IN THE SUPREME COURT OF THE STATE OF NEVADA

TRANDON GREEN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 81563

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court because it relates to a conviction for a Category B Felony. NRAP 17(b)(2).

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion by denying Appellant's Motion for Mistrial because there was no violation pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).
2. Whether there was no cumulative error.

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STATEMENT OF THE CASE

On July 14, 2017, Trandon Green, aka Trandon Tekario Green (hereinafter "Appellant"), was charged by way of Information with: Counts 1 & 8 – Battery Constituting Domestic Violence (Category C Felony – NRS 200.481, 200.485.1C, 33.018); Count 2 – Burglary (Category B Felony – NRS 205.060); Counts 3 & 4 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 5 – Battery with Intent to Commit Sexual Assault (Category A Felony – NRS 200.400.4); Count 6 – Sexual Assault (Category A Felony – NRS 200.364, 200.366); Count 7 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm Constituting Domestic Violence (Category B Felony – NRS 200.481, 200.485, 33.018); Count 9 – Assault with a Deadly Weapon (Category B Felony – NRS 200.471); Count 10 – Child Abuse, Neglect, or Endangerment with use of a Deadly Weapon (Category B Felony – NRS 200.508, 193.165); and Count 11 – Preventing or Dissuading Witness from Testifying or Producing Evidence (Gross Misdemeanor – NRS 199.230). 1 AA 000001-06.

Jury trial commenced on June 25, 2018. Id. at 000009. On July 3, 2018, the jury returned a verdict of not guilty as to Counts 1-4, 6-7, and 9 and guilty of Battery as to Count 5, guilty as to Count 8, guilty of Child Abuse, Neglect or Endangerment as to Count 10 and guilty as to Count 11. 6 AA 001274.

On August 22, 2018, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 5 – six (6) months in the Clark County Detention Center ("CCDC"); as to Count 8 – twelve (12) to thirty-six (36) months concurrent with Count 5; as to Count 10 – twelve (12) to thirty-six (36) months consecutive to Count 8; and as to Count 11 – three hundred sixty-four (364) days in CCDC concurrent with Count 10 for an aggregate total sentence of twenty-four (24) to seventy-two (72) months. Id. at 001278-79. The Judgment of Conviction was filed on August 29, 2018. Id. at 001277-79.

On February 19, 2019, Appellant filed a Postconviction Petition for Writ of Habeas Corpus alleging, specifically, that he had been deprived of his right to direct appeal. Id. at 001280-90. On April 24, 2020, the State informed the district court that it would not be taking a position on Appellant's Petition. Id. at 001348. On May 1, 2020, counsel was appointed. Id. at 001349. On July 28, 2020, the district court entered its Findings of Fact, Conclusions of Law and Order granting Appellant's Petition. Id. at 001293-95.

On July 31, 2020, Appellant filed a Notice of Appeal challenging his Judgment of Conviction. Id. at 001300-01.

STATEMENT OF THE FACTS

S.W. testified that she met Appellant in December of 2016. 3 AA 000725. S.W. identified Appellant in the courtroom. Id. at 000724-25. Appellant originally

contacted S.W. through an online dating site called Plenty of Fish. Id. at 000725. The two hit it off and quickly began a romantic relationship. Id. In December of 2016, S.W. was living at 2686 Jennydiane Drive in Apartment B. Id. at 000725-26. S.W. lived in the apartment with her six (6) year old daughter, R.W., who was "extreme special needs." Id. at 000726-27. Only S.W.'s name was on the lease despite the fact that Appellant had asked her numerous times to put his name on the lease. Id. at 000727. S.W. refused to put Appellant's name on the lease because she did not trust him. Id. at 000728. Appellant would spend the night at her apartment and had some clothes and hygiene products there, but Appellant lived with his parents. Id. In February or March of 2017, Appellant proposed to S.W. and she said yes. Id. at 000729. Appellant asked on several occasions to move into S.W.'s apartment full-time, but S.W. refused. Id. at 000730.

Shortly after the proposal, the relationship began to deteriorate. Id. On May 28, 2017, S.W. and Appellant were engaged in an argument which led to the police being called. Id. at 000731. Appellant came to the apartment and told S.W. that he wanted to bring a girl over. Id. at 000732. S.W. told Appellant that she was uncomfortable with that and Appellant told her she needed to leave the apartment. Id. S.W. packed a hot pink and dark blue Adidas duffle bag and went to her aunt's house for the day. Id. Appellant hit S.W. in the leg, arm and face after she said she did not want another woman coming over. Id. at 000732. S.W. testified that she had

bruises all over her body. Id. at 000732-33. Appellant also threw a metal aerosol container at her face and left a bruise. Id. at 000733. S.W. began crying and yelling at Appellant and told him if he did not go away she would call the police. Id. Appellant refused to leave so she called the police and they took pictures of her injuries and had her fill out a statement. Id. at 000734.

On May 28, 2017, Las Vegas Metropolitan Police Department ("LVMPD") Officer Zachary Gainey responded to a domestic violence call at 2686 Jennydiane. 4 AA 000873. Officer Gainey contacted S.W. and immediately noticed a cut to her lower lip that was still bleeding. Id. at 000875. Officer Gainey also noticed that S.W.'s hand was injured. Id. S.W. also told the officer that she had been hit in the head multiple times. Id. at 000878. S.W. indicated that Appellant had caused her injuries by hitting her in the face and smashing her hand with an aerosol container. Id. at 000877-79. S.W. also informed the officer that she had been fighting with Appellant because he wanted to bring another woman to her apartment. Id. at 000879. Officer Gainey also observed S.W.'s phone, which had threatening messages from Appellant. Id. at 000882. Appellant was not located that night. Id. at 000884.

S.W. testified that she wanted to end her relationship with Appellant and she asked him not to come back to her apartment. 3 AA 000737. S.W. did not give Appellant keys to her apartment, however, he eventually obtained keys to her

apartment as well as her debit card and EBT card. Id. Because Appellant had taken keys to her apartment without her permission, S.W. posted on Facebook that she needed someone to come and change her locks. Id. at 000738. S.W. was put into contact with a man named Leroy Denten and he changed the locks to her apartment for her while Appellant was gone. Id. at 000738; 4 AA 000860-61. This occurred in early June after the May 28th incident and Denten did not charge S.W. for the change. Id. at 000738-39; 4 AA 000861.

On June 17, 2017, Appellant came to S.W.'s apartment at approximately 10:00P.M. and began messaging S.W. to let him in. Id. at 000739. Appellant messaged her all night and into the next moring to let him in, but S.W. refused. Id. at 000739-41. Appellant continued to text and call S.W. and pounded on the windows and doors of her apartment. Id. at 000741. On June 18, 2017, at approximately 10:00 or 11:00A.M., Appellant broke into S.W.'s apartment through her daughter's window. Id. S.W. did not know Appellant was in the apartment until he walked into her living room with her daughter, R.W. Id. at 000741-42. Appellant was wearing jeans and a regular T-shirt and was wearing a ring. Id. at 000746. S.W. testified that she was concerned that Appellant was going to hurt her and her daughter. Id. at 000742. For a while Appellant just stood in S.W.'s living room staring at her and did not say anything. Id. After a while, S.W. said, "Do you want something?" Id. Appellant told R.W. to sit on the couch and said, "We need to talk,"

so he and S.W. went into S.W.'s bedroom. Id. S.W. did not call the police because she felt like nothing was done to Appellant after the May 28th incident. Id. at 000743-44.

Appellant asked why S.W. would not open the door and said that they were going to work their relationship out. Id. at 000743. S.W. continued to tell Appellant that she did not want to be in a relationship with him and the two began yelling at each other. Id. Between the time Appellant and S.W. had gone from the couch into S.W.'s bedroom, Appellant had taken S.W.'s phone and would not give it back because he thought S.W. was going to call 911. Id. at 000744. On several occasions, R.W. came into the bedroom during the argument. Each time S.W. told R.W. that she was alright and told her to go back into the living room. 3 AA 000745. Appellant also told R.W. to "get the fuck out" of S.W.'s room. Id. at 000745-46. During one of these instances, Appellant put a pair of kitchen scissors to R.W.'s throat and in her mouth. 4 AA 000758-59. Appellant told R.W. that he would kill her and S.W. Id. at 000758. S.W. could see that R.W. was scared and S.W. was afraid that Appellant would kill them both. Id. at 000759. S.W. tried to have R.W. leave out the window more than once, but Appellant would tell R.W. to come back or he would murder her mom. Id. at 000760. S.W. also tried to leave out of the front door and Appellant pushed the front door and told her "You're not getting out of here." Id.

Appellant had put on gloves also. 4 AA 000748. At some point, Appellant broke off a piece of the wooden door frame and began beating S.W. with it. Id. at 000749. S.W. testified that Appellant hit her several times in the leg, arm, stomach and mainly the upper left portion of her head. Id. Appellant told S.W. that the only way she and R.W. would be getting out of the apartment was in body bags and he also said, "You were raped as a small child, let me show you how it should have been done." Id. at 000751. S.W. testified that Appellant said, "Let's fuck." Id. at 000761. S.W. told Appellant no and that she did not want to have sex with him. Id. at 000762. Appellant was angry and began hitting S.W. Id. He told her, "We're going to fuck and you're just going to like it." Id. Appellant also said that S.W.'s "pussy [was] his, he's going to take it." Id. at 000764. S.W. continued to tell Appellant that she did not want to but Appellant pushed her on her bed and put his penis inside her vagina after she had told him no several times. Id. at 000764-65. S.W. also told Appellant no during the assault. Id. S.W. eventually took her clothes off because she wanted the whole thing to be over with. Id. Appellant ejaculated on S.W.'s backside and began to fall asleep after the assault. Id. at000766.

S.W. reached for her phone and Appellant told her to go into the bath to "wash off any evidence." Id. at 000766-67. S.W. went into the bathroom and ran the water, but made sure she did not use any soap. Id. at 000767. S.W. sent a text message to her friend, Denten, saying she was just assaulted and asked him to call 911. Id. at

000767-68, 000865. When S.W. went back into the bedroom, Appellant had a knife. Id. at 000767. S.W. testified that it was a red Army knife with other things that could be pulled out of it. Id. at 000769. Appellant said "Let's start with body parts, let's start with fingers," and cut S.W.'s finger with the knife. Id. at 000767. S.W. stated that her finger was bleeding for a couple of hours and her fingernail was completely off. Id. at 000770. She also said that she was in a lot of pain, was in a cast for approximately ten (10) days and it took about six (6) months for her nail to grow back. Id. at 000771. S.W. ran into the bathroom to clean up the blood and Appellant came in and began putting pressure on her finger. Id. at 000767.

While S.W. was in the bathroom, Appellant went and got dressed and began making Top Ramen in the kitchen. Id. S.W. then heard banging on the front door. Id. Appellant ran into the bathroom and said, "No matter what happens, I love you," and tried to kiss S.W. Id. at 000773. S.W. told Appellant to go out R.W.'s window and he did. Id. at 000774. S.W. then went and opened the door for police and said, "He went that way, go get him." Id. at 000774, 000969. S.W. testified that Appellant eventually changed into shorts and a long sleeved white shirt. 3 AA 000746. She gave the officers a description of Appellant and he was eventually arrested. 4 AA 000775, 000970-71. S.W. was transported to UMC Hospital where she received treatment for her finger, officers photographed her cuts and bruises and she underwent a rape kit. Id. at 000778. S.W. had contusions on her right upper back and

back of the upper arm. Id. at 000931. S.W. also had bruising and bleeding on her right lower leg. Id. at 000937. There was also sperm inside S.W.'s vagina. Id. at 000943. After his arrest, Appellant continued to contact S.W. Id. at 000780. On more than one occasion he told S.W. not to come to court and leave Las Vegas because then there's nothing "they" can do. Id.

On June 18, 2017, LVMPD Officer Jordan Richards responded to 2686 Jennydiane, Apartment B. Id. at 000905. Officer Richards had also previously responded to the May 28th domestic violence incident. Id. at 000902-05. Officer Richards could see S.W. crying and he noted that she had a severe cut to one of her fingers. Id. at 000906. LVMPD Officer Tyler Knepp also responded to the scene. Id. at 000992. When Officer Knepp intitially arrived on scene he was with fellow Officers LeGrand and Hennings. Id. at 000993. Officer Knepp looked through the blinds to see if anyone was in the apartment and knocked on the door to see if anyone would answer. Id. Officer Knepp could see a man inside the apartment. Id. at 000994. When the officers knocked, initially no one answered, but eventually S.W. opened the door. Id. S.W. gave a description of the suspect to the officers and Officer Knepp went around the corner and saw a man matching that description approximately 50 to 75 yards away. Id. at 000995. Officer Knepp called out for the individual to come back towards the officers and he complied. Id.

Officer Knepp asked the individual for his name and that name matched the name of the suspect they were looking for. 5 AA 000996. S.W. confirmed that Officer Knepp had the right person. Id. Appellant was the individual Officer Knepp took into custoday. Id. at 000997. Appellant denied jumping out of the window. Id. at 001000. Appellant was later transported to Metro headquarters. Id. at 001001. During an interview with LVMPD Detective Matthew Campbell, Appellant admitted that he had been inside of S.W.'s apartment and that they had got into an argument. Id. at 001101-02. Appellant also admitted that he left the apartment through the bedroom window. Id. at 001109. Appellant also told Detective Campbell that he wears gloves to workout and sometimes wears them outside of the apartment because he lives in a bad neighborhood and might get in a fight. Id. at 001110. Appellant stated that he put gloves on when he and S.W. began to argue. Id. at 001112. Appellant also admitted that he cut S.W.'s finger because he had scissors in his hand and was "fucking with her," and may have cut her hand while he was swinging the scissors. Id. at 001114. Appellant also told Detective Campbell that he may have threatened R.W. with the scissors to scare S.W. Id. at 001117.

LVMPD forensic scientist Brianne Huseby tested the vaginal and cervical swabs from S.W.'s rape kit as well as the handle of the kitchen scissors from S.W.'s apartment. Id. at 001018. Appellant was included as a possible contributor to the sperm found in S.W.'s vagina. Id. at 001021. Both S.W. and Appellant were included

as possible contributors to the DNA found on the handle of the scissors. Id. at 001023. S.W. was also included as a possible contributor to the DNA on the blade of the scissors and Appellant could not be excluded as a contributor. Id. at 001026. Another DNA profile on the blade of the scissors could have potentially come from a parent or child of S.W. Id. at 001028.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it denied Appellant's Motion for Mistrial because there was no violation under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Further, there was no cumulative error as the State did not commit prosecutorial misconduct during its closing argument.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL BECAUSE THERE WAS NO VIOLATION UNDER BRADY V. MARYLAND, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Appellant claims that the district court abused its discretion by denying Appellant's Motion for Mistrial based on an alleged Brady violation. Appellant's Opening Brief ("AOB"), p. 11-19. A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). However, In a Brady claim, whether the evidence is material is a mixed question of law and fact, and therefore this court

reviews de novo the district court's ruling. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). In reviewing the undisclosed evidence, this Court reviews the evidence as a whole. Id. The district court did not abuse its discretion by denying Appellant's Motion for Mistrial because there was no Brady violation.

Under Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1196-97 (1963), the prosecution cannot withhold evidence that is favorable to the defense. However, a mere showing that evidence favorable to the defense exists is not a constitutional violation under Brady. See Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) ("there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). Rather, a Brady violation only exists if each of three separate components exist for a given claim—first, that the evidence at issue is favorable to the defense; second, that the *evidence was actually suppressed* by the State; and third, that the *prejudice from such suppression* meets the Kyles standard of there being a reasonable probability of a different result, had the evidence reached the jury. Id.; Kyles v. Whitley, 514 U.S. 419, 434–35, 115 S. Ct. 1555, 1566 (1995).

Here, Appellant claims that the district court abused its discretion by denying Appellant's Motion for Mistrial because the State withheld evidence in violation of Brady. AOB at 11-19. Appellant claims that the State withheld evidence because the

LVMPD forensic scientist, Brianne Huseby, testified to information that was not contained in her report. See AOB at 4-9. Huseby testified that there was DNA found on a pair of scissors in the victim's home and that she found a mixture of three (3) different DNA profiles on the scissors and that one of the profiles came from an unknown individual. 5 AA 001026-27. This information was contained in her report. However, Huseby testified that, after a visual comparison of the DNA profiles, she determined that the unknown profile could have come from a close blood relative of the victim. AOB at 4-5. This was a new observation that was not contained in Huseby's report. Id. Following Huseby's testimony, Appellant's counsel realized that Huseby's testimony was not entirely contained within her report and requested a mistrial. See id. The district court found that Appellant was not prejudiced by Huseby's testimony and denied the Motion for Mistrial. Id.

As an initial matter, the district court had the opportunity to review Huseby's report and deteremined that Appellant was not sufficiently prejudiced to warrant a mistrial. 5 AA 001053. However, it does not appear that Appellant presented the case file to the district court. Thus, the district court was only able to rely on the representation of the parties as to what was or was not contained in the case file compared to what was contained in Huseby's report. Moreover, Appellant failed to provide either the report or the case file to this Court. This failure is fatal because "[i]t is [Appellant]'s responsibility ... to make and transmit an adequate appellate

record to this court. When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987). As Appellant has not presented either the report or the case file on appeal, Appellant has failed to demonstrate that the district court abused its discretion when it denied the Motion for Mistrial. Therefore, this Court cannot adequately review Appellant's claim and Appellant's claim fails.

Nonetheless, this Court can review the testimony presented at Appellant's trial. On direct examination, Huseby testified that there was a DNA mixture found on the blade of the kitchen scissors which was a mixture of three (3) separate DNA samples. 5 AA 001026. The different DNA samples comprise a different percentage of the mixture: 78%, 19% and 2%. Id. Huseby testified that the 2% sample was too small to draw a conclusion from. Id. at 001026-27. Huseby also testified that S.W. was the likely contributor of the 19% sample. Id. at 0001027. Huseby testified that she was unable to identify the contributor of the 78%, but stated that the profile shared one allele in common at twenty-one (21) different locations with S.W.'s DNA profile. Id. at 001027-28. Huseby testified that this would be consistent with either a parent or child of S.W. Id. at 001028. Huseby also testified that she could not reach a conclusion regarding the DNA. Id.

Huseby's report contained the fact that there was a DNA profile from an unknown individual, however, Huseby's observation about the potential relationship of this unknown individual to the victim was not contained in the report. 5 AA 001029. The State informed the district court that it does not receive the entire case file from the forensics lab, only the report. Id. at 001031. The defense never requested the entire case file and so the case file was not sent to the defense. Id. at 001032. This is standard practice and known to defense counsel. Id. at 001031-32. The State represented that, while pretrialing Huseby and discussing her report, the State asked about the 78% mixture and whether Huseby could tell them anything about that. Id. at 001031. At that time Huseby told the State that she could not. Id. Huseby then, on her own and not at the request of the State, took a look at the original case file and visually compared the 78% mixture with S.W.'s 19% mixture. Id. There was no additional testing of the genetic material and no other reports were ever generated by Huseby. Id. at 001032. On the morning of the first day of trial, Huseby sent a message to the State letting them know that she had looked at her notes. Id. The State then called Huseby and learned that the 78% mixture could have come from a relative of S.W. Id. at 001032, 001036. Further, Huseby informed the district court that she only made this observation on the morning of trial when she was preparing for her testimony. Id. at 001042. Huseby also stated that, even if she had

learned this information beforehand, it is not something that would have been contained in her report. Id. at 001046.

Further, the evidence in question is not exculpatory or favorable to the defense. Huseby testified that the DNA found on the blade of the scissors showed a mixture of three (3) different DNA profiles. Id. at 001026. After reviewing her report, Huseby testified that the largest portion of the sample was consistent with the DNA having come from S.W.'s mother or child. Id. at 001027-28. At trial, S.W. testified that Appellant threatened her daughter with the scissors and put the blade of the scissors in R.W.'s mouth. 4 AA 000758-59. Appellant also admitted to police that he threatened R.W. with the scissors. 5 AA 001117. Therefore, the evidence was not favorable to Appellant because it further corroborated S.W.'s testimony about the scissors.

However, Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. See Kyles v. Whitley, 514 U.S. 419, 442, 445-51, 1115 S. Ct. 1555, 1555 n. 13 (1995). Appellant claims that Huseby's testimony constituted impeachment evidence because Appellant could have asked officers why a DNA sample was not taked from R.W. AOB at 17-18. Nonetheless, Appellant bases his whole argument on the fact that the

information was not disclosed until after S.W., the victim, testified. AOB at 16-17. Whether the information was disclosed prior to S.W.'s testimony is irrelevant because she would have been unable to testify as to Huseby's findings and, thus, unable to impeach her testimony. Additionally, Huseby testified prior to the lead detective's testimony and, thus, counsel was able to cross-examine him as to why a DNA sample was not taken from R.W. In fact, the State asked the detective why a reference sample was not taken from R.W. 5 AA 001119. Therefore, Appellant's claim fails.

Further, Petitioner failed to demonstrate that the State affirmatively withheld the information. The defense bears the burden of proving that the State withheld information, and it must prove specific facts that show as much. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). To constitute a Brady/Giglio violation, the evidence at issue must have been in the State's exclusive control. See Thomas v. United States, 343 F.2d 49, 54 (9th Cir. 1954).

Huseby's report contained the fact that there was a DNA profile from an unknown individual, however, Huseby's opinion about the potential relationship of this unknown individual to the victim was not contained in the report. 5 AA 001029. Furthermore, Huseby's opinion was never even in the case file. Rather, Huseby reviewed the raw data contained in the case file and came to a new conclusion. Huseby informed the district court that she only drew this conclusion on the morning

of trial when she was preparing for her testimony. Id. at 001042. Huseby also stated that, even if she had learned this information beforehand, it is not something that would have been contained in her report. Id. at 001046. Therefore, even if the entire case file had been provided, Huseby's opinion would not have been contained in the case file because it had not been formed until the first day of trial. Presumably the raw data was at least summarized in Huseby's report. However, Appellant has failed to provide Huseby's report to this Court and anything not provided is presumed to support the district court's decision. Mandarino, 103 Nev. at 718, 748 P.2d at 493.

Here, Appellant has failed to demonstrate that the State had any Brady/Giglio information and failed to disclose it. Appellant also has not asserted—nor does the evidence evince—facial indicia that the State necessarily, or even should have had, knowledge of the evidence's existence. The district court concluded that the State could not have disclosed the information prior to trial because it did not possess the information. 5 AA 001047. Even if the entire case file had been provided, Huseby's opinion would not have been contained in the case file because it had not been formed until the first day of trial. While the district court did conclude that the information should have been provided prior to Huseby's testimony, the district court found that the State was not acting in bad faith. Id. at Despite the Strickler-Bennett requirement of proving affirmative State "suppression" for there to be a constitutional violation, Appellant nonetheless argues that the State

unconstitutionally violated his rights because the State did not take steps to affirmatively investigate the source of the DNA profile on the blade of the scissors. He claims that he had a right to rely upon the State to disclose all information that could have potentially be gleaned from the CSA's report, even if the State did not possess or know about it or, as was the case here, whether the information even exists.

Appellant's proposed rule would contravene the rule set forth by the U.S. Supreme Court in United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976) explaining that Brady violations *only occur* when information was known—actually or constructively—by the prosecution. Fashioning such a broad rule would be unreasonable. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Huseby testified that she did not even form this opinion until she was preparing for her testimony, one day prior to actually testifying. 5 AA 001042. Thus, the conclusion did not even exist until one day prior to Huseby's testimony. As the information was not in the State's exclusive control, and Huseby testified that she would not have put this information in her report even if it had been discovered earlier, Appellant has failed to demonstrate that the evidence was in the State's exclusive control and Appellant's claim fails.

Additionally, Appellant could have obtained the evidence in question through his own diligent discovery. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

This Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the

defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that there was no Brady violation when the State did not provide the phone records to the defense. Id.

In Evans v. State, 117 Nev. 609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the State had the obligation to continue investigating alternate suspects of the crime, and speculated the State had evidence one of the victims had been an informant previously, which would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The Court found that the defendant had not demonstrated that such an investigation would have led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's outcome, a defendant would have to allege the nondisclosure of specific information that not only linked alternate suspects to the crime, but also indicate the defendant was not involved. Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an informant, without at least some evidence that she had received actual threats against her, would not implicate the State's affirmative duty to disclose potentially exculpatory information to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

Even if the prosecution or one of the agencies acting on its behalf had the evidence, there was no duty to disclose it because Appellant could have discovered this information on his own. "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." Brown, 628 F.2d at 473. The information regarding the 78% sample was not contained in Huseby's report. 5 AA 001029. The defense never requested the entire case file and so the case file was not sent to the defense. Id. at 001032. The defense could have requested the case file and, with the help of an expert, visually observed the similarities in the DNA profiles. Had the defense requested the information, they would have easily obtained the case file and been able to discover the DNA comparison. Huseby testified that she merely looked at the raw data contained in the case file and did no other testing on the material. 5 AA 001031-32. The State did not in any way prevent or hinder Appellant from making such contact, thus Appellant could have discovered such information through reasonably diligent efforts. In fact, Huseby was noticed as a witness prior to the trial and Appellant's counsel had the opportunity to pretrial her in the same way the State did, but chose not to.[1] As

[1] Appellant failed to include a copy of the Notice of Expert Witness in his Appendix, however, Huseby was noticed as an expert witness on March 28, 2018.

evidence cannot be considered suppressed if it can be discovered through reasonable diligence, Appellant has failed to demonstrate that the evidence was actually suppressed and his claim fails. White, 970 F.2d at 337.

Finally, Appellant's claim fails because the evidence was not material. It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan, 116 Nev. at 66, 993 P.2d 25; Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome. Id. (original emphasis), *citing* Jimenez, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional

error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles, 514 U.S. at 433-34, 115 S. Ct. at 1565, *citing* United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S. Ct. 1565.

Appellant cannot demonstrate a reasonable probability that the result of the proceeding would have been different. Importantly, with the information provided in Huseby's report, no one, including R.W., had been excluded as the source of the 78% profile. Id. at 001051-52. Further, Huseby specifically testified that she could not conclude whether the DNA profile actually belonged to R.W. because she did not have a reference sample from her. Id. S.W. testified that Appellant threatened her daughter with a pair of kitchen scissors and put those scissors into her mouth. 4 AA 000758-59. Appellant also told police he threatened R.W. with the scissors. 5 AA 001117. Appellant's DNA was also found on the handle of the scissors. Id. at 0001023. Therefore, Appellant cannot demonstrate a reasonable probability that the outcome of the trial would have been different because, even without Huseby's visual comparison, there was more that sufficient evidence to convict Appellant of the Child Abuse charge.

However, even if there were error, Appellant was not prejudiced and thus the error was harmless. Pursuant to NRS 178.598, "any error, defect, irregularity or

variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14 (2001).

Under any standard, the asserted error does not warrant reversal. The district court found that Appellant was not prejudiced by Hubeby's testimony. 5 AA 001053. The district court noted that questions about the scissors were minor in comparison to counsel's lengthy cross-examination of the victim and that any DNA on the scissors, or lack thereof, had not been made a primary focus of Appellant's defense theory up until that point. Id. at 001053-54. The district court also pointed out that counsel was able to openly cross examine Huseby and bring back S.W. to re-cross her on the subject of the scissors if she wanted to. Id. at 001054-55. Therefore, even assuming *arguendo* that the information was material and should have been provided to the defense, Appellant had an opportunity to cross-examine the victim with the new evidence after Huseby's testimony.

Additionally, Appellant's claim that counsel was unable to attack the credibility of the police investigation is belied by the record. Appellant's counsel cross-examined Huseby at length about the fact that she had only provided the information the day prior and pointed out that S.W. had two daughters. Id. at 001056-57. Appellant's counsel also pointed out that Huseby could not determine the source of the DNA, i.e., whether any potential DNA had come simply from R.W. using the scissors. Id. at 001057-58. Thus, Appellant's counsel had all of the facts necessary to argue that the DNA did not come from R.W.'s mouth. Appellant's claim that placing emphasis on the scissors prior to discovering Huseby's observation prejudiced Appellant fails. Appellant's counsel was also still able to cross-examine Detective Campbell about his not conducting a proper investigation because he believed S.W. in spite of the inconsistencies in her story. Id. at 001143-46.

Therefore, because Appellant's Brady claim fails, the district court did not abuse its discretion when it denied Appellant's Motion for Mistrial.

II. THERE WAS NO CUMULATIVE ERROR.

Appellant claims that the cumulative effect of alleged errors warrants reversal. AOB at 20-22. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). Appellant must present all three elements to be

successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

a. There was no prosecutorial misconduct.

Appellant's cumulative error claim is essentially a claim that the State committed prosecutorial misconduct during its rebuttal argument by allegedly misstating the evidence. AOB at 20-22. However, Appellant's claim is meritless.

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. This Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89, 196 P.3d at 476. Misconduct may be

constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d 476-77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476-77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

While it is improper to argue facts not supported by the evidence, the State is permitted to ask the jurors to draw reasonable inferences based on the facts presented. Butler v. State, 120 Nev. 879, 897, 102 P.3d 71, 84 (2004); see also State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Reasonable inferences regarding evidence admitted at trial do not constitute mischaracterization of the evidence. See Middleton v. McDaniel, 386 P.3d 995 (Nev. 2016) (claiming that there was no mischaracterization of evidence in part because "the argument concerning the gag as a reasonable inference based on the evidence admitted at trial."). Indeed, prosecutors are afforded "reasonable latitude" in closing

arguments to argue such reasonable inferences based on the evidence. See e.g., Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

First, Appellant claims that the State misstated the evidence during rebuttal when it stated that Appellant's mother testified that she had been with S.W. and Appellant on the night of the incident. AOB at 21. Appellant claims the State further misstated the evidence when it stated that Denten testified that he had been with S.W. on the day of the incident, demonstrating the Appellant's mother's testimony conflicted with Denten's. Id. As an intial matter, the State did not misstate Denten's testimony. While Denten testified that he did not recall when he changed the locks on S.W.'s apartment, after the 911 call was played in court it was clear that Denten had told the 911 operator that he had changed the locks the day before the June 18, 2017, incident. 4 AA 000862-63, 000867. Therefore, Appellant's claim that the State misstated Denten's testimony is belied by the record and Appellant's claim fails.

Marilyn Green, Appellant's mother, testified that she had seen Appellant and S.W. argue on the Wednesday before Father's Day. 5 AA 001172, 001175-76.[2] Appellant's counsel used this fact to undermine S.W.'s credibility by arguing that she did not want to get away from Appellant. 6 AA 001229. The State then argued that this was in conflict with Denten's testimony because Denten testified that he

[2] The district court took judicial notice that, in 2017, Father's Day was on June 18, 2017. 5 AA 001174-75.

had been with S.W. on June 17th. Id. at 001255. However, the district court reminded the jury that counsel's statements were not evidence and that their recollection of the evidence controlled. Id. at 001255-56. Appellant's counsel reminded the jury that Marilyn had testified that S.W. was at her house the Wednesday before Father's Day, and the district court agreed with Appellant's counsel. Id. at 001256.[3] The State said "Okay, sorry. I didn't hear that," and moved on. Id. at 001256. While the State may have inadvertently mistook Ms. Green's testimony, as demonstrated below, this one minor statement was harmless beyond a reasonable doubt.

Next, Appellant complains that the State misrepresented the evidence to the jury when it argued about the blood on the stick Appellant used to beat S.W. AOB at 21. During closing, Appellant's counsel stated:

> The other interesting part about the stick is that we learned what? It had blood on it. She claimed that she got hit in the head with the stick first. So the CSA told you that it had some staining on it that wasn't blood but looked like blood and then some actual blood. Looks an awful lot like a fingerprint. Well Mr. Green wasn't bleeding. The only person that was bleeding was Samantha.

5 AA 001241. Appellant's counsel then went on to state that blood would only be on the stick if S.W. moved it before police arrived because she was the only one

[3] Appellant misstates the testimony in his own opening brief. Appellant claims that Ms. Green found Appellant and S.W. in her house on June 17th, however, Ms. Green testified that they were at her house the Wednesday before Father's Day, which was June 18, 2017. Compare AOB at 20-21; 5 AA 001172, 001175-76.

bleeding. Id. Appellant's counsel also attempted to infer that the substance was not blood because it was not tested. Id. at 001241-42. However, the CSA testified that she tested both sticks for blood and one was determined to be presumptive positive for blood stains and the other was negative. Id. at 001077. The CSA also testified that she was unable to lift any fingerprints off of the sticks. Id. at 001078. During rebuttal, the State refuted Appellant's claim that there was a bloody fingerprint on the stick and stated that it was determined not to be blood. Id. at 001257. Therefore, Appellant's claim is belied by the record and the State clearly did not misstate the evidence.

Appellant also claims the State misrepresented Appellant's counsel's arguments regarding S.W.'s memory of the sexual assault. AOB at 21. Appellant's counsel argued throughout its closing that S.W. "couldn't answer [her] questions" and that her story continued to change. 5 AA 001223-25, 001230. Appellant's counsel also argued that S.W. could not tell police any of the details about the injury to her finger or the sexual assault. Id. at 001236-37. Specifically, counsel argued:

> And then the sex assault, same thing, where are the details about that? *How did it happen? And I don't just mean functionally, penis into vagina. I mean did he push you down? Did he hold you down? Was he on top of you? Was he behind you? Not one detail, not one from her this week about the mechanics of how it happened?* And they didn't ask her what she told the detective about how it happened. So what are the details of that?

Id. at 001237 (emphasis added). The State refuted Appellant's counsel's statements by pointing out that S.W. did in fact describe how the sexual assault happened. 6 AA 001263. S.W. described how Appellant penentrated her vaginally and that she told him more than once she did not want to have sex. 4 AA 000764-65. S.W. told the jury that Appellant pushed her on the bed and ripped her shirt off and took her bra off. Id. at 000765. S.W. also said that she took off her own pants. Id. S.W. also said that she just looked at the wall during the whole assault and was crying. Id. at 000765-66. She said that Appellant was not wearing a condom and that he ejaculated on her body. Id. at 000766. To say that S.W. did not describe how the assault happened is patently false. Appellant's claim that the State misstated the evidence is belied by the record and Appellant's claim fails.

A singular, brief misstatement does not warrant reversal. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process and must consider such statements in context, as a criminal conviction is not to be lightly overturned. Thomas, 120 Nev. at 47. Here, the State specifically noted in its rebuttal, prior to any of these statements being made, that nothing the attorneys say is evidence and cannot be considered. 6 AA 001253. Further, after each of Appellant's counsel's objections, the district court reminded the jury that the statements of the attorneys are not evidence and that they should rely on their recollection of the

testimony. Id. at 001255-56, 001257, 001263. Importantly, after Appellant's object regarding Ms. Green's testimony, the district court went so far as to agree with Appellant's counsel's characterization of the evidence. Id. at 001256. The four (4) short statements were made in passing in a rebuttal that spanned approximately twenty (20) to thirty (30) minutes. See id. at 001250, 001251, 001270 Further, Appellant was acquitted on nearly all of the charges dealing with the alleged misstatements. They did not "so infect the proceedings with unfairness" such to deprive Appellant of a fair trial. Therefore, any statement by the prosecution, which did not amount to misconduct, was harmless and Appellant's claim fails.

b. There was no cumulative error, as Appellant has failed to assert any meritorious claim of error.

First, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*") (emphasis added). As demonstrated above, Appellant's Brady claim is meritless. See Section I, supra. Appellant also claims that the State committed prosecutorial misconduct by misstating the evidence during its closing argument. AOB at 20-22. However, Appellant's argument is meritless. See Section II(a), supra.

Second, there was sufficient evidence to support Appellant's conviction. S.W. testified that she knew Appellant and had been dating him for approximately six (6)

months at the time of the incident. 3 AA 000725, 000739-41. S.W. testified that Appellant threatened her daughter with a pair of kitchen scissors and put those scissors into her mouth. 4 AA 000758-59. Appellant also told police he threatened R.W. with the scissors. 5 AA 001117. Appellant's DNA was also found on the handle of the scissors. Id. at 0001023. S.W. also testified that Appellant began to hit her with a wooden stick. 4 AA 000749. S.W. had contusions on her right upper back and back of her upper arm as well as bruising and bleeding on her right lower leg which corroborated her account of the beating. Id. at 000931, 000937. S.W. also told the jury that, after his arrest, Appellant continued to contact her asking her not to come to court and to leave Las Vegas. Id. at 000780. The jury was able to see the communication between Appellant and S.W. following his arrest. Therefore, there was sufficient evidence presented at trial to sustain Appellant's conviction.

Finally, the only factor that weights in Appellant's favor is that he was convicted of a grave crime. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (stating crimes of first degree murder and attempt murder are very grave crimes). However, given the substantial weight supporting the first two factors, Appellant's claim of cumulative error has no merit. This Court should affirm Appellant's conviction.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 26th day of February, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 8,869 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of February, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 26th day of February, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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