IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE KARYIAN BOWSER,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 50851

RESPONDENT'S ANSWERING BRIEF

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

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ORIGINAL

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STATEMENT OF THE ISSUES

1. Whether The District Court Properly Admitted Defendant's Statement To Police.
2. Whether The State Committed Prosecutorial Misconduct.
3. Whether The District Court Erred In Allowing The Bailiff To Perform A Demonstration For The Jury.
4. Whether The Conviction On Counts Five And Six Violate Double Jeopardy.
5. Whether The Some Of The Jury Instruction Were Misleading And Prejudicial.
6. Whether The District Court Erred In Denying Defense Challenges For Cause.
7. Whether The Evidence Introduced Proved The Crimes Charged Beyond A Reasonable Doubt.
8. Whether The District Court Erred In Admitting Certain Evidence.
9. Whether The District Court Erred In Refusing To Strike The Notice Of Intent To Seek The Death Penalty.

10. Whether The District Court's Rulings During The Penalty Phase Violated Defendant's Constitutional Rights.
11. Whether The Sentence Imposed Amounts To Cruel And Usual Punishment.
12. Whether Cumulative Error Warrants Reversal Of Defendant's Conviction.

STATEMENT OF THE CASE

This is a direct appeal from a Judgment of Conviction filed on December 13, 2007. AA, Vol. IV, pp. 909-911. Terrance Bowser (Defendant), along with co-defendant Jamar Green (Green), was charged by Indictment on April 29, 2005, with Count 1 - Conspiracy to Commit Murder; Count 2 - Murder with Use of a Deadly Weapon, Count 3 - Conspiracy to Discharge Firearm out of a Motor Vehicle, Count 4 - Discharging Firearm out of a Motor Vehicle, Count 5 - Conspiracy to Discharge Firearm at or into Structure, Vehicle, Watercraft or Aircraft; and Count 6 - Discharging Firearm at or into Structure, Vehicle, Watercraft or Aircraft, in relation to the shooting death of John McCoy on January 31, 2005. AA, Vol. I, pp. 1-7.

A Notice of Intent to Seek Death Penalty was filed on May 26, 2005. AA, Vol. II, pp. 348-354. The Defendant filed a Motion to Strike the State's Notice of Intent to Seek the Death Penalty on May 9, 2006. AA, Vol. II, pp. 348-354. The State filed an Opposition on July 25, 2006 and the District Court denied Defendant's Motion on August 14, 2006. AA, Vol. II, pp. 355-384.

On February 22, 2006, the Defendant filed a Motion to Suppress Defendant's Confession. AA, Vol. II, pp. 252-257. The State filed at Opposition of March 6, 2006 and the District Court denied the Defendant's Motion on August 14, 2006. AA, Vol. II, pp. 258-347.

On November 30, 2006, the Defendant filed a Motion to Sever Defendants. AA, Vol. II, pp. 407-413. The State field an Opposition on December 8, 2006 and the District Court granted the Defendant's Motion on April 11, 2007. AA, Vol. II, pp. 414-427.

On October 11, 2007, Defendant was found guilty by way of Jury Trial to Count 1 – Conspiracy to Commit Murder; Count 2 – Murder with Use of a Deadly Weapon; Count 3 – Conspiracy to Discharge Firearm Out of Motor vehicle; Count 4 – Discharging Firearm Out of a Motor Vehicle; Count 5 – Conspiracy to Discharge Firearm at or into Structure, Vehicle, Aircraft, or Watercraft; and Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft or Watercraft. AA, Vol. VII, pp. 2319-2324.

On October 16, 2007, the penalty phase ended with the jurors returning a verdict of life with the eligibility for parole after 40 years on Count 2. AA, Vol. VIII, pp. 2770.

On December 5, 2007, Defendant was adjudged guilty and sentenced to Count 1 – to a maximum of 120 months and a minimum of 24 months; Count 2 – to a life term with parole eligibility of 20 years plus an equal and consecutive term with parole eligibility of 20 years for use of a deadly weapon to run concurrent with Count 1; Count 3 – to serve 365 days with credit for time served; Count 4 – to a maximum of 60 months with a minimum of 24 months to run concurrent with Counts 1 and 2; Count 5 – to serve 365 days credit for time served; and Count 6 – to a maximum of 60 months and a minimum of 12 months to run concurrent with Count 1 through 5 with 1,038 days credit for time served. AA, Vol. IV, pp. 909-911.

STATEMENT OF THE FACTS

On January 31, 2005, Officer D. Smith was employed as a police officer with the North Las Vegas Police Department (NLVPD). AA, Vol. VI, pp. 1973. In the late evening hours of January 31, 2005 around 11:56 p.m., Officer Smith was driving a marked patrol vehicle south on Ferrell Lane in Clark County, Nevada, when he was waved down by a resident in front of 4532 Ferrell. AA, Vol. VI, pp. 1973-1975. The resident identified himself to Officer Smith as Forrest Hawman. AA, Vol. VI, pp. 1975. Mr. Hawman reported just hearing two gun shots from the area to the west of his home. AA, Vol. VI, pp. 1975.

Officer Smith went to investigate. AA, Vol. VI, pp. 1975. Officer Smith turned his marked patrol vehicle onto Red Coach heading westbound and observed a vehicle traveling toward him on Red Coach without any headlights on. AA, Vol. VI, pp. 1975. As the car passed Officer Smith, he (Smith) noticed it did not have any license plates on the front or rear. AA, Vol. VI, pp. 1976. It was occupied by two Black male adults later identified as Defendant Terrence Bowser – the driver, and Jamar Green – the passenger. AA, Vol. VI, pp. 1976. Both wore hooded sweatshirts with the hoods pulled up over their heads. AA, Vol. VI, pp. 1976.

After Officer Smith passed by the suspect vehicle, later identified as a Lincoln, he began to turn his patrol car around. AA, Vol. VI, pp. 1977. The Lincoln accelerated through the stop sign at the intersection of Red Coach at Ferrell. AA, Vol. VI, pp. 1978-1978. Officer Smith activated his overhead red lights and siren and the Lincoln failed to yield. AA, Vol. VI, pp. 1978. Officer Smith followed the Lincoln through the following streets: Westbound on Drescina, southbound Genella, westbound Penthouse, northbound Norma Jean, westbound Drescina, southbound Whelk, eastbound Uranus, northbound Ryder and eastbound on Captain Kirk which is a cul-de-sac. AA, Vol. VI, pp. 1978-1979. The vehicle stopped in the driveway of 3521 Captain Kirk. AA, Vol. VI, pp. 1979. After about 10 seconds in the driveway the Lincoln backed into the street. AA, Vol. VI, pp. 1979. Officer Smith ordered it to stop at gunpoint. AA, Vol. VI, pp. 1980. The driver stopped the vehicle. AA, Vol. VI, pp. 1980. Officer Smith then ordered both occupants to hold their hands out of the vehicle's windows. AA, Vol. VI, pp. 1980. Officer Smith held both Defendants at gunpoint until more police units arrived. AA, Vol. VI, pp. 1980-1983.

After the suspect car was secured, Officer Smith learned that the Las Vegas Metropolitan Police Department (LVMPD) was working a shooting that they believed just occurred on Lone Mountain Road to the west of Decatur. AA, Vol. VI, pp. 1984.

Officers of the NLVPD and the LVMPD responded to the scene where the Defendant's vehicle was stopped and treated the area as a crime scene in order to preserve evidence. AA, Vol. VI, pp. 1984.

Officer Luthiger of the NLVPD was dispatched to the scene where the vehicle driven by the Defendant was detained. AA, Vol. VI, pp. 1996-1997. Officer Luthiger searched the area around the Lincoln Continental and the area around the driveway where the Lincoln had stopped. AA, Vol. VI, pp. 1999-2002. Officer Luthiger found a riot-type shotgun lying on the west side of the driveway. AA, Vol. VI, pp. 1999-2002. It was black in color with a pistol grip and was lying as closest to where the passenger side of the Lincoln would have been when it had been stopped in the driveway. AA, Vol. VI, pp. 2001-2003. He also saw a box of shotgun shells on the front seat of the Lincoln. AA, Vol. VI, pp. 2003. On the front passenger floorboard, police officers also found three (3) spent 12 gauge shotgun casings. AA, Vol. VII, pp. 2064-2065.

The license plates from the vehicle were also found inside the vehicle indicating that the plates were removed in the short time period after the shooting. AA, Vol. VII, pp. 2086-2087. One of the witnesses, Maria Dominguez, saw a license plate on the Lincoln after the shooting. AA, Vol. VII, pp. 2086-2087. Ms. Dominguez identified the license plate found inside the vehicle used by Defendants as consistent with the symbols on the license plate on the vehicle she observed at the crash scene. AA, Vol. VII, pp. 2086-2087.

Officer Sullivan of the NLVPD was on duty the late evening of January 31, 2005. AA, Vol. VI, pp. 2005. He also responded to the area of 3521 Captain Kirk and helped remove Terrence Bowser from the Lincoln. AA, Vol. VI, pp. 2005-2008. Officer Sullivan advised Defendant of his Miranda rights. AA, Vol. VI, pp. 2009. Defendant Bowser then told Officer Sullivan something to the affect, "you guys got me. I'm going to make you work for it. I'll see what my attorney can do for me." AA, Vol. VI, pp. 2010; Vol. IX, pp. 2789.

Maria Dominguez is a neighbor whose house backs up to Lone Mountain across from the crash site. AA, Vol. VII, pp. 2079-2080. The victim's crash site is across Lone Mountain Road from the back of her home. AA, Vol. VII, pp. 2081-2082. On the evening of the incident, she heard what she believed were two gunshots followed by a crash. AA, Vol. VII, pp. 2081-2082. She looked out of the window at the back of her house and noticed a "boxy" style vehicle she described as looking like a Town Car. AA, Vol. VII, pp. 2084. She saw the vehicle drive slowly by the crash going westbound on Lone Mountain. AA, Vol. VII, pp. 2083-2084. She then saw the vehicle flip a U-turn and proceed east quickly on Lone Mountain toward Decatur. AA, Vol. VII, pp. 2083-2084. Maria Dominguez reported seeing at least two individuals in the vehicle. AA, Vol. VII, pp. 2084-2085. After the Defendants were stopped driving the Lincoln Continental, Maria Dominguez was taken to the location where the defendant's vehicle was being detained and she positively identified the vehicle as the one she saw involved in the incident. AA, Vol. VII, pp. 2087-2089.

Officer Cox of the LVMPD was on patrol on January 31, 2005 and responded to the accident/crime scene on Lone Mountain Road. AA, Vol. VI, pp. 1865-1867. He was notified by a citizen in the area about a traffic accident. AA, Vol. VI, pp. 1867. Cox responded to the crash site on West Lone Mountain Road in the 5300 block. AA, Vol. VI, pp. 1867-1869. He found John McCoy in McCoy's vehicle. AA, Vol. VI, pp. 1869. McCoy identified himself to Cox as John. AA, Vol. VI, pp. 1869. John McCoy was bleeding from his left side. AA, Vol. VI, pp. 1869-1871. John McCoy reported that he had been shot by two Black men in a car. AA, Vol. VI, pp. 1871-1872. McCoy said he was shot by a shotgun. AA, Vol. VI, pp. 1870-1871. While looking inside the car, Cox observed a lot of blood and a handgun located on the passenger side floorboard. AA, Vol. VI, pp. 1875. He also observed a cellular telephone on the driver's side floorboard. AA, Vol. VI, pp. 1874. Officer Cox remained with John McCoy until he was transported via ambulance. AA, Vol. VI, pp. 1873.

Dawn Allen McCoy, the wife of the victim John McCoy stated that she and her husband were living, at the time, in the area of Lone Mountain and Decatur. AA, Vol. VI, pp. 1906. Dawn and her 10 year old daughter were waiting for her husband to come home from work the night of this incident. AA, Vol. VI, pp. 1910. John McCoy was an assistant casino manager at the Rainbow Hotel. AA, Vol. VI, pp. 1909. She said her husband did own a gun which was registered and that he had a concealed weapon's permit for it. AA, Vol. VI, pp. 1909. Dawn testified that her husband bought the gun for protection and usually carried it in the glove compartment of the car or in his briefcase. AA, Vol. VI, pp. 1909.

Crime Scene Analysts for the LVMPD responded to the location where the vehicle used by Defendants was recovered. AA, Vol. VI, pp. 2051-2054. Both gloves and a ski mask that were recovered from the car were used by Defendants. AA, Vol. VII, pp. 2054-2056.

The examination of the vehicle driven by John McCoy suggests that there were three gunshots to his vehicle. AA, Vol. VI, pp. 1943-1972. One gunshot hit the driver's side window and went in front of the face of John McCoy. AA, Vol. VI, pp. 1952-1953. One of the pellets from the first shot hit the door frame. AA, Vol. VI, pp. 1952. The other pellets hit the front windshield on the right inside corner. AA, Vol. VI, pp. 1953-1954. The second shot hit directly into the middle of the driver's side door. AA, Vol. VI, pp. 1955-1956. This is the shot that had several pellets hit the left side of John McCoy. AA, Vol. VI, pp. 1954-1957. The third shot came from the front left of John McCoy's vehicle and glanced off the hood at the front right corner going in a front to rear and left to right direction. AA, Vol. VI, pp. 1956-1957. The gunshots were 00 buckshot. AA, Vol. VI, pp. 1894; Vol. VII, pp. 2117-2118. An examination of the handgun found in the victim car's revealed that it was fully loaded and had not been fired. AA, Vol. VI, pp. 1970.

Three expended 12 gauge shotgun shell casings were found in the Defendant's vehicle consistent with the number of shots believed to have been shot. AA, Vol. VII, pp. 2064-2065.

Statement from Terrence Bowser

On February 1, 2005 at 10:24 a.m., LVMPD Homicide Detectives Wilson and O'Kelley met with Defendant, Terrence Bowser at the CCDC Booking Interview room. AA, Vol. VII, pp. 2136-2138. Defendant was again read his Miranda rights and gave a statement. AA, Vol. VII, pp. 2138. This was pursuant to being rebooked on the offense of Murder with Use of a Deadly Weapon. AA, Vol. VII, pp. 2136.

Detective Wilson and O'Kelley indicate that Defendant stated that he was good friends with Jamar Green (Green). AA, Vol. VII, pp. 2142; AA, Vol. II, pp. 279-347. They had known each other for several years. Id. On the night of the homicide, Defendant admitted driving his mother's Lincoln Town Car with Green. Id. Defendant stated that on the night of the incident, he was drinking Hennessy at his mother's house. Id. He became intoxicated but he thought he could still function. Id. He said he was drunk even though he wasn't acting drunk. Id. Defendant went to Green's house around 7:00 p.m. or 8:00 p.m. Id. They then went cruising in the Lincoln. Id. Green had his shotgun with him. Id. Defendant indicated that Green always carried a shotgun because of the neighborhood. Id.

Defendant brought a box of shotgun shells with him. Id. Those were the box of shells found in the Lincoln when it was impounded. Id. Defendant and Green then went cruising in the area of Craig and Ryder. Id. Defendant said Green's situation went wrong, pretty much, and blamed what happened on the alcohol. Id.

Defendant said that Green told him that the dude (McCoy) was talking shit. Id. Defendant had his windows down. Id. Defendant admitted following John McCoy. Id. Defendant could not hear anything from McCoy and stated that he heard Green tell him "this guys' talking shit." Id. Defendant stated that Green was the one who fired shots into the car and that he was drunk. Id. Defendant heard Green fire two shots. Id.

Defendant said he learned from a police officer that McCoy had a gun. Id. However, Defendant never saw the victim with a gun. Id. Defendant admitted that McCoy's vehicle had dark tint on the windows, and the window was cracked just a little bit - two or three inches. Defendant said at one point that it was "road rage" because Defendant had cut the victim off while driving. Id. Defendant said he pulled up next to the victim's car and heard the shots fired. Id. After the victim's car got shot, he sped off pretty fast but said he didn't think the shots hit the victim. Id. Defendant saw the hole in the victim's car from being shot, but he denied seeing the victim crash. Id. He also denied turning around and driving past the victim contrary to what the eyewitness reported. Id.

Defendant later admitted that he and Green had joked about what it would feel like to shoot a car. Id. There was no trash talking going back and forth between Defendant's car and the victim. Id. Defendant finally admitted there was probably a plan to shoot at a car. Id. At the end of the interview, Defendant admitted when he pulled up next to the victim's car, Defendant told Green to shoot. Id. Defendant admitted that he was there with Green and that they wanted to see how it would feel to shoot a car. Id. After the shooting, the Defendant stated that they then panicked and did a U-turn while the victim went straight. Id.

ARGUMENT

I
THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENT TO THE POLICE

A. Defendant Did Not Invoke His Right To Counsel And His Right To Silence.

In the case of Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350 (1994), the suspect, a member of the United States Navy, initially waived his rights to remain silent and to counsel when he was interviewed by Naval investigators in connection with the murder of a sailor. About one and a half hours into the interview the suspect stated "maybe I should talk to a lawyer." Investigators thereupon asked the suspect if

he was asking for a lawyer and the suspect replied that he was not. Investigators took a short break and thereafter continued the interview for another hour until the suspect specifically asked for a lawyer. During the hour period of interrogation between the suspect's ambiguous invocation of right to counsel and his definitive invocation of right to counsel he made incriminating statements. The United States Supreme Court held that investigators have the right to an unambiguous request for counsel and questioning does not have to cease immediately upon the making of an ambiguous or equivocal reference to an attorney. See also, Connecticut v. Barrett, 479 U.S. 523, 529-530, n. 3, 107 S.Ct. 828, 832 (1987). In the Davis opinion the United States Supreme Court has directly held that police need only respond to unequivocal invocations of one's right to counsel or to remain silent.

The Nevada Supreme Court has specifically adopted the ruling in Davis in Harte v. State, 116 Nev. 1054, 1067, 13 P.3d 420, 429 (2000). In State v. Kaczmarek, 120 Nev. 314, 91 P.3d 16 (2004), Defendant was given a death penalty following his conviction for Murder. The testimony indicated that Defendant had been contacted by two LVMPD homicide detectives who first met Defendant at the CCDC. When they advised Defendant of his Miranda rights, Defendant said he wanted to talk to them but said his attorney was coming this afternoon and wondered if they can talk to him then. The Detectives told Kazmarek that they (Detectives) were busy in the afternoon and if he wanted to talk to them he could talk to them now. Kaczmarek then said he would talk to the detectives. He was re-admonished of his Miranda rights and gave a recorded statement implicating him in the murder. The Nevada Supreme Court cited to the case of Davis v. United States and the Nevada case of Harte v. State and held that Defendant's reference to an attorney did not constitute an invocation of his Miranda right to counsel.

In the present case, the inquiry is whether the initial statement made by the Defendant constitutes an unequivocal right to cease questioning and/or to have an attorney present. Past precedent reveals that no invocation of one's right to silence

and/or counsel occurred in this case. Past examples of ambiguous invocations are as follows:

> "I think I better talk to a lawyer first." Davis, supra.
> "I should see an attorney because I do not want to incriminate myself." State v. Lanning, 109 Nev. 1198, 866 P.2d 272 (1993).
> "Just out of curiosity, when do I get to talk to a lawyer? ... they told me that I should talk to a lawyer. . . . I don't want to be a bitch and say give me a lawyer. . . . What do you think a lawyer would tell me right now?" Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).
> "Is it going to piss y'all off if I ask for my - to talk to a friend that is an attorney. I mean, I'm going to do whatever I have got to do. Don't get me wrong." Brown v. State, 668 S.2d 385 (Ala. App.1995).
> "I think I better talk to a lawyer first" State v. Eastlack, 883 P.2d 999 (Ariz. 1994).

Nothing that occurred in this case gives rise to an unequivocal invocation of the Defendant's right to remain silent or to the assistance of counsel. In fact, substantial evidence supports a finding that the Defendant did not make an unequivocal invocation of his right to remain silent, or, his right to counsel. According to the Officer who arrested the Defendant, the Defendant did not appear intoxicated or under the influence of any controlled substance. AA, Vol. IX, pp. 2787. The Officer then read the Defendant his Miranda rights and the Defendant responded by saying "you guys got me. I'm going to make you work for it. I'll see what my attorney can do for me." AA, Vol. IX, pp. 2789. That is not a direct statement unambiguously and unequivocally asking for a lawyer. Therefore, the Defendant failed to clearly and unequivocally request counsel.

B. The District Court Properly Held That The Defendant's Statement Was Freely And Voluntarily Given.

Defendant also contends that his confession should be suppressed because it was not freely and voluntarily given. However, the record demonstrates that the Defendant was acting with full knowledge when he confessed to his part in the killing of John McCoy.

"A confession is inadmissible unless freely and voluntarily given." Echavarria v. State, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992). In order for a confession to be deemed voluntary, it must be the product of a "rational intellect and free will" as determined by the totality of the circumstances. Passama v. State, 103 Nev. 212, 213-214, 735 P.2d 934, 940 (1987); See, Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973). Factors to be considered in determining the voluntariness of a confession include: (1) Youth of the accused; (2) Lack of education or low intelligence; (3) Lack of any advice of constitutional rights; (4) The length of detention; (5) The repeated and prolonged nature of the questioning; and (5) The use of physical punishment such as deprivation of food or sleep. Passama, at 214, 735 P.2d at 323. These factors will be discussed below. "The ultimate issue in the case of an alleged involuntary confession must be whether the will was overborne by government agents." Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997); Passama v. State, 103 Nev. at 213-214, 735 P.2d at 323, citing Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986). "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal." Chambers v. State, 113 Nev. at 981, 944 P.2d at 809; Echavarria v. State, 108 Nev. at 743, 939 P.2d at 595.

In determining whether a confession is the product of a knowing and voluntary waiver, Nevada employs a totality of the circumstances test. Rowbottom v. State, 105 Nev. at 482, 779 P.2d at 940 (1989). When a defendant is fully advised of his Miranda rights and makes a free, knowing and voluntary statement to the police such statements are admissible at trial. See Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630 (1966); Rowbottom, 105 Nev. at 482, 779 P.2d at 940.

On August 14, 2006, the District Court held an evidentiary hearing on the Defendant's Motion to Suppress. AA, IX, pp. 2779-2842. The State called Officer Sullivan to testify as to the voluntariness of the Defendant's confession. AA, Vol. IX, pp. 2785. Officer Sullivan testified he was on duty for the NLVPD on the night

January 31, 2005. AA, Vol. IX, pp. 2785-2786. He was radioed to help a fellow officer who was trying to attempt to make a traffic stop on a suspect vehicle. AA, Vol. IX, pp. 2786. The Officer had two male adults exit the vehicle, one of whom was the Defendant. AA, Vol. IX, pp. 2786. Officer Sullivan then escorted the Defendant back to him patrol car and put him in the back seat. AA, Vol. IX, pp. 2787. According to the Officer, the Defendant did not appear intoxicated or under the influence of any controlled substance. AA, Vol. IX, pp. 2787. The Officer then read the Defendant his Miranda rights. AA, Vol. IX, pp. 2787-2788. The Defendant responded by saying "you guys got me. I'm going to make you work for it. I'll see what my attorney can do for me." AA, Vol. IX, pp. 2789.

On February 1, 2005, LVMPD Homicide Detectives Rob Wilson met with Defendant, Terrence Bowser at the CCDC Booking Interview room. AA, Vol. IX, pp. 2796-2797. Officer Wilson was advised that the Defendant had previously been given his Miranda warnings and that he said something to the effect of "I think I'll wait and see what my attorney can get me". AA, Vol. IX, pp. 2798.

Officer Wilson became involved as a homicide investigator since the victim had since passed away a few hours before his meeting with the Defendant. AA, Vol. IX, pp. 2799. The victim passed away sometime around 6:00 a.m. on the morning of February 1, 2005 and the meeting with the Defendant took place around 10:00 a. m. AA, Vol. IX, pp. 2799. Officer Wilson went to see the Defendant particularly in order to rebook him under the charge of Murder with Use of a Deadly Weapon. AA, Vol. IX, pp. 2800. Therefore, Officer Wilson advised the Defendant of his Mirada rights. AA, Vol. IX, pp. 2801.

After Officer Wilson advised the Defendant of his Miranda rights, the Defendant began talking about what had happened. AA, Vol. IX, pp. 2801-2802. Officer Wilson was soon thereafter joined by homicide detective Dean O'Kelly. AA, Vol. IX, pp. 2804. The Defendant started by talking about the car and his level of cooperation before he willingly offered to give the detectives a statement. AA, Vol.

IX, pp. 2806. Officer Wilson testified as the statement being freely and voluntarily given. AA, Vol. IX, pp. 2806. Officer Wilson also testified that at no point during the statement did the Defendant ever say that he wanted to cease talking or that he wanted a lawyer. AA, Vol. IX, pp. 2808. Officer Wilson further testified that at no point did he ever believe that the Defendant was intoxicated or under the influence of any controlled substance. AA, Vol. IX, pp. 2821-2822.

Officer Wilson went on to testify that he did not believe that the Defendant invoked his rights to have an attorney present or not to talk to the detectives when he stated after the first time that he was Mirandized that "I think I'll wait and see what my attorney can do for me." AA, Vol. IX, pp. 2824-2825. The response according to Officer Wilson was not a definite invocation that he didn't want to talk to him or that he wanted to have an attorney there. AA, Vol. IX, pp. 2825.

The Court was also aware, via the State's Opposition to Defendant's Motion to Suppress, that the Defendant was experienced with the criminal justice system so as to be aware that he did not have to talk to interrogating officers. AA, Vol. II, pp. 258-347. The Defendant's criminal history includes arrests for Possession of Controlled Substance with Intent to Sell and Possession of a Controlled Substance. Id. He was cited with a Violation of Probation. Id. He was arrested on a Felony Grand Larceny Automobile charge and a Grand Larceny charge and an arrest for Possession of a Stolen Vehicle and Evading a Police Officer. He had an Obstructing Officer/Principal charge. Id. He was cited for loitering on school grounds, curfew, False Information to a Police Officer, Battery and Open or Gross Lewdness. Id. He was also on Formal Probation, had a consent decree and involved in a repeat offender program and various counseling programs. Id. Simply put, Defendant had extensive knowledge of the criminal justice system and is not a novice to what Miranda is all about.

After reading the motions and hearing the testimony at the hearing, the Court stated the following:

The Court:

> ...
> [T]here's not a direct statement unambiguously and unequivocally asking for a lawyer. In addition to that, just to be on the safe side and to make sure, they gave him his Miranda rights again, and at no time did he indicate that he wanted a lawyer. In fact, he gave a 70 page statement which indicates clearly that he didn't want a lawyer and he wanted to make a statement; so, therefore, looking at the totality of the circumstances, the statement was freely and voluntarily given. He didn't ask for a lawyer; they didn't' deny him a right to a lawyer. I think they did everything right this time. A lot of times they don't in term of advising them of their rights and giving him an opportunity not to make the statement; therefore, the motion to suppress is denied.

AA, Vol. IX, pp. 2830-2832. Given the facts, the District Court properly denied Defendant's Motion to Suppress since Defendant's statement was freely and voluntarily given.

II
THE STATE DID NOT COMMIT PREJUDICIAL PROSECUTORIAL MISCONDUCT

In reviewing a claim of prosecutorial misconduct, the relevant inquiry is whether the comments were so unfair that the defendant was denied due process. Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 897 (1996). The State may not urge the jury to convict on matters outside of the evidence. Pantano v. State, 121 Nev. 782, 789, 138 P.3d 477, 484 (2006). "A prosecutor's comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Leonard v. State, supra, 117 Nev. 53, 81, 17 P.3d 397, 414(2001)(citation omitted)(internal quotations omitted). Review of alleged prosecutorial misconduct requires consideration of the nature of the evidence presented against the defendant. Smith v. State, 120 Nev. at 947-948, 102 P.3d 569 (2004). Statements construed by the Defense as inflammatory mischaracterizations, will not be deemed prosecutorial misconduct where the statements are supported by evidence adduced at trial. Rose v. State, 123 Nev. 24, 163 P.3d 408 (2007). Further,

in order to prevail on a claim predicated upon prosecutorial misconduct, the burden lies upon defendant to show how that misconduct prejudiced him. Cunningham v. State, 113 Nev. 897, 944 P.2d 261, 267 (1997). See Walker v. State, 113 Nev. 853, 944 P.2d 762, 774 (1998) ("If the issue of guilt or innocence is close, if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial. Where evidence of guilt is overwhelming even aggravated prosecutorial misconduct may be harmless error.").

"To obtain a reversal for prosecutorial misconduct, a defendant must demonstrate that he was prejudiced by the misconduct." United States v. Christophe, 833 F.2d 1296, 1301 (9th Cir. 1987). Reversal is warranted only if it is more probable than not that the [prosecutorial] misconduct materially affected the verdict. Id. The prosecution's alleged misconduct must be viewed in the context of the entire trial. Id.

1. The prosecutor did not misstate the evidence.

In general, "the State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) , (citing Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000). A prosecutor's comments should be viewed in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. Knight v. State, 116 Nev. 140, 144-5, 993 P.2d 67, 71 (2000), (citing United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038 (1985)). In addition, comments that are harmless beyond a reasonable doubt do not warrant reversal. Atkins v. State, 112 Nev. 1122, 1135, 923 P.2d 1119, 1127 (1996).

Here, the Defendant alleges prosecutorial misconduct due to the following statement during the closing argument:

Ms. Jiminez:

...

> He's just been shot at, Fight or flight, he's going to speed up. He's going to speed up his car, and Terrence Bowser is going to speed up his

car to match his speed. That jockeying for position, that moving around, that didn't happen before the shooting. That happened during the shooting, because Terrence Bowser is making an effort to make sure that he's lined up with that car.

He overshoots it a little bit. And so when the second shot goes in to Mr. McCoy's side. There's a little bit of an angle, and that's what the flashlight shows. It's not actually measuring anything. It's showing you the angle of the shot. They used it for measurements. Shoots in the car. This time hits him.

This isn't happening in silence. Jamar Green and Terrence Boswer aren't sitting not saying anything. They're talking to each other...So Terrence Bowser is getting the car up close, and they are talking get me up closer. Here we go.

AA. VII, pp. 2270-2271. Here, Ms. Jimenez was making reasonable inferences based on the evidence. Particularly, witness Ford testified that three shots occurred and several officers testified to there being three shotgun shell casings found on the passenger side of the suspect vehicle. AA, Vol. VI, pp. 1915-1919. The Court after hearing the objection even stated that the prosecution "can make reasonable inference whether was more than one shot." AA, Vol. VII, pp. 2273. To be on the safe side though, the Court went on to instruct the jury accordingly:

The Court:

I want to caution the jury, the evidence is not what the lawyer says. The evidence is as you remember it to be or remember the witnesses saying. You are to be guided by that.

AA, Vol. VII, pp. 2273. The Defendant also takes issues with Ms. Jimenez stating the following: "He has the ability to do all this driving and not crash, and he's pulling up and John McCoy is most likely trying to get away." AOB, pp. 15. However, once again the prosecutor is just making reasonable inferences from the facts. The following exchange took place after the objection.

Ms. Jimenez:

We know he drove away, called 911 and said he wasn't going to go home.

The Court:

You can make reasonable inferences.

AA, Vol. VII, pp. 2275-2276. As demonstrated above, the prosecutor was simply arguing reasonable inferences from the evidence presented during the trial. Moreover, it cannot be said that Defendant would not have been convicted but for the prosecutor's statement. Thus, in light of substantial evidence of Defendant's guilt including Defendant's own words, any questionable comments by the State cannot be said to have infected the entire proceedings with unfairness such that Defendant's conviction warrants reversal.

2. The State did not improperly appeal to the passions of jurors.

Prejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). When reviewing prosecutorial misconduct, the challenged comments must be considered in context and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.

During the closing argument, the Defendant alleges the following statement was improper:

Ms. Jimenez:

> They don't even know Mr. McCoy. They don't even know who's in the car. Even at the time they pull up next to him to commit that shooting, they don't know who's in there. It could have been anyone. It could have been some 16 year old coming home from a party.

AA, Vol. Vii, pp. 2265. After defense counsel objected, the court even sustained the last part of the above comment. AA, Vol. Vii, pp. 2265.

The State here was simply drawing an inference to the jury from the evidence that the Defendant did not even know who was in the car that John McCoy was driving. As demonstrated by the facts, the Defendant and Green simply went out looking on the day in question for someone to open fire upon. Neither the Defendant nor Green had any idea who John McCoy was nor did they have any idea if anyone else was in the car that Green opened fire on. Moreover, any such error on the part of

this statement was harmless beyond a reasonable doubt given the amount of evidence against the Defendant, the length and form of the prosecutors' argument, and the judge quickly sustaining the objection.

3. The State did not inappropriately comment on Defendant's pre-arrest silence.

Defendant claims that the State improperly stated that the Defendant "didn't stop to help him there and didn't even call 911 anonymously and say somebody's been hurt." AA, Vol. VII, pp. 2267. However, the State is only forbidden at trial to comment upon a defendant's election to remain silent following his arrest. Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997). In that case, the Nevada Supreme Court held that the State's reference to Murray's silence after a murder in March 1987 until his arrest in October 1988 was not an improper comment on Murray's pre-arrest silence; that the State may opine on a criminal defendant's pre-arrest silence. Id. at 17, fn.1, 930 P.2d at 125.

Here, the State was simply articulating that the Defendant failed to render aid to the victim at the time of the crime. The statement by the prosecution was also intended to rebut the Defendant's apology that he made in his statement. Defendant fails to articulate how the above statement constitutes prejudicial prosecutorial misconduct, since the prosecutor never commented upon or questioned Defendant's choice not to testify at trial. Defendant fails to articulate how the above statement constituted prejudicial prosecutorial misconduct. Therefore, there is no colorable claim of misconduct presented here.

4. The Court did not err in denying the Defendant's mistrial request.

The "[d]enial 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, 388-389, 849 P.2d 1062, 1066 (1993). "Denial of a motion for mistrial can only be reversed where there is a clear showing of an abuse of discretion." Cramer v. Peavy, 116 Nev. 575, 580, 3 P.3d

665, 669 (2000). When it appears, beyond a reasonable doubt, that no prejudice has resulted, a defendant is not entitled to a new trial. Roever v. State, 111 Nev. 1052, 1055, 901 P.2d 145, 147 (1995). In this case, the defense moved for a mistrial after closing arguments:

Mr. Reed:

> Your Honor, at this point Terrence Bowser moves for a mistrial based upon prosecutorial misconduct that occurred during rebuttal of the State's argument.
>
> Ms. Jimenez said this could be anyone in this car. He didn't know who it was. Then said it could have been a 16 year old coming home from a party.
>
> Judge, I made a contemporaneous objection, and that objection was sustained. That comment was done for no other purpose but to inflame the passions of the jury. It's assuming facts not evidence.
>
> Its been specifically held by the Nevada Supreme Court that prosecutors cannot seek to inflame the passions and prejudice of the jury, especially in a capital murder prosecution. Based on that, we move for mistrial under Article 1 Section 3 in the Nevada Constitution and the 5th and 6th Amendments of the Federal Constitution.

Ms. Jimenez:

> Judge, that comment was absolutely not made to inflame the jury. If I had been allowed to finish with that line or argument, I was going to suggest it could have been several people, including someone who had a record or basically a bad person.
>
> The point is they didn't see who was in the car. There was evidence that the defendant's own statement says they didn't see who was in the car. They didn't know it was John McCoy. They didn't know he had a gun in the car. They didn't know it who it was because the window was tinted.

The Court:

> Ms. Jimenez, however, the Court agrees that the reference to a 16 year old is, I think, inflammatory, but the Court sustained the objection. The jury has been admonished the objection was sustained. They are not to consider it, and the Court sustained it immediately. And I think with the other instructions, I don't think any harm was done. The court is going to deny the motion for a mistrial.

AA, Vol. VII, pp. 2277-2279. As demonstrated above, most of the objections made during the prosecution's closing were without merit since the prosecutor is allowed to make reasonable inferences from the evidence derived during the trial. The reference to the 16 year old boy was promptly sustained by the judge and the jury was admonished accordingly. Therefore, based upon the facts presented to the District Court, the judge properly denied Defendant's motion for a mistrial.

III
THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL DUE TO THE ALLEGED JUROR MISCONDUCT

"Not every instance of juror misconduct requires the granting of a motion for a new trial. 'Each case must turn upon its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting.' The district court is vested with broad discretion in resolving allegations of juror misconduct." Meyer v. State, 119 Nev. 554, 562, 80 P.3d 447 (2003).

In order to warrant a new trial due to jury misconduct a defendant must establish by admissible evidence the occurrence of juror misconduct and prejudice. In very egregious cases of misconduct, such as jury tampering, there is a conclusive presumption of prejudice. The Nevada Supreme Court rejected the proposition that all forms of extrinsic influence on a jury are automatically prejudicial. Meyer, 119 Nev. at 564. The Court said, '...other types of extrinsic material, such as media reports, including television stories, or newspaper articles, generally do not raise a presumption of prejudice. Jurors' exposure to extraneous information via independent research or improper experiment is likewise unlikely to raise a presumption of prejudice. In these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." Id. at 456.

Factors to be considered when determining whether prejudice has occurred include: how the information was introduced; the length of time it was discussed by

the jury; the timing of the introduction; whether the information was ambiguous, vague, or specific; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence such as other bad acts of the Defendant. Id. at 565-566. While jurors are confined to the evidence and facts elicited during trial, jurors may rely upon their common sense and experience. Id. at 568.

In the instant case, the Defendant alleges that he should have been granted a mistrial due to "improper supplementing of the evidence" by the bailiff. However, a closer look as to what the bailiff did shows that a mistrial was not warranted. The following exchange took place in court when the issue was brought up.

> The Court:
>
> Bailiff, what did they ask you to do back there?
>
> The Bailiff:
>
> I went into the room and I asked them how they want me to do it. What did they want. And they said they wanted me to pump it as fast as I can and fire. So I did it in the air. And they spoke among themselves for a few minutes, then they said, Well, can you do it sitting down, and I said yeah. I sat down, same as I did in here.
>
> ...
>
> The Court:
>
> It wasn't a scientific demonstration. You're right. He shouldn't have been in there demonstrating for them, but he did it. I don't know why.
>
> But, anyway, the jurors have the gun. They can use it any kind of way they want to. They can fire it, pump it, do whatever they want to as part of the evidence. Of course, I don't know if they knew how to pull the thing back or why they asked him to do. But that's what they can do.
>
> And of course, everything was put on the record what they said they wanted. The same thing that was done in the room was done here in open court with everybody present. That's why the Court did it that way.
>
> ...
>
> Mr. Pesci:
>
> This is not the basis for a mistrial. They asked to be able to examine that firearm. And when it is brought back, it is in the

position where it cannot be examined in that fashion. And the bailiff is absolutely the appropriate person to bring the firearm back and make that firearm in a position where they can analyze where they have every right to. So he did nothing they couldn't do themselves.

It appears they asked him to do that, which is something they could have done, which is permissible. Nothing that causes a mistrial. They have this piece of evidence like every other piece of evidence, like the 911 tapes and listen to it all over again. They can look at pictures.

This is just another piece of evidence. In order to analyze it, they need it to be in a nonsafety position. And with Winchester live rounds back there, it is completely appropriate that the bailiff was present for that. We didn't want the shotgun and shells by themselves.

...

The Court:

Motion for mistrial is denied. We're in recess.

AA, Vol. VII, pp. 2310-2318. The alleged misconduct of the bailiff did not unduly prejudice the Defendant. What the bailiff did in the juror deliberation room was also done in open court with everybody present and on the record. Moreover, the bailiff was simply doing what any one of the jurors could have done themselves. However, due to the nature of the weapon, they jurors asked the bailiff if he could be the one to dry fire the shotgun. Therefore, Defendant was not unduly prejudiced by the bailiff actions.

IV
DEFENDANT'S CONVICTION ON COUNTS FIVE AND SIX DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense. Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002), cert. denied 537 U.S. 1031, 123 S.Ct. 569 (2002). This Court utilizes the test set forth in Block Burger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932) to determine whether multiple convictions for the same act or transaction are permissible. Under this test, if the elements of one offense are

entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses. Williams, 118 Nev. at 548, 50 P.3d at 1124 (quoting Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001)).

This Court will reverse "redundant convictions that do not comport with Legislative intent." Salazar v. State, 119 Nev. 224, 228 70 P.3d 749, 751 (2003)(quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)). In determining when convictions are redundant, the Court stated the issue ... is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. "Redundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act." Skiba v. State, 114 Nev. 612, 616, n. 4, 959 P.2d 959, 961 n. 4 (1998). The question is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant." State of Nevada v. District Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000).

In making his argument, Defendant notes that the Court reversed redundant convictions in Salazar, *supra*. However, the instant case can be distinguished. In Salazar, the defendant was convicted of Battery with Use of a Deadly Weapon with Substantial Bodily Harm and Mayhem with a Deadly Weapon. The Court concluded that the gravamen of the Battery offense was that the defendant cut the victim which resulted in permanent nerve damage and the gravamen of the mayhem offense was that defendant cut the victim and it resulted in permanent nerve damage. Therefore, the convictions were redundant. Salazar, 119 Nev. 224, 228 70 P.3d 749, 751 (2003).

"[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act." Skiba v. State, 114 Nev. 612, 616 n. 4, 959 P.2d 959, 961 n. 4 (1998). The question is whether the material or significant part of each charge is the same even if the offenses are not the same. State of Nevada v.

Eighth Judicial Dist. Court of State of Nevada, ex rel. County of Clark, 116 Nev. 127, 136, 994 P.2d 692 (2002).

In the instant case, Defendant was charged with, among other thing, NRS 202.297 (Discharging Firearm Within or From Structure of Vehicle) and NRS 202.285 (Discharging Firearm at or into Structure, Vehicle, Aircraft or Watercraft). Defendant raised this same double jeopardy argument via a Motion to Strike Counts Five and Six of the Indictment on March 7, 2007 which was denied by the District Court on September 5, 2007. AA, Vol. II, pp. 444-449. Defendant now alleges that the district court improperly denied the motion.

Applying the redundant conviction analysis, one can see that the gravamen of the offenses charged is not the same. NRS 202.287 addresses shooting within or from a vehicle while NRS 202.285 addresses shooting into a vehicle. Someone can shoot from a car and not shoot into a car. Moreover, someone can shoot into a car without shooting from a car. The legislature made it clear that it intended on punishing both as separate and distinct crimes because it passed two separate and distinct statutes. This is clear by the fact that when NRS 202.287 was passed it was not made a part of NRS 202.285. On the contrary, a separate and distinct law was needed to address the distinct crime. The separate and distinct nature of the charges is established not only by the different elements but also by the different punishments provided for by the Legislature. NRS 202.285 is punishable by a B felony with 1 to 6 years in prison while NRS 202.287 is punishable by a B felony with 2 to 15 years in prison. These statutes are separate and distinct and can be committed without committing the other.

As demonstrated above, the material or significant part of each charge is not the same, therefore, the gravamen of the charged offenses is not the same, and the convictions for each of the offenses was not impermissibly redundant. See Skiba, 114 Nev. 612, 616 n. 4, 959 P.2d 959, 961 n. 4 (1998). As such, the district court properly denied Defendant Motion to Strike Courts Five and Six of the Indictment.

V.

THE COURT PROPERLY INSTRUCTED THE JURY

Erroneous jury instructions are reviewable according to a harmless error analysis. Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000) (citing Neder v. United States, 527 U.S. 1, 13-15, 119 S.Ct. 1827 (1999)); Collman v. State, 116 Nev. 687, 720, 7 P.3d 426, 447 (2000). In fact, the giving of this particular instruction is subject to a harmless error analysis. Wegner, 14 P.3d at 30; Collman, 7 P.3d at 447. An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Wegner, 14 P.3d at 30; Neder, 527 U.S. at 18. Finally, this Court has held on numerous occasions that errors may be harmless when the "evidence of guilt is overwhelming." See, e.g., McIntosh v. State, 113 Nev.224, 227, 932 P.2d 1072, 1074 (1997); Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992).

1. Jury Instruction 17 was proper

Defendant alleges that Jury Instruction 17 is improper due to it relieving the government of its burden of proof. AOB, pp. 25-26. Specifically, Defendant states that the instruction "suggested that jurors had discretion to consider a first degree verdict in the absence of proof beyond a reasonable doubt." AOB, pp. 26. First of all, Instruction 17 was proffered by the defense, not the State, and had specifically been altered at the defense request to say "some of you" instead of the State's initially proposed instruction which said "all of you." AA, Vol. VII, p. 2194. This change was allowed. Only when the defense sought yet another modification of the instruction to read "any one of you" did the prosecution and the court decline. Id.; AA , Vol. IV, p. 825.

Second, the defense proposed instruction was an inaccurate statement of law because it removed the possibility of a hung jury and seemed to require a compromise on Second Degree Murder whenever a lone juror demanded it. AA, Vol. VII, p. 2195. This would have conflicted with other instructions requiring unanimity:

> Your verdict must be unanimous as to each charge. You do not have to be unanimous of the principle of criminal liability. It is sufficient that each of you find beyond a reasonable doubt that the defendant commit the charged crime. AA, Vol. IV, pp. 869.

Expressing preference for Instruction 17 over that offered by the defense the court reasoned that, "This gives them the alternative to find them guilty of first or second, if they can all agree to it." AA, Vol. VII, p. 2195.

Because the jury was instructed on unanimity and Instruction 17 was simply a transition instruction between First and Second Degree Murder, there was no prejudice in failing to give the defense proffered instruction which may have confused the jury.

2. Jury Instruction 15 was an accurate statement of the law.

Jury Instruction 15 states the following:

> The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act. AA, Vol. IV, pp. 843.

The above instruction was taken verbatim from the Nevada Supreme Court case Moser v. State, 91 Nev. 809, 544 P.2d 424 (1975) and is still good law. The court held that it did not misstate the law because intent may always be deduced form direct and circumstantial evidence, nor was it cumulative. AA, Vol. VII, 2192. Therefore, Defendant's claim is without merit.

3. Jury Instruction 21 was proper

Jury Instruction 21 states as follows:

> In order to "use" a deadly weapon, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime. AA, Vol. IV, pp. 849

Here, Defendant argues that the instruction is improper since it does not state that the State must prove that the Defendant had knowledge of the use of the deadly

weapon pursuant to Brooks v. State, 180 P.3d 657, 662 (2008). However, Defendant did not object to Instruction 21 below, nor did Defendant proffer or request any additional instructions on a non-shooter's liability for a co-defendant's use of a deadly weapon.

In addition to Instruction 21, Instructions 32 and 33 also informed the jury on the requisite specific intent for accomplice liability (aider and abettor and conspiracy) for not just the substantive crime but also the use of a deadly weapon. AA, Vol. IV, p. 860-61.

In Brooks, the Defendant Brooks was a getaway driver and alleges that he did not know that his co-defendant was armed when it left to rob the victim. Here, the facts are extremely different. The plan and agreement of both defendants was that they see what it was like to shoot someone in another car. The evidence clearly demonstrates that the Defendant knew that Green had a shotgun unlike in Brooks where the evidence suggested that Brooks might not have had knowledge of his co-defendant's use of the gun. Id. at 661. Therefore, any error in instructions was harmless.

4. Jury Instruction 13 and 14 were proper

Defendant alleges that Jury Instruction 13 and 14 improperly emphasize the "instantaneous" nature of premeditation.

The language in Jury Instruction 13 that Defendant takes issue with is the following:

> [p]remeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation, it is premeditated. AA, Vol. IV, pp. 841.

Such wording has been taken verbatim and has routinely been upheld by the Nevada Supreme Court as being a correct statement of the law. See Byford v. State,

116 Nev. 215, 994 P.2d 700 (2000). See also Schoels v. State, 114 Nev. 981, 966 P.2d 735 (1998).

The language in Jury Instruction 14 states the following:

> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix and unlawful killing as murder of the first degree. AA, Vol. IV, pp. 842.

Again, such wording has been taken verbatim and has routinely been upheld by the Nevada Supreme Court as being a correct statement of the law. See Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). See also Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Therefore, Defendant's claim that Jury Instructions 13 and 14 were improper fails.

VI
THE COURT DID NOT ERR IS DENYING DEFENSE CHALLENGES FOR CAUSE AND LIMITING DEFENSE COUNSEL'S VOIR DIRE

1. The Court properly denied challenges for cause

The correct standard for determining when a prospective juror should be excused for cause because of his or her views on the death penalty is whether the juror's ability to perform his or her duties in accordance with the instructions would be substantially impaired because of those views. Weber v. State, 121 Nev. 554, 580, 119 P.3d, 107, 125 (2005).

Here, Defendant takes issues which the fact that Juror Jiran indicated several times that he believed in "an eye for an eye" and that he believed the death penalty would protect the community from killers. AA, Vol. V, pp. 1151-1152. However, during voir dire, Jiran was asked in the following:

The Court:

> So, now, sir, could you really consider life in prison with the possibility of parole after 40 years for a person who has been convicted of first degree murder? I mean, that's the bottom line is, you are going to have these four options, actually

Juror:

Yeah.

The Court:

Actually, 100 years in prison with the possibly of parole after a minimum of 40 years and life in prison with the possibly of parole after 40 years. That's pretty much close to the same thing.

Juror:

Yes. Yes.

...

The Court:

And sir, can you follow the Court's instructions on the law?

Juror:

Yes.

The Court:

Now, you understand just because the defendant has been charge with a crime, that is not evidence of his guilt.

Do you understand that?

Juror:

Yes.

,,,

The Court:

If the State did not prove him guilty beyond a reasonable doubt, would you have any problems in finding him not guilty

Juror:

I would not have a problem.

...

The Court:

Can you be fair to both sides in this case?

Juror:

Yes, sir. AA, Vol V, pp. 1551-1557.

As demonstrated above, prospective juror Jiran was extensively questioned on her thoughts and as to any biases she had regarding the death penalty. After given what she had to say, the Court properly denied the cause challenge.

As to Juror Balalio, Defendant argues that she was improperly survived a cause challenge after indicating on her questionnaire that she felt a murderer "should go to death" or receive the death penalty and that she answered, "Probably Not" when asked

by defense counsel if she could be fair in light of her worries about the financial impact of the trial on her family.

Juror Balalio was also asked numerous questions which included the following:

Ms. Jimenez:

> Would you automatically vote for the death penalty just because it's a murder case?

Juror:

> No, not necessarily. I would hear everything that the case – the evidence and everything that goes into the case. I would listen to that, but the majority of the time it kind of ends up to be – you know, what they need to have is what they did wrong. They need to be penalized for that.

Ms. Jimenez:

> Okay.
> You feel like you would wait before you heard all the evidence before making a decision?

Juror:

> Yes.

Ms. Jiminez:

> And you could consider all four of those penalties in coming to that decision?

Juror:

> Correct. AA, Vol. V, pp. 1207-1208.

In response to the juror's "probably not" response when asked by defense counsel if she could be fair in light of her worries about the financial impact of the trial on her family, the State and the Court further inquired into the situation as shown below.

The Court:

> Ma'am, the defendant is entitled to 100 percent of your attention. This is a serious case here. On the one hand, you said you would be preoccupied with your family and your home life and your work to where you couldn't pay attention. You told that to Defense Counsel, then you tell her that you could be fair even though you have all these pressures from work and maybe not getting paid and whatever to where you might be distracted to you couldn't – you might not be a hundred percent fair.
> So, which one is it?

Juror:

If I were to have to be on the case, I would have to make that fair judgment.

The Court:

You would be fair if you were on the case?

Juror:

Yes. AA, Vol. V, pp. 1214-1215.

As demonstrated above, Juror Balalio repeatedly assured the Court that she could be impartial and fair. As such, the Court properly denied the cause challenge. Furthermore, both jurors were ultimately removed by peremptory challenged and Defendant has failed to show that any biased juror was actually seated.

2. The Court properly restricted defense voir dire

Defendant alleges that the Court improperly precluded defense counsel from questioning a juror about whether she could assert her individual opinion regarding whether the State has proven the aggravating factor and whether mitigating factors outweighed the aggravator. AOB, pp. 29-30.

When this line of question came about, the following exchange took place:

Mr. Pesci:

It's the State's burden to prove the aggravators beyond a reasonable doubt. It has to be unanimous, and there's a whole bunch of all that goes with all of that, and this is just a questionnaire. We're not supposed to put the mechanism of the death penalty instructions in this phase.

Ms. Luem:

I disagree, Judge. I think I can question her about the procedures and whether or not –

The Court:

No, you can't. You can question her about whether or not she can follow the law. That's what you can question her about. You can't go in there and try and argue your case.

Ms. Luem:

I understand, but if she doesn't know what the law is, how can she agree that she can follow it?

The Court:

Because of that, sustained.

> You don't go around telling her what the Court is going to instruct them on or what the law is. You ask them on or what the law is. You ask them if they can follow the law; otherwise, if you're going to put all the law in there and ask her if she can follow every law that applies – that's ridiculous. AA, Vol. V, pp. 1272-1274.

The purpose of "jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996). The District Court properly told defense counsel that they were allowed to ask the jurors if they can follow the law and be impartial. Instructing the jurors during voir dire on what exactly the law of the case will entail is improper. Therefore, as to this precise issue, defense counsel was properly restricted during voir dire.

VII
THE EVIDENCE INTRODUCED AT TRIAL ADEQUATELY PROVED A CONSPIRACY EXISTED BEYOND A REASONABLE DOUBT

A court will only reverse a conviction if the State fails to present sufficient evidence to prove a material element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Martinez v. State, 114 Nev. 746, 961 P.2d 752 (1998). In a sufficiency of the evidence claim, "the critical question is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Daniels v. State, 121 Nev. 101, 110 P.3d 477, 480-81 (2005), quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984), quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979).

Defendant contends that the State did not produce evidence sufficient to convict. Specifically, he states that the State failed to prove the existence of a conspiracy to commit murder. AOB, pp. 30-31.

A conspiracy is an agreement between two or more persons for an unlawful purpose. Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979). Conspiracy is

seldomly supported by direct proof, and is instead usually established by inference from the conduct of the parties. Gaitor v. State, 106 Nev. 785, 790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990). In particular, a conspiracy conviction may be supported by "a coordinated series of acts," in furtherance of the underlying offense, "sufficient to infer the existence of an agreement." Id.

Here, the State presented more than enough evidence to sustain a conspiracy conviction. In addition to the facts presented at trial, Defendant's own voluntary statement established that such conspiracy existed. AA, Vol. VII, pp. 2142; AA, Vol. II, pp. 279-347. In his statement, Defendant admits that he and Green had joked about what it would feel like to shoot a car. Id. He admits that when he (Defendant) pulled up next to the victim's car he told Green to shoot. Id. Defendant even stated that the reasons why was because they wanted to see how it would feel to shoot a car. Id. Therefore, since sufficient evidence exists to uphold Defendant's conspiracy conviction, this Court must affirm such conviction.

VIII

THE COURT DID NOT ERR IN ADMITTING EVIDENCE

This Court has consistently held that "[t]rial courts have considerable discretion in determining the relevance and admissibility of evidence [and] an appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion." Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Although relevant, evidence is not admissible if its probative value is *substantially outweighed* by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. NRS 48.035(1)(emphasis added).

Here, Defendant alleges that the court erred in admitting gloves and headgear found in Defendant's car. AOB, pp. 31-32. The Defendant made the same argument via Motion in Limine to Preclude Admission of Gloves and Headgear on September

19, 2007. AA, Vol. III, pp. 748-751. The State opposed the motion on September 27, 2007 and the District Court denied it on September 28, 2007. AA, Vol. III, pp. 814-816.

The gloves and headgear that were admitted in trial were highly relevant to the Defendant's intent, premeditation and deliberation, and his state of mind. The Defendant claimed that there was no evidence that he attempted to conceal his identity. However, this is not known since the only person to see the Defendants in the car when they were shooting was the victim John McCoy, who was not available to testify since he is deceased. Moreover, even if the Defendants did not wear the items, that they had them in their car and had removed the licence plate was indicative of a criminal intent. This is directly on point to the issue of the Defendant's state of mind when he committed the murder. This evidence is clearly relevant and highly probative to the Defendant's state of mind and intentions that night. Therefore, Defendant claim is without merit.

IX
THE DISTRICT COURT DID NOT VIOLATE DEFENDANT'S RIGHTS BY REFUSING TO STRIKE THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY

Defendant did not receive the death penalty and he has failed to establish prejudice in any alleged error in failing to strike the death notice.

1. Application of NRS 200.033(9) did not violates Defendant's Rights

Defendant contends that he is not sufficiently culpable for the murder of John McCoy to warrant the filing of a Notice Of Intent To Seek The Death Penalty. Defendant's contention is without merit.

In Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), the Nevada Supreme Court upheld defendant Guy's death sentence even though defendant Guy was not the shooter, rather Guy was the get a way driver. In fact, the Nevada Supreme Court cited to United States Supreme Court case law, as well as prior Nevada Supreme Court case law in upholding defendant Guy's death sentence. Specifically, the court said:

> In Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688 (1987), the Supreme Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Emmund culpability requirement." In Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-1293 (1991), we synthesized Emmund and Tison, holding that "[t]o receive the death sentence, [a defendant] must have, himself, killed, attempted to kill, intended that a killing take place, intended that lethal force be employed or participated in a felony while exhibiting a reckless indifference to human life." . . .
> Guy, at 783-78.

Applying the analysis and holding of Guy to the Defendant's case clearly establishes that the Notice of Intent to Seek the Death Penalty against Defendant is not in violation of United States as well as Nevada Supreme Court case law. The facts of the case before this Court indicate that Defendant, via his actions, was a major participant in the subject killing. Defendant admitted to the police that on such night both Green and himself had a plan to shoot a car. AA, Vol. VII. pp. 2142; AA, Vol. II, pp. 279-347. While driving around, the Defendant and Green located a car which turned out to be John McCoy's car. Id. Defendant pulled his vehicle up next to Mr. McCoy's car such that the passenger side window of the Defendants' car was facing the driver's door of Mr. McCoy's car. Id. Green then pointed a gun out the passenger side window in the direction of the driver's door of Mr. McCoy's vehicle as both vehicles continued to move. Id. Defendant told Green to shoot after which shots were fired and hit Mr. McCoy's vehicle in the exact location where the driver of such vehicle would be sitting. Id. Defendant then attempted to flee the scene with Green in his vehicle. Id.

Similar to Guy, the State submits these facts, from Defendant's own mouth, amply show that Defendant possessed the necessary degree of culpability to support the imposition of the death penalty. Defendant was not a passive player but an active participant supplying a car and ammunition as well as placing Green in position to take his fatal shots. Defendant even admits telling Green the precise moment to take these shots which killed Mr. McCoy. Clearly Defendant did nothing to stop Green

from taking such shots as he took aim with a shotgun while sitting in the seat next to Defendant. Defendant admits encouraging such acts. Moreover, Defendant did not attempt to stop to render aid after the shooting but sped away. The State submits this clearly shows Defendant intended that a killing take place and/or intended that lethal force be employed and/or participated in a felony while exhibiting a reckless indifference to human life. As such, pursuant to the above cited case law, the death penalty is appropriate in the subject case.

2. The State is not required to establish aggravating circumstances at a probable cause hearing.

The Nevada Supreme Court has directly addressed the issue of whether the State is required to prove aggravating circumstances at the preliminary hearing and held that "a probable cause finding is not necessary for the State to allege aggravating circumstances and seek a death sentence." Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249, 256 (2002), cert. denied post-Ring v. Arizona, 537 U.S. 1196, 123 S.Ct. 1257 (2003).

3. Application of NRS 200.033(9) did not impermissibly shift the burden of proof to the defense

NRS 200.033(9) is an aggravating circumstance that exists if "the murder was committed upon one or more persons at random and without apparent motive." This statute is clear on its face as to the meaning of random and without apparent motive. The State presented compelling evidence to support that the murder was committed at random and without apparent motive. Defendant's own voluntarily statement implies that this was a random act and that he and his co-defendant ended up killing a person who neither one of them had ever seen before. AA, Vol. VII, pp. 2136. Therefore, NRS 200.033(9) did not impermissibly shift the burden of proof to the defense.

4. Evidence supported the aggravating circumstance

As presented more thoroughly in the statement of facts, the State had more than enough evidence to prove the aggravating circumstance beyond a reasonable doubt.

Moreover, the Court even made the following observation when it was brought up during the penalty hearing.

The Court:

> Counsel, I think your argument is without merit.
> The evidence is even if they were looking for a car – to shoot any car, people – they didn't know who was driving or who was in the car and you shoot into a car with a shotgun and you don't know who is behind – they haven't done anything to you, there's no road rage, there's no cognizable – I think what "motive" means, one that's cognizable I don't think you have one hear. It appears to have been random. The person just happened to be in the wrong place at the wrong time and got shot. They didn't know him; he hadn't done anything to him, and whoever drove by in that area was going to get shot, and I think that's within the purview of that particular statue which means what an aggravator is, so the motion is denied on that ground. AA, Vol. VIII, pp. 2343-2344.

Given the abundant about or direct and circumstantial evidence in support of the aggravator, Defendant's argument is without merit.

5. The District Court correctly permitted the jury to be death qualified.

A defendant's Sixth Amendment right to a fair and impartial jury is not violated when the jury is "death qualified." Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1986); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Neither is there a presumption that a death qualified jury is biased in favor of the prosecution, as defendant erroneously contends by alleging that a jury is more prone to convict and is therefore not impartial. McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985). The burden rests upon the defendant to prove that a jury that convicted the defendant was not fair and impartial. Williams v. State, 103 Nev. 227-231, 737 P.2d 508, 512 (1987); Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986).

NRS 175.552 expressly provides that

> Upon a finding that a defendant is guilty of murder of the first degree, the court shall conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to

> life imprisonment with or without possibility of parole. The hearing shall be conducted in the trial court before the trial jury.

It is now axiomatic that any juror who would be automatically opposed to the imposition of the death penalty regardless of the evidence or whose attitude concerning the death penalty would prevent or substantially impair his performance of his duties is not a juror who is able to follow the applicable law of capital cases. Hence, such a juror is properly the subject of a challenge for cause. See Witherspoon, *supra*, and Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 (1985). Any juror who cannot at least consider the full range of punishments provided in this state for murder of the first degree is not a juror who can render equal and exact justice to both parties. Id.

Those who oppose the death penalty do not constitute a cognizable segment of our society. Aesoph v. State, 102 Nev. 316, 318, 721 P.2d 379, 381 (1986). "Thus, exclusion of prospective jurors who fall into such a group does not contravene any of the basic objectives of the fair cross-section requirement." Id. at 318, 721 P.2d at 381. A "death qualified" jury does not therefore violate a defendant's constitutional rights to an impartial jury and to a fair and impartial trial. Id.

McKenna v. State, supra, is particularly on point. The defense in McKenna argued that the jury was devoid of persons and alterably opposed to the death penalty and was therefore biased in favor of the prosecution during the guilt phase of the trial. Additionally, McKenna argued that such a jury violated his right to a fair trial because the jury was an unrepresentative cross section of the community. The Nevada Supreme Court in rejecting the contention of McKenna stated:

> Furthermore, under Witherspoon, we are not required to presume that a death qualified jury is biased in favor of the prosecution. Rather, the accused has the burden of establishing the non-neutrality of the jury. Witherspoon, 391 U.S. at 520, n.18. See also Hovey v. Superior Court of Alameda Cty., 616 P.2d 1301 (Cal. 1980) (rejecting appellant's non-neutrality studies because of their failure to take into account that California excludes persons who would automatically vote for the death

penalty, as well as those who would automatically vote against it); Rowen v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984) (noting that the crucial question is whether a death qualified jury is likely to convict innocent people); Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985) (holding a death qualified jury does not deprive a defendant of a fair and impartial jury even if on the average, it would favor the prosecution). Because McKenna failed to prove the non- neutrality of the jury which convicted and sentenced him, we reject this assignment of error. Id. at 344, 705 P.2d at 618.

The United States Supreme Court in Lockhart v. McCree, 476 U.S. 162, 177, 106 S.Ct. 1758, 1767 (1986), addressed the issue of juror partiality. The court in Lockhart observed that:

> McCree argues that his jury lacked impartiality because the absence of 'Witherspoon-excludables' slanted the jury in favor of conviction. We do not agree. McCree's impartiality argument apparently is based on the theory that, because all individual jurors are to some extent pre- disposed toward one result or another, a constitutionally impartial jury can be constructed only by 'balancing' the various predispositions of the individual jurors. Thus, according to McCree, when the state 'tips the scales' by excluding prospective jurors with the particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last term when we squarely held that an impartial jury consists of nothing more than jurors who will consciously apply the law and find the facts. Id. at 177, 106 S.Ct. at 1767.

This Nation's High Court continued in the same vein in Buchanan v. Kentucky, 483 U.S. 402, 416, 107 S.Ct. 2906, 2914 (1987). The Court explained:

> The facts of the case at bar do not alter the conclusion that 'Witherspoon-excludables' are not a distinctive group for fair cross section purposes. Thus, there is no violation of the Sixth Amendment's fair cross section requirement here.
>
> The analysis in McCree also forecloses petitioner's claim that he was denied his right to an impartial jury because of the removal of 'Witherspoon-excludables' from the jury at his joint trial. The court considered a similar claim in McCree that was directed at the exclusion of such jurors prior to the guilt phase of a capital defendant's trial ... It rejected McCree's claim that the impartial-jury requirement demanded a balancing of jurors with different predilections because that view was inconsistent with the court's understanding that jury impartiality requires

> only 'jurors who will conscientiously apply the law and find the facts.' . . . [P]etitioner's claim that a 'death qualified' jury lacks impartiality is no more persuasive than McCrees. As was stated in McCree, 'The constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. Id. at 416, 107 S.Ct. at 2914.

Defendant's argument that death-qualifying a jury undermines the presumption of innocence and minimizes the State's burden of proof is wholly unsupported and has been dismissed by the both the Nevada Supreme Court and the United States Supreme Court. Therefore, Defendant's claim is without merit.

X
THE COURT'S RULINGS DURING THE PENALTY PHASE DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS

A. Dr. Paglini

A trial court judge is presumed to be impartial, and the party seeking to disqualify a judge must establish sufficient facts that warrant disqualification. Hogan v. Warden, 112 Nev. 553, 559-60, 916 P.2d 805, 809 (1996). Moreover, a judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity. Kinna v. State, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). The trial judge has the right to examine witnesses to establish the truth or to clarify testimony with the limitation that he not become and advocate for either side or give the jury an impression of his feelings about the case. Azbill v. State, 88 Nev. 240, 249, 495 P.2d 1064 (1972).

Defendant alleges that during the penalty phase, the Court had inappropriately opined on and undermined Dr. Paglini's Testimony while he was on the Stand. AOB, pp. 41-42. However, such allegation is belied by the record. When this issue was presented to the Court via a motion for a mistrial, the following exchange took place.

Mr. Reed:

> Judge, during the examination of Dr. Paglini, the Court, with all due respect for the tribunal, made some comments that I feel that

were inappropriate and that diminished our ability to present the defense in this case. Your Honor had said at one point during the examination what is the point of this and that he didn't form opinions. It was the defense's position that he did do all that, and while it was a narrative, this is a penalty hearing, and the manners and procedures are normally somewhat laxed.

The Court:

That's not true. First of all, it's the Court's duty and obligation to make sure that this trial proceed in an orderly fashion and that you subscribe to the rules of criminal procedure, and that, you weren't doing, and as the Court admonished you and which I told the jury I would do, so you made your record. Fine. I don't think there was any prejudice.

Mr. Reed:

Right.

The Court:

You let the guy get up here and go on and on and on for an hour without asking one question, and not only that, people lost sight of – here I am, a trained jurist, and I lost sight of what the man was even talking about.

...

Mr. Pesci:

Judge, I believe the doctor was able to give his entire opinion, statement, presentation. He got to do everything they wanted to do, so I don't think there's anything that arise to the level of a mistral.

...

The Court:

Not only the Court was more than lenient with defense counsel by letting him go on and get in all kind of stuff, a lot of which probably was not even admissible, so your doctor got in to say everything, but you, yourself – you're not supposed to let a guy get up there and ramble on for 45 minutes to an hour without saying – without even asking a question and talking about all kinds of stuff without saying it was an opinion or what his opinion was or what he was doing. AA. VIII, pp. 2511-2514.

The Court continually allowed Dr. Paglini to give a narrative type answers while on the stand. The Court had no choice but to intervene and tell defense counsel that the Doctor had yet to focus on Dr. Paglini's own expert opinions rather than what

somebody else said. The Defendant fails to make a reasonable argument for judicial bias or impartiality considering the statements made by the Court. Thus, Defendant's claim is without merit.

B. Penalty Phase Closing Argument

In reviewing a claim of prosecutorial misconduct, the relevant inquiry is whether the comments were so unfair that the defendant was denied due process. Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 897 (1996). The State may not urge the jury to convict on matters outside of the evidence. Pantano v. State, 121 Nev. 782, 789, 138 P.3d 477, 484 (2006). "A prosecutor's comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Leonard v. State, supra, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citation omitted) (internal quotations omitted). Review of alleged prosecutorial misconduct requires consideration of the nature of the evidence presented against the defendant. Smith v. State, 120 Nev. at 947-948 (2004). Statements construed by the Defense as inflammatory mischaracterizations, will not be deemed prosecutorial misconduct where the statements are supported by evidence adduced at trial. Rose v. State, 123 Nev. 24, -- P.3d – (2007). Moreover, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error. King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

This Court has held that in cases where the evidence against the defendant is overwhelming, prosecutorial misconduct not prejudicing the defendant amounts to harmless error. Winfrey v. State, 133 Nev. 157, 931 P.2d 54 (1997). Further, in order to prevail on a claim predicated upon prosecutorial misconduct, the burden lies upon defendant to show how that misconduct prejudiced him. Cunningham v. State, 113 Nev. 897, 944 P.2d 261, 267 (1997). See Walker v. State, 113 Nev. 853, 944 P.2d 762, 774 (1998) ("If the issue of guilt or innocence is close, if the State's case is not

strong, prosecutorial misconduct will probably be considered prejudicial. Where evidence of guilt is overwhelming even aggravated prosecutorial misconduct may be harmless error.").

The Defendant alleges that during the closing argument of the penalty phase, the State improperly minimized the State's burden of proof by arguing "that jurors simply needed to find that the aggravating factor made things worse or more severe." AOB, pp. 42-43. However, such allegation is belied by the record. The following exchange took placed during the penalty hearing:

> Mr. Jimenez:
>
> ...
>
> The first step is determining whether or not the State has proven beyond a reasonable doubt the aggravating circumstances in this case. Aggravating, to make worse or more severe. In this case, to make a determination about the aggravating circumstance, you must be unanimous in your verdict –
>
> Mr. Reed:
>
> I don't' mean to object, but I don't think it says anywhere in the jury instructions the language in the following slide, which is aggravating to make worse or more severe. We object to that statement.
>
> Ms. Jimenez:
>
> I wasn't saying it was in the jury instructions.
>
> The Court: I'm going to sustain the objection because aggravating circumstance used in this penalty hearing is a term of art. You can't use the average definition out of the local dictionary, so it's sustained.
>
> Ms. Jimenez:
>
> In determining the aggravating circumstance, you must find it unanimously and beyond a reasonable doubt. The aggravating circumstance that is alleged here is at random and without motive, and there's a definition given to you of what those terms mean and that's in instruction No. 11... AA. VIII, pp. 2680-2681.

Here, the prosecutor did not try nor did she minimize the State's burden of proof. Moreover, the Court sustained defense counsel's objection immediately to

which the State readily agreed and went on to comment exactly what the State's burden of proof was when trying to prove an aggravating circumstance.

Defendant also takes issue with the prosecutor mentioning that the killing was the result of a "curiosity" and that it was a "random thrill kill". AOB, pp. 43-44. However, such comments were supported by the evidence. The Defendant's own voluntary statement demonstrates that they wanted to see how it would feel to shoot a car. AA, Vol. VII, pp. 2142; Vol. II, pp. 279-347. In addition, the Defendant even admitted that when he pulled up next to the victim's car, he told Green to shoot. Id. Therefore, Defendant's allegation that the court erred in not granting a mistrial due to the State's alleged prosecutorial misconduct during the penalty phase closing argument is without merit.

C. Characterizations of the Crime and Victim Impact Evidence

Victim impact testimony is permitted at a capital penalty proceeding under NRS 175.552(3) and under Federal due process standards, but it must be excluded if it renders the proceeding fundamentally unfair. Leonard v. State, 114 Nev. 1196, 1214, 969 P.2d 288, 300 (1998). See also Homick v. State, 108 Nev. 127, 138, 825 P.2d 600, 607 (1992)(such testimony may be admitted at a penalty proceeding so long as it is not impalpable or highly suspect).

In Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995), citing, Randell v. State, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993), this Court stated that:

> [Nevada's victim impact statute] is similar in scope to statutes enacted in Arizona and California. Courts in both states take expansive views of their victim impact statutes concluding that they are designed to grant victims expanded rights, rather than limit the rights of victims. Id.

Additionally, the Court noted that "NRS 176.015 creates in certain defined victims the undeniable right to appear and express their views concerning the crime, the person responsible and the impact on the victim." Id.

The Supreme Court has stated that victim impact evidence during a capital penalty hearing is relevant to show each victim's "uniqueness as an individual human being." Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607 (1991). Admissibility of testimony during the penalty phase of a capital trial is a question within the district court's discretion, and this court reviews only for abuse of discretion. Rippo v. State, 113 Nev. 1239, 1261, 946 P.2d 1017, 1031 (1997).

Here, Defendant alleges it was improper for the jurors to hear the daughter of John McCoy, Kimberly Graham, state the following:

> So many things have changed because of this horrible night that Terrence Bowser and Jamar Green had nothing to do – had nothing to do than act out a joke. Our lives will never be the same, and our sadness hurt will never be gone. AA, Vol. VIII, pp. 2391.

Defendant also alleges that it was improper for the wife of John McCoy, Dawn McCoy to testify that her daughter "wants to know who is going to walk her down the aisle when she gets married." AA, Vol. VIII, pp. 2408.

The random and horrific acts of the Defendant and Green that resulted in John McCoy's murder had a tremendous impact on the victim's loved ones. Both of the statements at issue coming from the daughter and wife were both relevant and gave a unique insight on how the crime affected them and their family. Moreover, neither statement drew an objection from defense counsel. Therefore, the victim impact evidence admitted was proper and was not unduly inflammatory.

D. Irrelevant and Prejudicial Evidence

The decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. McKenna v. State, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998). Evidence of character is admissible during a penalty hearing so long as it is relevant and the danger of unfair prejudice does not substantially outweigh its probative value.

See Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); see also NRS 175.552(3).

1. Juvenile Records

The admitting of juvenile records during the penalty hearing of a trial and been deemed proper numerous times by the Nevada Supreme Court. See Domingues v. State, 112 Nev. 683, 696-97, 917 P.2d 1364, 1373-74 (1996).

Here, Defendant argues that the Court erred in allowed the State to admit part of the Defendant's juvenile record since the State had failed to prove the conviction by clear and convincing evidence. AOB, pp. 44-45. However, such allegation is belied by the record. The State put Jodi Wardleigh Coggins (Coggins) on the stand to testify during the penalty hearing. AA, Vol. VIII, pp. 2373. Coggins was the Defendant's last probation officer assigned to his case. AA, Vol. VIII, pp. 2375. Coggins had in her possession and reviewed the records and reports associated with Defendant's juvenile probation. AA, Vol. VIII, pp. 2376. She was therefore familiar with his prior charges. Coggins testified that she knew from the documents founds in his file that he had been previously charged for Grand Larceny, Possession of a Stolen Vehicle and Possession of a Controlled Substance. AA, Vol. VIII, pp. 2376-2377.

Defendant's juvenile record was relevant to his character, revealing a pattern of criminal behavior. Although this evidence was prejudicial, it was not unfairly so. It also had significant probative value, showing not only his propensity for criminal activity which was relevant in the determination of his sentence. Therefore, the Court did not err in admitting some of the Defendant's prior juvenile record.

2. Green's Juvenile History

The Nevada Supreme Court has affirmed the decision to admit otherwise impermissible testimony when defense counsel had opened the door to such testimony. See Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000)

Here, Defendant argues the court erred in allowing the State to present evidence that Jamar Green had no juvenile criminal history. AA, Vol. VIII, pp. 2649. However,

Defendant fails to mention in his brief that it was defense counsel that opened the door to such testimony. Below is part of the exchange that took place when the issue was brought up while Det. Dean O'Kelly was on the stand:

> Mr. Pesci:
>
> As far as Jamar Green, was he ever on juvenile probation?
>
> Mr. Reed:
>
> I will object as to the relevancy…
>
> The Court:
>
> You put in his sentencing document.
>
> …
>
> Mr. Reed:
>
> I didn't put that in. the State put that in. I put the sentencing transcript in.
>
> The Court:
>
> What's the difference.
>
> …
>
> Mr. Pesci:
>
> The defense has made an issue of the fact that the sentence that Jamar Green got. I think there should be some explanation behind that. The State should be able to respond to that.
>
> The Court:
>
> Overruled. AA, Vol. VIII, pp. 2649-2650.

Given the fact that it was defense counsel who opened the door to Jamar Green's criminal history, the district court properly allowed testimony.

3. Family Photos

The admission of photographs of victims is within the sound discretion of the trial court and will be disturbed only if that discretion is abused. Redmen v. State, 108 Nev. 227, 231-32, 828 P.2d 395, 398 (1992). Photographic evidence is admissible unless the photographs are so gruesome as to shock and inflame the jury. See Cutler v. State, 93 Nev. 329, 332, 566 P.2d 809, 811 (1977).

Despite the blocking some of the State's photos as being cumulative, Defendant contends that the admission of the certain photos showing the Defendant with members of his family was impermissibly prejudicial. AOB, pp. 45. The photographs admitted in this case were properly presented during the penalty phase of the hearing.

The photos defense counsel states were overly inflammatory were not of the victim deceased or when he was found all shot up, but instead simply of him with his daughter. The State is allowed and the jury is entitled to know and see that the Defendant had a family during the penalty phase. As such, the court properly found that such photos were probative.

E. Mitigation Evidence

Defendant alleges that the Court erred by excluding footage of a documentary. However, such evidence was properly excluded as being irrelevant. The following exchange took place when the issue was brought up.

The Court:

> What's the relevance? I don't know how this goes to mitigation.

Ms. Luem:

> The relevance is that members of Mr. Bowser's family are interviewed on this video. It gives context for how his family got to Las Vegas or how his mother got to the position she's in working for the UNLV library, not as a maid, like many other people before her, Judge. It's relevant to show Mr. Boswer's place in history, his place in this community. The fact that he has a very strong family kinship and a relationship to this city.

Ms. Jiminez:

> I don't see how that's relevant to mitigation in this case. We heard from some of his family members. We're going to hear from more of his family members. They can certainly talk about their relationship with Mr. Bowser and their family, but to go through these – it's my understanding – aside from his mother and himself and who was interviewed, and I'm not sure that's part of the video or not.
>
> There are extended family and how they came here to Las Vegas, I don't see how that's relevant specifically to Mr. Bowser, his upbringing, his family members as it relates how they interacted with him and his upbringing here.

The Court:

> I don't think a general history of black folks moving to Las Vegas is relevant to a penalty hearing of an individual.
>
> ...
>
> Even if his family came here 50 years ago, that's not relevant to mitigation. AA, Vol. VIII, pp. 2585-2587.

As demonstrated above, the documentary about his mother and how the Defendant's family has been here for some 50 years was correctly found to be completely irrelevant to the case at hand. Therefore, the Court properly excluded it.

XI
DEFENDANT'S SENTENCE DOES NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution and Article 1 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. U.S. Const. Amend. VIII, Nev. Const. Art. 1, § 6. The Nevada Supreme Court has ruled that this prohibition "forbids [an] extreme sentence that [is] 'grossly disproportionate' to the crime." Allred v. State, 120 Nev. 410, 92 P.3d 1246, 1253 (2004), citing Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680 (1991). Despite the seeming harshness of a sentence, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Id., citing Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-222 (1979)). "A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993), Allred v. State, 120 Nev. 410, 92 P.3d 1246, 1253 (2004).

On December 5, 2007 Defendant was adjudged guilty and sentenced to Count 1 – to a maximum of 120 months and a minimum of 24 months; Count 2 – to a life term with parole eligibility of 20 years plus an equal and consecutive term with parole eligibility of 20 years for use of a deadly weapon to run concurrent with Count 1; Count 3 – to serve 365 days with credit for time served; Count 4 – to a maximum of 60 months with a minimum of 24 months to run concurrent with Counts 1 and 2; Count 5 – to serve 365 days credit for time served; and Count 6 – to a maximum of 60 months and a minimum of 12 months to run concurrent with Count 1 through 5 with

1,038 days credit for time served. AA, Vol. IV, pp. 909-911.

"[A] sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional." Griego v. State, 111 Nev. 444, 893 P.2d 995, 997-98 (1995).

The record is void of any evidence that the trial court abused its discretion in imposing Defendant's sentence which had been selected by the jury. Absent such an abuse of discretion, Defendant would have to establish that the statute fixing the penalty is unconstitutional. Defendant does not make such a claim and instead requests the Court grant relief due to the "gross disproportionalilty" between the crime and the sentence. AOB, pp. 6. This Court has stated that there is no legal requirement that co-defendants receive identical punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390-91 (1990). Further, this Court held that it will not "superimpose its views on lawful sentences pronounced by district court judges, even if it might advocate a more lenient sentence." Griego, 111 Nev. at 447, 893 P.2d at 998. Defendant was sentenced under unchallenged statutes to sentences permitted by that statutes and has utterly failed to establish an abuse of discretion in sentencing so as to constitute cruel and unusual punishment. Therefore, Defendant's claim of cruel and unusual punishment is without merit.

XII
CUMULATIVE ERROR IS NOT PRESENT IN THE RECORD THAT WOULD DEMAND OVERTURNING DEFENDANT'S CONVICTION

Defendant argues that cumulative error denied him a fair trial and as such, he is entitled to reversal of his conviction. Reversal, based on cumulative error, is proper if the aggregate effect of actual errors are the cause of an unfair trial to a criminal defendant. Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993); Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985); see also Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). The considerations relevant to deciding whether error is harmless include whether the issue of guilt or innocence is close, the quantity or character of the error and the gravity of the charged offenses. Libby, 109 Nev. at 918-

919 (citing Big Pond, 101 Nev. at 2., 692 P.2d at 1289). The testimony elicited at trial including the Defendant's own voluntary statement removes the possibility of labeling the guilt-innocence issue a close call.

The State has dispelled Defendant's contentions in the above arguments. Qualitatively, Defendant has not offered any one issue, or any aggregate thereof, that demands a jury's reconsideration of his guilt. No margin exists for him to argue that cumulative error denied him a fair trial or so infected the determination of his guilt that reversal is warranted. As such, Defendant's alleged points of error have not cumulatively deprived him of a fair penalty phase.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny the Appellant's Appeal.

Dated this 8th day of April, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 8th day of April, 2009.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 8th day of April, 2009.

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