IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 53859

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

5. Procedural history.

On December 19, 2008, Defendant was charged, by way of Information with the crime of Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165). On February 10, 2009, Defendant was charged, by way of Information with the crime of Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

On May 8, 2009, Judgment of Conviction was entered and Defendant was sentenced to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years plus a consecutive term of two hundred forty (240) months maximum with a minimum parole eligibility of ninety-six (96) months for the use of a deadly weapon to be served in the Nevada Department of Corrections with one hundred eighty-one (181) days credit for time served.

On May 21, 2009, Defendant filed his Notice of Appeal. On August 18, 2009, Defendant filed his Fast Track Statement.

6. Statement of facts.

Defendant was convicted for the Second Degree Murder of his live-in girlfriend Victoria Whitmarsh. Defendant was Caucasian, 5'10", 185 pounds, (Appellant's Appendix ("AA") 281: 68), a decorated military veteran with combat experience and military training in self defense. (AA 255: 178). Ms. Whitmarsh was 5'4", 110 pounds and Asian American. (AA 281: 68). Prior to her murder, Defendant was quoted as stating that he wanted to "kill the bitch" because he believed she was responsible for putting him away in prison. (AA 94: 14-15). Also prior to her murder, Defendant demonstrated to others the manner in which he could kill a person with a knife. (AA 94: 2-24).

On November 5, 2008, a fight ensued between Defendant and Ms. Whitmarsh. (AA 67, 71-72, 281: 66). The fight was so loud that it woke sleeping neighbors and caused them to go upstairs to see about the commotion (AA 67:188, 71: 204). Defendant fatally stabbed Ms. Whitmarsh with a knife. (AA 283: 77). In addition to her knife wound, Ms. Whitmarsh had a series of bruises all over her body that were determined to be a contributing cause of her death. (AA 182: 99: 8-12). Despite being militarily trained in self defense, 6 inches taller and weighing 75 pounds more than Ms. Whitmarsh, Defendant claims he had no choice but to kill her out of self defense. (AA 303: 154). Defendant did not claim that Ms. Whitmarsh's death was the result of a suicide. (See Generally AA). Defendant also did not claim he killed Ms. Whitmarsh in the "heat of passion." (See Generally AA). Despite this self-defense theory, Defendant never called 911. (AA 285: 83: 8-13). He also did not allow

police officers to come into the room to assist her. (AA 103: 51: 3 – 52: 10, AA 286: 86: 16-21). Defendant had to be tazed by the police and removed from the murder scene. (AA 112: 23-24).

At trial, Defendant sought to admit evidence that Ms. Whitmarsh had tried to commit suicide in the past and evidence that she struggled with depression, as proof of her violent character towards other people. (AA 266). The trial court excluded this evidence on the grounds that it did not amount to specific acts of violence against others. (AA 266: 7: 23 – 8:1).

During trial a police officer was allowed, over defendant's objection, to testify, about the times that he encountered stabbing homicide suspects in his career, whether or not those suspects had cuts on their hands similar to the cuts found on the Defendant's hands. (AA 203: 183: 10-12, 203: 184: 3-5, 203: 184: 24 – 185: 5). The trial court also precluded defendant's accident reconstruction expert for providing a legal conclusion about whether the stab wound Ms. Whitmarsh received was accidental. (AA 246: 144: 4-23). The trial court reasoned that since the witness was not a medical doctor, had not been noticed to make such a finding and had no reference to such testimony in his expert report regarding the medical opinion, he should be excluded because it was beyond his area of expertise. (AA 248: 152: 22-25).

During trial, Officer Hutcherson testified that Defendant made two racial epithets while sitting in the officer's vehicle (AA 135: 179: 10-12). Prior to testifying, the Officer never memorialized the statements, never placed them in his police report, or included them in a handwritten note submitted for discovery. (AA 153: 251: 22 – 252: 13). The State only learned of the statements the night before trial. (AA 164: 26: 10-22) After learning of the statements, the State instructed the officer not to include such remarks while testifying. (AA 164: 26: 15 – 27: 16). The officer disregarded the instruction and made them during trial. Defendant sought a mistrial on the grounds that it was a discovery violation and prejudicial. (AA 153: 251, AA 154: 254: 14-20). The district court found that in light of the lack of memorialization no discovery violation was committed and given the limited prejudicial

effect of the two statements the prejudice that Defendant may have suffered did not warrant an entirely new trial. (Id.).

The trial court also allowed the medical examiner to discuss photographs that illustrated the extent and severity of Ms. Whitmarsh's injuries. (AA 182). The medical examiner stated that the bruises covered her forehead, left arm, left side, right side of the abdomen, knee, legs and feet as well as buttocks. (AA 182-183). The medical examiner also testified that the bruises were a contributing cause of her death along with the stab wound she suffered. (AA 182: 99: 8-12). The medical examiner concluded that the bruises could have been caused by another person. (AA 182).

The trial court also made a number of rulings regarding proffered jury instructions. The trial court also denied Defendant's request for a Flight Instruction because there was no evidence of flight. (AA 230: 78: 22 – 79: 19). The trial court also denied Defendant's request for a Heat of Passion Instruction because the State's instruction was an accurate statement of the law. (AA 296: 126-127). Defendant and State jointly decided to forgo giving a Good Character Instruction to the jury. (AA 295: 122-123). The State submitted Jury Instruction #13 to the trial court. (AA 349). Instruction #13 defined that malice aforethought could be express or implied. (AA 349). Defendant did not object to the instruction. (See Generally AA). During closing arguments, the State discussed implied malice. (AA 298: 135: 8-20, 299: 140: 1-3). The State also submitted Jury Instruction #18 to the trial court. Instruction #18 defined Second Degree Murder, but specifically omitted any reference to a Second Degree Murder conviction based on a felony murder theory. (AA 354). Defendant objected to the admission of this Instruction on the grounds that it argued felony murder. (AA 294). The trial court overruled the objection and admitted the instruction. (AA 294: 119; 384).

7. Issues on appeal.

I. Did the Trial Court Err in Concluding that Evidence of a Victim's Past Suicide Attempts and Depression Are Not Specific Acts of Violence Against Others?

II. Did the Trial Court Err in Admitting a Jury Instruction that Accurately Defined Second Murder or Allowing the State to Properly Define Implied Malice During Closing Arguments?

III. Is a New Trial Warranted Where There Is No Discovery Violation and Where the Prejudice from the Inadvertent Disclosure of Off-Color Remarks are Minimal?

IV. Did the Trial Court Err in Admitting Photographs of Injuries Determined to be a Contributory Cause of the Victim's Death?

V. Did the Trial Court Err in Admitting the Lay Opinion of Police Officer or Precluding Defendant's Expert Witness From Testifying to a Legal Conclusion that Was Not Within His Realm of Expertise or Expert Report?

VI. Did the Trial Court Err in Settling the Jury Instructions?

8. Legal Argument, including authorities:

I. THE TRIAL COURT PROPERLY CONCLUDED PAST SUICIDE ATTEMPTS DO NOT CONSTITUTE SPECIFIC ACTS OF VIOLENCE TOWARDS OTHERS.

Overall, trial 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). The standard of review in a criminal case 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." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Furthermore, it is well established that it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). A verdict supported by substantial evidence will not be disturbed by a reviewing court. Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975).

Defendant claims that his due process rights were violated because the trial court excluded evidence of Ms. Whitmarsh's past suicide attempts and problems with depression. (FTS at p. 6). He erroneously contends that this evidence demonstrated Ms. Whitmarsh's violent character towards others and accordingly it should have been admitted to prove that she was the first aggressor on the night Defendant murdered her. (FTS at p. 7). As a general rule, character evidence is normally inadmissible to show that a person acted in conformity with their character. NRS 48.045(1). However, one exception allows "a defendant to

present evidence of a victim's character when it tends to prove that the victim was the likely aggressor, regardless of the defendant's knowledge of the victim's character." Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). More specifically, evidence that the victim committed specific acts of violence against others is admissible, when a defendant raises a claim of self-defense. Id.

Here, Defendant raised a claim of self-defense. Defendant sought to introduce his own testimony and extrinsic evidence about her depression and past suicide attempts. (FTS at p. 7). Defendant also sought to introduce his own testimony that two days before her murder, Ms. Whitmarsh attacked Defendant with a knife. (AA 266: 6: 14-21). Defendant mistakenly believed that Ms. Whitmarsh's past efforts to harm *herself* was tantamount to aggressive acts of violence against other people, such as Defendant. (FTS at p. 7). The trial court, however, disagreed. (AA 266: 7-8).

The trial court made two rulings. First, it properly determined that under NRS 48.045 and Daniel, Defendant could testify that Ms. Whitmarsh allegedly attacked him with a knife. (AA 266: 7: 18-22). It was held to be a specific act of violence against another. Id. The trial court also properly concluded that the evidence of her past suicide attempts and therapy that she underwent should be excluded. (AA 266: 7: 10–8: 1). The trial court recognized that under Daniel this proffered evidence did not amount to a "specific act of violence" towards another person. (AA 266: 7: 23- 8:1).

Despite the clear holding of Daniel, Defendant still contends the ruling was in error. (FTS at p. 6-10). Defendant relies on a trio of cases, all from outside this jurisdiction, to support his claim. (FTS at p. 9) See State v. Stanley, 37 F.3d 85, 90 (N.M. 2001); People v. Salcido, 246 Cal. App. 2d 450, 458-60 (Cal. App. 5th Dist. 1966); State v. Jaeger, 973 P.2d 404, 407-08 (Utah 1999). Defendant's reliance on these cases is entirely misplaced. In each of those cases, the defendants sought to introduce evidence of the victims' past suicide attempt history, because the defendants' defense at trial were that the victims *were not murdered, but rather committed suicide*. See Stanley, 37 F.3d at 90; Salcido, 246 Cal. App. 2d at 458-60; Jaeger, 973 P.2d at 407-08. Consequently, the courts in those cases found

where the defense of suicide is being raised such evidence is probative because it supports the defendant's theory that victim died as a result of a successful suicide attempt. See Stanley, 37 F.3d at 90; Salcido, 246 Cal. App. 2d at 458-60; Jaeger, 973 P.2d at 407-08. That situation is not present here. Defendant never argued Ms. Whitmarsh successfully committed suicide. (See generally AA) Defendant argued that he killed her in self defense. (AA 303: 156: 3-6). The factual circumstances and legal defenses raised in Stanley, Salcido and Jaeger are entirely different than the case at bar. The issue before this jury was not whether it was murder *or suicide*, but rather murder *or self defense*. This trio of decisions, consequently, is irrelevant. There is no legal authority to suggest suicidal tendencies are tantamount to having a propensity for violence towards other people. In light of Daniel, it is evident that as matter of law the trial court's ruling was well reasoned and proper.

II. THE TRIAL COURT PROPERLY SUBMITTED INSTRUCTION #18 AND ALLOWED IMPLIED MALICE TO BE DISCUSSED DURING CLOSING.

Defendant contends a new trial is warranted because it was improper to submit Jury Instruction #18 ("Instruction #18") to the jury and to allow the State to discuss an implied malice theory to the jury. Since a trial court is afforded great discretion when settling jury instructions, its decisions are reviewed only for an abuse of discretion. Crawford v. State, 121 Nev. 744, 748 121 P.3d 582, 585 (2005). Such abuse only occurs when the decision is considered "arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Upon review of the record and Nevada law, it was proper to submit Instruction #18 to the jury and allow implied malice to be discussed during closing arguments. Instruction #18 provided the definition of Second Degree Murder to the jury. (AA 354). Defendant claims the admission was incorrect because the second paragraph of Instruction #18 stated that the jury could find Defendant guilty under a "felony murder" theory. (FTS at p. 10). Defendant argues that since no felony murder theory was ever argued by the State, it was reversible error to provide such an instruction. (Id.). Instruction #18, however, contained no reference to felony murder. Paragraph 2 of Instruction #18 states as follows:

> 2) ***Where an involuntary killing occurs in the commission of an unlawful act, the natural consequences of which are dangerous to life, which act is intentionally performed by a person who knows that his conduct endangers the life of another***, even though the person has not specifically formed an intention to kill.

(AA 354) (emphasis added). This second paragraph is taken virtually verbatim from NRS 200.070 which defines Involuntary Manslaughter. The selected language from this statute that was used for Instruction #18, however, is taken from part of the statute that specifically defines *what other type* of intentional unlawful behavior, *other than a felony*, if committed, would constitute murder in the second degree. NRS 200.700 states in full:

> "Involuntary manslaughter" defined.
> 1. Except under the circumstances provided in NRS 484.348 and 484.377, involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, ***but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being,*** or is committed in the prosecution of a felonious intent, ***the offense is murder.***
> 2. Involuntary manslaughter does not include vehicular manslaughter as described in NRS 484.3775.

NRS 200.700 (emphasis added). A comparison of the emphasized text from Instruction #18 and NRS 200.700 reveals that a felony murder instruction was never given. It defines what other type *non-felonious but unlawful behavior* would warrant a Second Degree Murder conviction. Upon a closer review of NRS 200.700, it is clear that the State deliberately omitted the language of the statute that discussed felony murder. See NRS 200.700(1) ("or is committed in the prosecution of a felonious intent"). Thus no felony murder instruction was provided to the jury.

To avoid any risk of confusion, the trial court still gave the jury an oral instruction during trial that they were to disregard and not rely upon a felony murder theory. (AA 294: 119: 384.) Furthermore, the State was also instructed not to argue felony murder. (Id.). The State, accordingly, did not discuss it. (See Generally AA 297: 130 – 301: 147: 6; 305: 165: 20 – 309: 179: 23). Since the jury was not given a felony murder theory either in the form of Instruction #18 or closing arguments, Defendant's basis for appeal is meritless.

Defendant also contends a new trial is needed because the State argued to the jury that a "finding of murder could be based upon implied malice." (FTS at p. 11). However, the Defendant raised no objection to Jury Instruction #13 which expressly states "Murder is the unlawful killing of another human being, ***with malice aforethought, either express or implied***...." (AA 349) (emphasis added). Consequently, the State was well within its rights to state that murder can be found upon a showing of implied malice. There is no basis to award a new trial on this ground.

III. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL BECAUSE NO DISCOVERY VIOLATIONS OCCURRED AND PREJUDICE FROM THE OFF-COLOR REMARKS WERE MINIMAL

Defendant also claims that his due process rights were denied when a police officer, after being instructed by the State not to discuss the matter, testified that Defendant made two racial epithets while sitting in the officer's vehicle. (AA 135: 179: 10-12). A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-389, 849 P.2d 1062, 1066 (1993).

Defendant claimed that a mistrial was warranted because the introduction of the statement was prejudicial and it also constituted a discovery violation. (FTS at p. 12). However, no discovery violation occurred and the prejudice suffered was at worst minimal. There was no discovery violation because Officer Hutcherson never memorialized the statements. (AA 153: 251: 22 – 252: 13). He never wrote them down in his police report, he never gave a recorded statement of these facts and failed to put them down in a handwritten note regarding the case that was submitted for discovery. (AA 153: 251: 22 – 252: 13). The State only learned about the statement the night before the officer's testimony. (AA 164:26:10-22). However, the State did notice that the officer was an anticipated witness for this trial long before the officer testified. (AA 153: 252: 5-11). Thus, Defendant had the opportunity to pretrial the officer and discover the statements. In light of these facts, the court properly concluded that no discovery violation took place. (AA 154: 254: 14-20). Defendant fails to explain why this ruling amounts to an abuse of discretion. The record

reveals the trial court thoughtfully concluded that the violation took place because; 1) There was no memorialization of the statement; 2) The State only learned of the statement on the night prior to the testimony; and 3) Defendant had time to pretrial the officer.

Furthermore, Defendant was not so prejudiced to warrant a new trial. Prior to the Officer's testimony, the State instructed him to "stay away from the racial slurs." (AA 164: 26: 15 – 27: 16). Despite the good faith efforts, these two short comments were made during trial. After their disclosure the State promised the trial court that no further references to the statements would be made. (AA 154: 256: 22 – 257: 7). The State made good on that promise. (See Generally AA). As Defendant noted in his brief, the State's case against the Defendant was never about race. (FTS at p. 12). It simply was not an issue in this trial – especially because Ms. Whitmarsh was Asian American. The real issue was the amount of racially neutral evidence that proved beyond a reasonable doubt that he was a murderer. While Defendant may have suffered some minimal prejudice, it is clear that Defendant's due process rights were protected during this fair trial.

IV. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM'S INJURY PHOTOS BECAUSE THE INJURIES WERE A CONTRIBUTING CAUSE OF HER DEATH.

Defendant claims that he deserves a new trial because the trial court should have excluded photographs of bruises on the victim's body that were a contributing factor in her death. The admissibility of evidence, Crowley, 120 Nev. at 30, 83 P.3d at 282, as well as the admissibility of expert testimony, Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994), falls within the sound discretion of the trial court. Defendant erroneously argues that it was an error to admit the photographs, because there was "no causation" between the bruises and the night of her death, and there was no "foundation" that O'Keefe could have caused those bruises and it was difficult to conclude exactly when the bruises were made (FTS at p. 13). These allegations are untrue.

First, the medical examiner concluded that the bruises were a *contributory cause* of her death, because she died of exsanguination, more commonly known as "bleeding to death." (AA 182: 99: 8-12). Second, the medical examiner's testimony established a causal

link between the defendant and those bruises, because he concluded these injuries could have been made by another person. (AA 182). This testimony is particularly relevant because Defendant physically struggled with Ms. Whitmarsh prior to murdering her. (AA 272: 32 – 273-36: 67-72). Third, although the medical examiner had difficulty in precisely concluding how and when each bruise was made, the evidence is still relevant because Defendant could have inflicted those injuries. Finally, the photographs are relevant because they accurately depict her vast array of bruises that spanned from her forehead, left arm, left side, right side of the abdomen, knee, legs, feet as well as her buttocks. (AA 182:100: 7 – 183: 103: 3). For these reasons, the trial court properly concluded the evidence was relevant.

Defendant's appeal is not really concerned with the photos' admissibility, but rather the "weight" that should be afforded to them. Defendant has no issues with the authenticity of the photos, the qualifications of the witness called to testify about the photos or the accuracy of what the medical examiner concluded from the photos. (See FTS at p. 13). Defendant simply did not find the evidence to be compelling. This is simply not a proper basis for appeal. Determining the weight and sufficiency of evidence falls squarely within the province of the jury – not this Court. Since the record demonstrates that the photographs were authentic as well as relevant to the case, the trial court's decision to admit them was proper.

V. THE TRIAL COURT PROPERLY ADMITTED AN OFFICER'S LAY OPINION AND PRECLUDED DEFENDANT'S EXPERT WITNESS FROM TESTIFYING TO A LEGAL CONCLUSION BEYOND HIS EXPERTISE

Defendant also claims his rights were violated because the trial court employed "different standard[s]" when evaluating what the State and Defendant's witnesses could testify to. (FTS at p. 14: 6-8). As discussed, the admission of expert testimony is reviewed only for an abuse of discretion. Brown, 110 Nev. at 852, 877 P.2d at 1075. "The threshold test for the admissibility of testimony by a qualified expert is whether the expert's knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987); N.R.S. 50.275. Specifically, Defendant believes a double standard was created for state and defense

witnesses – that essentially permitted the State's detective to testify but denied his expert witness the same opportunity. (FTS at p. 14). Although Defendant attempts to paint the two sets of proffered testimony as a comparison of "apples to apples," the record reveals that the comparison more akin to "apples to oranges."

First, Defendant takes issue with the State's examination of Detective Wildemann, a police officer for the last twenty-one years. (AA 203: 183: 10-12). The detective testified that during that time he had witnessed many stabbing cases. (AA 203: 184: 3-5). The question and answer at issue for defendant was the following:

Mr. Smith:	"…[I]n your training and experience, have you come across occasions where a suspect in a stabbing has had cuts on their fingers in the very area that the defendant does?
Det. Wildemann:	Yes, Yes.
Mr. Smith:	How often would you say or –
Det. Wildemann:	I can't give you a specific number, but it happens frequently.

(AA 203: 184: 24 – 185: 5). On appeal, Defendant disingenuously mischaracterized the record by claiming that this testimony provided the officer's "expert" opinion on whether or not the wounds were defensive. (FTS at p. 13: 26-28). In actuality, the question called for the perceptions of a lay witness and at best, a lay opinion. NRS 50.265. In Nevada, testimony or opinions are permitted if they are based on the witness' rational perceptions. NRS 50.265. Here, he was only asked about what he witnessed. He was never asked to reach an expert opinion or legal conclusion about whether or not the cuts on Defendant's hands were defensive. The record reveals this argument is baseless.

The trial court's decision to exclude Defendant's "expert" testimony presented very different circumstances. Defendant called George Shiro as an expert witness. Defendant noticed Mr. Shiro as an expert in crime scene analysis, crime scene investigation, processing of crime scenes, collection and preservation of evidence, latent print comparison, foot wear comparison and DNA evaluations. (AA 247: 147: 1-7). Mr. Shiro is not a doctor, a medical examiner or affiliated in any way with the coroner's office. (AA 240: 119-121). Furthermore, his expert report made no determination about Ms. Whitmarsh receiving an accidental knife wound. (AA 247: 148-149; 248: 152: 1-4). Despite a lack of medical

expertise, discussion in his report or notice provided to the State, Defendant sought to ask this witness to render an expert medical opinion that made a legal conclusion about whether or not the fatal stab wound to Ms. Whitmarsh was an accident or a deliberate act. (AA 246: 144: 4-23).

Detective Wildemann's testimony was entirely different in nature from Mr. Shiro's proffered testimony. One was a description of what an officer had witnessed in his twenty years on the job. The other was a medical opinion about the central issue in the case from a man who; 1) Was unqualified to make such a determination; 2) Failed to devote any part of his report to this vital issue; and 3) Was not noticed to the State to even discuss the matter before the jury. Defendant's argument that the court somehow failed to establish that Mr. Shiro was not an expert in this area is unavailing. (See FTS at p. 14) Defendant admitted that he was not a doctor, (AA 240: 119-121), but a chemist who specialized in reconstructing accident scenes and collecting crime scene evidence. (Id.; AA 248: 151: 4-18). Furthermore, the Court noted that Defendant, in noticing this expert, failed to state that it anticipated he would testify to such a matter. Lastly, Mr. Shiro's expert report never discussed whether or not the victim was accidentally stabbed. (AA 247: 148-149; 248: 152: 1-4). After hearing both sides, the trial court reached the only decision allowable under the law. It properly excluded Mr. Shiro's testimony on the grounds that it was "beyond his expertise, beyond what's identified in his report, and also beyond the notice of expert that was filed in this court…." (AA 248: 152: 22-25). While Nevada law may permit an expert to assist the trier of fact to understand a fact in issue, experts cannot offer legal conclusions about matters beyond their education, training and experience.[1] Mr. Shiro's unqualified legal conclusions were properly excluded.

VI. THE TRIAL COURT PROPERLY SETTLED THE JURY INSTRUCTIONS

Defendant erroneously claims that a number of errors were committed during the selection of jury instructions. (FTS at p. 14-15). A trial court is afforded great discretion

[1] Defendant's claim that his constitutional rights were denied, because a portion of Mr. Shiro's testimony was excluded is erroneous. (See FTS at p. 14). Mr. Shiro had ample time to speak on the areas he was qualified to discuss – namely accident reconstruction.

when settling jury instructions and should be reviewed solely for abuse of discretion. Crawford, 121 Nev. at 748, 121 P.3d at 585. Defendant claims the trial court erred for failing to give a Flight Instruction. A jury may be presented with a Flight Instruction when it is reasonable from the evidence presented to infer that the defendant fled the scene of the crime. Carter v. State, 121 Nev. 759, 700, 121 P.3d 592, 599 (2005). However, no evidence of flight was introduced during trial. Furthermore, Defendant does not explain why he was entitled to this instruction. (FTS at p. 14). The record reveals Defendant sought a Flight Instruction as some type of proof that Defendant was not guilty of murder. Despite a complete lack of legal authority to support this position, Defendant's trial counsel stated:

> And honestly, I've seen the flight instruction so many times. The fact that Mr. O'Keefe stayed in the location didn't attempt to flee even after he had been discovered by private individuals and had the opportunity to flee. I think the fact that he remained there certainly is evidence that he did not, in his mind, believe he has committed a crime. So it's simply an inverse statement of a case – or of an instruction that's been given by the State in numerous occasions.

(AA 230: 78: 22 – 79: 19). There is absolutely no basis under Nevada law to include such an instruction, when there is no flight evidence. The trial court did the only thing allowable under Nevada law – deny the request. Defendant also claims the trial court erred in refusing its proffered instruction on malice, but again entirely fails to explain why it was an error. (FTS at p. 15). A trial court can disregard a proffered jury instruction if it misstates the law. Barron v. State, 783 P.2d 444, 338 (Nev. 1989). Here, however, there is no evidence that the Malice Instruction, accepted by the court, was inaccurate. As discussed extensively in this brief, *supra* 7-9, no error was committed.

Defendant also erroneously claims that the court denied its proffered instruction Voluntary Manslaughter. Defendant relies on the holding of Crawford as support. 121 Nev. at 754, 121 P.3d at 589. Defendant's reliance on Crawford, however, is entirely misplaced. Crawford holds that this instruction must only be provided when the theory of Voluntary Manslaughter *is properly at issue*. Id. This theory, however, is not at issue. Defendant never claimed he killed in the heat of passion. He claimed self-defense – a theory thoroughly covered by the instructions. (AA 370-376) Defendant, accordingly, is not entitled to this instruction.

Defendant also argues that the trial court should have accepted his Good Character Instruction. However, the record reveals that the State and Defendant mutually decided to "forgo" submitting such an instruction. (AA 295: 122: 24 – 123: 15). The trial court, accordingly, committed no error. Finally, Defendant contends that the cumulative effect of the denied instructions warrants a new trial. Defendant's appeal not only fails to establish that an error was made but also fails to demonstrate how any of the decisions were somehow arbitrary, capricious or exceeded the bounds of law or reason. 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 (1974)). The trial court made sound, well reasoned and legally accurate decisions when rejecting these proffered jury instructions. Accordingly, this Court should not disturb its findings.

9. Preservation of the Issue.

The issues were properly preserved.

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 8th day of September, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of September, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

JONEL THOMAS
Deputy Special Public Defender

STEVEN S. OWENS
Chief deputy District Attorney

BY */s/ eileen davis*
Employee, District Attorney's Office

SSO/Christopher Hamner/ed