, we have no
24 objections to State's photos -- excuse me -- 11
25 through 39 and the disk, which is 41.

1 **THE COURT:** Thank you. Admitted.

2 **Q.** **(BY MS. JOHNSON)** So, Officer Pena, showing
3 you State's Exhibit No. 11, I'm going to go through a
4 few of them; and these -- and if you could describe
5 to the jury what is depicted, starting with State's
6 Exhibit No. 11.

7 A. This right here is the gas station on this
8 corner here, and I'm standing away -- behind the
9 store at an angle, facing in a northwest direction.

10 **Q.** Showing you State's Exhibit No. 12, what is
11 shown in State's Exhibit 12?

12 A. Again, another angle of the convenience
13 store and the gas pumps. And I'm standing on the
14 northeast corner, facing in a southwest direction.

15 **Q.** And State's Exhibit No. 14?

16 A. That's -- I'm standing in front of the
17 store, facing in a south direction.

18 **Q.** And is that the front door of the store in
19 State's Exhibit 14?

20 A. This is. Right there, yes, ma'am.

21 **Q.** And why do you document so many angles of
22 the outside of the store?

23 A. For future reference as far as avenues of
24 approach and avenues of departure, as far as -- has
25 to do with suspects that came to the scene or left

1 the scene.

2 Q. Now, in comparison to other convenience
3 stores that you have documented, was it a pretty big
4 store?

5 A. Yes, ma'am, it was.

6 Q. Did it have a lot of, I guess, merchandise
7 or products in there?

8 A. It did, yes, ma'am.

9 Q. Now, showing you State's Exhibit No. 16,
10 what is shown in State's Exhibit 16?

11 A. This is the gaming area behind the
12 cashier's register area and the TV showing the
13 different video surveillance of the store.

14 Q. And so, were there cameras in the store?

15 A. They were. I think I documented about five
16 of them.

17 Q. Did you take pictures of those cameras?

18 A. I did, yes, ma'am.

19 Q. Now, showing you State's Exhibit No. 19,
20 what do you see here in State's Exhibit No. 19?

21 A. I'm inside the store, facing in a north
22 direction. And you see the front door of the store;
23 the register area over here to the left; and the
24 aisle area, product area on right.

25 Q. Showing you State's Exhibit 21, is that

1 another shot of the front counter?

2 A. Yes, ma'am.

3 Q. Now, did you document the cash registers
4 that were inside the store?

5 A. I did, yes, ma'am.

6 Q. Do you recall how many cash registers there
7 were?

8 A. There were two.

9 Q. And were those cash registers open or
10 closed?

11 A. They were closed when I was there, ma'am.

12 Q. Showing you State's Exhibit No. 20, what is
13 shown in State's Exhibit 20?

14 A. One of the registers here.

15 Q. And was it closed?

16 A. It was just like that when I arrived, yes,
17 ma'am.

18 Q. And based on the conversations you had with
19 Officer Hensley and the homicide officers, were there
20 ever any cash registers that appeared to be opened
21 and then were later closed?

22 A. None that I was made aware of, no, ma'am.

23 Q. Now, was there a man's body behind the
24 counter in the store?

25 A. It was on the floor, yes, ma'am.

1 Q. Okay. And had he already been pronounced
2 dead?

3 A. Yes, ma'am.

4 Q. And when you arrived, was the Houston and
5 fire -- Fire Department still on the scene?

6 A. No, ma'am.

7 Q. Are there sometimes when you arrive at
8 scenes of homicides where the person is taken to the
9 hospital and later pronounced dead?

10 A. Yes, ma'am.

11 Q. So, did you document the location of the
12 complainant's body in the scene?

13 A. I did, yes, ma'am.

14 Q. Did you ever identify his name or anything
15 like that?

16 A. I did not. Not at that point, no.

17 Q. Showing you State's Exhibit No. 22, what do
18 we see in State's Exhibit 22?

19 A. We see the floor area, sales area of the
20 store, and the cashier area and the body at this
21 location here.

22 Q. And are you allowed to move the
23 complainant's body?

24 A. I am not, no, ma'am.

25 Q. Why not?

1 A. State law puts the burden on the medical
2 examiner investigator.

3 Q. So, do you wait for the Medical Examiner's
4 Office to arrive on the scene?

5 A. I do, yes, ma'am.

6 Q. Showing you State's Exhibit No. 23, what do
7 we see in State's Exhibit No. 23?

8 A. This is another angle of the cashier area
9 showing the body at this location and No. 2, which is
10 a fired bullet at that location.

11 Q. Okay. And that's marked with a tent
12 marker?

13 A. That's correct. No. 2.

14 Q. And right here, that stool that's been
15 knocked over, is that how you found that stool when
16 you arrived?

17 A. Yes, ma'am.

18 Q. Now, you said earlier that you did -- or,
19 actually, let me go back.

20 Showing you State's Exhibit No. 34,
21 explain to me what's in State's Exhibit 34.

22 A. You see the complainant in this case laid
23 out on the floor, and it's a close-up of it.

24 Q. And is this from a different viewpoint than
25 the previous State's Exhibit of 23?

1 A. It is, yes, ma'am. Because at this point
2 I'm on the south -- on this point here, I'm on the
3 north side facing south. On the other one I'm on the
4 south side facing north.

5 Q. Now, showing you State's Exhibit No. 35,
6 describe what's going on and where are you standing
7 to take this picture.

8 A. I'm on the east side. I'm facing west.
9 And to my left here would be the slot machines that
10 we saw earlier, and this would be the sales area of
11 the store.

12 Q. Now, where you're standing, is that an
13 entrance to behind the counter at the store?

14 A. It is, yes, ma'am. So, it's like a little
15 step there.

16 Q. Were there any type of doors or gates or
17 windows to block anyone from coming thorough that
18 area?

19 A. No, ma'am.

20 Q. Now, you stated earlier that you found
21 about five video cameras inside the store. Showing
22 you State's Exhibit No. 28, what do we see in State's
23 Exhibit 28?

24 A. We see a camera at this angle and one at
25 this angle. And this one should be the one that

1 faces south onto the front door; and this one faces
2 west onto the coolers, if I'm not mistaken.

3 Q. Could you re -- redraw on there which one
4 faces which way?

5 A. This one faces the coolers, and this one
6 faces the front door here. This one there.

7 Q. Showing you State's Exhibit No. 29.

8 A. This one is in the middle of the top of the
9 ceiling. And that one faces the front door, as well.

10 Q. If you could circle that where you can see
11 the camera.

12 A. (Witness complies.)

13 Q. Now showing you State's Exhibit No. 30.

14 A. This is right above the front door, and it
15 faces south onto the sales floor area of the store.

16 Q. Now showing you State's Exhibit 31.

17 A. This one here is behind the counter, and it
18 faces the register. And this one here faces north
19 onto those gaming machines that we saw earlier, the
20 slot machine.

21 Q. The first one at the top of State's Exhibit
22 No. 31, would that show a scene of the back of the
23 person working behind the counter?

24 A. It would. This one right here, yes, ma'am.

25 Q. And so, the other one down, I guess,

1 towards the bottom to the -- my left, you said that's
2 facing toward the slot machines?

3 A. Yes, ma'am.

4 Q. From that camera, are you able to see
5 anyone come in through that entrance to behind the
6 counter?

7 A. On this one here?

8 Q. Yes, sir.

9 A. Yes. You should.

10 Q. Showing you State's Exhibit No. 32.

11 A. This is the one at the bottom back of the
12 store behind the teller area should be, and it faces
13 west. The camera there.

14 Q. And then, did you -- State's Exhibit
15 No. 33, is this just a more closeup of the
16 complainant?

17 A. It is, yes, ma'am.

18 Q. And when you're taking pictures of the
19 body, what are you trying to document?

20 A. I'm trying to document the position of the
21 body and any wounds that might be visible without the
22 body being moved.

23 Q. So, you used two tent markers to mark
24 evidence, correct?

25 A. I did, yes.

1 Q. And showing you State's Exhibit No. 36,
2 what do we see in State's Exhibit 36?

3 A. The marker here. And I used that to mark a
4 spent casing.

5 Q. And what is a casing for those of us that
6 aren't familiar with guns?

7 A. A spent casing is the part that's ejected
8 from the gun after you fire a bullet.

9 Q. And if you could kind of orient the jury
10 where this is in relation to the complainant's body
11 and the counter area.

12 A. The counter area would be back here
13 somewhere; the front door is at this angle here; and
14 right here you're facing north, if you're looking at
15 this machine, and onto the parking lot. If you go in
16 this direction, you go back to the manager's office
17 (indicating.)

18 Q. And if you go in the direction past the red
19 portion of that counter, what do you see?

20 A. On this angle here?

21 Q. Yes, sir.

22 A. That would be going to the register area --

23 Q. Okay.

24 A. -- that we talked about.

25 Q. Okay. State's Exhibit No. 35, if you're

1 standing there where the tent marker is, would you be
2 looking --

3 A. Correct.

4 Q. -- in this area?

5 A. That red wall that I circled would be this,
6 this would be a portion of it here, and this would be
7 the other one going into the register area
8 (indicating.)

9 Q. Okay. So, when you find a shell casing
10 right here, what does that tell you, based on your
11 training and experience as a CSU officer?

12 A. That indicates that somebody was shooting a
13 gun from the -- it could be from this location here
14 or the counter area because most bullets on
15 semiautomatic weapons will eject to the right and to
16 the rear.

17 Q. Showing you State's Exhibit 37, is that
18 just a closeup of the spent shell casing?

19 A. Yes, ma'am.

20 Q. Okay. Showing you State's Exhibit No. 38,
21 we see tent marker No. 2. What are you marking
22 there?

23 A. It's a closeup of -- indicating No. 2,
24 which is the fired bullet.

25 Q. And showing you State's Exhibit No. 39.

1 A. This is a closeup of the fired bullet.

2 Q. And so, you recovered one spent shell
3 casing and one fired bullet?

4 A. Yes, ma'am.

5 Q. Now, showing -- looking at where the tent
6 marker is in State's Exhibit No. 38, tent marker
7 No. 2, I show you State's Exhibit No. 23, if you
8 could explain the direction or how you found that
9 bullet in the scene?

10 A. The fired bullet is right here on the south
11 side of the cashier register area. This is the south
12 side back here and I'm facing south and the bullet --
13 there was no bullet strikes on the floor here or
14 anywhere on the floor.

15 Q. What is a bullet strike?

16 A. A bullet strike would be me discharging a
17 weapon and the bullet hitting the floor and making a
18 hole in the carpet or making a dent on the tile, and
19 that's what we call bullet strike. But you don't
20 find a bullet at that location. It ricochets
21 somewhere else.

22 Q. So, based on where you were standing and
23 taking this picture and where you see tent marker
24 No. 2 for the bullet and then also where you found
25 No. 1, the spent shell casing, based on your

1 examination of the scene, could the shooter have been
2 standing facing the complainant, shot the
3 complainant, the bullet --

4 **MR. HAMM:** I object to the question as
5 leading.

6 **THE COURT:** Sustained.

7 **Q. (BY MS. JOHNSON)** What would be your opinion
8 of where possibly the shooter could have been and
9 caused the bullet to go to tent marker No. 2?

10 **A.** Based on my experience with ballistics, the
11 shooter would be over here on the north side on --
12 where the feet of the complainant here are at. And
13 he would be facing south and holding a gun possibly
14 in a right hand because the projectile ended up over
15 here in this area to the right and to the rear.

16 **Q.** And did you find any other shell casings or
17 bullets at the scene?

18 **A.** I did not, no, ma'am.

19 **Q.** Now, when you document a scene, do you
20 usually try to look for fingerprints or anything that
21 might contain any type of DNA?

22 **A.** I do, yes, ma'am.

23 **Q.** Did you find anything like that at the
24 Siesta Food Mart?

25 **A.** I did not. And, initially, when we arrived

1 at the scene, we were told by the responding officers
2 and later I was told by the homicide investigators
3 that the persons that robbed the store were wearing
4 ski masks and gloves. So, it was going to be a waste
5 of time to try to dust the area for fingerprints.

6 Q. Because you were aware that the suspects
7 were wearing gloves?

8 A. That's correct. Yes, ma'am.

9 Q. And were you made aware of anyone having
10 any type of -- beside the complainant -- have any
11 type of bleeding or injury or anything like that,
12 where you would look for blood in other areas?

13 A. None that I was told about, no.

14 Q. Did you find any firearms at the scene?

15 A. I did not, no, ma'am.

16 Q. Now, going to the outside, did you find any
17 significant evidence outside the food mart?

18 A. Yes. Down the street about a half a block
19 down, there was a cluster of coins at the location on
20 the street.

21 Q. And where -- what street were those located
22 on, if you remember?

23 A. If I remember correctly, it's Colloquit, I
24 think is the name of the street.

25 Q. Cotillion?

1 A. That's it. Yes, ma'am. Thank you.

2 Q. And did you collect those coins?

3 A. I should have, yes, ma'am.

4 Q. Did you find any firearms or shell casings
5 or bullets outside of the store?

6 A. I did not, no, ma'am.

7 Q. Did you find any type of clothing like
8 hats, bandannas, long-sleeved shirts or pants or
9 anything like that?

10 A. No, ma'am.

11 Q. Did you document any cars or vehicles that
12 were at the scene?

13 A. I did not.

14 Q. At this time I'm going to publish State's
15 Exhibit 41, the scene video; and we will watch this.

16 **THE COURT:** And there is no sound on
17 that, is there?

18 **MS. JOHNSON:** No, ma'am. No.

19 **(Exhibit Published)**

20 Q. **(BY MS. JOHNSON)** Now, Officer Pena, also as
21 a part of your investigation and documentation of the
22 scene, did you create a scene diagram?

23 A. I did, yes, ma'am.

24 **THE COURT:** Excuse me. Before we
25 start that, let's take the afternoon recess. We will

1 take a break until 20 until. Thank you.

2 All rise, please, for the jury.

3 **(Jury released)**

4 **(Recess taken)**

5 **(Jury enters courtroom)**

6 **THE COURT:** Thank you. Please be
7 seated. You may continue.

8 **MS. JOHNSON:** Thank you, Judge.

9 **Q. (BY MS. JOHNSON)** Now, Officer Pena, before
10 the break we just watched the scene video. Did you
11 also create a diagram based on the scene at the
12 Siesta Food Mart?

13 A. I did, yes, ma'am.

14 **Q.** Let me show you State's Exhibit No. 40. Do
15 you recognize this?

16 A. Yes, ma'am. This is a completed diagram
17 from my notes of the convenience store.

18 **Q.** Okay. And are these your notations down at
19 the bottom?

20 A. That's correct. I drew this diagram so it
21 has my name, unit number, date, and case information.

22 **Q.** And does this diagram fairly and accurately
23 depict the way the scene appeared to you on
24 August 31, 2009, at 390 Aldine Bender?

25 A. It does, yes, ma'am.

1 **MS. JOHNSON:** At this time I offer
2 State's Exhibit No. 40 into evidence and tender to
3 opposing counsel.

4 **MR. HAMM:** I have no objection to
5 State's 40, Judge.

6 **THE COURT:** Admitted.

7 **Q. (BY MS. JOHNSON)** Now, why do you make a
8 scene diagram in addition to the photos and the
9 video?

10 **A.** To help in a future trial with the jury,
11 yourself, the defense attorney, and the
12 investigators, to better -- get a better view of the
13 scene, birdseye view, per se.

14 **Q.** And so, can you tell the jury specifically
15 what you have documented in State's Exhibit No. 40?

16 **A.** I documented the entrance of the store, the
17 sales area of the store, the counter area, the slot
18 machine area, sink area there, and the manager's
19 office, and also the location of the casing, the
20 location of the fired bullet, and the location of the
21 body.

22 **Q.** And -- specifically, are the manager's
23 office -- when we were looking at the video, what was
24 located in the manager's office?

25 **A.** In the manager's office was a recording

1 device and a monitor for a security system.

2 Q. Okay. And so, did you find a system
3 capable of making a surveillance video in there?

4 A. I did, yes, ma'am.

5 Q. And did you, yourself, pull any
6 surveillance video from that system?

7 A. I did not. I was advised by the homicide
8 investigators. We weren't sure if it was a remote
9 system or a system that was recording within the
10 store and whether it was a digital system or not.
11 And we did not want to tinker with it so we possibly
12 wouldn't erase anything that might be on it.

13 Q. Okay. So, you didn't want to mess anything
14 up?

15 A. That's correct.

16 Q. Now, looking at the scene diagram at the
17 tent marker No. 1 and tent marker No. 2, earlier in
18 your testimony you were giving your opinion to the
19 jury as to the possible location of the -- of the
20 shooter in this case.

21 If you could, looking at this diagram,
22 where do you believe, based on the physical evidence,
23 the shooter would have been or could have been?

24 A. In my opinion, the shooter would have been
25 here at this location or at this location

1 (indicating.)

2 Q. And that second location, would that be
3 inside the counter or outside the counter?

4 A. Inside.

5 Q. Okay. And the area that's marked "slot
6 machine area," was there a camera that, I guess,
7 faced down in that area where you could see what was
8 going on by the slot machines?

9 A. Yes, ma'am. It was about at this location
10 here.

11 Q. And then where would the camera be? Kind
12 of looking on this diagram, that would show the back
13 of the complainant as he was working at the counter?

14 A. There would be a camera at this location,
15 facing in that direction, westbound.

16 Q. Okay.

17 A. I'm sorry. Eastbound.

18 Q. And here we see -- on State's Exhibit 40,
19 we have --

20 **MR. HAMM:** Excuse me.

21 Q. **(BY MS. JOHNSON)** -- the storage room area
22 and a large walk-in cooler --

23 A. That --

24 Q. -- is that correct?

25 A. Yes, ma'am. The storage area here and

1 restroom area and also the walk-in cooler, which is
2 all this area here (indicating.)

3 Q. And did you find any cameras in that area?

4 A. In this particular area, yes. And there
5 should have been one in this area, as well
6 (indicating.)

7 Q. Okay.

8 A. On the southeast corner.

9 Q. Now, going back to the manager's office, in
10 relation to the slot machines and this magazine rack
11 that also serves as part of the counter, was there a
12 way to get back to that manager's office?

13 A. Yes, ma'am. You can access it this way or
14 this way (indicating.)

15 Q. And were there any -- was there -- did you
16 locate any type of safe or anything like that back in
17 the manager's office?

18 A. I did not, no, ma'am.

19 Q. Now, when you recovered the bullet and the
20 shell casing, is there a way to know what type of gun
21 they came from?

22 A. Yes, ma'am. One way to know is to actually
23 pick up the casing and look at the back of it, and
24 you have markings on the back of the casing that
25 indicate the caliber of the weapon and the maker of

1 the ammunition.

2 Q. And so, were you able to determine by
3 looking at the shell casing what type of weapon that
4 it came from?

5 A. I did initially. I figured it was a
6 9-millimeter or 357. It turned out to be a Federal
7 .40 Smith and Wesson spent casing that possibly came
8 from a semiautomatic weapon.

9 Q. And what does semiautomatic mean?

10 A. A semiautomatic is the weapon -- you see
11 the square-type weapon, not the cowboy-type revolver;
12 and those weapons do not retain spent casings. The
13 spent casings, like I stated earlier, would eject to
14 the right on most weapons and to the rear.

15 Q. Now, while you were documenting the scene,
16 did you hear any phones ringing or any noises like
17 that during the time?

18 A. I did, yes, ma'am.

19 Q. Can you describe that for the jury?

20 A. It was constantly ringing, and I believed
21 it was coming from the pocket of the complainant.

22 Q. And did you answer the cell phone?

23 A. I did not, no, ma'am.

24 Q. Why not?

25 A. I don't have any authority to go into the

1 pockets of the complainant -- in this case the dead
2 person. So I waited for the medical examiner
3 investigator to arrive.

4 Q. Now, when the medical investigator does
5 arrive, what do they do with the body?

6 A. They do the same thing that I do. They
7 photograph it. They document the evidence as is.
8 And then, of course, they move the body around; and
9 we take photographs and document wounds to the body.

10 Q. And did you find any physical evidence
11 underneath the body when it was moved?

12 A. No, ma'am.

13 Q. As a crime scene unit officer, is it more
14 part of your responsibility to interview witnesses or
15 look for any possible suspects?

16 A. No, ma'am.

17 Q. What is your responsibility as a crime
18 scene?

19 A. As I stated earlier, I'm part of the
20 homicide team. I'm the third person. I'm the one
21 that documents the scene with the video and photos,
22 and I'm the one that collects the evidence and tags
23 the evidence. And I also process evidence.

24 What I mean by "process evidence," I
25 can -- if I recover beer bottles, I can fingerprint

1 them. I can swab them for DNA and such.

2 **Q.** After documenting the scene, were you ever
3 able to watch any surveillance video from the store?

4 **A.** No, ma'am.

5 **Q.** Were you there when this surveillance video
6 was found or retrieved from the computer system?

7 **A.** I was not.

8 **MS. JOHNSON:** May I have a moment,
9 Your Honor?

10 **THE COURT:** Yes, ma'am.

11 **(Brief pause)**

12 **MS. JOHNSON:** Pass the witness.

13 **THE COURT:** Thank you.

14 **MR. HAMM:** Judge, may we approach
15 briefly?

16 **THE COURT:** Yes, sir.

17 **(At the Bench)**

18 **MR. HAMM:** Judge, I was going to try
19 to -- I was going to try to get some copies of
20 State's 40 so that I can have -- so the record will
21 be clear when I question so I can write on it. I
22 can't write on their exhibit.

23 **THE COURT:** Sure.

24 **MR. HAMM:** I don't know what's proper.

25 **THE COURT:** Okay. Could you xerox a

1 copy of them for him?

2 Okay. Thank you.

3 **(End of Bench Discussion)**

4 **CROSS-EXAMINATION**

5 **Q.** **(BY MR. HAMM)** Officer Pena, does your --
6 you did a supplement in this investigation, did you
7 not?

8 A. I completed one, yes, sir.

9 **Q.** Does your supplement consist of pages .35,
10 I believe, to .38?

11 A. They might on your end, but on my end they
12 are a little bit different because I have my own
13 copy.

14 **Q.** Can you do that for me? Will you tell me
15 how many pages your supplement consists of?

16 A. Five, sir.

17 **Q.** Okay. And --

18 **MR. HAMM:** May I approach the witness,
19 Judge?

20 **THE COURT:** Yes, sir.

21 **Q.** **(BY MR. HAMM)** Have you had an opportunity
22 to refresh your recollection of the things that you
23 did back on August 31, 2009, involving your
24 investigation?

25 A. Yes, sir.

1 Q. And those things that you have testified to
2 the jury came from the supplement to the offense
3 report that you prepared?

4 A. That's correct. Yes.

5 Q. And is that what is in front of you
6 presently?

7 A. Yes, sir.

8 Q. Thank you. Okay. Okay. I want to make
9 sure you have the same markings and materials that I
10 have. Yours is the same as my number -- you have a
11 page stapled that I don't have contained, but we do
12 have the same -- I have a copy of your supplement to
13 the offense report. So, I may ask you a couple
14 questions from that.

15 A. Yes, sir.

16 Q. Now, I want to go back over with you, sir,
17 what you showed the jury with respect to the State's
18 Exhibit 40. And I put this back on the board for
19 you. Actually, what I will do, I will put this back
20 on the screen for you so you can see it; and I'm
21 going to -- I'm going to give you a copy so that you
22 will have it for your benefit.

23 Do you have a marker, sir, or
24 anything?

25 A. I have a pen. Yes, sir.

1 Q. Okay. I'm going to hand you what is
2 proposed as Defense 1, which is State's 40. Just
3 with my exhibit sticker. Okay?

4 A. Yes, sir.

5 Q. Now, what's in evidence is the positioning
6 of where in your opinion would be based upon evidence
7 marker No. 1; is that right?

8 A. That's correct. You're talking about the
9 position of where a person might be that discharged a
10 weapon.

11 Q. Yes, sir. And while you were being
12 directed, you told the jury -- we have a mechanism
13 that allows you to touch the screen, and it lights up
14 where that individual is standing.

15 A. Right. Possibility, yes, sir.

16 Q. But we don't have anything that shows --
17 the jury could not get State's 40 and actually see
18 what your opinion was; is that right?

19 A. That's correct.

20 Q. So, now I'm going to hand you Defense 1,
21 sir. And if you will, will you touch -- will you go
22 back to the screen for me first up there, and if you
23 can -- I don't know if you have the ability to put a
24 "1" because I think you identified two separate areas
25 that an individual could have been; is that right?

1 A. That's correct.

2 Q. Will you put a "1" in the first area -- let
3 me -- hold on. Before you do that, let me make it
4 big so that the ladies and gentlemen can see
5 everything. Okay.

6 A. (Indicating.)

7 Q. All right. And now, that's a possible
8 position. What you have just marked on State's 40 is
9 a possible position of where the shooter could have
10 been; is that correct?

11 A. A possible shooter, yes, sir.

12 Q. Will you take your pen, if you have --
13 actually, let me give you mine because it's red.

14 If you don't mind and if you will,
15 mark that again for me on Defense 1, please.

16 A. (Witness complies.)

17 **MR. HAMM:** Judge, at this time I offer
18 Defense 1 into evidence and tender to opposing
19 counsel for any objections.

20 **MS. JOHNSON:** No objection, Your
21 Honor.

22 **THE COURT:** Admitted.

23 Q. **(BY MR. HAMM)** And now, did I hand you the
24 other one -- now I'm going to hand you Defense 2, and
25 if you would -- untap your screen.

1 Can you now tap your screen for me,
2 sir, and tell me where that second position that --
3 and I will give you this for your benefit -- the
4 second position of the shooter may have been, as
5 well.

6 A. At about that location where I placed that
7 dot.

8 **Q.** Okay. And now on Defense 2, will you
9 please, if you will, mark on the exhibit for me, sir.

10 A. (Witness complies.) Yes, sir.

11 **MR. HAMM:** And I would hand this to
12 opposing counsel, Judge, for any objections, as well.

13 **MS. JOHNSON:** No objection.

14 **MR. HAMM:** Move to admit Defense 2 as
15 well, Judge.

16 **THE COURT:** Yes, sir. Admitted.

17 **Q.** **(BY MR. HAMM)** Now, how do you come to the
18 conclusion that the shooter would have been either in
19 that location -- well, first, that location? Let's
20 do this like that.

21 A. Okay. The conclusion is the person is here
22 at this location, that possibly gets shot. And if
23 you'd let me see the rest of the diagram.

24 **Q.** Certainly. And for the benefit of the
25 record, we're speaking about Defendant's Exhibit 1,

1 right?

2 A. That's correct. Yes, sir.

3 Q. Okay.

4 A. And you see this angle here where this
5 fired bullet ends up at.

6 Q. Okay. You're speaking about -- you're
7 referencing the evidence marker No. 2, correct?

8 A. That's correct. That is the fired bullet.

9 Q. Yes, sir. And so, what you're saying is
10 that based upon the location of the projectile, it
11 would have exited the individual's body; and if it
12 was obstructed in any way, it landed or at least came
13 to rest where you have that exhibit. Is that fair?

14 A. That No. 2, yes, sir.

15 Q. I'm going to hand you what is proposed as
16 Defense 3; and, if you will, will you mark the
17 location that we identified as where the shooter
18 would be as well as what you just testified to, your
19 understanding of how the person -- your opinion,
20 excuse me, of how the person would have been in that
21 location in relation to evidence marker 2?

22 A. Yes, sir.

23 **MR. HAMM:** Judge, I will --

24 Q. **(BY MR. HAMM)** If you would do me a favor,
25 where the shooter was, would you just put an "X" on

1 Defense 3. Thank you.

2 **MR. HAMM:** I hand Defense 3 to
3 opposing counsel for any objections, Your Honor.

4 **MS. JOHNSON:** No objection.

5 **THE COURT:** Admitted.

6 **MR. HAMM:** Move to admit Defense 3,
7 Judge.

8 **THE COURT:** Admitted.

9 **Q. (BY MR. HAMM)** Now, so that we have some
10 eyes on the record, as well, Deputy Pena, will you
11 clear your screen, please?

12 **A.** It is cleared, sir.

13 **Q.** Okay. And with respect to the second
14 possible location of where the shooter would have --
15 could have been, excuse me, will you please explain
16 to the jury how you come to that conclusion?

17 **A.** Same scenario, basically the shooter would
18 move to this location where I placed that dot. The
19 person would be standing in this area here -- or
20 where it's at. And you --

21 **Q.** Yes, sir.

22 **A.** And you end up with the same angle with the
23 fired bullet at this point.

24 **Q.** Okay. May I approach and hand you
25 Defendant's 4, as we -- and if you will, will you

1 mark with an "X" the same things you have identified
2 on the board for us, along with the trajectory of the
3 evidence marker No. 2?

4 A. Yes, sir.

5 **MR. HAMM:** Judge, I hand this to the
6 State for any objections, as well.

7 **MS. JOHNSON:** No objection.

8 **THE COURT:** Admitted.

9 **MR. HAMM:** Move to admit Defense 4,
10 Your Honor.

11 **THE COURT:** Admitted.

12 **Q. (BY MR. HAMM)** Now, Deputy Pena, can you
13 clear your screen for me, sir?

14 I'm going to go back to State's 40.
15 Okay. Now -- and I want to ask you some questions
16 about the magazine rack. Now, is it not possible
17 that the shooter could have been somewhere in any of
18 these locations, at this area here, sir?

19 A. Yes, sir. It's possible, yes, sir.

20 **Q.** And for the benefit of the record, we are
21 talking about the north end of the -- how do you say
22 that -- north end -- north side of the magazine rack?

23 A. Yes, sir.

24 **Q.** Okay. Which would have been if the shooter
25 was facing the deceased, the evidence marker No. 1

1 would be to the immediate right, somewhere in that
2 general area?

3 A. Exactly where it's at, yes, sir.

4 Q. Okay. And that would still -- that would
5 place a restriction between the actual complainant
6 and the body of whomever the shooter was.

7 A. Yes, there is a barrier there.

8 Q. Thank you. You said it better.

9 A. Yes, sir.

10 Q. And, also, that individual would have been
11 close to the exit of Siesta Mart.

12 A. You're talking about a possible shooter at
13 this location?

14 Q. Not -- no. I don't mean -- based upon what
15 you just drew, that is almost directly in front of
16 the exit and -- well, let's do it like this:

17 If the projectile was obstructed, the
18 shooter could have been at or near the exit of the
19 door, right?

20 A. I agree with that, sir.

21 Q. Okay.

22 A. And the reason for it -- if you blow up the
23 diagram, I will show you.

24 Q. Certainly. Which part do you need?

25 A. The whole diagram.

1 Q. All right. I'm saying where do you want me
2 to get it bigger at?

3 A. That's fine.

4 If the front door is up here, you tell
5 me there is a possible shooter at this location?

6 Q. Right.

7 A. That would not be possible, in my opinion.

8 Q. Okay.

9 A. Of course, because the fired bullet ended
10 up down here in this area; and if that was the case,
11 it would end up somewhere over here.

12 Q. I got you.

13 A. In my opinion.

14 Q. And now -- and is your opinion based upon a
15 bullet having a clean entrance and exit without any
16 type of interference?

17 A. That's correct. Yes, sir.

18 Q. Because there are times when bullets are
19 fired that their path is changed based upon if it
20 comes in contact with anything.

21 A. You're absolutely correct. Yes, sir.

22 Q. Whether that something is tissue and/or
23 bones or anything that may come in contact with the
24 projectile, when it leaves an individual's body?

25 A. That's correct.

1 Q. So, with those facts in mind, it still
2 would be possible for an individual to be somewhere,
3 in State's 40, by the entrance and/or exit door that
4 is identified on the north part of the Siesta Mart.

5 A. I would disagree with that because that
6 bullet would have to take a drastic turn from this
7 location to that location down there.

8 Q. Okay. Does that take into account the
9 positioning of the body?

10 A. That's correct. Yes, sir.

11 Q. And if you will -- with me -- okay. There
12 is one picture I wanted to go over with you. All
13 right. Here we go.

14 I'm going to show you -- I'm going to
15 show you State's 21 and the areas that you and I were
16 discussing. You see the radio on the counter?

17 A. That's correct. Right there, sir.

18 Q. All right. And then this wall is the
19 manager's office; is that correct? That's identified
20 in State's 40?

21 A. That's correct. Yes, sir.

22 Q. All right. And so, when we look back at
23 State's 40 and we compare that to State's 21, what
24 you're telling the ladies and gentlemen is that the
25 shooter would have been -- could have been, pardon

1 me, in this general area. Can you mark that for me,
2 sir, on your screen?

3 A. In this general area and this general area
4 (indicating.)

5 Q. Yes, sir. And it's also possible that the
6 shooter could have been in this general area
7 (indicating)?

8 A. That's correct. Yes, sir.

9 Q. And that would be outside, and 40 had the
10 magazine part, correct?

11 A. That's correct. Yes, sir.

12 Q. Did you -- Officer Pena, were you able to
13 identify any cameras or anything on the outside of
14 the Siesta Mart?

15 A. No, sir.

16 Q. There was a -- another business, Angie's
17 something, Angie's hair or something like that?

18 A. Correct.

19 Q. Did anywhere else in that plaza have any
20 surveillance at all?

21 A. I made note of none, no, sir.

22 Q. All right.

23 **MR. HAMM:** Pass the witness, Judge.

24 **THE COURT:** Thank you.

25

REDIRECT EXAMINATION

1
2 **Q.** **(BY MS. JOHNSON)** Officer Pena, now, when
3 Defense counsel was showing you all the diagrams,
4 this is just a possibility based on your opinion of
5 where you found the shell casing, which was No. 1,
6 and the bullet, which was No. 2, that you documented
7 at the scene; is that right?

8 A. That's correct. That's my opinion based on
9 my experience with firearms.

10 **Q.** And so, just to be clear, showing you
11 State's Exhibit No. 40, which shows the front
12 entrance being right near the front -- main front
13 door, based on your opinion, do you believe it's
14 possible for the shooter to be standing at the front
15 door and cause the bullet to be where No. 2 is and
16 shell casing to be where No. 1 is?

17 A. No, ma'am.

18 **Q.** Now, this area that's by the magazine
19 rack -- showing you State's Exhibit No. 18, is that
20 the magazine rack right here at the bottom of the
21 picture?

22 A. That's correct. Yes, ma'am.

23 **Q.** And you can see, I guess, some type of
24 register here and then some booklets and magazines
25 right there (indicating); is that right?

1 A. That's correct. Yes, ma'am.

2 Q. And then if you could circle on this
3 picture from this view where you believe the
4 possibilities of the location of the shooter would
5 be?

6 A. Behind this wall here, right there -- I
7 will just put a 1 at this location, and then the
8 other one is going to be in front of this book
9 counter at this location (indicating.)

10 Q. Okay. And then right here, this wall here,
11 is to the hallway that takes you to the manager's
12 office (indicating)?

13 A. That's correct. Yes, ma'am.

14 Q. And so, from this location to the front
15 door, if you can, can you approximate how far away
16 that would be?

17 A. That's somewhere between 15 and 20 feet, if
18 I'm not mistaken. I actually took measurements. 16
19 feet.

20 Q. 16 feet from the magazine rack to the front
21 door?

22 A. Approximately, yes, ma'am.

23 Q. So, is it fair to say they aren't right on
24 top of each other?

25 A. They're not, no, ma'am.

