IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 53159

RESPONDENT'S ANSWERING BRIEF

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

JONELL THOMAS, ESQ.
Special Public Defender
Nevada Bar No. 4771
330 South Third Street, Suite 800
Las Vegas, NV 89155
(702) 455-6270

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Nevada Revised Statutes:

Other

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STATEMENT OF THE ISSUE(S)

1. Whether the district court erred in allowing evidence of other bad acts committed by the Defendant.
2. Whether the admission of testimony referencing Dr. Knoblock's and Wahl's expert findings amount to plain error.
3. Whether the district court erred in allowing in to evidence statements made by the Defendant to the police while he was in custody for a different offense.
4. Whether the district court erred in allowing certain autopsy photographs into evidence.
5. Whether the district court erred in ruling that part of William Kinsey's proposed testimony was inadmissible hearsay.
6. Whether the State committed prosecutorial misconduct during closing arguments.
7. Whether there was sufficient evidence presented at trial to convict the Defendant.
8. Whether the district court committed cumulative error.

STATEMENT OF THE CASE

On December 13, 2006, Defendant Norman Keith Flowers aka Norman Harold Flowers, III ("Defendant") was charged via a Grand Jury Indictment of committing the following crimes against Sheila Quarles: Count 1- Burglary; Count 2- Murder; Count 3- Sexual Assault; and Count 4- Robbery. Volume 1 Appellant Appendix ("AA") page 1-7.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with district court case C216032. 1 AA 8. In C216032, Defendant was charged with two (2) counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. 1 AA 21-22. The Defendant filed an Opposition on January 2, 2007. 1 AA 21-29. On January 8, 2007, District Court Judge Joseph Bonaventure, sitting judge for case C216032, denied the State's motion. 1 AA 37.[1]

On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this matter. 1 AA 30-34.

On January 23, 2007, Defendant filed a Motion-In-Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel. 1 AA 35-46. In his motion, the Defendant sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple as his counsel. 1 AA 35-46.[2] The State filed an Opposition on February 2, 2007. 1 AA 48-63. On February 5, 2007, the district court denied Defendant's motion to confirm counsel. 3 AA 642. On April 13, 2007, District Court Judge Donald Mosley stated that he believed the cases should be consolidated and wanted to wait to see what District Court Judge Michael Villani did before making a ruling on Defendant's bad act motion. 2 AA 261.[3] Judge Mosley found the motion moot. 3 AA 644.

Due to judicial retirements and shifting caseloads, this case was transferred to District Court Judge Stewart Bell's department. On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of C216032 at trial in this matter. 1 AA 64-75. The Defendant filed an Opposition on November 6, 2007. 1 AA 77-81. On November 15, 2007, the district court ordered a Petrocelli hearing on the bad acts that State wanted to introduce at trial. 3 AA 646.

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[1] See Blackstone Minutes for hearing on 01/08/2007 in Case C216032.

[2] Mr. Whipple was originally retained by the Defendant for charges pertaining to Coote. 1AA 56.

[3] Judge Villani was in the process of taking over Judge Bonaventure's case load, the judge who originally denied the State's motion to consolidate. 2 AA 261.

On August 1, 2008, a Petrocelli hearing was conducted for this matter. 3 AA 649. The State sought to introduce evidence from Case C216032. 3 AA 649. The district court found that the murder and sexual assault of Coote was sufficiently similar in nexus and time to Quarles murder. 3 AA 649. The court also found that there was clear and convincing evidence that the Defendant sexually assaulted and murdered Coote. 3 AA 649. Finally, the district court found that probative value for purposes of intent and identity was not outweighed any unfair prejudice. 3 AA 49. Therefore, the district court held that evidence regarding the similarities between Coote and Quarles was to be allowed at trial. 3 AA 649. However, the district court denied admission of evidence of the Rena Gonzales murder at trial. 3 AA 649.[4]

A Motion to Reconsider the Ruling on Defendant's Motion-In-Limine to Preclude Evidence of Other Bad acts was filed on September 29, 2008. 1 AA 120-123. The district court denied Defendant's motion on October 15, 2008. 3 AA 653.[5]

The jury trial began on October 15, 2008. 3 AA 654. On October 22, 2008, the jury found the Defendant guilty of Burglary, Murder and Sexual Assault. 3 AA 657. The jury found the Defendant not guilty of Robbery. 3 AA 657. Per the Special Verdict form, the Defendant was found guilty of Felony-Murder. 3 AA 183. On October 23, 2008, the penalty hearing began for the first degree murder conviction. 3 AA 658. The jury found several mitigating circumstances for the Defendant. 3 AA 184-85. On October 24, 2008, the jury returned a verdict of Life in the Nevada State Prison Without the Possibility of Parole. 3 AA 659.

On October 30, 2008, the Defendant filed a Motion for a New Trial. 1 AA 187-190. The State filed an Opposition on November 10, 2008. 1 AA 236-247. On November 12, 2008, the district court denied Defendant's Motion. 1 AA 248-249.

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[4] The State had argued that the Rena Gonzalez murder should come in because Ms. Gonzalez was murdered the same day in the same apartment complex as Ms. Coote. 1 AA 67. Like the other murders, Ms. Gonzales was sexually assaulted and strangled. 1 AA 67. Additionally, personal property was taken from her apartment. 1 AA 67. However, unlike Ms. Coote and Quarles, DNA evidence did not directly connect the Defendant to Ms. Gonzalez's murder. 1 AA 69; 2 AA 649.

[5] Several other pretrial motions were filed in this matter but since they are not contested in Defendant's brief they were not included in the Statement of Case.

On January 13, 2009, Defendant was sentenced to the Nevada Department of Corrections as follows: Count 1- a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months; Count 2- Life without the possibility of parole, to run consecutive to Count 1; and Count 3- Life without the possibility of parole with a minimum parole eligibility of one hundred twenty (120) months to run consecutive to Count 2. 3 AA 661. Defendant received seven hundred sixty one (761) days credit for time served. 2 AA 250-51. A Judgment of Conviction was filed on January 16, 2009. 2 AA 250-51. An Amended Judgment of Conviction was filed on February 12, 2009, amending the Defendant's sentence as to Count 3 to Life with the possibility of parole with a minimum parole eligibility of one hundred twenty (120) months. 2 AA 254-55.

STATEMENT OF THE FACTS

In March of 2005, Sheila Quarles ("Sheila") was living with her mother Debra Quarles ("Debra") in a modest, one-bedroom apartment located at 1001 North Pecos ("Pecos Apartment"). 2 AA 373, at 5-6. At the time Sheila was working at Starbucks at the convention center and Debra worked at a family food market. 2 AA 373, at 6.

As a very social 18 year old, Sheila had a lot of different social contacts. She was involved in a sexual relationship with a young man named George Brass ("Brass"). 2 AA 494, at 81. Brass was a friend of the family. 2 AA 373, at 8. His mother was friends with Debra and Brass was also a close friend of Sheila's older brother, Ralph. 2 AA 373-74, at 8-9. Sheila was also involved in a sexual relationship with a young woman named Qunise Toney ("Qunise"). 2 AA 408, at 145-147.

On March 23, 2005, Sheila spent the night over at Qunise's apartment. 2 AA 374-75, at 12-13. Sheila came back to the Pecos Apartment around 6:30 AM on March 24, 2005. 2 AA 375, at 14. Debra was preparing for work, when Sheila walked into their apartment. 2 AA 375, at 14-16. Sheila stayed home from work on March 24. 2 AA 375 at 15. Once Debra left for work, Sheila was alone in the Pecos Apartment. 2 AA 375, at 15.

Throughout the day, Sheila conversed with people on her cell phone. She talked to Qunise while Qunise was at work. 2 AA 409, at 152. Qunise noticed music playing in the

background during the conversation, which was not surprising because Debra recently purchased a new stereo system for the apartment. 2 AA 374, at 10-11, 2 AA 410, at 155. Sheila also talked to her mother several times that day. 2 AA 375, at 16. During her last phone conversation with Sheila around 1:00 PM, Debra testified that the phone went dead. 2 AA 375, at 16. Qunise testified that she received a phone call from Sheila's cell phone at 1:35 PM but no one responded when she answered. 2 AA 410, at 154. Qunise tried to call Sheila back several times but ended up only getting Sheila's voicemail. 2 AA 410, at 155.

Debra returned to the Pecos Apartment around three in the afternoon. 2 AA 376, at 19. Debra honked her horn to get Sheila out of the apartment to help carry grocery bags upstairs. 2 AA 376, at 19. One of Debra's neighbors, Robert Lewis ("Robert") came downstairs and helped Debra with her grocery bags. 2 AA 376, at 19.

When Debra reached the front door of her apartment, she noticed that the door was closed but not locked. 2 AA 376, at 19-20. Robert followed Debra into the Pecos Apartment with some grocery bags and waited in the living room as Debra searched for Sheila. 2 AA 376-77, at 20-21. Debra walked into the apartment and noticed that her new stereo was missing. 2 AA 376, at 20. Debra called out for her daughter but received no response. 2 AA 376, at 20. She noticed that her bed was "messed up" and heard a water dripping sound emanate from the bathroom. 2 AA 376, at 20. Eventually, Debra made her way to the bathroom to turn the water off. 2 AA 376, at 20.

Inside the bathroom, Debra noticed that the shower curtains were pulled shut. 2 AA 377, at 21. Debra pulled the curtain back to find her daughter Sheila submerged in the bathtub with part of her face sticking out of the water. 2 AA 377, at 21-22. Debra noticed that the water in the bathtub was still very hot. 2 AA 377, at 22. Debra became hysterical. 2 AA 385, at 56. Robert lifted Sheila out of the bathtub. 2 AA 377, at 23. A friend or family member covered up Sheila's naked torso area before the police arrived at the scene. 2 AA 383, at 85-86.

Robert went next door, his mother's apartment, and told his family members that Sheila needed help. 2 AA 368, at 122-22. Someone from that apartment called 9-1-1. 2 AA 369, at 125-26. Hysterical, Debra left the scene to get her son Ralph, who lived close to the Pecos

Apartment. 2 AA 377, at 23-24 Robert's niece and other stayed at the Pecos Apartment on the phone with the 9-1-1 operator until police got to the apartment. 2 AA 368-9. Paramedics arrived at the Pecos Apartment it was too late for them to render any aid or revive Sheila. 2 AA 365, at 111.

Several pieces of personal property were missing from the Pecos Apartment. Debra testified that Sheila's cell phone and bank card were missing. 2 AA 378, at 26. Additionally, Debra noticed that some jewelry and pillow case from her bed were missing from the apartment. 2 AA 378, at 26. Debra also reported that her new stereo systems along with all her compact discs were missing. 2 AA 378, at 26. Detectives theorized that the pillow case was used to transport stolen property. 3 AA 517-18, at 52-53.

Sheila's body had no major external injuries. 3 AA 520, at 61. There was also no sign of forced entry into the apartment. 2 AA 478, at 20. Some items in the bathroom were knocked over but there were no obvious signs of a struggle or fight. 2 AA 393, at 86-87; 2 AA 479, at 21. However, the Las Vegas Metropolitan Police Department ("LVMPD") detectives noticed that Sheila's jeans and underwear were positioned in a way that was not consistent with someone taking off their own clothes to take a bath. 2 AA 394, at 90-91. Sheila had two superficial injuries to her body. 2 AA 353, at 64. She had a bruise on her left abdomen and she had a scrape on her knee. 2 AA 353, at 64.

Dr. Lary Simms ("Dr. Simms"), a forensic pathologist at the Clark County coroner's office testified at trial that Sheila suffered several internal injuries. 2 AA 349-360. Sheila had two hemorrhages on her right scalp. 2 AA 351, at 56. This indicated that Sheila suffered some a blunt force injury to her head around the time of her death. 2 AA 351-52, at 56-57. Sheila also had several injuries to her neck area. 2 AA 351, at 53-56. The injuries to her neck indicated that Sheila was manually strangled. 2 AA 351, at 54-55. The injuries were consistent with someone applying pressure with his hands with the intent to cause injury. 2 AA 352, at 57-58. Additionally, small hemorrhages in Sheila's eyes indicated that pressure was applied to her neck which led to a build up of blood in the veins that burst. 3 AA 351, at 53-54. Furthermore, Dr. Simms testified that Sheila had fluid in her lungs, which was a sign of drowning. 2 AA 352, at 60.

Dr. Simms also testified that Sheila had multiple lacerations in her vaginal area which indicated that Sheila was sexually assaulted. 2 AA 350, at 51-52. The doctor also noted that there was no swelling associated with these injuries, which indicated that Sheila was sexually assaulted very close to the time of her death since swelling takes about 20 to 30 minutes to become visible. 2 AA 350-51, at 52-53. Linda Ebbert, a sexual assault nurse examiner, testified at trial that photographs of injuries to Shelia's vaginal area were more consistent with non-consensual sex. 2 AA 447, at 82-83. The coroner's office found that Sheila's cause of death was from drowning with strangulation as a contributing factor and the matter was a homicide. 2 AA 354, at 68.

At the autopsy, DNA samples from semen were collected from Sheila's vaginal area. 2 AA 483, at 38-39. Kristina Paulette ("Paulette"), a forensic scientist for the LVMPD forensic lab was able to generate a DNA profile of two unknown males from the vaginal swabs and extracts taken from Sheila's underwear. 3 AA 548, at 36. Paulette testified at trial that over 99.99% of the world's population could be excluded as one of the contributors of DNA found in Sheila's vaginal swabs. 3 AA 550, at 42. Paulette excluded Robert Lewis as possible source of the DNA collected from Sheila. 3 AA 549, at 37-38. She entered the DNA profiles into CODIS, a data base for DNA information. 3 AA 549, at 38-39.

The case went cold for several weeks. Detective George Sherwood ("Detective Sherwood") was the lead detective in Sheila's homicide case. 2 AA 477, at 16. He investigated an alleged burglary that took place around the same time in the same apartment complex, but it was determined to be unrelated to Sheila's murder. 2 AA 481-82, at 31-33. Instead, the burglary was intoxicated individual who attempted to get into an apartment where he used to reside. 3 AA 522, at 69. With no suspects, Sheila's murder remained unsolved. However, in May 2005, Detective Sherwood learned about an event that provided him with information regarding the identity and intent of Sheila's murderer.

Less than three months later after Sheila's murder, on May 3, 2005, Marilee Coote ("Marilee"), a 45 year woman who lived in an apartment located on East Russell was found dead in her apartment. 2 AA 422, at 202-204. Similar, to Sheila's case there were no signs of forced

entry. 2 AA 439, at 52. Marilee was found laying in her living room completely naked. 2 AA 410, at 210. Similar to Sheila, Marilee had no outward signs of injuries besides a thermal injury to Marilee's pubic hair and inner thighs caused by application of heat to the area. 2 AA 355, at 72. Additionally, several items of personal property were submerged in water in a bath tub and other items appeared to have been put through a machine wash in the apartment. 2 AA 424, at 211-12; 2 AA 429, at 12.[6]

Dr. Simms testified at trial about Marilee's autopsy. Marilee suffered several injuries to her neck, similar to Sheila, which indicated that she was manually strangled. 2 AA 355, at 71. The neck injuries were consistent with someone applying pressure to inflict injury. 2 AA 357, at 77. Also similar to Sheila, Marilee suffered injury to her head from blunt trauma contemporaneous with the time of her death. 2 AA 356, at 76. Moreover, again like Sheila, Marilee had injuries to her vaginal area indicating that she was sexually assaulted. 2 AA 356, at 75. The police collected DNA samples from semen collected in Marilee's vaginal area. 2 AA 442, at 63. The coroner's office concluded that Marilee's death was caused by strangulation and the manner of death was homicide. 2 AA 359-60, at 88-89.

Juanita Curry ("Juanita"), Marilee's downstairs neighbor, testified at trial that on morning of May 3, 2005, she noticed emergency personal going up and down the stairs to Marilee's apartment. 3 AA 508, at 14-16. While emergency personnel were still in the apartment complex, the Defendant came to Juanita's door. 3 AA 509, at 17-18. Juanita knew the Defendant through her friend Mawusi Ragland. 3 AA 509, at 18. Ms. Ragland lived in the apartment next door to Marilee. 2 AA 442, at 62. The Defendant attempted to come into Juanita's apartment when emergency personnel came downstairs from the apartment above. 3 AA 509, at 18. Defendant told Juanita that police made him nervous. 3 AA 509, at 19.

Through the investigation of Marilee's murder, the police requested and received a DNA sample from the Defendant through a buccal swab. 2 AA 442, at 62. The police compared the Defendant's DNA profile with the DNA profile created from DNA evidence collected from

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[6] A latent print examiner expert testified that when items are wet or been submerged in water it is difficult to obtain latent prints off of them. 2 AA 451, at 98-99.

Marilee and a carpet stain located under Marilee's legs. 3 AA 552, at 50. The police learned that Defendant's DNA profile matched the DNA found in Marilee and on the carpet beneath her. 3 AA 553, at 53. The frequency of the profile is rarer than one in 650 billion people. 3 AA 552, at 51-52. So to a scientific certainty, the Defendant was identified as the source of DNA found in Marilee and on the carpet stain. 3 AA 552, at 52.

Defendant's DNA profile was entered into CODIS and it was revealed that Defendant's profile was consistent with one of the contributors of DNA taken from the vaginal swabs at Sheila's autopsy. 3 AA 522, at 71. Paulette testified at trial that Defendant could not be excluded as the DNA source unlike 99.99% of the population. 3 AA 550, at 42. After receiving notification of the CODIS hit, Detective Sherwood focused on defendant as a possible suspect in Sheila's murder. 3 AA 523, at 73-75.

The police talked to Debra and found out that the Defendant actually dated Debra in the past. 2 AA 378, at 27-28. Debra told police that the Defendant had met Sheila before as well. 2 AA 378, at 28. She testified that the last time she saw the Defendant while Sheila was alive was two weeks before Sheila's death. 2 AA 379, at 29. Sheila and Debra were outside their Pecos Apartment when they spotted the Defendant. 2 AA 379, at 29. Defendant noted that Debra had changed apartments in the complex. 2 AA 379, at 29. Debra asked the Defendant what he was doing at the apartment complex and the Defendant told her that he was working at the apartment complex as a maintenance man. 2 AA 379, at 30. At trial, the property manager for the apartment complex testified that Defendant never worked at the complex. 3 AA 571-72, at 128-29.

Debra also testified that after Sheila's murder, the Defendant was very interested in helping her cope with the grief of her daughter's loss and even drove her to appointments to see a psychologist. 2 AA 379, at 31-32. Defendant asked Debra for updates regarding the investigation of Sheila's case. 2 AA 379, at 32. The Defendant asked Debra if the police ever found out what happened to Sheila or who killed her. 2 AA 379, at 32. At no point did the Defendant ever claimed or mentioned to Debra that he had any type of sexual relationship with Sheila. 2 AA 379, at 32.

With the new DNA information, the police re-investigated Sheila's murder. 2 AA 483, at 40. The police questioned Sheila's friends about other possible sexual relationships she may have had with men. 2 AA 483-84, at 40-41. The police discovered that Sheila also had a casual sexual relationship with George Brass. 2 AA 494, at 81-82. The police questioned Brass and he volunteered that he had a sexual encounter with Sheila the morning on the day she was murdered. 2 AA 484, at 42-43; 2 AA 494, at 82. Brass told police that after the sexual encounter with Sheila he left to go to work at Wal-Mart. 2 AA 494, at 82-83. DNA testing showed that Brass could not be excluded as the second DNA contributor to the mixture of male DNA collected from Sheila. 3 AA 551, at 47-48.

The police investigated Brass's alibi. They found out that on March 24, 2005, Brass checked into work at noon, went to lunch at 4 PM, returned to Wal-Mart at 5 PM and finally left work at 7:45 PM on March 24, 2005. 2 AA 498, at 99. There was no indication that anyone changed Brass's time record. 2 AA 498, at 99-100. Moreover, the Wal-Mart where Brass worked at was located good distance away from the Pecos Apartment with no convenient driving route. 3 AA 527-28, at 92-93. Thus, Brass checked into work before Sheila's murder and left for lunch after Sheila body was discovered.

On August 26, 2006, Detective Sherwood interviewed the Defendant about Sheila's murder. 3 AA 524, at 78. At the time, the Defendant was incarcerated in the Clark County Detention Center due to the Marilee Coote murder. 3 AA 666. Detective Sherwood told the Defendant that he was not going to question him about his pending case but about a separate matter. 3 AA 524, at 80. The detective read the Defendant his Miranda rights from a card and the Defendant acknowledged that he understood his rights. 3 AA 524, at 79-80. The Defendant signed the card in Detective Sherwood's presence. 3 AA 524, at 80. Detective Sherwood asked the Defendant if he knew Debra. 3 AA 525, at 82-83. The Defendant did not respond to the question. 3 AA 525, at 83. He then told the detective that he was not going to tell him if he knew Debra until the detective told him why he was being interviewed. 3 AA 525, 83-84. Detective Sherwood informed the Defendant that he was investigating Sheila's death. 3 AA 526, at 85-86. Defendant told the detective he did not know a Sheila. 3 AA 526, at 86. After

Detective Sherwood told the Defendant that Sheila was Debra's daughter, the Defendant told the detective that he only knew Sheila by her nickname. 3 AA 526, at 86. Defendant told the detective that he had his own problems and that he did not want to be involved in someone else's problems. 3 AA 526, at 87-88.

Eventually, Defendant was arrested and charged with Murder, Sexual Assault, Burglary and Robbery relating to Sheila.

ARGUMENT

I

THE COOTE MURDER EVIDENCE WAS PROPERLY ADMITTED

Defendant contends that the trial court improperly allowed the State to introduce bad act evidence, namely the Coote murder. However, the district court considered the matter in a Petrocelli[7] hearing and found that it was admissible with an admonishment to the jury. Defendant fails to show why the district court was "manifestly wrong" in its reasoning. Therefore, the Defendant's conviction should not be reversed.

NRS 48.045(2) provides that evidence of other crimes may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-1065 (1997).

Ultimately, the decision to admit or exclude evidence lies within the discretion of the court. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998). This Court has held that the trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and will be given great deference. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Once the trial court makes it's determination, his or her decision

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[7] Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

will not be disturbed absent a manifest abuse of discretion. Felder v. State, 107 Nev. 237, 241, 810 P.2d 755, 757 (1991), citing Hill v. State, 95 Nev. 327, 594 P.2d 699 (1979).

On August 1, 2008, the district court held a Petrocelli hearing regarding whether the State would be permitted to introduce evidence of Defendant's murder of Marilee Coote and Rena Gonzalez. 2 AA 267-324. At the hearing, DNA analyst Paulette testified that the Defendant was identified as the source of the semen detected on the vaginal and anal swabs of Marilee. 2 AA 271. The Defendant was also identified as the source of semen found on the carpet stain removed from underneath Marilee. 2 AA 271. As for Gonzalez, Paulette testified that there was semen found but due to lack of sperm heads there was no way to identify the DNA source. 2 AA 272. Finally, Paulette testified that she was the analysis that worked on Sheila's case and 99.9934 percent of the world population could be excluded from DNA detected on the vaginal swab of Sheila, but that the Defendant could not be excluded. 2 AA 273. Once she received a CODIS hit that Defendant was not excluded as a source of DNA in Sheila's case, Paulette testified took a confirmatory step and processed her own DNA results to ensure there was a proper match. 2 AA 280-81.

At the hearing, the State argued that the evidence went to intent because it demonstrated that Sheila did not have consensual sex with the Defendant. 2 AA 288. This was especially relevant because the Defendant indicated that he was going to make a consent defense. 2 AA 288. Additionally, the State argued that it demonstrated identity because of the unique circumstances surround the murder.

The district court found that evidence of Marilee's murder would be allowed at trial in this case. 3 AA 649. The district court found that evidence of Marilee case "is sufficiently similar and nexus in time" to Sheila's case. 3 AA 318. The court also found that there was clear and convincing evidence, especially considering the DNA, that the Defendant committed Marilee's murder. 3 AA 312-13. Additionally, the court also found that the probative value was not substantially outweighed by unfair prejudice. 3 AA 649. In coming to its ruling, the district court noted that the Defendant was acquaintances of both Sheila and Marilee, meeting both women through women he used to date. 2 AA 316. It was also noted that in both cases there were signs

of violent sexual assaults and DNA evidence that directly implicated the Defendant. 2 AA 316. Additionally, it was probative because two sexual assaults with such similarities undermine the Defendant's argument that he had consensual sex with Sheila. 2 AA 318.

On October 15, 2008, the district court denied Defendant's Motion for Reconsideration. 2 AA 333, at 11. Again, the district court found that (1) it was clear that the Defendant murdered Marilee due to the DNA evidence; and (2) that it was relevant for identity and intent because the modus operandi was so similar. 2 AA 332, 7-8. The district court constantly admonished the jury with a limiting instruction regarding character evidence before all testimony about Marilee's murder was introduced and provided a limiting jury instruction. 2 AA 334, at 13; 1 AA 172 (Instruction 26).

In his brief, the Defendant does not argue and therefore concedes that there was clear and convincing evidence that the Defendant murdered Marilee. Thus, the State will only address the argument regarding the other two Tinch requirements.

A. The Coote Charges Were Relevant To Identity and Intent

The district court correctly ruled that evidence of Marilee's murder and sexual assault was relevant to identity and intent in this murder case.

In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), evidence of other acts was admitted to show identity, intent, motive and common plan. Gallego, 101 Nev. at 788, 711 P.2d at 861. The defendant in Gallego was charged with the 1980 kidnapping of two young women from a shopping mall, assaulting them and bludgeoning them to death with a hammer. Id. at 784, at 858. The trial court allowed the State to introduce evidence that Gallego kidnapped two young women from a shopping mall in 1978, sexually assaulted them and shot and killed them. Id. at 788-89, at 861. This Court found that the evidence was properly admitted as it was "not remote in time from the killings here considered" and that "substantial similarities" were shown to exist between the two events, indicating that the evidence was relevant to issues of identity as well as common plan. Id., at 789, at 861. Finally, this Court found that the probative value outweighed prejudice to the Defendant. Id.

Moreover, this Court has found a particular modus operandi to a crime can be relevant and admissible under NRS 48.045(2) when the identity of the perpetrator is at issue. This Court found the identity exception to NRS 48.045(2) generally involves situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial. Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (citing Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988)).

In this case, the State needed to demonstrate that any sexual encounter with the Defendant was non-consensual and that Brass did not commit the sexual assault and murder. The evidence was probative because it showed that the Defendant committed a similar murder and sexual assault; therefore, it was unlikely that the Defendant just happened to have two consensual sexual encounters with two women who were then murdered allegedly by someone else. It also made it less likely that Brass supposedly faked an alibi by having someone else clock in and out for him.

There were several similarities in the murders. Both Marilee and Sheila were casual acquaintances of the Defendant. They both knew the Defendant through women the Defendant had dated. Defendant chose locations where people would not find his presence suspicious.[8] Both women were killed in their apartments while they were alone during the daylight hours with no sign of forced entry. Both women's bodies were found naked face up in their apartment. Additionally, small items of personal property were taken from both women. The Defendant also attempted to destroy evidence by immersing it in water in both cases. Even more telling was that both women were violently sexually assaulted and suffered blunt trauma to their heads close in time with their murder. Manual strangulation was a factor in both deaths. While the coroner's office found that Sheila cause of death was drowning, the coroner's office also found that strangulation was a contributing factor. Finally, and possibly most important, DNA evidence obtained by vaginal swabs of both decedents directly tied the Defendant to both

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[8] At Sheila's apartment complex Defendant told people that he worked for the owners as maintenance man. At Marilee's apartment complex, he was dating one of the tenants.

murders, which occurred less than three months apart. Thus, testimony regarding details of Marilee's murder was plainly relevant to the identity and intent. Therefore, the district court was not manifestly wrong in allowing such evidence at trial

B. The Probative Value Of Marilee's Murder Outweighed The Prejudicial Effect.

As stated in Tinch, the probative value of the bad acts evidence must not be substantial outweighed by the danger of an unfair prejudicial effect. Tinch, 113 Nev. at 1176, 946 P.2d at 1064-1065. Typically, the prejudice cannot be brought on by the probative value of the evidence. United States v. Bonds, 12 F.3d 540, 572-574 (6th Cir. 1993).

This Court has affirmed previous district court's decisions to admit evidence of other murders or attempted murders in the past. See Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) *superseded by statute on other grounds* as stated in Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). Significantly, courts have explained that evidence is not "prejudicial" simply because it is incriminating. For instance, in United States v. Harrison, 679 F.2d 942 (D.C. Cir. 1982), the court held that allowing the extrinsic evidence was permissible explaining:

> …There is nothing "unfair" in admitting direct evidence of the defendant's past acts by an eyewitness thereto that constituted substantive proof of the relevant intent alleged in the indictment. The intent with which a person commits an act on a given occasion can many times be best proven by testimony or evidence of his new acts over a period of time prior thereto….

Id. at 948

In this case, as shown in Argument I(A), the probative value of Marilee's murder is immense. The State needed to demonstrate lack of consent in order to prove the Defendant sexually assaulted Sheila. Evidence that the Defendant manually strangled and violently sexually assaulted Marilee was extremely probative because it is highly unlikely that the Defendant had consensual rough sex with both women and then someone else murdered them on the same day. Additionally, it provided strong evidence that Defendant, not Brass, committed murder. While Brass testified that he was at work during the time of the murder the Defendant attempted to place doubt in the jury's mind by suggesting that someone could have clocked Brass in at work, leaving Brass free to commit the crime. 2 AA 489.

Moreover, the State limited the testimony regarding Marilee's murder to facts necessary to demonstrate the similarities to Sheila's murder. Dr. Simms testified to coroner's findings in both murders, which were similar in both cases. Monica Ramirez testified that she found Marilee's body naked, face up (similar to how Debra found Sheila) and that she did not move Marilee's body, setting up later testimony. 2 AA 422-23, at 203. Consuelo Henderson briefly testified that Marilee did not have a boyfriend and was not prone to put random personal belongings into her washing machine. 2 AA 444. Crime Scene Analyst Jeff Smirk testified about items found in Marilee's apartment that were placed in the washing machine and the bath tub. 2 AA 429-30, at 12-15. Another crime scene analyst testified for foundation regarding the carpet stain found under Marilee's body later discovered to contain the Defendant's DNA. 2 AA 436, at 39-40. Ebbert, the SANE nurse, testified to the indications of sexual assault in both cases. 2 AA 447. Edward Guenther testified to the lack of fingerprint evidence against the Defendant found in Marilee's apartment similar to Fred Boyd's testimony of lack of fingerprint evidence found in Sheila's apartment. 2 AA 420, at 194-195; 2 AA 453, at 105. Mr. Guenther also discussed why it was difficult to obtain latent prints off wet or submerged items. 2 AA 451, at 98-99.

Detective Donald Tremmel testified at trial to circumstances surrounding Marilee's murder including the position of the body, the lack of forced entry, signs of sexual assault and how he acquired DNA from the Defendant. 2 AA 438-42. The detective did not testify at this trial about three separate occasions he interrogated the Defendant about Marilee and Rena Gonzales murder. 1 AA 101. Juanita Curry's, Marilee's neighbor and friend, brief testimony was used to demonstrate that the Defendant was at Marilee's apartment complex at the time of her murder. The State did not elicit testimony from Ms. Curry of several peculiar interactions the Defendant had with her that day including his numerous attempts to get into her apartment and his attempt to kiss her. 3 AA 99-100. Finally, Paulette testified to the DNA evidence connecting the Defendant to both murders.

Evidence of Marilee's murder and sexual assault was necessary for intent and identity purposes. The probative value of the evidence far outweighed the danger of unfair prejudice. Therefore, Defendant's conviction should be affirmed.

C. The Evidence Presented Did Not Exceed the District Court Order.

The Defendant asserts that the testimony of Ramirez, Henderson and Curry went beyond the scope of the district court's order on the matter. The Defendant admits that he did not make an objection at trial based on these grounds.

In order to preserve an issue for review, a defendant must object and distinctly state the grounds for the objection." Johnson v. Egtedar, 112 Nev. 428, 434, 915 P.2d 271, 275 (1996). Because Defendant failed to object at trial, he must establish that the alleged error was both plain and affected his substantial rights. McConnell v. State, 120 Nev. 1043, 1058, 101 P.3d 606, 617 (2004). Plain error has been defined as that which is "'so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 1529, 907 P.2d 984, 987 (1995) (citing Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990)). For an error to be plain it must be clear under existing law. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (internal citations omitted).

The district court found that the State could put on Marilee's case to show intent and identity. 2 AA 381; 3 AA 649. Once the Defendant related a defense that he had consensual sex with Sheila as he did in his opening statement; the evidence of Marilee's murder became more relevant. 2 AA 347, at 38; 2 AA 348, at 41

As shown above, the State used all the witnesses in this fashion. Ms. Ramirez, testified to the position of the body and how the body was found, which were similar to the discovery of Sheila's body. Ms. Henderson testified that Marilee did not have boyfriend implying that she was not involved with the Defendant, similar to Debra's testimony that the Defendant was not in a relationship with Sheila. Additionally, Ms. Henderson also testified that Marilee would not typically submerge personal items in the washer or bath tub, indicating that the Defendant did such thing in attempt to spoil evidence. Finally, Ms. Curry testimony was used to demonstrate how the Defendant became a suspect in Marilee's case and then later in Sheila's case. Moreover,

considering the DNA and other evidence presented in this case, the Defendant is unable to demonstrate his substantial rights were affected by the brief testimony of these three individuals.

Therefore, the district court did not plainly err by allowing such testimony to be heard at trial.

II

DEFENDANT'S CONFRONTATION RIGHTS WERE NOT VIOLATED

Defendant alleges his confrontation rights were violated because the State presented expert findings without calling the specific expert to testify at trial. Specifically, Dr. Simms, a forensic pathologist at the Clark County Medical Examiner's Office testimony at trial included information gleaned from Dr. Ronald Knoblock's coroner's reports of Sheila and Marilee. Dr. Knoblock is a forensic pathologist that formerly worked in the Clark County Medical Examiner's Office. 2 AA 349-50, at 46-50. Dr. Knoblock authored those reports while he worked at that office. 3 AA 349, at 48; 3 AA 355, at 70. However, Dr. Simms formed his own opinions on the murders after an independent review of the materials (autopsy photographs, toxicology screen, autopsy findings) 2 AA 350, at 50; 2 AA 351, at 55-56; 2 AA 354-55, at 68-69; 2 AA 359-60, at 88-89 .

Additionally, LVMPD DNA analyst Paulette testified at trial regarding her own DNA findings in Sheila's case. She also testified about DNA report on DNA found in Marilee authored by Thomas Wahl, a DNA analyst who formerly worked in the LVMPD forensic lab. 3 AA 551, at 48.[9] However, Paulette did her own re-testing of DNA evidence in Marilee's case. 3 AA 553, at 53-54. She testified that like Wahl's testing, she found that the Defendant was the contributor to the DNA profile in the carpet stain found beneath Marilee and that the DNA profile was rarer than 1 in 650 billon. 3 AA 553, at 54-55.

The Defendant did not object at trial to the admission of Dr. Simms and DNA expert Paulette's testimony and thus waived the issue. Therefore plain error analysis should be applied to this matter.

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[9] It should be noted that both Dr. Knoblock and Wahl testified at the preliminary hearing in the Coote case. 1 AA 86-7.

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right "to be confronted with the witnesses against him." United States Const. Amend. VI This protection applies to the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794–95, 89 S.Ct. 2056, 2062–063 (1969).

The U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004), held that statements that are "testimonial" in nature, provided by a witness who does not testify at trial, are not admissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. However, the Court failed to define the scope of "testimonial" statements. Crawford, 541 U.S. at 68, 124 S.Ct. 1354 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

However, the Court did describe three formulations of a "core class" of "testimonial statements": 1) Ex-parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements that a declarant would reasonably expect to be used for prosecution; 2) Extrajudicial statements contained in formal testimonial materials such as affidavits, depositions, prior testimony, or confessions; and 3) Statements made under circumstances where it is reasonable to believe the statement will be available for later use at trial. Id. at 51–52, 124 S.Ct. 1354.

Recently, the Court had occasion to apply Crawford to notarized certificates issued by forensic analyst attesting to their findings. Melendez-Diaz v. Mass., 557 U.S. ___, 129 S.Ct. 2527, 2531 (2009). Melendez-Diaz involved a drug trafficking case in which the defendant allegedly stashed cocaine in the police vehicle on his way to jail. Id. at 2530. After forensic analysts performed tests, they submitted signed, notarized certificates reporting their findings, including identifying the substance as cocaine. Id. at 2531. The defendant objected to submission of the certificates asserting it would violate the Confrontation Clause; however, the certificates were admitted. Id. None of the analysts testified during the defendant's trial. Id. The Court held that under such circumstances—where the prosecution proved an element of

the offense by a sworn certificate, rather than by live testimony at trial (or a showing of witness unavailability and the prior opportunity for cross-examination)—the admission of the certificates amounted to error under a straightforward application of Crawford's holding. Id. at 2542.

The certificates in Melendez-Diaz were prepared "specifically for use at the [defendant's] trial . . . ." Id. at 2540. Their "sole purpose" was to provide prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed. Id. at 2533. Further, the certificates contained "only the bare-bones statement that 'the substance was found to contain cocaine.'" Id. at 2537. The defendant did not know what tests were performed, whether the tests were routine, and whether interpreting the results required the exercise of judgment or the use of skills that the analysts may not have possessed. Id.

Justice Thomas, who made up the fifth vote in the five-to-four holding of Melendez-Diaz, concurred. He wrote separately, "[t]o note that I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.'" Id., 129 S.Ct. at 2543 (*citing* White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736 (1992) (Thomas, C, concurring). He further stated he joined the majority because the certificates of analysis in question in Melendez-Diaz were "quite plainly" affidavits that fall within the core class of testimonial statements governed by the Confrontation Clause. Id. at 2543.

A. The DNA Report Was Not Testimonial

There several important difference with the DNA report and the situation Unlike in the Melendez-Diaz case. Unlike the certificate of analysis in Melendez-Diaz, the DNA report was not admitted into evidence at trial. Also unlike Melendez-Diaz, the DNA report was not an affidavit made in lieu of testimony. In this case, the State expert, Paulette, reviewed the report, testified that she agreed to its findings and was subject to cross-examination. Moreover, Paulette testified to the procedures of the LVMPD forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination. Finally,

Paulette re-tested the Defendant's DNA profile after she received a CODIS hit in Sheila's matter.[10]

Paulette testified to what made up a DNA profile. 3 AA 548, at 35-36. She also testified to how the forensic lab acquired DNA evidence to create a profile. 3 AA 548, at 36-37. Further she explained how she compared DNA profiles to see if she found a match. 3 AA 549, at 38-40. She even used a chart, stipulated to by the Defendant, to aid the jury with the DNA evidence. 3 AA 548, at 34. Moreover, she explained how DNA material is preserved in her laboratory. 3 AA 548, at 40. Finally, she also discussed the statistics of the DNA findings and what it meant per lab policy. 3 AA 551, at 46; 3 AA 552, at 51-52.

During cross-examination, Paulette testified to why testing was done over a period of time instead of all at once. She also testified regarding possible DNA mixtures. Finally, she answered questions about the CODIS database. 3 AA 553-54, at 55-59.

In People v. Johnson, 394 Ill.App.3d 1027 (Ill. App. 2009), the defendant challenged an expert's testimony regarding DNA test results, arguing that he had no opportunity to cross-examine the analysts who conducted the testing. The court distinguished Melendez-Diaz, noting that "[i]n contrast with certificates presented at trial" there, the DNA expert in the case before it "testified in person as to [her] opinion based on the DNA testing and [was] subject to cross-examination." Johnson, 394 Ill.App.3d at 1037. The court noted that experts are permitted to disclose underlying facts and data to the jury in order to explain the basis for their opinions. It concluded that the DNA report at issue was offered as part of the basis for the expert opinion, so there was no confrontation violation.

The California Supreme Court has found that a DNA report is not testimonial hearsay. People v. Geier, 41 Cal.4th 555, 593-94, 161 P.3d 104, 131 (Cal. 2007). In Geier, the defendant alleged a violation of his confrontation rights under Crawford because the opinion of the prosecution's DNA expert was based on testing she did not personally conduct. The Geier court

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[10] Additionally, Defendant's own DNA expert did not dispute LVMPD's forensic laboratory method of extracting DNA and agreed with the statistical calculations made by Paulette in both Sheila's and Marilee's cases. 3 AA 580-81, at 83-85

extensively reviewed different opinions from several jurisdictions before concluding that "scientific evidence memorialized in routine forensic reports is not testimonial." Geier, 41 Cal.4th at 606, 161 P.3d at 139, 61 Cal.Rptr.3d at 621. The court went on to point out that the DNA analyst's notes during testing were not themselves "accusatory, as DNA analysis can lead to either incriminatory or exculpatory results." Geier, 41 Cal.4th at 607, 161 P.3d at 140, 61 Cal.Rptr.3d at 622. In contrast, the accusatory statements, that the defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless the defendant was the donor, the California Supreme Court noted, came from the live testimony of the DNA expert. Geier, 41 Cal.4th at 607, 161 P.3d at 140.

While the Melendez-Diaz Court noted this Court's ruling in Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005), as one of those cases in compliance with the rule set forth in Melendez-Diaz that case does not apply here. In Walsh, 121 Nev. at 906, 124 P.3d at 208, this Court held that affidavits specified in NRS 50.315 are testimonial because while they may document standard procedures, they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, would violate the Confrontation Clause. Walsh, 121 Nev. at 906, 124 P.3d at 208. The DNA report in this case was not an affidavit or formalized testimonial material made in lieu of testimony as was the case in Walsh. Moreover, DNA report was not done for the purposes of litigation but was an analysis of physical evidence to locate a possible suspect in a routine police investigation made in the ordinary course of the laboratory's business. Such reports are just as likely to be exculpatory.

In this case, the report was not read into evidence as a sworn affidavit. Indeed, they were not read into evidence at all. Instead, Paulette was testifying about the results of DNA testing in a lab where she was employed as a DNA analyst. Additionally, Paulette even re-tested some of the DNA evidence found in Marilee's case. She also reworked the Defendant's DNA sample and created her own DNA profile for the Defendant. 3 AA 549, at 40. Paulette's testimony about the test results performed by someone else is not akin to the affidavit-like certificates of analysis used in Melendez-Diaz. Whereas the certificates of analysis in Melendez-Diaz were "functionally identical

to live, in court testimony," the test results here served as a partial basis for the opinion of a testifying expert.

B. The Coroner's Reports Were Not Testimonial.

The Defendant erroneously proposes that Melendez-Diaz should apply to the coroner's reports of Sheila and Marilee. However, the instant case is distinguishable from Melendez-Diaz. First, as stated above, the Defendant had an opportunity to cross-examine the medical examiner who independently reviewed both cases and gave his own opinion regarding the victims' injuries and causes of death. 2 AA 354, at 68; 2 AA 359, at 88. Additionally, the Dr. Simms worked in the same office in the same position as Dr. Knoblock and therefore could testify to the office procedures and was subject to such cross-examination. Finally, unlike the materials in Melendez-Diaz, the coroner's reports were not admitted into evidence.

Like DNA report, the coroner's reports were not formalized documents read into testimony and acting as "functionally identical to live, in court testimony," but instead were documents that served as a partial basis for the opinion of a testifying expert.

C. Dr. Simms' And Paulette's Testimony Were Properly Admitted.

Melendez-Diaz also does not apply in the circumstances as related above because Dr. Simms and Paulette formed their own independent opinion at least to the victims' injuries and DNA. The fact that they used non-testifying expert's reports or examinations in forming such an opinion does not violate Melendez-Diaz.

Expert witnesses can testify "within the scope of [their specialized] knowledge," NRS 50.275, based on facts or data "made known to (them) at or before the hearing," NRS 50.285(1), that are "of a type reasonably relied upon by experts in forming opinions or inferences" and therefore "need not be admissible in evidence," NRS 50.285. Pursuant to NRS 50.285, experts are allowed to base their opinion on otherwise inadmissible information, if that information is reasonably relied upon by others in the field. Estes v. State, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006). In addition, Nevada law allows an expert to testify as to the basis of her opinion. NRS 50.305 ("The expert may testify in terms of opinion or inference and give his reasons therefore…").

In this case, both Dr. Simms' (2 AA 349) and Paulette's (3 AA 547) testimony constituted expert testimony because they were experienced and qualified to make such opinions. Dr. Simms and Paulette properly relayed in part on information found in other expert's reports in reaching their opinion. Thus, in accordance with Estes and NRS 50.305, Dr. Simms and Paulette properly gave the basis of their opinion, even if the reports were arguably inadmissible.

Dr. Simms reviewed Dr. Knoblock's reports, toxicology screens and the autopsy photographs and subsequently agreed with Dr. Knoblock's findings as stated in the coroner's reports. Moreover, Paulette reviewed Wahl's DNA reports and conducted her own DNA testing on some of the evidence and found with the same statistical likelihood that the DNA found on Marilee was generated by the Defendant.

D. The Coroner's Reports and DNA Report Are Exceptions to the Hearsay Rule

Pursuant to NRS 51.035, hearsay evidence is evidence of a statement made other than by a testifying witness which is offered to prove the truth of the matter asserted. The general rule is that hearsay is inadmissible. NRS 51.065. Pursuant to NRS 51.135, business records are an exception to the hearsay rule and thus are admissible.

In Melendez-Diaz, the Court reiterated its position in Crawford that, "Most of the hearsay exceptions covered statements by their nature were not testimonial—for example, business records . . . ." Business records are exempt because they have been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Melendez-Diaz, 129 S.Ct. at 2539–40. Documents, such as the affidavits prepared by the analysts, created specifically for use at trial, are considered testimony against a defendant; therefore the analysts were subject to confrontation under the Sixth Amendment. See Melendez-Diaz, 129 S.Ct. at 2540. The Court held in Melendez-Diaz, 129 S.Ct. at 2538, that the notarized certificates at issue were not exempt under the business record exception because, like police reports, they were generated by law enforcement officials ***and*** created essentially for use in court.

To qualify as a business record, it must: 1) Be a memorandum, report, record or compilation of data; 2) of Acts, events, conditions, opinions or diagnoses; 3) Made at or near the time by, or from information transmitted; 4) Made by a person with knowledge; 5) All in the course of a regularly conducted activity; and 6) As shown by the testimony or affidavit of the custodian or other qualified person. NRS 51.135.

The coroner's report in the instant case is a report of an act, event, condition, opinion or diagnosis, made near the time of the decedent's death by a person with knowledge, in the course of a regularly conducted activity, as shown by the testimony of a qualified person. Accordingly, the coroner report is admissible under the business records exception.

This Court would not be alone in holding that coroner's reports qualify as business records, in fact, several courts have held that autopsy reports fall under the business record exception to hearsay. See, *e.g.*, United States v. De La Cruz, 514 F.3d 121, 132–134 (1st Cir. 2008) (holding an autopsy report was a business record noting "[c]ertainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case); United States v. Feliz, 467 F.3d 227 (2nd Cir. 2006) (holding that autopsy reports are admissible as both business records and public records).

Here, the coroner's report was not created for use in court. Conducting a medical examination to determine the cause of death is part of the duties of a medical examiner. See Clark County Code §2.12.250 (1967); see also NRS 259.050(1). State and County laws make it the duty of the Clark County Coroner to inquire into and determine the cause and manner of death that occurs under several other circumstances such accidental, suspicious, unattended and overdose. Investigating the "cause and manner of death" entails an initial investigation and a medical examination, i.e., an autopsy. As such, an autopsy report is not created in anticipation of prosecution, it is a portion of the overall process followed by the Clark County Coroner's office in its investigations of several types of deaths—not just those that might lead to prosecution.

Finally, Pursuant to NRS 51.165, records or data compilations, in any form, of death, are admissible under the hearsay rule if the report was made to a public office pursuant to

requirements of law. Accordingly, a coroners' report is also exempt under the public records exemption.

Application of Melendez-Diaz to autopsy reports was contemplated by the dissenting Justices. The Justices were concerned about the range of other scientific tests that *may* be affected by the Court's holding set forth in Melendez-Diaz citing a law review article, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L.Rev. 1093, 1094, 1115 (2008) (noting that every court post-Crawford has held that autopsy reports are not testimonial, and warning that a contrary rule would "effectively functio[n] as a statute of limitations for murder"). Melendez-Diaz, 129 S.Ct. at 2546 (Kennedy, A., dissenting) (emphasis added).

As for the DNA report, Paulette testified that Wahl's report was kept in the course of business for the forensic lab. 3 AA 551, at 48. Paulette testified that she was qualified as a custodian of record to review Wahl's report. 3 AA 551-52, at 48-49. She testified that as manner of course she entered the DNA information obtained in Sheila's case into a database that stores DNA information. 3 AA 549, at 38-39. After she received a notification that the DNA matched the Defendant she reworked Defendant's DNA sample and came to the same result.

Considering Justice Thomas narrow concurrence in Melendez-Diaz it is unlikely the majority of United States Supreme Court Justices would hold the coroner's reports or Wahl's DNA report to be applicable to the rule announced in Melendez-Diaz, therefore this Court should affirm Defendant's conviction and sentence.

E. Error Analysis

Even if this Court found that Paulette's testimony regarding Wahl's findings was improper, such an error would have been harmless. In considering whether a Confrontation Clause violation is harmless, this Court looks to "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of

course, the overall strength of the prosecutor's case." Hernandez v. State, 124 Nev. 60, 188 P.3d 1126, 1135–36 (2008).

As stated above, Paulette retested some of the DNA evidence and thus independently found, like Wahl, that the Defendant's DNA profile matched the profile found in Marilee's case. Moreover, Paulette also did the DNA testing in Sheila's case. Therefore, any error in introducing Wahl's findings would not affect the Defendant's substantial rights and any case would be harmless. The State had a strong case, independent of Wahl's findings, to convict the Defendant of murder and sexual assault of Sheila as shown in Argument I(c) and VII. Thus, the any error would have been harmless.

III

DEFENDANT'S STATEMENT WAS PROPERLY ADMITTED

Defendant claims that his constitutional rights were violated because Detective Sherwood interviewed him about Sheila's case after he was in custody for another matter. However, it is well established law that law enforcement officials may discuss a matter with a defendant who is in custody for other unrelated charges. In this case, the Defendant was advised of his Miranda rights and purposefully chose to waive them and even signed a Miranda card. Thus, Defendant's claim is without merit.

A. Defendant's Sixth Amendment Right To Counsel Was Not Violated.

The Sixth Amendment right to counsel prevents admission at trial of a defendant's statements which police have deliberately elicited after the right has attached and without obtaining a waiver or providing counsel. Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d 16, 24 (2004) (citing Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 1022-23, (2004)). Once a defendant invokes the Sixth Amendment right to counsel, the government must cease further attempts to obtain his statements until he has been provided counsel, unless he initiates the conversation and waives his rights. Kaczmarek, 120 Nev. at 327, 91 P.3d at 25 (citing McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

However, the Sixth Amendment right to counsel is offense specific and does not require suppression of statements deliberately elicited during a criminal investigation merely because the right has attached and been invoked in an unrelated case. Kaczmarek, 120 Nev. at 327, 91 P.3d at 25 (citing McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

In his Opening Brief, the Defendant acknowledges that the rule allows police officers to interview a person in custody about an offense unrelated to his custody without violating the Defendant' Sixth Amendment rights. Thus, the Defendant Sixth Amendment rights were not violated.

B. Redacting References To Defendant's Attorney Was Not Error

Defendant argues that the district court erred in not allowing him to introduce into evidence the portion of his statement where he requested to talk to his attorney.

It is within the trial court's discretion to admit or exclude evidence and that determination will not be disturbed unless manifestly wrong. Walker v. State, 116 Nev. 670, 674-75, 6 P.3d 477, 479-480 (2000).

In this case, the Defendant attempted to cross-examine Detective Sherwood about that portion of the interview where the Defendant indicated would not decided whether to answer questions until he spoke to his attorney. 3 AA 534, at 117-118. Prior to Detective Sherwood's testimony, the Defendant sought to exclude the introduction of Defendant's statement on Sixth Amendment grounds and was denied. 3 AA 505-6, at 3-6. However, the district court agreed references to the attorney should not be made. Therefore when the Defendant appeared to open the door to this issue, the State objected to point out that possibility. 3 AA 534, at 118. After a bench conference, the district court sustained the objection. 3 AA 534, at 118. Later, Defendant's counsel made a record stating that he intended, for strategic reasons, to bring in testimony that the Defendant wanted to talk to his attorney before deciding to answer questions. 3 AA 540, at 4. The district court stated that it believed such testimony would imply that the Defendant, by exercising his right to counsel, had something to hide and that a negative inference can be drawn against the Defendant for doing something he was entitled to do. 3 AA

541, at 5-6; See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229 (1965); Diomampo v. State, 185 P.3d 1031, 1039-40 (2008). The State noted for the record that it stopped questioning Detective Sherwood about the Defendant's statement right before the Defendant told the detective that he wanted to talk to his attorney. 3 AA 541, at 5-6. Thereafter, Defendant's responses continually contained something about wanting to talk to his attorney. 3 AA 541 at 5.

While its true that NRS 47.120 generally permits all of a statement to be admitted if the opposing party so desires, the statute cannot cure a Griffin or Doyle problem. Thus the district court, balancing between the constitutional problems and the statute, did not err.

The defendant cites Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996) in support of his claim. In Domingues, the State introduced portions of Domingues's admissions to police. Domingues, 112 Nev. at 694, 917 P.2d at 1372. The district court prohibited defense counsel from cross-examining the detective regarding other portions of the statement that were arguably favorable to Domingues. This Court found that the portion of the interview was relevant and thus the trial court erred in denying it. Id. However, this Court found the trial court's error harmless because there was overwhelming evidence that Domingues's committed the murders.

In this case, the excluded statement portion was not directly exculpatory and allowing such questioning would have left a false impression with the jury. Unlike, Domingues where the excluded statement directly aided the defendant's defense and included exculpatory statements, the excluded portions in this matter did not help the Defendant's case. Instead, as pointed out by the district court, it made the Defendant look even less cooperative with police.

Finally, even if the district court did err, *in arguendo*, the Defendant was not prejudiced by the error. As stated above, the Defendant does not make any statements that are remotely exculpatory in the excluded portion. Additionally, despite Defendant's assertions, it is unlikely that Defendant's claims that he needed to talk to attorney would have been seen as cooperative. Especially, since there were no future statements made by the Defendant to the police. Moreover, the evidence against the Defendant was overwhelming. See Arguments VII. Therefore, Defendant's conviction should be affirmed and his sentence upheld.

IV

AUTOPSY PHOTOGRAPHS WERE PROPERLY ADMITTED

Defendant asserts the district court erred in allowing the State to admit cumulative and gruesome autopsy photographs at trial.

The admissibility of evidence is within the trial court's sound discretion; this Court will respect the trial court's determination as long as it is not manifestly wrong. Byford v. State, 116 Nev. 215, 231 994 P.2d 700, 711 (2000). Additionally, this Court has previously held that gruesome photographs are admissible at trial if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). Such photos have been deemed appropriately admitted when they depict the crime scene, the severity of the wounds and the means of infliction. Byford, 116 Nev. at 231, 994 P.2d at 711. Despite the Defendant's apparent reliance on Dearman v. State, 93 Nev. 364, 566 P.2d 507 (1977), nothing in that case mandates the district court review each proposed photograph outside the presence of the jury. Dearman, 116 Nev. at 369-70, 566 P.2d at 410.

In this case, the Defendant objected to the use of some of the autopsy photographs during Dr. Simms testimony. 2 AA 353, at 62. It is never mentioned on the record, which photographs in particular were objected to by the Defendant. The district court asked Dr. Simms if he "went through all of the photos that were available and pick out a minimum number that could demonstrate each of the points you needed to make." 2 AA 353, at 62. Dr. Simms told the district court that he had. 2 AA 353, at 62. Thereafter, Defendant's objection was overruled. 2 AA 353, at 62. The Defendant renewed the objection during testimony about Marilee's autopsy. 2 AA 357, at 80. The district court asked Dr. Simms the same question and Dr. Simms responded that he had picked out the minimum number to demonstrate the points he was making with the jury. 2 AA 357-58, at 80-81. The State noted that there were hundreds of photographs taken at each autopsy and only a few of them were used at trial. 2 AA 358, at 81.

The autopsies photographs were especially necessary in this case because the State was attempting to prove the identity and intent of the Defendant by demonstrating that he murdered Sheila in the same manner that he had murdered Marilee. The State presented several

photographs depicting the severity of the internal wounds and the means of infliction. The photographs that were used in conjunction with the testimony of Dr. Simms, helped the jury understand the basis of his findings. Additionally, the timing of Sheila's injuries was critical due to Brass's alibi. As its members are without medical training, the jury might otherwise be incapable of understanding the extent of the victims' injuries without the visual assistance of photographs to coincide with the expert testimony. For example, the pattern of injuries to Sheila's and Marilee's neck indicated that the Defendant had manual strangled them probably with the use of his hands. 2 AA 352, at 57-58. Cropped photographs of the hemorrhages in the neck would not have been as informative because it would not have shown the full pattern of injuries found within the victims' neck.

In light of Dr. Simms' testimony that he used the minimum amount of autopsy photographs necessary to make his points to the jury and the State's attempt to demonstrate the similarities in Sheila's and Marilee's murders in order to establish identity and intent, the district court did not abuse its discretion in admitting the photographs.

V

DISTRICT COURT PROPERLY EXCLUDED IMPROPER HEARSAY

Defendant asserts that the district court erred in not allowing him to elicit testimony from inmate William Kinsey that he thought Sheila was dating someone named "Keith" around the time of her death. However, it was undisputed that Kinsey was incarcerated during this period of time and therefore had no personal knowledge regarding who Sheila was dating. The district court heard the matter outside the presence of the jury and correctly ruled that such testimony from Kinsey was inadmissible hearsay.[11]

As stated above, it is within the trial court's discretion to admit or exclude evidence and that determination will not be disturbed unless manifestly wrong. Walker, 116 Nev. at 674-75, 6

[11] The Defense opened with testimony it should have known was hearsay and would not have been admissible. 2 AA 347, at 38-39. The State believes they should have been admonished for this since the State would have been.

P.3d at 479-480 (2000). Hearsay statements are inadmissible at trial unless they fall under an exception. NRS 51.065. Hearsay is defined as an out of court statement used to prove the truth of the matter asserted. NRS 51.035. The policy behind excluding hearsay is that it becomes difficult or impossible to test the credibility of the declarant, since cross-examination to ascertain a declarant's perception, memory, and truthfulness is not available. See Deutscher v. State, 95 Nev. 669, 684, 601 P.2d 407, 417 (1979).

In this case, William Kinsey was set to testify for the Defense. 3 AA 584. However, the State objected to Kinsey's testimony as hearsay since he had been in State custody since December of 2004, several months before Sheila's murder. 3 AA 584, at 6. The State specifically objected to Kinsey's proposed testimony that he was allegedly aware that Sheila was dating someone named "Keith". 3 AA 541, at 6. The district court found that Kinsey did not have personal knowledge that Sheila was dating someone named Keith because he was incarcerated. 3 AA 541, at 8. Sheila never visited him with a man named Keith. 3 AA 542, at 10. Defendant's counsel admitted that Kinsey did not know the Defendant. 3 AA 542, at 9. Thus, the only way Kinsey would know that Sheila was dating someone named Keith was if someone told him. Therefore, Kinsey's comments were hearsay and the district court did not err in excluding it.

The Defendant claims that it was necessary present Kinsey's testimony to counter testimony by Debra and Ameia Fuller that Sheila had a relationship with Brass. However, unlike Kinsey testimony, Fuller testimony was not used to demonstrate the truth of the matter- that Sheila had a sexual relationship with Brass- but how the police found out about Sheila's relationship with Brass. Fuller testified that she told police that Sheila had a relationship with Brass. 2 AA 493, at 77-78.

Moreover, other testimony about Brass's and Sheila's relationship was based on personal knowledge. At trial, Debra testified that Sheila lived with her. 2 AA 373, at 5-6. She further testified that Sheila and Brass were close friends but was unaware that they had a sexual relationship. 2 AA 374, at 9-10. Brass testified at trial that he had a sexual relationship with Sheila. 2 AA 484, at 81. Finally, Defendant's witness Anthony Culverson, a member of Brass's family, testified that he knew Brass and Sheila were "seeing each other off and on." 2 AA 475, at

5-6. Thus, there was a substantial amount of personal knowledge presented at trial that Brass had a relationship with Sheila that was sometimes sexual. There was no such evidence introduced about the Defendant.

Defendant cites to DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001) in his brief for support of his position.[12] However, that case is easily distinguishable from this matter. In DePetris, the defendant killed her husband with shotgun while he was sleeping and presented evidence at trial of an imperfect self-defense. Defendant wanted to introduce handwritten journals authored by the deceased, which detailed extreme acts of violence and cruelty against his first wife and others. DePetris, 239 F.3d at 1060-63. The defense involved Defendant's fear of her husband and a belief that he would harm her as he had others. DePetris, 239 F.3d at 1063. The Ninth Circuit ruled the exclusion of the journal was improper because it went to the "heart of the defense" and there was also a strong indicia of reliability because the journal was in the deceased own handwriting. DePetris, 239 F.3d at 1062.

Kinsey testimony does not have any indicia of reliability. Kinsey never told police this information when they interviewed him and he did not send a letter stating this and only allegedly mentioned this in a not taped interview with the Defense. 3 AA 541, at 7. Unlike DePetris, the information was not in the victim's handwriting. Kinsey was in prison during the relevant timeframe and had no personal knowledge on the matter. There was no corroborating evidence introduced at trial that Sheila was dating a person named "Keith" much less that "Keith" was the Defendant, her mother's former boyfriend.

Moreover, if this Court finds that Kinsey's testimony was improperly excluded it was harmless error. There was overwhelming proof of Defendant's guilt as set forth in Argument VII. Given the overwhelming evidence, Defendant's conviction should be affirmed.

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[12] Defendant also relies on Chambers v. Mississippi, 410 U.S. 284 (1973) in arguing that the trial court's barring of the hearsay statements constituted a denial of a fair trial in violation of constitutional due process requirements. However, the Court specifically confined its holding to the 'facts and circumstances' presented in that case. United States v. Scheffer 523 U.S. 303, 316, 118, S.Ct. 1261, 1268 (1998) (internal citations omitted).

VI

THERE WAS NO PROSECUTORIAL MISCONDUCT

Defendant claims that he was denied a fair trial because of prosecutorial misconduct. Specifically, the Defendant claims that the prosecutor made improper indirect remarks about Defendant's silence. When addressing these claims, this Court engages in a two-step analysis. Valdez v. State, 124 Nev. 97, 196 P.3d 465, 476 (2008). First, this Court must determine if the conduct was improper, and second, if it is does whether it warrants a reversal. Id. Regarding the second step, a conviction will not be overturned if the conduct amounts to harmless error. Id. To determine if a harmless-error review is appropriate, this Court needs to determine if "the prosecutorial conduct is of a constitutional dimension." Id.

Determining whether misconduct is of a constitutional dimension depends on its nature. Id. If the conduct impermissibly comments on a specific constitutional right then it is considered a constitutional error. Id. Misconduct may also be of a constitutional dimension if in light of the proceedings the misconduct so infected the proceedings with unfairness that due process was denied. Id. If there is no constitutional dimension this Court shall apply a harmless-error review only if the defendant properly preserved his/her objection for appellate review. Id. If not preserved, it shall be reviewed for plain error. Id.

In this case, the Defendant acknowledges that his counsel failed to object regarding the alleged indirect references to Defendant's silence and that this Court should only consider this matter for plain error. See Defendant's Opening Brief, pg. 36.

Defendant claims that in prosecutor's closing and rebuttal "made numerous direct and indirect comments concerning" the Defendant's decision not to talk to the detectives or testify at trial citing to remarks made at 3 AA 595 and 3 AA 612-13. However, it is clear from the transcripts that the prosecutor was not indirectly commenting on Defendant's right to remain silent but instead she was commenting on the evidence. Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citation omitted) (a prosecutor's comments should be considered in context).

The State, in order to demonstrate beyond a reasonable doubt that the Defendant murdered Sheila, needed to show that George Brass could not have been her murderer since both men's DNA was found on the victim. The remarks referenced by the Defendant in his Opening Brief show the State's attempt to persuade the jury that George Brass could not be the murderer. The State argued that the evidence showed that Brass had sexual intercourse with Sheila before he went to work, several hours before Sheila was murdered. 3 AA 595, at 51-52. Moreover, the State cited many other reasons why George Brass would not harm Sheila such as he was already in a relationship with her, was good friends with her brother and Sheila's brother was dating Brass's sister. 3 AA 596, at 53-54. The prosecutor simply compared Brass's lack of reasons to murder Sheila with that of the Defendant. 3 AA 596, at 54. The Defendant was not young like Brass or Sheila's other boyfriend William Kinsey, in fact he use to date Sheila's mother, and it was unlikely Sheila would want to have sexual intercourse with him. 3 AA 596, at 54. The State pointed out that the evidence showed that both Brass and the Defendant were questioned about Sheila's murder while in custody. However, Brass was cooperative while the Defendant pretended, at first, not to know Sheila and Debra and was uncooperative.

Defendant did make objection during the State's rebuttal based on the State's reference to Defendant's statement during his interrogation, claiming that it was an improper comment on post-Miranda silence. However, the Defendant voluntarily waived his rights and therefore statements he made after he was advised of his Miranda rights were properly admitted. The district court correctly pointed out that Defendant was not silent. 3 AA 613, at 121. In fact, it was undisputed at trial that the Defendant was read his Miranda rights and even signed the Miranda card. 3 AA 524, at 79-80. Thus, it was entirely proper for the State to comment on Defendant's answers or lack of answers provided during his police interview.

VII

SUFFICIENT EVIDENCE SUPPORTS SEXUAL ASSAULT AND MURDER

The standard of review for sufficiency of the evidence upon appeal is whether the trier of fact, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim focused on sufficiency of the evidence, the relevant inquiry is "whether, after reviewing 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." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979)) (emphasis in original). "Where there is substantial evidence to support a jury verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

The evidence supports the jury's determination that the Defendant was guilty of sexual assault and murder. Dr. Simms testified that an autopsy of Sheila's body showed that she suffered blunt trauma to her head shortly before she died, was manually strangled and violently sexually assaulted. Moreover, Sheila was sexually assaulted very close in time with her death. Therefore, the person who murdered Sheila was likely the person who sexually assaulted her. Paulette testified that a mixture of DNA was found on Sheila's body through a vaginal swab and that the Defendant could not be excluded as a source when over 99.99 percent of the population could be excluded. She also testified that George Brass could not be excluded as the other source of the other DNA found on Sheila. George Brass testified that he had a sexual relationship with Sheila and that he had sexual intercourse with her the day that she had died. He further testified that he went to work after he had sexual intercourse with Sheila. Time records from Brass's work indicate that he was at work at the time of Sheila's death. Debra, Sheila's mother, testified that she used to date the Defendant and that she had seen the Defendant near her apartment two weeks before Sheila's murder. The Defendant told Debra he was working as a maintenance man for apartment complex. This turned out to be false.

Additionally, evidence was presented that Defendant committed a very similar murder just a few weeks after Sheila's death. Like Sheila, Marilee was found naked in her apartment face up with no sign of forced entry. Marilee was also an acquaintance of the Defendant like Sheila. Also like Sheila, Marilee was violently sexually assaulted. The Defendant was identified as the source of the DNA found on Marilee's body. Marilee, like Sheila, experienced blunt trauma to her head shortly before she died and was manually strangled. In both cases, the Defendant took personal property and used water in attempt to spoil forensic evidence. The evidence of Marilee's murder helped prove the identity and intent of the Defendant regarding Sheila's case.

Thus, the jury had sufficient evidence that the Defendant was guilty of Sheila's sexual assault and murder.

VIII

NO CUMULATIVE ERROR EXISTS

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1998).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Notably, a defendant "is not

entitled to a perfect trial, but only a fair trial…" Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)). Here, Defendant received a fair trial. All the errors alleged here are without merit. Therefore, Defendant's conviction must stand.

CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Dated this 19th day of February 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY /s/ Nancy A. Becker
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 19th day of February 2010.

Respectfully submitted

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Nancy A. Becker
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on this 19th day of February, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Catherine Cortez Masto
Steven S. Owens
JoNell Thomas

/s/ Margie English
Employee, Clark County
District Attorney's Office

BECKERn/Michael Schwartzer/english