IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 53159 & 55759

NORMAN KEITH FLOWERS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX TO MOTION TO REINSTATE APPEALS VOLUME I OF III

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
*C.B. KIRSCHNER
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577
Fax: (702) 388-6419

*Counsel for Petitioner Norman Flowers

ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

VOLUME I

VOLUME II

VOLUME III

Dated this 18th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

I served a true and accurate copy of the foregoing by placing it in the United States mail, first-class, postage pre-paid, addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, NV 89101

Adam Laxalt
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89104

I further certify that I have mailed the foregoing document by first-class mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following people:

Norman Flowers
#39975
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender, District of
Nevada

ORIGINAL

FILED

Dec 13 3 02 PM '06

Shirley B. Parraguirre
CLERK

IND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers, III,
#1179383

Defendant.

Case No. C228755
Dept. No. XIV

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, NORMAN KEITH FLOWERS, aka, Norman Harold Flowers, III, accused by the Clark County Grand Jury of the crimes of **BURGLARY (Felony - NRS 205.060); MURDER (Felony - NRS 200.010, 200.030); SEXUAL ASSAULT (Felony - NRS 200.364, 200.366) and ROBBERY (Felony - NRS 200.380)**, committed at and within the County of Clark, State of Nevada, on or about the 24th day of March, 2005, as follows:

COUNT 1 - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit assault or battery and/or a felony, to-wit: murder and/or robbery and/or sexual assault, that

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COUNTY CLERK

certain building occupied by SHEILA QUARLES, located at 1001 North Pecos #H-63, Las Vegas, Clark County, Nevada.

COUNT 2 - MURDER

did then and there wilfully, unlawfully, feloniously, without authority of law, and with malice aforethought, kill SHEILA QUARLES, a human being, by manual strangulation with his hands and/or an unknown object, said killing having been (1) wilfull, deliberate and premeditated; and/or (2) committed during the perpetration or attempted perpetration of sexual assault as set forth in Count 3 and 4 and/or burglary as set forth in Count 1 and/or robbery as set forth in Count 4, said acts being incorporated herein by this reference as though fully set forth, said Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by Defendant directly committing the acts constituting the offenses, and/or (2) by aiding or abetting an unknown individual by counseling, encouraging, commanding or procuring the unknown individual to commit the offenses and/or (3) by conspiring with an unknown individual to commit said offenses.

COUNT 3 - SEXUAL ASSAULT

did then and there wilfully, unlawfully, and feloniously sexually assault and subject SHEILA QUARLES, a female person, to sexual penetration, to-wit: sexual intercourse, by the said Defendant placing his penis and/or an unknown object into the genital opening of the said SHEILA QUARLES, against her will, said defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by Defendant directly committing the act constituting the offense, and/or (2) by aiding and abetting an unknown individual by counseling, encouraging, commanding or procuring the unknown individual to commit the offense, and/or (3) by conspiring with an unknown individual to commit the said offense.

COUNT 4 – ROBBERY

did then and there wilfully, unlawfully, and feloniously take personal property: to-wit: a stereo and speakers, cell phone, and/or other personal property from the person of SHEILA QUARLES or in her presence, by means of force or violence, or fear of injury to, and

without the consent and against the will of the said SHEILA QUARLES, said Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by Defendant directly committing the acts constituting the offenses, and/or (2) by aiding or abetting an unknown individual by counseling, encouraging, commanding or procuring the unknown individual to commit the offenses and/or (3) by conspiring with an unknown individual to commit said offenses.

DATED this 13 day of December, 2006.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY _____ for
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

ENDORSEMENT: A True Bill

_____
Foreperson, Clark County Grand Jury

Names of witnesses testifying before the Grand Jury:

SIMMS, DR. LARY C.C.M.E.

TONEY, QUNISE, C/O CCDA, SVU, 301 E. CLARK PLACE, LVN 89101

SHERWOOD, GEORGE, LVMPD P#3676

TREMEL, DONALD LVMPD P#2038

QUARLES, DEBRA C/O CCDA, MUV, 301 E. CLARK PL. LVN

PAULETTE, KRISTINA C/O CCDA, MVU, 301 E. CLARK PL. LVN

Additional witnesses known to the District Attorney at the time of filing this Indictment:

ADAMS, OFFICER C.C.D.C.

ALBERT, BARBARA LVMPD P#3108

ALBIETZ, D. LVMPD P#4204

AYOTTE, RONALD [redacted] LV NV

BAKER, SHANE [redacted] LV NV

BELL, BETTY ADDRESS UNKNOWN

BEVILACQUA, A. LVMPD P#6258

BOGUE, MERANDA [redacted] LV NV

BRIAN, WAYNE ADDRESS UNKNOWN

BUCZEK, J. LVMPD P#3702

BURGESS, SHERRI LYNN [redacted] LV NV

CABRALES, A. LVMPD P#2045

COOTE, CLATON [redacted] CORVALIS, OR

COURTRIGHT, JOHNATHAN ADDRESS UNKNOWN

CRAW, MICHELINE [redacted] LV NV

CURRY, JUANITA [redacted] LV NV

CURRY, SANDRA ADDRESS UNKNOWN

CUSTODIAN OF RECORDS LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS LVMPD RECORDS

1	DELLACOURT, NINA	ADDRESS UNKNOWN
2	DUNLAP, GEORGE	C.C.D.C. INMATE
3	EBBERT, LINDA	UMC
4	ERDMAN, SHELLY	LVMPD P#7917
5	ESPLIN, CATHI JO	[redacted] LV NV
6	FIGUERA, C.	LVMPD P#3341
7	FRENCH, DET.	LVMPD P#375
8	GALLAGHER, E.	LVMPD P#5769
9	GONZALEZ, ANDY	ADDRESS UNKNOWN
10	GONZALEZ, LLOYD	[redacted] HND NV
11	GONZALEZ, PAULINE	[redacted] HND NV
12	GREEN, CHARITY	LVMPD P#7716
13	GROVER, B.	LVMPD P#4934
14	GUENTHER, EDWARD	LVMPD P#5891
15	HAGMEIER, WILLIAM	F.B.I.
16	HERNANDEZ, CESAR	[redacted] LV NV
17	HUGGINS, SHEILA	LVMPD P#3603
18	JACKSON, APRIL	[redacted] LV NV
19	JARO, HELEN	ANDRE AGASSI COLLEGE PREP SCHOOL
20	JOHNSON, JAMES	ANDRE AGASSI COMPANY
21	KELLY, S.	LVMPD P#6836
22	KING, BARBARA	ADDRESS UNKNOWN
23	KNOBLOCK, RONALD	C.C.M.E.
24	LAMOUREUX, B.	LVMPD P#7716
25	LARSON, DEBRA	[redacted] LV NV
26	LEEKE, OFFICER	C.C.D.C.
27	LUTZ, RICHARD	LVMPD P#1746
28	MANN, ANDREW	[redacted] LV NV

1	MAUPIN, R.	LVMPD P#5923
2	MCGOWAN, BARBARA	[redacted] LV NV
3	MCGOWAN, CLAUD	[redacted] LV NV
4	MCGRAW, REANNA	ADDRESS UNKNOWN
5	MCKENNA, KATRINA	ADDRESS UNKNOWN
6	MCLAUGHLIN, RANDAL	LVMPD P#4170
7	MENDEZ, ANGELA	[redacted] LV NV
8	MENDEZ, VANESSA	[redacted] LV NV
9	MITCHELL, DENNIS	ANDRE AGASSI COMPANY
10	MOON, L.	C.C.M.E. #313
11	MOORE, KAREN	ADDRESS UNKNOWN
12	NELSON, WILLIAM	H.D.S.P. NDOC#48044
13	OSGOOD, ROGER	ADDRESS UNKNOWN
14	PARKER, MARCIA	[redacted] LV NV
15	PAROLE OFFICER	NV DEPT P & P OFFICER FOR N. FLOWERS
16	PETERSON, DANIEL	LVMPD P#4034
17	PIRTLE, M.	LVMPD P#4017
18	RAGLAND, MAWUSI	[redacted] LV NV
19	RAMIREZ, MONICA	[redacted] RD LV NV
20	REMBERT, RANZY	[redacted] LV NV
21	ROBERTS, OFFICER	LVMPD P#6644
22	ROBINSON, SHAWNTA	C.C.D.C. INMATE
23	ROWLAND, T.	LVMPD P#4178
24	RUTLE, M.	LVMPD P#4017
25	SCHELLBERG, PETER	LVMPD P#5413
26	SILVAS, CONNIE	[redacted] LV NV
27	SMINK, JEFF	LVMPD
28	SMITH. B.	LVMPD P##4712

SMYTH, REBECKA	[redacted] LV NV
SPOOR, MONTE	LVMPD P#3856
THOMAS, KENDRA	[redacted] LV NV
TURNER, ALICIA	ANDRE AGASSI COLLEGE PREP SCHOOL
URENO, RANDY	[redacted] LV NV
VILLAGRANA, WILLIAM	LVMPD P#8426
WAHL, THOMAS	LVMPD P#5019
WILLIAMS, ELWOOD	ADDRESS UNKNOWN

06AGJ103X/06F23792X/SVU
LVMPD EV# 050324-1801
MURDER; ROBB; BURG; S/A - F

VER

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT
OCT 22 2008 1:36 pm
BY: TINA HURD, DEPUTY

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,

Defendant.

CASE NO: C228755

DEPT NO: VII

VERDICT

We, the jury in the above entitled case, find the Defendant NORMAN KEITH FLOWERS, as follows:

COUNT 1 – BURGLARY

(please check the appropriate box, select only one)

☒ Guilty of Burglary

☐ Not Guilty

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COUNT 2 – MURDER

(please check the appropriate box, select only one)

☒ Guilty of First Degree Murder

SPECIAL VERDICT

(please check the appropriate box or boxes)

☐ The jury unanimously finds the murder willful, deliberate, and premeditated.

☒ The jury unanimously finds the murder was committed during the perpetration of a burglary, sexual assault, or robbery.

☐ The jury does not unanimously find the defendant guilty under a single theory of murder of the first degree.

☐ Guilty of 2nd Degree Murder

☐ Not Guilty

COUNT 3 – SEXUAL ASSAULT

(please check the appropriate box, select only one)

☒ Guilty of Sexual Assault

☐ Not Guilty

COUNT 4 – ROBBERY

(please check the appropriate box, select only one)

☐ Guilty of Robbery

☒ Not Guilty

DATED this 22 day of October, 2008

FOREPERSON

ORIGINAL

13

0001
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
CLARK W. PATRICK
Deputy Special Public Defender
Nevada Bar No. 9451
330 South Third Street, Suite 800
Las Vegas, NV 89155-2316
(702) 455-6265
Attorneys for Defendant

FILED

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
NORMAN FLOWERS,
Defendant,

CASE NO. C228755
DEPT. NO. VII

DATE OF HEARING: _____
TIME OF HEARING: _____

MOTION FOR NEW TRIAL

COMES NOW, Defendant NORMAN KEITH FLOWERS, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, CLARK W. PATRICK, Deputy Special Public Defender, and hereby moves the Court and moves this Court pursuant to NRS 176.515 for a new trial.

This Motion is made and based on the pleadings and papers on file herein; the Points and Authorities and Affidavit of Counsel attached hereto; and the argument of counsel at the hearing of the Motion.

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing before the above-entitled Court on the 12 day of November, 2008 at the hour of 8:30 a.m.

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CLERK OF THE COURT

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

App 0010

POINTS AND AUTHORITIES

FACTUAL BACKGROUND

The Court has now heard the evidence that was presented to the Jury in this case. Based upon the evidence, the State, immediately prior to trial after the disclosure of George Brass's contact with Ms. Quarles prior to her death appropriately amended it's Information regarding the presence or involvement of a third party. The Court also heard the evidence regarding Jesse Nava, who was in possession of the stereo or "a stereo" after the death of Ms. Quarles. The Jury found did not convict the Defendant of the Robbery Count.

Based upon the information, it is more than arguable that without the admission of the Coote case, there was insufficient evidence presented to allow the jury to find guilt beyond a reasonable doubt.

ARGUMENT

NRS 176.515 states that:

> "1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
>
> . . .
>
> 4. A motion for new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period."

FLOWERS asserts, as set forth below, that the overwhelming prejudice of the admission of the COOTE case has become so apparent at the time of this trial; that the damage feared by Judge Bonaventure in his ruling on January 8, 2007 came to fruition. *See* Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997), and the pleadings and transcripts attached hereto as Exhibits A, B, and C.

Additionally, the admission of just a portion of the Defendant's statement (exhibit D attached hereto) regarding this case also evolved into an improper comment on Flowers invocation of right to counsel, and his silence in violation of the Fifth Amendment.

The prosecution is forbidden at trial to comment upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by Miranda v.

Arizona, 384 U.S. 436 (1966); Neal v. State, 106 Nev. 23, 787 P.2d 764 (1980). See, Doyle v. Ohio, 426 U.S. 610 (1976). This Court has held that an attack on a defendant's silence delivered as merely an innocuous, passing comment during closing argument is not necessarily error. Fernandez v. State, 81 Nev. 276, 402 P.2d 38 (1965). However, the Court in Fernandez carefully drew a distinction between a comment (whether direct or indirect) on the defendant's failure to testify and a reference to evidence or testimony that stands uncontradicted, stating

> "Paraphrasing Griffin [v. California, 85 S.Ct. 1229], what the jury may infer given no help from the Court (or prosecution) is one thing. What they may infer when the court (or prosecution) solemnizes the silence of the accused into evidence against him is quite another. Permitting such comment imposes a penalty for exercising a constitutional privilege. The dividing line must be approached with caution and conscience."

Fernandez, 81 Nev. at 279.

Similarly, the Court in McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) reversed a conviction as a result of the prosecutor commenting to the jury that the defendant had "never testified before" in the case, and then questioned the truth of the defendant's trial testimony by inquiring "why he would remain silent" until the time of trial if his alibi was true. McGuire, 100 Nev. at 157.

The Nevada Supreme Court in Mahar v. State, 102 Nev. 488, 728 P.2d 439 (1986) found questioning of a prosecutor to be reversible error when it went to post-arrest silence. Use of silence as a form of impeachment of a criminal defendant while he is testifying

> "is impermissible as violative of the due process right to a fair trial [citation]. Implicit in the Miranda warning is the assurance that the defendant's silence will carry no penalty. Doyle, 426 U.S. at 618; Aesoph, 102 Nev. at 316, 721 P.2d at 383."

In the case at bar the is now doubt from the record that Flowers was under arrest (albeit for the COOTE case) when Detectives were questioning him. Flower's "invocation" of his right was equivocal... merely desiring to speak to his Court appointed attorney (Pipe (sic)).

...

...

CONCLUSION

It is respectfully requested that based on the foregoing argument, this Court grant Mr. Flowers a new trial.

DATED this ___ day of November, 2008.

RESPECTFULLY SUBMITTED:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

RANDY H. PIKE
CLARK W. PATRICK
330 South Third Street, 8th Floor
Las Vegas, NV 89155-2316
Attorneys for Defendant

EXHIBIT A

0076
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS aka Norman Harold Flowers, III, #1179383

Defendant.

Case No. C216032/ C228755
Dept No. VI

NOTICE OF MOTION AND MOTION TO CONSOLIDATE

DATE OF HEARING: 1/11/07

TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and files this Notice of Motion and Motion to Consolidate.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department VI thereof, on Thursday, the 11th day of January, 2006, at the hour of 8:30 o'clock a.m., or

as soon thereafter as counsel may be heard.

DATED this _____ day of December, 2006.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY Pamela Weckerly
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

STATEMENTS OF FACT

A. Fact of Case C in District Court VI

On May 3, 2005, Silver Pines Apartments employees discovered 45 year old Marilee Coote lying on her living room floor. Ms. Coote was a reliable employee of the Andre Agassi Center. When she did not arrive at work by 7:30 a.m., a co-worker became concerned and asked the apartment workers to do a welfare check. After the apartment employees discovered the body, they contacted the police.

Initially, paramedics arrived, but Ms. Coote was already deceased. Police followed. Ms. Coote was found lying on her living room floor, facing up and completely nude. Inside her belly button were ashes from burnt incense. The skin between her upper thighs and her pubic area was burned. Coote's apartment was locked, but her purse and keys were missing. Inside Coote's washing machine, police found personal photos, bills, and identification belonging to Coote. The items appeared to have been washed because they had a soap residue on them. In the bathtub, under ten inches of water, police found other items of paperwork, a phone book, and jewelry boxes covered with a towel. The apartment was otherwise very neat and undisturbed.

The detectives initially did not view this incident as a homicide. Therefore, they documented the scene, but did not collect evidence. After conducting an autopsy, however, Dr. Knoblock concluded the Coote died as the result of strangulation. He also noted tearing of Coote's labia and anal area. Dr. Knoblock concluded that these tears were sustained ante-

mortem. Coote also had contusions on her arms and forearms.

While various officers were in Coote's apartment during the morning of May 3, 2005, another resident of the complex, Juanita Curry, came in contact with the defendant, Norman Flowers. This occurred between 7:00 and 10:00 a.m. Curry was an acquaintance of Flowers' girlfriend, Mawusi Ragland. Curry lived two floors below Coote. Curry noticed the police and paramedics going in and out of Coote's apartment. From apartment employees, Curry believed that Coote died of natural causes. Sometime that same morning, defendant Flowers knocked on Curry's door. He asked if he could use her phone. He said he was supposed to meet up with Mawusi that morning. She agreed and gave him the phone.

Curry is physically disabled and sometimes walks with a cane. Because of her compromised physical state, she was not comfortable allowing Flowers in her apartment, so she let him use her cordless phone in the doorway. After Flowers used the phone, he came back a few times later, each time with a new request. He asked to use the phone again. He asked for water. At one point, he asked to use her bathroom. She agreed, but when he went in the bathroom, she stepped out of the apartment. As she did so, he asked her to come in and help him find the bathroom light. She refused. When Flowers was at her doorstep, she also noticed that when the police walked back and forth, he would turn his head away. He commented, "the police make me nervous." During the final conversation in Curry's doorway, Flowers leaned down and tried to kiss Curry on the mouth. She turned away.

Curry observed Flowers walk across the parking lot to the doorway of Rena Gonzalez's apartment that morning. Curry left the complex a little before 11:00 in the morning. When she returned, she learned that the police had discovered the body of Rena Gonzalez. She gave a statement to police and identified Mawusi's boyfriend as someone she saw in the area of Rena Gonzalez's apartment.

Officers learned of the homicide involving Rena Gonzalez at approximately 4:00 p.m. Rena's Gonzelez's two daughters, the oldest of whom is seven years old, came home from school and found their mother on her knees leaning against her bed in her master bedroom. She was unresponsive. They ran and got their friend, Shayne. Shayne returned with them.

They tried to remove a phone cord around Gonzalez's neck and called 911.

Gonzalez's apartment was clean and undisturbed with the exception of the following: a broken blue plastic hair comb in the front hallway and a single green sandal were both in the front hallway. Officers could not locate Gonzalez's purse or keys.

Gonzalez was at the foot of her bed, with her body bent at the waist. Her upper torso was on the bed with her face down and arms outstretched. A black phone cord and black lanyard were around her neck. She was dressed in shorts, which were slightly pulled down, and a shirt. She had the matching blue hairclip hanging from her head and blood coming from her ear.

At autopsy, Dr. Simms noted extensive bruising to breast, right arm and right leg. Dr. Simms concluded that Gonzalez died as a result of strangulation. He also noted tearing to her vaginal and anal area. Dr. Simms concluded that these injuries took place post-mortem.

Detectives learned that Rena Gonzalez was a close friend of Mawusi Ragland. In fact, the two women would trade off watching each other's children. They determined that Gonzalez had walked her daughters to the school bus the morning of the 3rd and would have returned home around 8:30 a.m. Rena Gonzalez did not work.

Mawusi Ragland also lived at the Silver Pines Apartments. She lived in the apartment across from Coote. She told detectives that approximately three weeks before the homicide, she and Flowers had gotten into an argument and had not spoken since. In the argument, Mawusi implied that she would socialize with other men. Mawusi had discussed Flowers with her friend Rena Gonzalez as well, although Flowers and Gonzalez had not met. According to Mawusi, Gonzalez advised her not to date Flowers.

When Mawusi returned home on the evening of May 3, she saw police vehicles. She was told her friend, Rena, had been murdered and that her other friend, Marilee, had died of natural causes. On her apartment door, Mawusi noticed a note. It was from Flowers. It stated that he tried to catch her before she went to work, but that it looked like he picked a bad day because "big shit is happening over here." He also asked if she had dated other men since their argument. Flowers called Mawusi that evening. She was very emotional and

explained that both Marilee and Rena were dead. Flowers did not appear to be shocked upon hearing this news. She asked him to come over and help her through this difficult time. He told her he'd be right over. When Flowers did not arrive in the next 90 minutes, Mawusi called him to ask where he was. He said he had not left home because when tried to call her, she did not answer her phone. He also mentioned that he had seen Rena that morning and had a short conversation with her. Mawusi asked him what time he was at the complex and Flowers responded, "I didn't kill her."

After speaking with Mawusi, detectives interviewed Norman Flowers. Initially, he told officers that he had no contact with Marilee Coote on the morning of the murder. He said he had not seen her for months. He also explained that he met Rena Gonzalez several months earlier through Mawusi. He admitted that he had spoken with Rena that morning, but denied ever entering her apartment. Flowers agreed to provide a DNA sample.

Subsequently, Flowers' DNA sample was compared with swabs from Marilee Coote's sexual assault kit. Both vaginal and rectal swabs matched to Flowers. In addition, DNA was collected from the carpet area where Coote was lying, specifically, the carpet beneath her upper thighs. That sample also matched to Flowers.

Detectives interviewed Flowers again. He still maintained that he had never been in Gonzalez's apartment that morning. With regard to Marilee Coote, he first explained that he had had sex with her in the past, but not that day. Then, he acknowledged that he had sex with her the night before she died, but that she was alive and fine when he left. He denied having rough sex with her. Later in the interview, he claimed that he might have had rough sex with her, but that she was fine when he left. In a third interview, he said he did have rough sex with her, but that she was alive when he left. He also stated that there was a third man watching the two have sex. He said this man was a medium height, weight, and age black man, but he did not know his name. He claims this man remained in the apartment after he left. Thus, his latest claim was that the sex was consensual and another individual must have killed Coote.

DNA was found in Rena Gonzalez's rectal swabs. Flowers is excluded as the source

of this DNA. In addition, DNA was found on the phone cord around Gonzalez's neck. He is excluded as the source of that DNA as well.

B. Facts of Case C228755 in District Court XIV

Less than two months prior, on March 24, 2005, Debra Quarles returned home from grocery shopping to her residence at 1001 North Pecos, Las Vegas, Clark County, Nevada, and found her eighteen year old daughter, Sheila Quarles unresponsive in a bathtub containing warm water. Debra had returned home at 2:30 in the afternoon. She was able to remove Sheila from the tub with the help of a neighbor who had helped her carry in groceries. Debra immediately called 911.

An autopsy later determined that Sheila died from drowning. However, strangulation was a significant contributing factor to her death. Sheila also had multiple vertical lacerations on her introitus, evidence of a violent sexual assault.

Investigation revealed that Sheila spoke to her mother, Debra, at approximately 12:30 p.m. and her mother arrived home to find her at approximately 2:30 p.m. In addition, detectives learned that Sheila was involved in a lesbian relationship with an individual named Quinise Toney.

At autopsy, investigators collected samples from Sheila's vagina. Those swabs contained a mixture of DNA which included semen. Quinise Toney was excluded as being a source of this DNA. Sheila Quarles was the major component of the DNA. The male portion of the DNA was entered into a DNA database. When Flowers' DNA was collected in the May murders, his profile was entered into the DNA database as well. After this entry, investigators were notified that Flowers' profile was consistent with part of the minor component DNA from Sheila Quarles' vaginal swabs. In fact, 99.9934 percent of the population is excluded as being a source of that DNA, but Flowers is not. There was an additional, unknown male contributor to the vaginal swabs of Sheila Quarles as well.

After detectives were notified of the DNA match, they recontacted Debra Quarles. Quarles explained that she knew and had actually dated Norman Flowers several months before the murder. She also explained that he would occasionally give her a ride to her work

at the time and that he knew her family members. Quarles said that just prior to the murder, she saw Flowers at her apartment complex. At that time, he explained that he was working in maintenance at the complex. After her daughter's murder, Quarles suffered from depression. Flowers offered to drive her to appointments with her therapist. On several occasions, Flowers inquired to Debra whether the police had figured out who had murdered her daughter.

The defense has suggested that Flowers will offer an alibi defense to the March 2005 crime.

The State moves to consolidate defendant's two cases.

ARGUMENT

The issue of consolidation lies within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. Robins v. State, 106 Nev. 611, 789 P.2d 558 (1990); Mitchell v. State, 105 Nev. 735, 782 P.2d 1340 (1989). "Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict." Weber v. State, 121 Nev. 554, 119 P.3d 107, 119 (2005). Moreover, on appeal "the defendant carries the heavy burden of showing an abuse of discretion by the district court." Id. at 121. In exercising that discretion, courts consider potentially conflicting interests of judicial economy and efficiency of judicial administration, crowded court calendars, avoidance of multiple trials and possible prejudice to the defendant. See United States v. Fancher, 195 F. Supp. 634 (D. Conn.), affirmed, 319 F.2d 604 (4th Cir. 1963). However, to establish actual prejudice from joinder requires the defendant to demonstrate more than that severance might have made acquittal more likely. Weber, 119 P.3d at 121 It requires that the defendant demonstrate that the joinder may have prevented jurors from making a reliable judgment about guilt. See id. At 122

Nevada Revised Statute 174.155 states:

> The court may order two or more indictments or information or both be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be

the same as if the prosecution were under such single indictment or information.

Section 173.115 of the Nevada Revised Statutes provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> 1. Based on the same act or transaction or
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Finally, Eighth Judicial Court Rule 3.10 emphasizes the importance of judicial economy, providing:

> (a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.
> (b) Unless objected to by one of the judges concerned, criminal cases, writs or motions may be consolidated or reassigned to any department for trial, settlement or other resolution.

This Court has defendant Flowers' first case set for trial in January 2007. As a capital case, it is likely to take longer to proceed to trial than a non-capital murder case and certainly other felony cases. Thus, the case will represent an imposition on the Court as well as members of a jury who will assess the facts of the case. Flowers' second case is set for trial in February 2007 in District Court XIV. It is also likely to be a capital case, meaning the same burdens will be placed on both the court and a potential jury hearing the case for a second time. Certainly, there is little question that consolidating the cases would be in the interests of judicial economy, court administration, and imposition of costs to the community.

Moreover, the Nevada Supreme Court has held that "if . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Robins, 106 Nev. at 619, 798 P.2d at 563 (citing Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342). In other words, joinder is proper when evidence from a separate case would be admissible by other means.

Section 48.045(2) of the Nevada Revised Statutes provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In applying NRS 48.045(2), courts must assess whether the probative value of the evidence is substantially outweighed by a risk of prejudice. Significantly, however, courts have recognized a distinction between evidence that is incriminating versus evidence that is actually prejudicial. For instance, in United States v. Harrison, 679 F.2d 942 (D.C. Cir. 1982), the prosecution presented evidence that the defendant had been engaged in drug dealing in the past over a period of time in order to establish motive, intent, preparation, and absence of mistake on his current drug charges. The court held that allowing the extrinsic evidence was proper. It explained:

> 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 acts over a period of time prior thereto . . .

Id. at 948.

Therefore, while certain evidence may increase the likelihood of conviction and thus be incriminating, such evidence may not unfairly cast the defendant in a bad light and therefore be prejudicial.

In the instant case, Flowers' two cases are cross-admissible. Evidence of the March murder would be admissible in a trial focusing on the May murders because such evidence would be relevant to identity, intent, and motive and vice versa. In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), the Nevada Supreme Court noted how a defendant's prior murders could be relevant in establishing a common plan, intent, identity, and motive in a subsequent murder case. In Gallego, the defendant was charged with kidnapping, assaulting, and killing two young women by bludgeoning them with a hammer. The trial court permitted the State to introduce evidence that Gallego had previously kidnapped two young women from a shopping mall and shot and killed them. Id. at 789, 711 P.2d at 861. On appeal, Gallego challenged the introduction of such evidence.

The Nevada Supreme Court affirmed the conviction and introduction of the evidence on several grounds within NRS 48.045(2). The court noted that the evidence was relevant to Gallego's intent and motive, because both instances were prompted by a "sex slave" fantasy on the part of Gallego. The court also commented that the evidence was relevant because the prior murders were "not remote in time from the killings here considered" and that "substantial similarities" were shown to exist between the two events, suggesting that the evidence was relevant to issues of identity as well as a common scheme or plan. See id.

In other case, the Nevada Supreme Court has commented how 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. The court has stated that modus operandi evidence is proper in "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).

In the case of Flowers, all three victims were casual acquaintances of Flowers. All three were killed in their residences. All three were killed during daylight hours. In addition to being murdered, all three also had some minor property taken from them as well. More significantly, of course, all three were sexually assaulted prior to their deaths. The victims all had damage to their vaginal and/or anal areas substantiating the sexual assault charges. All three victims were killed by means of strangulation. Admittedly, the cause of death for Sheila Quarles was a drowning; however, the strangulation was a significant contributing factor to the death. Certainly, the similarity of the three murders constitutes evidence of identity admissible under NRS 48.045(2).

In addition, evidence of the March 2005 killing is relevant to the May 2005 killings because it would constitute evidence of intent and lack of accident as well which are also admissible under NRS 48.045(2). In Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), reversed on other grounds by Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001), the Nevada Supreme Court explained how in a murder prosecution where defendant was claiming that a homicide was an accident, evidence of a prior killing committed by him

which he also claimed was accidental was relevant and admissible under NRS 48.045(2).

In one of his interviews regarding the May killings, Flowers maintained that while he may have had sex with Marilee Coote, but he did not kill her. This, of course, occurred after he adamantly denied having sex with her at all. In any case, given that one possible defense available to Flowers is that he had consensual sex with Coote and she somehow died during the encounter, evidence of the March 2004 killing is relevant to his intent during his encounter with Coote. The fact that he previously had had a violent sexual encounter which resulted in vaginal trauma to victim Sheila Quarles as well as her strangulation and death is evidence that Coote's strangulation was intentional and not an accident. See id.

Finally, evidence of the March 2005 murder is relevant to the May 2005 murders in terms of the sexual assault counts. In one of several interviews with detectives, Flowers claimed that he had consensual intercourse with Marilee Coote, notwithstanding the trauma to her genital area. He mentioned that they may have engaged in "rough" sex at one point during his interview. Evidence of the sexual assault trauma to Sheila Quarles would be relevant to the issue of whether Coote consented to a sexual encounter with Flowers. In Williams v. State, 95 Nev. 830, 603, P.2d 694 (1979), a sexual assault victim testified that she met the defendant while discussing a possible job as his secretary. At some point, the defendant offered her $5000 for a "one night stand," but she refused. The defendant told her that he was trained in martial arts and demonstrated what he could do to her and then sexually assaulted her. The defendant maintained that the intercourse was consensual. The State presented the testimony of two prior victims, from incidents occurring nineteen months before the charged incident, who testified that they met the defendant through a job interview and were coerced into having sex with him after he demonstrated his karate knowledge. In affirming the admission of testimony regarding the prior incidents, the Nevada Supreme Court stated:

> In the instant case, evidence of Williams' sexual misconduct with other persons was admitted as being relevant to prove his intent to have intercourse with the victim without her consent. This evidence was introduced after Williams admitted committing the act, but claimed to have done so with the victim's consent. By acknowledging the commission of the act but asserting

> his innocent intent by claiming consent as a defense, Williams himself placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams' testimony on a point material to the establishment of his guilt.

Id. at 833.

Because all three victims were killed after they were sexually assaulted, the State must rely on circumstances and medical testimony to establish the lack of consent in the instant case. Nevertheless, like Williams, Flowers has put consent at issue because he claims that the sexual encounter with Marilee Coote was consensual. In maintaining that claim, Flowers makes relevant his prior conduct with Sheila Quarles who also was sexually assaulted by Flowers and subsequently killed.

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to consolidate Flowers' two pending cases.

DATED this _____ day of December, 2006.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY Pamela Weckerly
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and forgoing, was made this 26 day of December, 2006, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
FAX#455-6273

BY M. [signature]
Employee of the District Attorney's Office

mb

EXHIBIT B

0001
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
CLARK W. PATRICK
Deputy Special Public Defender
Nevada Bar No. 9451
330 South Third Street, Suite 800
Las Vegas, NV 89155-2316
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN FLOWERS,

Defendant.

CASE NO. C 216032
CASE NO. C228755

DATE OF HEARING: 1-11-07
TIME OF HEARING: 8:30 a.m.

OPPOSITION TO STATE'S MOTION TO CONSOLIDATE

COMES NOW, Defendant NORMAN KEITH FLOWERS, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, and CLARK W. PATRICK, Deputy Special Public Defender and hereby submits the following Points and Authorities in opposition to the State's Motion to Consolidate Case No. C216032 and Case NO. C228755.

POINTS AND AUTHORITIES

FACTUAL BACKGROUND

On June 7, 2005, a Criminal Complaint was filed in Justice Court charging Defendant NORMAN FLOWERS (hereinafter FLOWERS) with a single count of Murder (and other charges) on the alleged victim Marilee Coote. Approximately two weeks later, a Second Amended Criminal Complaint was filed charging FLOWERS with Murder (and other charges)

alleging "this time" two (2) victims, Marilee Coote and Rena Gonzales.

On August 17, 2005, at the conclusion of FLOWERS' preliminary hearing, the Court dismissed all counts relating to victim Rena Gonzales. On August 29, 2005, an information was filed in District Court, Case Number C214390, charging Flowers with this single homicide (Marilee Coote).

At the initial Arraignment on August 30, 2005 FLOWERS appeared and pled "not guilty." In addition, FLOWERS asserted his Constitutional right to a speedy trial and the Court set a trial date of October 24, 2005. On the same day, counsel for FLOWERS received notice of the State's Intent to Seek and Indictment. Thereafter, on October 18, 2005 the State dismissed Case Number C214390, and FLOWERS was indicted in Case Number C216032 and charged with two (2) counts of homicide, alleged to have occurred on May 3, 2005.

On November 8, 2005, FLOWERS received a Notice of Intent to Seek Death Penalty containing aggravator number eight (8) which alleged, as a basis for seeking the death penalty, two or more convictions for murder.

FLOWERS has now been indicted under Case Number C228755 charging him with a third homicide that occurred March 24, 2005, forty-one days prior to the first two.

The State is requesting to consolidate Case Nos. C216032 and C228755, and the three homicides. This is improper under section 173.115 of the Nevada Revised Statutes as the cases do not arise from the same transaction nor constitute a common plan. Further, joinder would be more prejudicial than probative. Therefore, this Court should deny the State's request.

ARGUMENT

The Court should not consolidate the offenses which allegedly occurred on March 24, 2005 and May 3, 2005. Joinder is not proper as the events do not arise from the same transaction nor constitute a common plan. Further, joinder would be prejudicial to Defendant and result in a violation of due process.

. . .

. . .

A.

Consolidation Should Not Be Granted Because the March 24, 2005 and May 3, 2005 Incidents Do Not Arise from a Common Transaction Nor Do They Comprise a Common Scheme

NRS 173.115 **"Joinder of Offense"** provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
>
> 1. Based on the same act or transaction; or
>
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The policy behind joining offenses is judicial economy. Honeycutt v. State, 56 P.3d 362, 367, 118 Nev. Adv. Rep. 70 (2002). In the case at bar, the three incidents were not based on the same transaction, nor were they part of a common scheme or plan.

When offenses are factually similar and occur in close temporal proximity, they are properly joined. Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996). In Tillema, the defendant was arrested for a burglary of a vehicle on May 29, 1993 and a burglary of a vehicle and a burglary of a store on June 16, 1993. Id. at 267. Because both crimes involved vehicles in casino parking garages and were seventeen days apart, they "evidenced a common scheme or plan." Id. at 268. Additionally, the store burglary was connected to the vehicle burglary because it was part of a "continuing course of conduct." Id. at 269, *quoting* NRS 173.115(2) and Rogers v. State, 101 Nev. 457, 465-66, 705 P.2d 664, 670 (1985). In the second incident, Tillema burglarized the van and then immediately walked into a store, where he committed another burglary, so the two incidents were connected. Id.

Similar victims and motives, however, are not necessarily part of a common scheme or plan. Tabish v. State, 119 Nev. Adv. Rep. 35, 72 P.3d 584 (2003). The State was trying to argue that events involving Leo Casey and events involving Ted Binion were properly joined, having in common greed, money and the Jean sand pit. Id. at 590. The State also emphasized the similarities between Leo Casey and Ted Binion. Id. The Nevada Supreme Court noted that "money and greed could be alleged as connections between a great many

crimes and thus do not alone sufficiently connect the incidents." Id. That Court held that the incidents were too far apart in time (fifty days) and that the alleged connections did not demonstrate a common scheme or plan. Id. at 591.

Similarly, in Mitchell v. State, 105 Nev. 735, 782 P.2d 1340 (1989), incidents forty-five days apart were not considered part of the same transaction. Id. at 738. Additionally, the two offenses committed by that defendant were not part of a common plan. Id. The defendant was charged with grand larceny and sexual assault (the Petz charges) and sexual assault and murder (the Brown charges). Id. at 737. On two separate occasions, the defendant took two different women to the same bar, forty-five (45) days apart, and sexually assaulted them. Id. Our Supreme Court noted that taking two women dancing and then later assaulting them (on separate occasions) could not be considered a common plan, simply because the women were taken to the same bar. Id. at 738.

When considering joinder under NRS §173.115.2, it is useful to distinguish the facts of the case at hand with the facts of a case for which the Nevada Supreme Court found joinder permissible. In Floyd, the defendant argued that counts related to the sexual assault of a woman at gunpoint inside an apartment and the subsequent shooting of five employees at a nearby supermarket should be severed. However, the Nevada Supreme Court found that "joinder was proper because the acts charged were at the very least 'connected together'." Floyd v. State, 42 P.3d 249, 254 (2002). The court explained that a connection existed because the counts relating to the subsequent act began only fifteen minutes after the counts relating to the first act had ended.

Contrary to Tillema, and Floyd, the offenses in the instant case did not occur in close temporal proximity. If a connection between separate acts can be argued to exist because of their relative proximity in time, then it is reasonable to expect that the existence of such a connection is diminished as the length of time between the acts increases. Here, the incidents were forty-one (41) days apart, so there was no "continuing course of conduct." The incidents in Tillema flowed one into the other. With forty-one (41) days between them, the incidents at bar were too far apart in time to be part of the same transaction. So while a connection may

still remain between two acts after only fifteen minutes, extending that time more than three-thousand fold would seem to extinguish such a connection, utterly.

Here, there was also no common scheme or plan, similar to Tabish and Mitchell. In both of those cases, there were similar motives and similar crimes; however, that was not enough to establish a common scheme or plan. Here, the only other common denominator, besides the defendant himself, is the possibility that the defendant knew all of the victims. Again, that is not enough to establish a common scheme or plan. The victims were different, the incidents occurred in different locations, albeit two of the homicides occurred in the same apartment complex and were forty-one (41) days apart. One of the incidents allegedly involved a manual strangulation, one allegedly involved strangulation with a ligature, while the other allegedly involved a downing. As for the alleged sexual assaults, Flowers' DNA was recovered from Marilee Coote, however Flowers admits to having "rough" consensual sex with Coote, and there was "unknown" male DNA that was also recovered from Coote. The DNA recovered from Rena Gonzalez *excluded* Flowers as the donor. And while Flowers' DNA was recovered from Sheila Quarles, again there was "unknown" male DNA also recovered. There is nothing connecting the three incidents.

Because the incidents were not part of the same transaction, nor were they part of a common scheme or plan, the Defendant respectfully requests that this Court denies the State's request to consolidate the incidents of March 24, 2005 and May 3, 2005.

B.

Consolidation Should Not Be Granted Because the Evidence Is Not Cross-admissible

The Nevada Supreme Court has held that if evidence of one crime would be cross-admissible at a trial on another charge, the charges may be tried together. Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989). In the case at bar, the evidence of one offense is not necessary in proving the other offense, nor is it necessary in providing the jury with a complete picture. The three offenses are not connected in any way and the evidence is not cross-admissible. Moreover, admitting the evidence of one offense in the trial of the

other would be more prejudicial than probative. Mitchell, at 738, *citing* Berner v. State, 104 Nev. 695 (1988); and citing NRS 48.045(2). The evidence would essentially amount to evidence of prior bad acts. This type of evidence is not allowed to show that a defendant has the propensity to commit the crime. Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998). The State argues that the evidence would be cross-admissible because they can use evidence of one offense to show motive or intent, thus circumventing the propensity rule. NRS 48.045 (2004). However, that argument is tenuous, at best. Moreover, the prejudicial nature of the evidence far outweighs its probative value and the evidence is therefore not cross-admissible. *See* Tabish v. State, 73 P.3d 584, 593, *citing* Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064065 (1997).

The Tabish case is useful in understanding when evidence is not cross-admissible because the prejudicial value outweighs the probative value. The defendants were charged with the September 17, 1998 murder of Ted Binion, as well as the July 1998 kidnaping and beating of Leo Casey. Tabish, at 586. Defendant Tabish was convicted in both offenses. Id. Both defendants appealed their convictions, arguing, among other things, that the joinder of the offenses was improper. Id. at 589. The State argued that the evidence was cross-admissible for the purposes of showing motive, plan and identity. Id. at 593. Our Supreme Court disagreed. Id. The court noted that although the evidence could have been used to show motive, plan or identity, the prejudicial value of the evidence was far greater than the probative value. Id. The court further reasoned that the evidence would cause a "spillover effect." Id.

The same reasons that make joinder of the counts inappropriate, make the severance of the same counts appropriate. The controlling state statute which describes relief from prejudicial joinder is NRS §174.165, which states in part, "[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendant's or provide whatever other relief justice requires."

When counts are not related, "the court must assess the likelihood that a jury not

otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. If the court finds a likelihood that this may occur, severance should be granted." Floyd v. State, 118 Nev. 17, 42 P.3d 249 (2002), citing, People v. Bean, 46 Cal. 3d 919, 760 P.2d 996 (Cal. 1988).

This is exactly the danger the defendant faces in the instant case. The Defendant faces the risk of the jury accumulating evidence against him, as well as using evidence of one offense to infer propensity to commit a crime in the other offenses. The counts of each event are prejudicial in their nature and will be highly inflammatory to any jury. By joining the counts of each event, the State will be able to provide a circular argument, wherein the likelihood that the Defendant committed the offenses at one of the events is made more probable by the possibility that the Defendant committed the offenses at the other event. These are risks that the Defendant should not face in a trial where his liberty is at stake.

C.

Consolidation Should Not Be Granted Because a Heightened Standard of Review Is Required Due to the Fact the Death Penalty Is Being Sought

In a series of recent decisions, the California Supreme Court has made it abundantly clear that in a capital case it will no longer tolerate the indiscriminate joining together of two murder charges, especially when the effect of the joinder is to give rise to the special circumstance allegation of multiple murder (*see*, People v. Johnson [1987] 43 Cal.3d 296, 309, n.5; People v. Smallwood [1986] 42Cal.3d; Williams v. Superior Court (1984] 36 Cal.3d 441).

In Williams, the Court ordered severance of two similar but unrelated murder charges and also set forth the standards for meaningful review of severance motions. In the course of its discussion, the Court emphasized:

> "The final consideration in our analysis is that since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case. Even greater scrutiny is required in the instant matter, for it is the joinder itself which gives rise to the special circumstance allegation of multiple murder under Penal Code Section 190.2, subdivision (a)(3)." (36 Cal.3d at 454.)

In Smallwood, the Court reversed a death penalty case in its entirety solely on the basis that the trial court erred in denying defendant's pretrial motion to sever two murder counts. Citing Williams, the Court stressed "the fact that this case is a capital one, 'carrying the gravest possible consequences.'" (42 Cal.3d at 430.) The Court was highly critical of the trial court for ignoring that fact:

> "This factor should have prompted the trial court to analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case. Here, the record demonstrates that the trial court ruled with virtually no scrutiny and care, denying a severance motion in the face of a clear showing of prejudice and despite the prosecutor's concession that no legitimate state goals would be served by joinder. Even if such an ill-considered ruling were justifiable in a less serious case, it was impermissible where questions of life and death were at stake." (Id., at 431.)

The Court acknowledged that in the past trial court rulings on severance motions "were typically accorded great deference." (Id., at 425.) But Williams had drastically altered the law of severance in capital cases:

> "Williams represented a major advance by announcing for the first time that reviewing courts must analyze realistically the prejudice which flows from joinder in light of all the circumstances of the individual case. Williams also directed reviewing courts to weigh any claimed benefits to the prosecution from joinder in order to determine whether such benefits are real or theoretical. No longer may a reviewing court merely recite a public policy favoring joinder or presume judicial economy to justify denial of severance. Put simply, the joinder law must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (Id., at 425.)

Finally, in People v. Johnson, *supra*, the Court briefly considered the effect of Williams on the retrial of a case in which the prosecutor had joined a capital murder case with a related non-capital rape charge. The Court concluded: "(a)s for prejudice, the inflammatory nature of the rape--a brutal cross-racial rape in a church--coupled with the fact that the murder is a capital offense, weigh heavily against a joint trial upon retrial." (43 Cal.3d at 309-310, n. 5.)

CONCLUSION

NORMAN FLOWERS respectfully requests that this Court deny the State's motion to consolidate because the three separate and distinct offenses are not part of the same

. . .

. . .

transaction or occurrence, are not part of a common scheme or plan, and as the evidence of one is not cross-admissible in the trial of the others,

DATED this 2 day of ~~December, 2006~~ January 2007.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

RANDY H. PIKE
Deputy Special Public Defender
CLARK W. PATRICK
Deputy Special Public Defender
330 South Third Street, 8th Floor
Las Vegas, NV 89155-2316
(702) 455-6265
Attorneys for Defendant

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **OPPOSITION TO STATE'S MOTION TO CONSOLIDATE** is hereby acknowledged this 2 day of ~~December~~ Jan, 07.

DAVID ROGER
District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155
Attorney for Plaintiff

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding

Opposition to Motion to Consolidate

filed in or submitted for District Court Case number C216032

XX Does not contain the social security number of any person.

-OR-

____ Contains the social security number of a person as required by:

___ A. A specific state or federal law, to wit:

_____

-or-

___ B. For the administration of a public program or for an application for a federal or state grant.

Signature

1/2/07
Date

CLARK W. PATRICK
Print Name

DEPUTY SPECIAL PUBLIC DEFENDER
Title

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding

Opposition to Motion to Consolidate

filed in or submitted for District Court Case number C228755

XX Does not contain the social security number of any person.

-OR-

____ Contains the social security number of a person as required by:

___ A. A specific state or federal law, to wit:

_____

-or-

___ B. For the administration of a public program or for an application for a federal or state grant.

_____ 1/2/07
Signature Date

CLARK W. PATRICK
Print Name

DEPUTY SPECIAL PUBLIC DEFENDER
Title

EXHIBIT C

TRAN

ORIGINAL

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	Case No. C216032 Dept. No. 6

MOTIONS

Before the Honorable Joseph Bonaventure
Monday, January 8, 2007, 8:30 a.m.

Reporter's Transcript of Proceedings

APPEARANCES:

For the State of Nevada: Pamela Weckerly, Esq.
Elissa Luzaich, Esq.
Deputies District Attorney
Las Vegas, Nevada

For the Defendant: Randall Pike, Esq.
Clark Patrick, Esq.
Special Public Defenders
Bret Whipple, Esq.
Las Vegas, Nevada

REPORTED BY: BILL NELSON, RMR, CCR No. 191

Las Vegas, Nevada; Monday, January 8, 2007

* * * * *

THE COURT: Flowers.

I read the briefs.

Does the State want to say anything?

MS. WECKERLY: No, Your Honor.

I know the Court's quite familiar with the facts of this case and the new case.

The only thing I would add is, when I read the opposition, it seemed to me that the focus of the opposition was on obviously the Binion case and the consolidation in that case.

THE COURT: And I know that case well.

You know, I still think I did right on that case, and you know, you never know what the Supreme Court is going to do.

We can go to trial on this case, and then a year from now, a year-and-a-half from now, they are going to reverse and say, Bonaventura shouldn't have consolidated, and you got to start over again, and you know, I don't know what to say.

MS. WECKERLY: The only distinguishing argument I would make for the record, Your Honor, is that I believe the Binion or Tabish opinion seems to

focus on the exception of common scheme or plan and how narrow that exception is, and of course the State's position in this case is not under that exception of cross admissibility, we're more focused on identity and intent and motive, and I think that's where the distinguishing feature of the case law is, and under the Gallego (Phonetic) case, and Williams case, and the other cases cited by the State, it is permissible to consolidate in this type of situation where you have three victims all sexually assaulted and all murdered by the same means effectively, and there is quite a bit of similarity between the three victims in this case, and of course the Defense in this case will be identity, making all the evidence all the more relevant.

THE COURT: Well, certainly if this goes to trial, whenever it does, we could always take a look at it, and if they open the door or something like that, and they want to open the door, maybe bring it in as a rebuttal, or evidence of other acts, I don't know, but does anybody want to say anything regarding this?

MR. PATRICK: Yes, Judge.

The same means?

All three of these murders were completely

different.

One was manual strangulation.

One had a ligature.

And one was a drowning.

The means are not close at all.

Also, between the first incident, Miss Quarles (Phonetic), and the other two, there was 41 days elapsed, and you know the Court in Pablimo (Phonetic) said 17 days was okay because they were both in the parking garage, but if you look at Tabish, it was 350 days, and Mitchell was 45 days, and it's too distant in time to connect the three incidents.

And I think that all that is going to happen is, Mr. Flowers is going to be greatly prejudiced by the accumulation of evidence in this.

You know, the case against Miss Gonzalez is very weak.

The case against Miss Quarles is not all that strong.

But by putting them all together the State's going to be able to accumulate all of the evidence, and the jury will look at it and say, you know, they wouldn't have arrested him for all three of these unless he was guilty, and I think there is

an extreme risk of prejudice that outweighs any other considerations the Court would have, whether it be judicial economy or not.

I don't think that Mr. Flowers can get a fair trial if we try all three of these together.

THE COURT: All right. Anything else?

MS. WECKERLY: Well, Your Honor, the risk of prejudice really isn't legally defined as making acquittal more likely, it's whether there is a question about the jury verdict in a particular case, and by consolidating these three cases I don't think that we can say that there is a risk of an unfair or unfounded verdict.

The Defendant himself in the first instance with regard to the sexual assault and murder of Marilee Koot (Phonetic) said that -- initially he said he didn't have sex with her, but afterwards, after several comments being made, he said that he may have had sex, and then well, I did have sex with her, but someone else killed her.

And the fact that he then puts consent at issue in terms of that particular victim makes the other case of Sheila Quarles all the more relevant because here we have another instance where his DNA is found in someone sexually assaulted and ultimately

murdered, and that puts his own statements - puts his consent at issue and makes the other cases relevant because they go directly to that issue.

THE COURT: All right. I've reviewed it and pondered over it.

You know, I want to be fair.

I have to be fair to the State.

I certainly have to be fair to the Defendant.

It's a capital murder case.

You know, if this was a burglary or something like that, or whatever, but you got to really -- it's a heightened standard of review required on a death penalty case, and I just feel it will be more prejudicial, and I'm not going to consolidate them.

The motion to consolidate is denied.

I notice you have another motion to consolidate in Department 14.

What is that about?

MS. WECKERLY: Well, we just noticed this in that department in the event this was granted to let Judge Mosley know what a happened.

THE COURT: Should I take that off calendar?

MS. WECKERLY: That can be off calendar.

THE COURT: I'll take that off calendar, January 17th.

So as far as I know now, I don't know what you want to do, but we have a calendar call coming up.

We'll talk about it.

MR. PATRICK: Thank you, Your Honor.

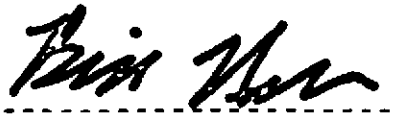
THE COURT: All right.

CERTIFICATE

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Bill Nelson, RMR, CCR 191, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Hon. Joseph Bonaventure, District Court Judge, presiding.

Dated at Las Vegas, Nevada this 11th day of January, 2007.



Bill Nelson, RMR, CCR 191,
Certified Court Reporter
Las Vegas, Nevada

EXHIBIT D

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

EVENT #: 050324-1801

SPECIFIC CRIME: MURDER INVESTIGATION

DATE OCCURRED: 03/24/05 TIME OCCURRED: 1451 HRS

LOCATION OF OCCURRENCE: 1001 N. PECOS #H-63, LAS VEGAS, NV

CITY OF LAS VEGAS CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: NORMAN "KEITH" FLOWERS

DOB:	SOCIAL SECURITY #:
RACE:	SEX:
HEIGHT:	WEIGHT:
HAIR:	EYES:
WORK SCHEDULE:	DAYS OFF:
HOME ADDRESS:	HOME PHONE:
WORK ADDRESS:	WORK PHONE:
BEST PLACE TO CONTACT:	
BEST TIME TO CONTACT:	

The following is the transcription of a tape-recorded interview conducted by DETECTIVE G. SHERWOOD, P# 3676, LVMPD Homicide Section, on 08/24/06 at 0830 hours. Persons present during this interview are NORMAN "KEITH" FLOWERS and DETECTIVE SHERWOOD.

Q. Operator, this is Sherwood, uhm, at Clark County Detention Center on 08/24/2006, talking to Norman Flowers, ID#1179383. Is it okay— whatta you go by Norman?

A. Uh, Norman, Keith.

Q. Okay. What would you rather I call you?

A. Uh, you can call me Keith.

Q. Okay. I'm gonna be talkin' to Keith Flowers. Uhm, date and time is 08/24/06 at 0830. We're at the Clark County Detention Center.

Uhm, Keith, prior to the interview, I told you that we're not going to discuss your case at all, is that correct?

A. Correct.

Q. Okay. And I also advised you of your Miranda rights, which I have to do because you're in custody, and had you sign a card sayin' that I advised you. Is that correct?

A. Correct.

Q. Okay. Uhm, first thing I wanna talk to you about, Keith, is I'm trying to find out who a friend of yours is. And he may be a friend of yours and he may not be a friend of yours. He's a black guy and he's got like a skin condition on his arms. Does that ring a bell of anybody?

A. What's the point of tryin' to find him? Why you tryin' to find him for?

Q. Well, because I need to ask him some questions on a case I'm investigating. And your name came up in the case that he's a friend of yours.

A. Uh, you... you're givin' me limited information.

Q. Okay. How 'bout... how 'bout I start and give you some more information. Okay. Uhm, do you know Debra Quarles?

A. (No verbal response)

Q. Let me show you a picture of her. Will that help?

A. Yeah.

Q. Okay. Uh, okay, this is a picture of Debra Quarles, ID#857276. Do you know this lady?

A. I'm not sayin'.

Q. Well, I mean do you think you know her? I mean she said she knows you.

A. I'm not sayin'. I mean until I know what it's about, I'm not saying anything.

Q. Okay. Here's what I'm investigating. I'm investigating the... the death of her daughter. Uhm, it's possible that someone you know may have been involved in it. And I just... I'm tryin' to find out who that person is so that I can go and talk to him. I mean Debra tells me that she's a good friend of yours and that you would probably help me. And I wanted to come talk to you and appeal to you because Debra can't rest in peace 'cause her daughter's killer hasn't been caught. And the reason I think it's the guy with the skin condition is just prior to Sheila being found, there was a guy hanging out outside that matches the description of him, wearing like a long-sleeved shirt, which it wasn't extremely cold that day. It was a long-sleeve flannel shirt. And I'm thinkin', you know, maybe this guy is tryin' to hide his skin condition or something like that.

A. I don't understand what makes you guys think a person would even have a skin condition because they have the long shirt.

Q. Well, here's why. Because this guy... this guy that I'm looking for, I was told is a

friend of yours. And I was told that you gave Debra rides home from work, so maybe... maybe he saw Debra and maybe he saw Sheila and maybe he got interested in Sheila.

A. Who is Sheila?

Q. Uhm, Sheila is Debra's daughter.

A. Oh. Only knew her by her nickname.

Q. Puka? (Unknown spelling) Okay. So you didn't really know her well.

A. (No verbal response)

Q. Okay. Uhm, anyway, uhm, you know, I'm just— I'm tryin' to solve... solve a crime that happened. And I mean I know... I know you're probably not real anxious to cooperate with the police, but I wanted to appeal to you as a friend of Debra's, uhm, you know, to maybe just pointin' in the right direction.

A. Can't do it. No. I'm not— I don't wanna be involved.

Q. Okay. Well, I understand that. And I mean I... you know, I can... I can find out. Uhm, how well do you know Debra?

A. No, I won't answer no questions about any of that.

Q. Okay. Well, could I ask you a couple... just a couple more things, then we'll be done?

A. No. I got my own problems to deal with, so I don't wanna get involved in anybody else's matters.

Q. So you don't wanna help Debra at all. You don't wanna... you don't wanna like try and help catch who killed her daughter?

A. (No verbal response)

Q. Really?

A. I'm not sayin' yes, I'm not sayin' no. I'm just— I don't wanna be involved in anybody else's problems. I have my own case to deal with.

Q. Well, and I understand that.

A. And—

Q. And that's why I told you, you know, man to man, Norman, I came down here and I told you that I'm not gonna ask you questions about your case because I know you have your own problems. But I also wanted to appeal to your human decency.

A. If I do anything, I... I have to talk to my lawyer first, so— Before I do anything. I mean that's what I learned so far, so before I speak about anything or—

Q. Well, I know. But we're not talkin' about the case that—

A. I understand. It has nothin' to do with my case or anything, but the fact is still, I have a... I have an attorney and I... I believe I should talk to my attorney before doin' anything in... in the present or in the future.

Q. Okay. Well, you know, I understand that. But like I said, I'm also not asking you questions in regard to the case that you're under arrest for.

A. I understand.

Q. I mean I'm talking to you about something that's totally non-related.

A. I understand. It's obviously a legal matter because you read me my rights. So, therefore, I should speak to a legal counselor, you know what I'm sayin'. My lawyer. I mean I understand has nothin' to do with my case, but still, you know. I understand everything you said and I still would rather, you know—

Q. So your friendship with Debra, you don't really wanna help her? I mean she— can I just tell you somethin'? Debra told me you guys were actually intimate. That you guys had a relationship for a while.

A. Okay, that's what she told you. Well, I mean what's that supposed to mean?

Q. Well, I'm just— I mean like I said, I thought if I appealed to your, you know, maybe a friend, that, you know, you might at least give me the courtesy of talking to me about a couple of the people— I mean I wanted to show you some pictures of people and see if you knew 'em and, you know, see if you just wanted to help me with somethin' totally non-related to... to what you're in here for.

A. Like I said, I got my own problems.

Q. Well, can— well, did you know Puka?

A. Like I said, I got my own problem. Not sayin' anything. I'm not nobody's information giver or anything like that. I don't... I'm not doin' nothin' and sayin' nothin' until I talk to my lawyer.

Q. Okay. So you wanna be done?

A. Yeah, I guess. 'Cause I mean he might want me to speak to you. He might not want me to speak to you. I don't know. You know what I'm sayin'. I figure gettin' in other people problems create problems, so—

Q. Okay. Well, and I understand that. But like I said, I just... I mean I... I... my basic points of coming down here and talking to you were just to see, you know, if you would help Debra put... lay her daughter to rest. And, you know, I'll be honest with you, we have no idea who did this. Uhm, we're grasping at straws because I happen to think Debra's a pretty nice lady and I've been tryin' to do some work on this and get somethin' goin'. And that's all. I mean and chances are we'll never figure who did this. You know, we don't know... we don't know why they did it, we don't know what the motive for it was. I mean from what I heard, she had no enemies. So it's, uh, it's just like I said, it's one of those deals where, you know, I'm tryin' to do the right thing for the family. But like I also said, you know, if you don't wanna help, I mean I can't make you.

A. All I said was I'm gonna have to talk to my attorney first.

Q. Who's your attorney?

A. Uh, Randy Pipe (?). Randy Pipe (?).

Q. Okay. And do you want me to come back and talk to you or you just wanna be done with me and you talkin'?

A. That's up to him, so— that's up to him.

Q. Okay.

A. It's up to him.

Q. Okay. Well, I'll shut the tape off and we'll be done then. Is that what you want?

A. Yes.

Q. Okay. That's the end of this, uh, tape. The date and time is same date, time is now 0840 hours.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT THE CLARK COUNTY DETENTION CENTER, LAS VEGAS, NV, ON THE 24TH DAY OF AUGUST, 2006, AT 0840 HOURS.

GS:cc
06V1134

ORIGINAL

20

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED
Nov 18 2 36 PM '08
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
NORMAN FLOWERS,
#1179383
Defendant.

Case No. C228755
Dept No. VII

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 11/12/08
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 12th day of November, 2008, the Defendant being present, REPRESENTED BY RANDALL PIKE and CLARK PATRICK, Deputy Special Public Defender's, the Plaintiff being represented by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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IT IS HEREBY ORDERED that the Defendant's Motion For New Trial, shall be, and it is DENIED.

DATED this 19th day of November, 2008.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

dd-mvu

JOC

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2009 JAN 16 A 6:49

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS
aka Norman Harold Flowers III
#1179383

Defendant.

CASE NO. C228755

DEPT. NO. IV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - BURGLARY (Category B Felony) in violation of NRS 205.060, COUNT 2 – MURDER (Category A Felony) in violation of NRS 200.010, 200.030, COUNT 3 – SEXUAL ASSAULT (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 4 – ROBBERY (Category B Felony) in violation of NRS 200.380; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 - BURGLARY ((Category B Felony) in violation of NRS 205.060, COUNT 2 – FIRST DEGREE MURDER (Category A Felony) in violation of NRS 200.010, 200.030, COUNT 3 – SEXUAL ASSAULT (Category A Felony) in violation of NRS 200.364,

200.366; COUNT 4 – FOUND NOT GUILTY; thereafter, on the 13TH day of January, 2009, the Defendant was present in court for sentencing with his counsel, RANDY PIKE, Deputy Special Public Defender and CLARK PATRICK, Deputy Special Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS; AS TO COUNT 2 - TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, to run CONSECUTIVE to COUNT 1; AS TO COUNT 3 - TO LIFE WITHOUT THE POSSIBILITY OF PAROLE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, to run CONSECUTIVE to COUNT 2; (Category B Felony) in violation of NRS 205.060, COUNT 2 – MURDER (Category A Felony) in violation of NRS 200.010, 200.030, COUNT 3 – SEXUAL ASSAULT (Category A Felony) in violation of NRS 200.364, 200.366; with SEVEN HUNDRED SIXTY-ONE (761) DAYS credit for time served.

DATED this 15th day of January, 2009

KATHY HARDCASTLE
DISTRICT JUDGE

2

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CLERK OF THE COURT

NOAS
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
CLARK W. PATRICK
Deputy Special Public Defender
Nevada Bar No. 9451
330 South Third Street, Ste. 800
Las Vegas, NV 89155-2316
(702) 455-6265
Fax: 455-6273
rpike@co.clark.nv.us
cpatrick@co.clark.nv.us
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO. C228755 DEPT. NO. IV DOCKET NO. N/A

NOTICE OF APPEAL

DATE: N/A
TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff;

TO: DAVID ROGER, DISTRICT ATTORNEY; and

TO: DEPARTMENT IV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

NOTICE is hereby given Defendant NORMAN FLOWERS, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from his conviction and sentence entered from his trial in this matter. (Judgement of Conviction (Jury Trial) was

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CLERK OF THE COURT

filed on January 16, 2009).

DATED this 26th day of January, 2009.

DAVID M. SCHIECK
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JONELL THOMAS
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4771
330 S. THIRD ST., STE. 800
LAS VEGAS, NEVADA 89155-2316
(702) 455-6265

CERTIFICATE OF MAILING

The undersigned employee with the Clark County Special Public Defender's Office, hereby certifies that on the 26 day of January, 2009, a copy of the Notice of Appeal was deposited in the United States mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to District Attorney's Office, 200 Lewis Ave., 3rd Floor, Las Vegas NV 89155; the Nevada Attorney General's Office, 100 N. Carson, Carson City, NV 89701; and Norman Flowers, No. 1179383, Clark County Detention Center 330 S. Casino Center Blvd., Las Vegas NV 89101, that there is a regular communication by mail between the place of mailing and the place so addressed.

DATED: 1/26, 2009.

_____
KATHLEEN FITZGERALD
An employee of The Special Public Defender

JOC

FILED

2009 FEB 12 A 7:19

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS
aka Norman Harold Flowers III
#1179383

Defendant.

CASE NO. C228755

DEPT. NO. IV

AMENDED JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - BURGLARY (Category B Felony) in violation of NRS 205.060, COUNT 2 – MURDER (Category A Felony) in violation of NRS 200.010, 200.030, COUNT 3 – SEXUAL ASSAULT (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 4 – ROBBERY (Category B Felony) in violation of NRS 200.380; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 - BURGLARY ((Category B Felony) in violation of NRS 205.060, COUNT 2 – FIRST DEGREE MURDER (Category A Felony) in violation of NRS 200.010, 200.030, COUNT 3 – SEXUAL ASSAULT (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 4 – FOUND NOT GUILTY; thereafter, on the 13TH day of January, 2009, the Defendant was present in court for sentencing with his counsel, RANDY

PIKE, Deputy Special Public Defender and CLARK PATRICK, Deputy Special Public Defender, and good cause appearing,

THE DEFENDANT WAS ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant was SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS; AS TO COUNT 2 - TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, to run CONSECUTIVE to COUNT 1; AS TO COUNT 3 - TO LIFE WITHOUT THE POSSIBILITY OF PAROLE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, to run CONSECUTIVE to COUNT 2; with SEVEN HUNDRED SIXTY-ONE (761) DAYS credit for time served.

THEREAFTER, on the 29th day of January, 2009, the Defendant appeared in court with his counsel, CLARK W. PATRICK, Special Deputy Public Defender, and pursuant to the State's request for clarification of the sentence, and good cause appearing to amend the Judgment of Conviction; now therefore,

IT IS HEREBY ORDERED that the Defendant's sentence be amended to reflect: AS TO COUNT 3 – TO LIFE WITH THE POSSIBILITY OF PAROLE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, to run CONSECUTIVE to COUNT 2.

DATED this 10th day of February, 2009

KATHY HARDCASTLE
DISTRICT JUDGE

NOAS
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
CLARK W. PATRICK
Deputy Special Public Defender
Nevada Bar No. 9451
330 South Third Street, Ste. 800
Las Vegas, NV 89155-2316
(702) 455-6265
Fax: 455-6273
rpike@co.clark.nv.us
cpatrick@co.clark.nv.us
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO. C228755 DEPT. NO. IV DOCKET NO. N/A

AMENDED NOTICE OF APPEAL

DATE: N/A
TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff;

TO: DAVID ROGER, DISTRICT ATTORNEY; and

TO: DEPARTMENT IV OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

NOTICE is hereby given Defendant NORMAN FLOWERS, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from his conviction and sentence entered from his trial in this matter. (Amended Judgement of Conviction (Jury

Trial) was filed on February 12, 2009).[1]

DATED this 19th day of February, 2009.

DAVID M. SCHIECK
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
JONELL THOMAS
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4771
330 S. THIRD ST., STE. 800
LAS VEGAS, NEVADA 89155-2316
(702) 455-6265

CERTIFICATE OF MAILING

The undersigned employee with the Clark County Special Public Defender's Office, hereby certifies that on the 19th day of February, 2009, a copy of the Amended Notice of Appeal was deposited in the United States mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to District Attorney's Office, 200 Lewis Ave., 3rd Floor, Las Vegas NV 89155; the Nevada Attorney General's Office, 100 N. Carson, Carson City, NV 89701; and Norman Flowers, No. 1179383, Clark County Detention Center, 330 S. Casino Center Blvd., Las Vegas NV 89101, that there is a regular communication by mail between the place of mailing and the place so addressed.

DATED: 2/19, 2009.

_____
KATHLEEN FITZGERALD
An employee of The Special Public Defender

[1]Judgement of Conviction (Jury Trial) was filed on January 16, 2009. The Notice of Appeal was filed on January 26, 2009. Due to a clerical error in the Judgement of Conviction, the District Attorney's Office requested a hearing to clarify Mr. Flowers sentence and correct the Judgement of Conviction. This appeal is from the Amended Judgement of Conviction.

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S OPENING BRIEF

JoNell Thomas
State Bar #4771
Deputy Special Public Defender
David M. Schieck
State Bar #0824
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Norman Flowers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Statutory Authority

Other Authority

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed.

The State obtained a conviction against Flowers based upon the improper use of bad act evidence from another murder case; by eliciting testimony about a statement he gave to detectives, while he was in custody for the other murder, even though he was represented by counsel in the other case and this case serves as an aggravating circumstance in the other case; and by commenting on his decision not to talk to the detectives or testify about this case. The conviction is also the result of the introduction of gruesome photographs from the autopsy, introduction of testimonial hearsay evidence from expert witnesses, and by prohibiting Flowers from introducing evidence that would have supported his defense.

These errors, both alone and in combination, deprived Flowers of his right to a fair trial and rendered the proceedings against him fundamentally unfair. He asks that this Court reverse his conviction and remand this case for a new trial.

II. STATEMENT OF THE CASE AND JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first degree murder, one count of sexual assault, and one count of burglary. The judgment of conviction was filed on January 16, 2009. 2 App. 250. A timely notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the

possibility of parole for sexual assault. 2 App. 255; 3 App. 640. A timely amended notice of appeal was filed on February 20, 2009. 2 App. 256. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

III. STATEMENT OF THE ISSUES

A. Whether the district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony

B. Whether the district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

C. Whether the district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel

D. Whether the district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

E. Whether the district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

F. Whether the prosecutor committed misconduct by commenting on Flowers' right to remain silent

G. Whether there is insufficient evidence to support the conviction

H. Whether the judgment should be vacated based upon cumulative error.

IV. PROCEDURAL HISTORY

On December 13, 2006, the State charged Appellant Norman Flowers with one count of burglary, one count of first degree murder, one count of sexual assault and one count of robbery. 1 App. 1. Sheila Quarles was identified in the Indictment as the victim. 1 App. 1. The State filed a motion indicating its intent to seek the death penalty. 1 App. 30, 82, 112.

On December 26, 2006, the State filed a motion to consolidate this case with the case of State v. Flowers Dist. Ct. No. C216032. 1 App. 8. Marilee Coote and Rena Gonzalez were identified as the victims in that case. 1 App. 8-12. Flowers opposed the motion to consolidate. 1 App. 21. During a hearing on April 13, 2007, the State informed the district court (Judge Mosley) that Judge Bonaventure denied the motion to consolidate the two cases. 2 App. 259. Judge Mosley indicated a desire to have the cases consolidated and asked that

the matter be heard before Judge Villani, who was assigned the other case following Judge Bonaventure's retirement. 2 App. 261-62.

On January 23, 2007, Flowers filed a motion to preclude evidence of other bad acts. 1 App. 35. The State opposed the motion. 1 App. 48. On November 5, 2007, the State filed a motion for clarification of the court's ruling. 1 App. 64. Flowers opposed the motion. 1 App. 77. On November 15, 2007, the matter was heard by Judge Bell. 2 App. 63. He ordered that a Petrocelli hearing be conducted. 2 App. 264. The hearing was held on August 1, 2008. 2 App. 267-324. The district court ruled that evidence concerning the Coote allegation was admissible but evidence concerning the Gonzalez allegation was not. 2 App. 318, 327, 332. The district court further ruled that the State could present evidence from the detective about similarities between the two cases, from the nurse and the coroner/medical examiner about the way Coote died, and DNA evidence. Other evidence concerning that case was found to be inadmissible. 2 App. 318. On September 29, 2008, Flowers filed a motion to reconsider the ruling on the motion in limine to preclude evidence of other bad acts. 1 App. 120. The district court denied the motion and allowed Flowers to make a continuing objection to the evidence. 2 App. 331-34. The district court found that the record was preserved concerning admissibility of the evidence. 2 App. 334. The district court ruled that Flowers was entitled to a cautionary instruction as the evidence was introduced and to a jury instruction. 2 App. 334. During trial, the jury was admonished that the bad act testimony was only to be considered if the jury found that it had been proven by clear and convincing evidence and should be used only to prove identity, intent, motive, and absence of mistake or accident. 2 App. 421.

On July 30, 2008, Flowers filed a bench brief. 1 App. 95.

Jury trial began on October 15, 2008. 2 App. 331. During trial, the State objected to testimony from William Kinsey, who was called as a witness by Flowers. 3 App. 541-42. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila Quarles was dating someone named Keith. 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever

personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

The parties settled jury instructions on October 22, 2008. 1 App. 146. Flowers proposed jury instructions that were not given by the district court. 1 App. 126. During settlement of jury instructions, Flowers proffered instructions on the State's failure to test speaker wires that were found at the crime scene; circumstantial evidence; other matter evidence; flight of another potential suspect; corroboration of DNA; the lesser-included offense of manslaughter; and specific intent and robbery. 3 App. 545. Flowers objected to instructions on the State's burden to prove elements of the offense of burglary, the instruction beginning "the jury must decide if the defendant is guilty"; malice aforethought; express malice; and premeditation. 3 App. 546.

Instructions were read to the jury. 3 App. 576-80. After struggling with deliberations for more than 24 hours, the jury returned verdicts of guilty on the charges of burglary, first degree murder and sexual assault. 1 App. 182-83; 3 App. 625. The jury noted on a special verdict that it unanimously found Flowers guilty of a murder committed during the perpetration of a burglary, sexual assault or robbery. It did not unanimously find him guilty of willful, deliberate and premeditated murder. 1 App. 183; 3 App. 622. The jury found him not guilty of robbery. 1 App. 183; 3 App. 622.

Following the trial phase, evidence and argument was heard by the jury concerning the penalty to be imposed for murder. The jury returned special verdicts for mitigating circumstances. 1 App. 185. It returned a verdict for life without the possibility of parole. 1 App. 186.

Following the verdicts, on October 30, 2008, Flowers filed a motion for a new trial. 1 App. 187. The motion was based upon the district court's rulings on the admission of evidence from another case and the admission of a portion of Flowers' statement to the police. The State opposed the motion. 1 App. 236. On November 18, 2008, the district court denied the motion. 1 App. 248; 3 App. 630.

The sentencing hearing was held on January 13, 2009. 3 App. 632. The judgment of

conviction was filed on January 16, 2009. 2 App. 250. A notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the possibility of parole for sexual assault. 2 App. 255; 3 App. 640. An amended notice of appeal was filed on February 20, 2009. 2 App. 256.

V. STATEMENT OF FACTS

Sheila Quarles was 18 years old when she was killed by drowning in an apartment that she shared with her mother Debra and her siblings Miracle and Xavier. 2 App. 373. On the day she was killed, March 24, 2005, Sheila returned home at about 6:30 a.m., after spending the night with Qunise Toney, with whom she was in a relationship. 2 App. 375. Robert Lewis, Debra's companion, Debra and the two younger children left the apartment, so Sheila was alone in the apartment. 2 App. 375.

Qunise talked with Sheila on the phone three or four times that day. 2 App. 409. They last talked around 11:00 a.m. or 12:30 p.m. and Sheila was in a good mood at that time. 2 App. 409-11. Debra talked to Sheila about five times during the day, and Sheila sounded normal during those conversations. 2 App. 375. They last talked at about 1:00 p.m. 2 App. 375. During that call, the phone went dead and Debra tried to call Sheila, but no one answered. 2 App. 375. Qunise received a call from Sheila's phone at 1:35 p.m., but when Qunise answered the phone, no one said anything. 2 App. 410, 412. When Qunise called back, she received a voicemail message. 2 App. 410.

Debra returned home around 3:00 p.m. She called for Sheila to assist her with groceries, but Sheila did not respond. 2 App. 376, Robert came down to help Debra carry the groceries to her apartment. 2 App. 376, 385. Sheila's habit was to have the door to the apartment locked while she was inside, but on this occasion the door was open. 2 App. 376. Debra put down the groceries and realized the stereo was missing. 2 App. 376. She heard water in her bathroom, went there to turn off the water, and discovered Sheila's body in the

tub. 2 App. 376-77. On the way the bathroom, Debra noticed that her bedroom was messed-up. 2 App. 376. Debra and Robert pulled Sheila out of the hot water. 2 App. 377, 385. Debra then left the apartment and got her oldest son Ralph, who was working a few minutes away. 2 App. 377. Robert also left the apartment. 2 App. 386.

Robert told neighbors that Pooka, which is Sheila's nickname, needed help. 2 App. 368. One of the neighbors, Marquita Carr, went into the Quarles apartment, saw Sheila lying on the floor with no clothes, and had someone call 911. 2 App. 368. Carr covered the body after checking to see if Sheila was breathing. 2 App. 368. Officer Brian Cole responded to the 911 call at about 2:50 p.m. 2 App. 364. He saw Sheila's body on the bathroom floor, face up with her feet on top of the tub. He secured the scene. 2 App. 365.

Debra returned to the apartment with her son Ralph after the police and paramedics had arrived. 2 App. 377. Debra talked with detectives and told them that perhaps Qunise was the person who killed Sheila and that she could not think of any other person with whom she had any troubles. 2 App. 378. Debra went back into the apartment with a detective and noticed a whole bunch of keys. She told the detective that items were missing, including her stereo, pillow cases, Sheila' cell phone, her bank card, jewelry, and CDs. 2 App. 378.

Detective James Vaccaro was assigned to the case along with Detectives Sherwood, Long, Wildeman, and Wallace. 2 App. 389, 477. Vaccaro descried the crime scene to the jury. 2 App. 389-90. There did not appear to be a forced entry into the apartment. 2 App. 390, 478; 3 App. 510. He noticed that two pillows in the bedroom did not have pillowcases. 2 App. 392. Sheila's clothing was found in the bathroom. 2 App. 394; 3 App. 512. The police recovered underwear, jeans, and a wig. 2 App. 394. The underwear was on the outside of the jeans, were inside out and backwards. 2 App. 394, 415-16. Vaccaro stated his belief that the victim did not place her underwear on the jeans. 2 App. 394.

A crime scene analyst collected 21 samples for fingerprint examinations. 2 App. 414. Prints were found on nine of those items. 2 App. 420. None of the prints belonged to Keith Flowers. 2 App. 420. No attempt was made to lift fingerprints from the body. 2 App. 417. The police did not examine the apartment with special equipment to determine if semen or

other bodily fluids were present. 2 App. 417. No evidence of blood was found on the body or at the scene. 3 App. 511. There was no sign of a physical struggle. 3 App. 512, 515.

Items taken from the apartment, including a stereo and cell phone, were never found by police officers. 3 App. 517. Detective Sherwood tested a key that was found in the bedroom on various doors in the apartment complex but it did not fit any of those doors. 3 App. 517. He did not test the key in the lock of the apartment where Flowers stayed. 3 App. 531. The detectives did not subpoena bank records following August of 2005 to determine whether the bank card was used. 3 App. 531. Detective Long was not aware that a bank card had been stolen and was unaware of any investigation concerning its use. 2 App. 492. Sheila' telephone records were examined. 2 App. 491. The last call recorded was an incoming call on March 24, 2005 at 1: 35 p.m. 2 App. 491. The last outgoing call was to Qunise's number. 2 App. 491. Detectives did not examine cell tower records. 3 App. 531.

Vaccaro attended the autopsy. 2 App. 401. It was not immediately apparent to the coroner that Sheila's death was the result of a homicide, and the coroner did not immediately find that a sexual assault was involved. 2 App. 401. Eventually, DNA from two male sources was found on Sheila's underwear. 2 App. 406. Other clothing was not collected, so no tests were performed on those items. 2 App. 406. Vaccaro agreed with the prosecutor that "women can have sex with people consensually and later get murdered and there is not necessarily a sexual component to the homicide." 2 App. 403. Over objection, he agreed with the prosecutor's statement that "when you have an individual who has consensual sex and then maybe has lacerations to her vagina and has an additional source of DNA in her, then perhaps there might be a sexual component to the homicide." 2 App. 403-04.

The medical examiner who performed the autopsy, Dr. Knoblock, did not testify at trial. 2 App. 354. Instead his findings were presented by medical examiner Lary Simms. 2 App. 354. Simms testified that Sheila was asphyxiated by strangulation to her neck. 2 App. 350, 351. There were no ligature marks so it was likely that there was a manual strangulation or compression. 2 App. 351. There was bruising on her abdomen, an abrasion on her knee, and some lacerations in the vaginal area. 2 App. 350. The tears which appeared

in the lining of the opening of the vagina were consistent with sexual assault and did not normally happen except in a forcible kind of situation. 2 App. 350. The lacerations were made prior to Sheila's death. 2 App. 350. Based upon the absence of swelling, the medical examiner believed that the insertion which caused the laceration took place within an hour of her death. 2 App. 351. He could not determine whether the lacerations were caused by a penis or a foreign object. 2 App. 362. The presence of DNA inside the vagina did not indicate that the semen was contemporaneous with the sexual assault. 2 App. 362. It is not scientifically possible to determine which male had sex with a female first in a case where the semen of two men is identified. 2 App. 362. There was a fresh hemorrhage to Sheila's head that was consistent with a blunt force injury. 2 App. 351. She had a frothy fluid in her airways, which is a sign of drowning. 2 App. 352. Simms testified that Knoblock formed the opinion that the cause of death was drowning and that strangulation was a contributing factor. 2 App. 354. Based upon his observations in the photographs and report, Sims agreed with Knoblock's opinion. 2 App. 354. Although Flowers did not contest the cause of death, over a defense objection, the district court allowed the State to introduce photographs from the autopsy. 2 App. 353. The photographs were admitted as Exhibits 93 to 108. 2 App. 352-55; 3 App. 695a-713. They include several photographs of Sheila's tongue after it was removed from her body by the medical examiner. 3 App. 695a-704.

Linda Ebbert, a sexual assault nurse examiner, testified that in the thousands of examinations she has performed she has concluded that 65 to 67percent resulted in injuries. 2 App. 446. Injuries are often found between five o'clock and seven o'clock of the genitalia. 2 App. 446. She reviewed Sheila's autopsy report and photographs from the autopsy. 2 App. 446. There were two lacerations, one of which was significant because it was wide and deep. 2 App. 447. She believed that it was consistent with non-consensual sex. 2 App. 447, 450. On cross-examination, Ebbert acknowledged that injuries can occur during consensual sex. 2 App. 449. She did not review photographs of Sheila's cervix. 2 App. 449.

Over objection, Detective Sherwood was allowed to testify that hemorrhages to the neck and petechial hemorrhages in the eyes were findings consistent with strangulation. 3

App. 520. He participated in other investigations where strangulation was the cause of death. 3 App. 520. He was present when vaginal, anal, and oral swabs were collected during the autopsy. 3 App. 520. He requested that the swabs be tested for DNA and requested comparison to swabs taken from Qunise Toney and Robert Lewis. 3 App. 520. On cross-examination, Detective Sherwood acknowledged that he was not a doctor and basically went by what others told him. 3 App. 532.

DNA tests were conducted by Kristina Paulette. 3 App. 547. Sheila's vaginal sample showed a mixture belonging to Sheila and two males. 2 App. 548. Robert Lewis and Qunise Toney were excluded as a sources of the samples. 3 App. 549. She identified Flowers as the probable source of one of the male samples. 3 App. 549. She did not obtain any foreign results from samples taken of Sheila's fingnails or a Gatorade bottle. 3 App. 550. A sperm sample consistent with Flowers was found on Sheila's underwear. 3 App. 551.

Detective Sherwood testified that he learned there were two different sources of DNA inside of Quarles, one of which was identified as belonging to Norman Flowers. 3 App. 522. He realized that there was another detective who had a suspect by that name on a different case. 3 App. 522. Over a hearsay objection, he was allowed to testify that he looked at a homicide notebook by Detective Tremel and found that there was another victim who had been strangled and violently sexually assaulted by Flowers. 3 App. 523.

Sherwood contacted Debra and then contacted Flowers, who was in custody on another matter. 3 App. 524. Flowers was given his Miranda rights. 3 App. 714. He talked with the detective after being told that they would not discuss the case for which he was in custody. 3 App. 525, 665. Flowers would not give a response when asked if he knew Debra Quarles and indicated that he knew Sheila Quarles by her nickname, Pooka. 3 App. 526. He told the detective that he did not want to be involved and would not answer any questions about the Quarles case. 3 App. 526.[1]

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[1]The testimony concerning this matter is set forth in full in the Appendix as it is relevant to Flowers' contention that the district court erred in failing to suppress this evidence.

In 2008, Paulette tested a sample from George Brass and found that he was a probable source of samples from Quarles' vagina and underwear. 3 App. 551. Detective Sherwood investigated the source of the second semen sample and learned from Detective Long that the source had been identified. 3 App. 527. George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass.[2] 3 App. 556.

Debra knew both Flowers and Brass. 2 App. 373. Flowers dated Debra for about four months in 2004. 2 App. 378. Flowers knew Sheila and Debra's other children. 2 App. 378. She saw Flowers at her apartment complex about two weeks prior to Sheila's death. 2 App. 379. At that time, Debra and Sheila were sitting outside near their apartment. 2 App. 379. They asked Flowers what he was doing there and he said that he worked as a maintenance man at a couple of the apartment complexes owned by the landlord. 2 App. 379. They talked for about 20 minutes. 2 App. 379.

Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. Debra knew that Brass and Sheila were friends, but did not know of any sexual relationship between them. 2 App. 374.

Following Sheila' death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379. Flowers recommended

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[2] George Schiro, a DNA expert, testified that it is possible to have a false "hit" when evaluating DNA in a case where a mixture is present. 3 App. 558. As the Quarles case, it would be expected that between 40 and 130 people in the Las Vegas valley would have the same profiles as those attributed to Flowers and Brass. 3 App. 558. It is not possible to determine from DNA how long a sperm sample has been present or in which order two sperm samples were deposited. 3 App. 558. Other clothing could have been examined to establish a timeline as to when the semen was introduced. 3 App. 559.

a psychiatrist and drove her to the two appointments she attended. 2 App. 379.

Debra stated that Flowers did not ever tell her that he had a sexual relationship with Sheila or that they went out. 2 App. 379. Debra believed that Sheila did not like older men. 2 App. 379. She did not ever see Flowers and Sheila together. 2 App. 379. On cross examination, Debra acknowledged that Sheila did not tell her about the sexual relationships she had with with Qunise Toney or George Brass. 2 App. 380. Qunise also testified that she had never met or talked with Sheila's mother, despite the fact that Qunise and Sheila were in a relationship for several months. 2 App. 412.

Brass also contacted Debra and her family at their new apartment following Sheila's death. 2 App. 381. He did not ever tell Debra that he had been having a sexual relationship with Sheila. 2 App. 382. Robert Lewis, who is Brass's uncle, saw Brass at the apartment at lunch time on the day that Sheila was killed. He thought he saw Brass around 11:20 or 11:30. 2 App. 387.

Brass testified that he knew the whole Quarles family and was good friends with Sheila's brother Ralph. 2 App. 493. Brass claimed that he had a sexual relationship with Sheila. 2 App. 494. He lived with his mom in Sheila's apartment complex. 2 App. 494. He claimed that he had vaginal sex on the living room floor with Sheila between 10:30 a.m. and 11:15 a.m. 2 App. 494-96. They were together for twenty minutes, at the most. 2 App. 495. Sheila did not receive any phone calls while Brass was there. 2 App. 496. His uncle was outside of Sheila's apartment when he left. 2 App. 496.

Brass claimed he then went to work at Super Wal-Mart, at Craig and Clayton. 2 App. 494. He usually swiped his ID badge when he arrived and when he left. 2 App. 494. He believed that he took a lunch break that day. 2 App. 495. He usually had lunch with his grandma, about seven blocks away from Wal-Mart. 2 App. 495. His mother called him at work that day and he also received a call from Ralph. 2 App. 495. He left work and went to his mother's apartment. 2 App. 495. He did not clock out when he left. 2 App. 496. Gabriel Ubando, an assistant manager at Wal-Mart, identified Brass's time records for March 24, 2005. 2 App. 498. The records indicated that George clocked in at 12:04 p.m., went to

lunch at 4:04 p.m., came back at 5:03 p.m. and left work at 7:45 p.m. 2 App. 488. It's possible that another employee could have clocked him in and out and its also possible that an associate manger could change the times in the system. 2 App. 498. There was no indication that anyone changed Brass's time record. 2 App. 498.

Police officers asked Brass a few questions on the day Sheila was killed. 2 App. 495. They did not record the conversation. 2 App. 495. Others present were his uncle, mother, sister, grandmother, and his father. 2 App. 496.

Some time after Sheila's death, about two or three years later, the police talked to Brass about his sexual relationship with her and the fact that he had sex with her the morning she was killed. 2 App. 497. He did not tell them about that fact the day she was killed because they did not question him about it, and it did not occur to him that it would be helpful to the police to know that information. 2 App. 497. Upon determining that George Brass was not a suspect, the location of his sexual intercourse with Quarles was no longer relevant to the detectives. 2 App. 404. Police officers did not compare Brass's fingerprints to prints found at the scene. 2 App. 421. Ameia Fuller, Sheila's cousin, testified that she talked with Sheila by telephone shortly before Sheila died. 2 App. 492. Sheila told her that she was friends with Chicken (Brass). 2 App. 493. Ameia provided this information to a detective who called her. 2 App. 493.

Other suspects and leads were not thoroughly explored by the detectives. For example, a stereo was stolen from the Quarles' apartment on the day Sheila was killed.[3] 2 App. 374, 492. Detectives were aware that another burglary took place in the apartment complex on the day that Sheila was killed. 2 App. 406, 481. No suspect was arrested for that offense. 2 App. 406, 482. Fingerprint samples from other possible suspects were not requested. 2 App. 421.

Debra informed the detectives that there was an older man who had just moved into

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[3]As noted above, Flowers was charged with robbery based upon the theft of the stereo. The jury acquitted him of this offense.

the apartment complex who had just gotten out of prison. 2 App. 380. There was an occasion, about a month prior to Sheila's death, when the old man knocked on their apartment door and asked Debra's daughter Miracle to get Sheila. 2 App. 380. Debra told the old man Sheila's age and told him to stay away from her house. 2 App. 380. She gave police officers the name of "Darnell" and gave them a description of the man. 2 App. 381-82. The detectives were unable to determine who this person was based upon their interviews with neighbors. 2 App.483. Detective Sherwood claimed that Detective Long investigated this lead and it turned out to be nothing. 3 App. 522.

Robert Lewis voluntarily gave a DNA sample and talked to police officers for about an hour, but they did not take a handwritten statement from him. 2 App. 386-87, 480-81; 3 App. 531. The detective did not check Robert's name with pawn shops to see if he had pawned any items. 3 App. 532. Robert saw a nephew, Anthony Culverson at Sheila's apartment on the day she was killed. 2 App. 387. Culverson, who was in custody of the state prison at the time of trial, testified that he is Brass's cousin and was aware that Brass and Sheila saw each other on and off. 2 App. 474.

Detective Sherwood talked with Debra a number of times and asked if she knew of Sheila having any boyfriends. 3 App. 532. No male names were given. 3 App. 532. There was a letter to William Kinsey on a bed in the apartment. 3 App. 532. Several months prior to trial, Sherwood met with Kinsey. 3 App. 532. Sherwood opined that Kinsey was not cooperative. 3 App. 532. The detective was aware that the letter was addressed to Kinsey and was from "Sheila Kinsey." 3 App. 533. Kinsey was in custody when Sheila was killed and was therefore not a suspect. 3 App. 536. He testified that Sheila was his girlfriend. 3 App. 584. He has been in custody since December, 2004. 3 App. 584. Sheila visited Kinsey and wrote to him while he was in custody. 3 App. 584.

Natalia Sena lived in the Palm Village Apartments in March of 2005. 3 App. 565. She told officers that she saw a tall, skinny man in a flannel shirt near Quarles' apartment on the day she was killed. 3 App. 566. She also saw Chicken (Brass) that day and believed she saw him both before and after 12:00 p.m.. 3 App. 566. Chicken was with the tall, skinny

man. 3 App. 566. They were at Quarles' apartment. 3 App. 566. He was creeping around and looking to see who was around. 3 App. 566. On the day Sheila was killed, Jesse, the cousin of the father of Sena's child, was living with Sena. 3 App. 567. Sena was arrested that day and when she returned two or three days later she saw Jesse outside with a radio. 3 App. 567. She recalled that the radio had detachable speakers and she asked him where he got it. 3 App. 567. Jesse told her he got it from the girl's downstairs apartment. 3 App. 567. Drugs were missing from her apartment when she returned from jail. 3 App. 567. On cross-examination, Sena acknowledged that she used crystal meth every day in March, 2005. 3 App. 568. Sena was sure that she saw Chicken at about noon. 3 App. 568. She believed that she heard the deceased girl's mom scream about an hour or less later. 3 App. 569. She did not see the man in the girl's apartment or see him walk out of the apartment. 3 App. 569. She saw the man in the girl's doorway. 3 App. 570. It was possible that she was coming from the apartment next door. 3 App. 570.

Veronica Sigala, the assistant manager of the Palm Village Apartments, testified that she worked at the apartment complex in March, 2005. 3 App. 571. Flowers did not ever work in the maintenance department while she was there. 3 App. 571. He did not work in any other capacity at the complex. 3 App. 572. She identified the photograph of another man, Mr. Nararo, who stayed with people in the apartment complex. 3 App. 572-73. She saw that man break into apartments. 3 App. 572. She called the police regarding the man three or four times and she also told the man to leave seven or eight times. 3 App. 572. She did not see him in Quarles' apartment. 3 App. 573.

Martha Valdez testified that she moved into the Palm Village apartments near the end of March 2005. 3 App. 573. On the first or second day that she moved into her apartment, a man entered into her apartment. 3 App. 574. She saw him in the doorway of her bedroom, told him she was going to call the police, and he ran out of the apartment. 3 App. 574. She identified a photograph of the man. 3 App. 575. The next day she saw police at her apartment complex and learned they were investigating the death of the girl. 3 App. 575

Extensive evidence was presented concerning the murder of Merilee Coote.

Following an admonition by the district court, the jury heard evidence from Monica Ramirez. 2 App. 422. She worked at an apartment complex at 6650 Russell, which was not the complex where Sheila was killed. 2 App. 422. On May 3, 2005, she conducted a welfare check on one of her residents, Merilee Coote. 2 App. 422. Ramirez and her assistant Michelle Craw went to the apartment and found Coote on the living room floor. 2 App. 422. She was not wearing any clothing. 2 App. 422. They contacted 911. 2 App. 423.

Officers responded to Coote's apartment. 2 App. 424. They found that the lights were on and the television was tuned to a pay per view information channel listing pornographic movies. 2 App. 424. Coote's legs were spread, she was wearing one earing and another was on the floor, some of her public hair was burned, and there was an incense stick in her belly button. 2 App. 424, 439. There were some ashes between her legs, under her vaginal area. 2 App. 424. Some of the carpet was burned and there was an area of apparent blood adjacent to the burned carpet. 2 App. 431. Biological fluids were found only in the carpet area in front of a love seat. 3 App. 507. Officers saw a reaction on the carpet near the burned area, which had a floral type odor, similar to fabric softener. 2 App. 431, 436. It appeared that someone had placed a contaminant in the area in an attempt to hide evidence. 2 App. 431. Inside of a washing machine, officers found a purse and its contents, a knife, a daily planner, ice cube trays and other items. 2 App. 424, 430. In the master bedroom, the bathtub was full of water. There were some makeup items, jewelry, clothing and newspaper in the tub and it was all covered up with a blue towel. 2 App. 424, 429. It appeared that the shower and washing machine were wiped down. 2 App. 432. Photographs of the crime scene were admitted. 2 App. 428. There was no forced entry. 2 App. 429, 439. The cause of death was not immediately apparent to the police as there were no gunshot or stab wounds or injuries of that nature. 2 App. 440.

An autopsy was performed on Marilee Coote by Dr. Knoblock.[4] 2 App. 355. He did

[4]Flowers objected to testimony concerning this matter. 2 App. 355. The district court noted the continuing objection. 2 App. 355.

not testify at trial. Instead his findings were presented by Lary Simms. 2 App. 355-56.

Sims testified that Knoblock found that Coote was 45 years old at the time of her death. 2 App. 355. There were signs of asphyxiation and she had some contusions on her arms. 2 App. 355. There were also areas of superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks. 2 App. 355. It appeared that a hot object was applied to the skin. 2 App. 355. It appeared that the burns occurred at about the time of death. 2 App. 356. He could not determine whether the burns were pre-mortem or post-mortem. 2 App. 356. There was a small abrasion behind her ear, superficial tears on the opening of the vagina, a tear on the opening of the anus and some hemorrhages on her skull and neck. 2 App. 356. Coroner Sims believed the tears to be consistent with sexual assault. 2 App. 356. The hemorrhaging on the anus indicated pre-mortem penetration. 2 App. 356. The hemorrhages on the skull indicated blunt trauma that was contemporaneous with Coote's death. 2 App. 356. The injuries to her neck indicated there was manual strangulation. 2 App. 357. The cause of death was strangulation. 2 App. 359, 440.

Officers returned to the apartment the following day and learned that Coote's son had broken the crime scene barrier tape and had been inside of the apartment. 2 App. 441. They had carpeting removed to test for DNA evidence. 2 App. 441. Officers learned that Coote's car was missing. 2 App. 441. The car was recovered but the keys were not located. 2 App. 442. The car was processed for fingerprints but no prints were found. 2 App. 443.

During the course of their investigation, officers learned that Flowers' girlfriend lived in the same apartment complex as Coote and her apartment was across the porch or walkway from Coote's apartment, 2 App. 442. A DNA sample was collected from Flowers. 2 App. 442. DNA samples were also recovered from Coote and the carpet. 2 App. 442.

A fingerprint examiner testified that he attempted to develop tests on numerous items recovered from Coote's apartment, including items found in the washing machine and tub, but he was unable to recover any latent prints from these items. 2 App. 452. He recovered numerous prints from Coote's car and examined them against exemplars from Flowers and several other people. No prints were identified as belonging to Flowers. 2 App. 453. Three

prints did not match any of the exemplars submitted. 2 App. 453.

Consuelo Silva Henderson, a long time friend of Coote's, did not believe that Coote would have put ice cube trays or the contents of her purse in a washing machine, or put bills or other items in a bathtub. 2 App. 444. She did not know Coote to watch pornography. 2 App. 444. Coote did not have a boyfriend while living in Las Vegas. 2 App. 444.

Juanita Curry, a neighbor of Coote's, testified that while emergency personnel were coming downstairs from Coote's apartment, Flowers knocked on her door and indicated that he wanted to come into her apartment. 3 App. 509. She had met him before through a mutual friend and had helped Curry move items into her apartment. 3 App. 509. He said that the police made him nervous. 3 App. 509.

Linda Ebbert reviewed the autopsy report concerning Coote. 2 App. 447. She found three lacerations, between five and seven o'clock, and concluded that they were consistent with non-consensual sexual intercourse. 2 App. 447. She believed the evidence was consistent with non-consensual penetration of the anus. 2 App. 448.

Over a hearsay objection, Paulette testified concerning a DNA report concerning Merilee Coote's vaginal sample.[5] 3 App. 551-52. She testified that another DNA analyst, Thomas Wahl, found that the source of the semen found in Coote's sample was Flowers. 3 App. 551-52. She testified that she could state the identity because there was a single source or a major profile in the sample. 3 App. 552. She testified that the profile generated was rarer than one in 650 billion. 3 App. 552. Flowers was also identified as the source of a rectal sample collected from Coote and of a stain on the carpet of her apartment. 3 App. 552. After examining Wahl's findings, she looked at the carpet stain and found that there was some sort of detergent on the carpeting. 3 App. 553. She concluded that the stain on the carpet was from Flowers' semen. 3 App. 553.

[5]In a voir dire examination, Flowers' counsel elicited testimony that the records were kept as business records with her lab. 3 App. 551.

As noted above, based upon this evidence the jury found Flowers guilty of first-degree murder under a felony-murder theory. The jury also found him guilty of burglary and sexual assault. He was acquitted of the robbery charge.

V. ARGUMENT

A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce prior bad act evidence of another murder which was not relevant and which was highly prejudicial. Flowers' constitutional rights were further violated because the State presented bad act evidence in excess of that permitted by the district court's order. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). See also Fields (John) v. State, __ P.3d __ (Nev. 2009). Flowers submits that the admission of propensity evidence violates his state and federal constitutional rights of due process. See Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) (recognizing but reserving the issue). Constitutional error is evaluated under the harmless error standard. Erroneous admission of evidence in violation of the Due Process Clause is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 23-24 (1967).

2. The district court abused its discretion in admitting prior bad act evidence.

The district court allowed the State, over a continuing defense objection, to introduce evidence concerning the murder of Marilee Coote. The State alleged that Flowers killed Coote and claimed that the Coote evidence was relevant to proving the identity of the person who killed Sheila Quarles. In support of its motion to introduce this evidence, the State

noted that Sheila died two months prior to Coote; DNA belonging to Flowers was found among the DNA identified on Quarles' vaginal sample, and DNA identified to Flowers was found in Coote's vaginal and rectal swabs. 1 App. 12-13.

> NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "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, 1064-65 (1997). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put – whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." Ledbetter, 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16.

Fields, __ P.3d at__. Flowers submits that the State failed to establish the admissibility of the Coote murder under these three prongs.

First, there were substantial differences between the two incidents: Sheila was 18 years old at the time of her death, while Coote was 45 years old. 2 App. 355, 373. Coote had superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks, while Sheila did not have any such injuries. 2 App. 355. Coote had injuries to her anus, while Sheila did not. 2 App. 356. Sheila drowned to death while Coote's cause of death was strangulation. 2 App. 359, 440. Coote's car was missing, while no similar item belonging to Sheila was taken. 2 App. 441. In Coote's apartment, police officers found unusual items in the washing machine and tub, while no similar evidence was found in Sheila's apartment. 2 App. 452. Pornography was playing on the television in Coote's apartment, but not in Sheila's apartment. 2 App. 444. In Coote's case, police officers found detergent on a stain on the carpet, but did not find anything similar in Sheila's apartment. 3 App. 553. Flowers was seen near Coote's apartment on the day Coote was killed, while no one testified that Flowers was present at Sheila's apartment on the day Sheila was killed.

3 App. 509. Finally, the evidence established that Flowers knew Sheila, but there was no testimony that Flowers knew Coote. 2 App. 378. The lack of similarities in the two cases negates the relevance of the evidence concerning the Coote case. Under these circumstances, the district court abused its discretion in finding the Coote evidence to be relevant to the State's charges against Flowers in which Sheila was identified as the victim.

Second, the probative value of the evidence from the Coote case was substantially outweighed by the danger of unfair prejudice to Flowers. Presentation of evidence concerning the Coote case was a substantial portion of the evidence presented at trial. The State presented evidence from the apartment manager who discovered her body, officers who responded to the scene, a medical examiner concerning the autopsy, a fingerprint examiner, an expert in DNA, Coote's friend, and Coote's neighbor. In essence, the State presented a second trial concerning Coote within the trial concerning Sheila. Further, extensive argument about the Coote case was made during closing arguments. 3 App.597-98, 611-12. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers.

Finally, the nature and quantity of the evidence supporting Flowers' conviction beyond the prior act evidence is incredibly weak. A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Thus, the prejudice to Flowers was great as there is a substantial likelihood that he would not have been convicted had evidence concerning the Coote case not been introduced. The judgment of conviction should therefore be reversed.

3. The district court erred in allowing the State to present evidence beyond that provided for by the district court's order.

In ruling on the Flowers' motion to exclude evidence of other bad acts, the district court ruled that the State could present evidence from a detective about similarities between the two cases, from the nurse and coroner/medical examiner about the way Coote died, and DNA evidence, but other evidence concerning the case was found to be inadmissible. 2 App. 318. Specifically, the district court ruled:

> You can put on the Coote case to show intent to and to show identity by talking to the detective about the similarities in the case, the nurse and the coroner/medical examiner about the way she died, the similarities in vaginal tearing, and the DNA profile person, and then that's as far as the State is going.

2 App. 318-19. Despite this order, the State presented evidence from the apartment manager who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's who testified that Coote did not watch pornography and did not have a boyfriend. 2 App. 444. Flowers made a continuing objection to all of the evidence concerning the Coote case, albeit not on the ground that the district court abused its discretion in allowing the State to introduce evidence beyond that provided for in the district court's order. 2 App. 334.

The district court made a firm ruling on the scope of the evidence which could be presented by the State concerning the Coote case. The State was obligated to follow this ruling. The district court abused its discretion in allowing the State to present this additional evidence. Flowers was prejudiced by the introduction of this evidence as it further emphasized the prejudicial evidence suggesting the Flowers was involved in another murder.

B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

Flowers's state and federal constitutional rights to due process, confrontation and cross-examination were violated because the district court allowed the State to introduce testimonial hearsay evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. Chavez v. State, 213 P.3d 476, 484 (Nev. 2009) (citing Mclellan v. State, 124 Nev. __, 182 P.3d 106, 109 (2008)). "However, whether a defendant's Confrontation Clause rights were violated is 'ultimately a question of law that must be reviewed de novo.' Id. (quoting U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007)). The federal courts follow this same standard. Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999). Confrontation Clause violations are subject to harmless error analysis. See U.S v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004). That is, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers' rights of confrontation and cross-examination were repeatedly violated as the State presented the findings of experts who conducted examinations for the prosecution without calling those experts as witnesses.

Flowers' constitutional rights were violated as the district court allowed the State to present the findings of expert witnesses who did not testify at trial. Specifically, Dr. Knoblock, the medical examiner who performed the autopsies on Sheila and Coote did not testify at trial. Instead, Dr. Knoblock's findings were presented by medical examiner Lary Simms. 2 App. 350-62. Also, DNA expert Paulette testified about a DNA examination conducted by another DNA analyst, Thomas Wahl. 2 App. 551-53. No explanation was provided for the absence of either Knoblock or Wahl and no effort was made to establish that they had previously been subject to cross-examination and confrontation by Flowers.

The district court erred in allowing the State to present the findings of expert witnesses without requiring those experts testify at trial. In doing so, the district court violated Flowers' rights under Crawford v. Washington, 541 U.S. 36 (2004), as this was testimonial hearsay evidence and inadmissible under these circumstances. See also City of Las Vegas v. Walsh, 121 Nev. 899, 906, 124 P.3d 203, 208 (2005).

This issue was recently considered by the United States Supreme Court. In

Commonwealth v. Melendez-Diaz, 129 S.Ct. 2527 (2009), the Supreme Court found that admission of a laboratory analysts' affidavits violated the defendant's right of confrontation:

> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id. at 2532 (alteration in original) (quoting Crawford, 541 U.S. at 54).

As in Melendez-Diaz, evidence of the autopsy and DNA tests allegedly conducted here were admitted, even though the experts who performed the examinations did not testify at trial. Flowers was denied the opportunity to question these experts about their methodology, competence as experts, and other factors relevant to the weight and admissibility of the testimony provided via Sims and Paulette. As set forth at length in Melendez-Diaz, findings by expert witnesses must be subject to confrontation:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." Id., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution.
>
> Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, post, at 10, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as Amicus Curiae 15-17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.
>
> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he

> legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded: "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original). Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Melendez-Diaz, 129 S. Ct. at 2537 (footnote omitted). Under this authority, there can be no question that Flowers was entitled to cross-examine the expert witnesses and it was constitutional error to admit hearsay statements of these examinations.

The violation of Flowers' constitutional right of confrontation having been established, it is the State's obligation to prove that the error was harmless beyond a reasonable doubt. See Idaho v. Wright, 497 U.S. 805, 827 (1990). The State cannot do so as this evidence was crucial to the State's case. The judgment must therefore be reversed.

C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.

Flowers's state and federal constitutional right to due process, right to a fair trial, rights to remain silent and right to counsel were violated because the district court allowed the State to introduce evidence of statements made by Flowers at a time when he was represented by counsel, and had invoked his right to remain silent, in a case for which the conviction here serves as an aggravating circumstance. His constitutional and statutory rights were also violated because the district court prohibited Flowers from introducing his whole statement to the police after the State had introduced a portion of the statement. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

A trial court's decision to admit or suppress a statement that may have been obtained in violation of Miranda is reviewed de novo. See U.S. v. Rodriguez-Rodriguez, 393 F.3d

849, 855 (9th Cir. 2005). In considering a Sixth Amendment claim, this Court reviews under the clearly erroneous standard with respect to the underlying factual issues but de novo with respect to the ultimate constitutional issue. U.S. v. Johnson, 4 F.3d 904, 910 (10th Cir. 1993).

2. The district court erroneously allowed the State to introduce evidence of Flowers' statements to the police which were obtained in violation of Miranda and Massiah.

The district court erred in admitting evidence of Flowers' statement to police officers because he was in custody, had been formally charged, and was represented by counsel for a murder charge in the case involving Coote, at the time he was interrogated by police officers in this case. While Flowers recognizes the general rule that police officers may interrogate a person who is in custody for an offense which has not yet been charged, he submits that this general rule does not apply in a case such as this because the conviction for murder in this case is an aggravating circumstance in the other case.

Outside the presence of the jury, Flowers objected to the State's introduction of his statement to detectives. 3 App. 505. His counsel noted that Flowers was in custody on the other case and counsel represented him on that case. 3 App. 505. Counsel was unaware that the detectives planned to interrogate Flowers. 3 App. 505-06. The State informed the district court of its intent to introduce a portion of the statement for the purpose of showing that Flowers was evasive and that he knew Sheila only by her nickname, Pooka. 3 App. 506. The State noted that charges in this case had not been filed. 3 App. 506. Flowers contended that the State's recitation of the law "may be the status of the law now, but I think we need to make a record that that isn't what it should be." 3 App. 506. The district court noted the objection and found the statement to be admissible. 3 App. 506.

The relevant procedural history of the two cases was provided in Flowers' opposition to the State's motion to consolidate. 1 App. 206. Flowers was charged in the Coote case on June 7, 2005. 1 App. 206. Counsel was appointed for Flowers and he entered a plea of not guilty at his arraignment on August 30, 2005. 1 App. 207. On November 8, 2005, Flowers received a Notice of Intent to See Death Penalty, which included an aggravating

circumstance for two or more convictions for murder. 1 App. 207. He was interrogated by police officers in this case on August 24, 2006. 3 App. 524, 665. The detective informed Flowers that "we're not going to discuss your case at all" but did not inform him that evidence obtained concerning the murder of Sheila could be used to establish a conviction for that case and that such a conviction could be used as an aggravating circumstance in the pending case involving Coote. The State introduced evidence of Flowers statement to the detectives. It is reproduced as an Exhibit to this brief at pages 1-4.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Supreme Court explained when this right arises:

> The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Id. at 175 (citations and internal quotations omitted). Accordingly, the Court held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See id. at 176. See also Maine v. Moulton, 474 U.S. 159, 180 (1985); Texas v. Cobb, 532 U.S. 162 (2001); Dewey v. State, 123 Nev. __, 169 P.3d 1149, 1152 (2007).

_____It does not appear that this Court, the United States Supreme Court or any other court has considered this issue in the context presented here, which involves an interrogation on a second case for which the defendant has not been charged, but for which it is easily foreseeable, that a conviction in the second case would serve as an aggravating circumstance in the first case for which the defendant has been charged. In other words, because the second case is part of the first case, in that a conviction from the second case can be used as an aggravating circumstance in the first case, the general rule established in McNeil, Moulton, and Cobb does not apply.

Support for this argument is found in the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 482-85 (2000) (any fact that increases the penalty for a crime

beyond the statutory maximum must be submitted to a jury) and Ring v. Arizona, 536 U.S. 584 (2002) (extending Apprendi to capital cases). In essence, the conviction obtained here, which was based in part upon Flowers' statements to the detectives, is an element of the capital charge pending in the Coote case. Accordingly, this case is an essential part of the Coote case, the detectives were wrong in informing Flowers that their interrogation did not in fact involve the Coote case, and the district court erred in allowing the State to present evidence of Flowers' statements to the detectives without first conducting a full hearing as to their admissibility under Massiah v. U.S., 377 U.S. 201 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966).

_____3. The district court abused its discretion in prohibiting Flowers from introducing his entire statement after the State introduced a portion of his statement.

As noted above, the State elicited evidence about a portion of Flowers' statement to the detectives. On cross-examination, Flowers attempted to elicit testimony about additional statements made by Flowers during the interrogation. 3 App. 534; Appendix pg. 4. Specifically, in response to the State's questions on direct implying that Flowers was not cooperative and was evasive with the detectives, Flowers counsel asked the detective whether Flowers advised the detective that he may want to speak with the detective in the future. 3 App. 534; Appendix pg. 4. The State objected to this testimony, there was a discussion off the record, and the district court sustained the objection. 3 App. 534; Appendix page 4. Later, a record was made concerning the court's ruling. 3 App. 540. The State noted that it stopped its examination at page five of the transcript of the statement, prior to Flowers statement that he had to talk with his lawyer before he did anything and that maybe his lawyer would let him talk to the detectives. 3 App. 541. Flowers' counsel noted that he wished to elicit this testimony to counter the implication from the State's examination that Flowers was evasive and unwilling to cooperate. 3 App. 541. The district court held that it "was trying to protect the defendant is all" and that "there is a potentially negative inference that can be drawn against the defendant for doing something he's absolutely entitled to do. And I think that it's in the defendant's best interest [not] to let it in and that's

why I said you couldn't bring it in." 3 App. 541.

NRS 47.120(1) provides that "when any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any other party may introduce any other relevant parts." See also Domingues v. State, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996) (district court abused its discretion in limiting a detective's testimony regarding his interview of the defendant by prohibiting the defendant from introducing other relevant parts of the interview).

The State elicited testimony from a detective that Flowers was evasive and uncooperative. Flowers' counsel made a strategic decision that the best way to contest the State's evidence was to elicit testimony from the detective that Flowers stated he might be willing to talk to the detectives, but he wished to consult with his counsel before doing so. Flowers had a constitutional right to confront the State's evidence, and a statutory right to introduce the relevant portions of his statement to the detective after the State introduced part of the statement. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); NRS 47.120. The State improperly interfered with the strategic decision of Flowers' counsel by objecting to this evidence. The district court erred in substituting its own judgment for that of Flowers' counsel as to whether this testimony should be presented, and erred in refusing admission of this important evidence.

Flowers was prejudiced by the district court's decision because the jury was precluded from hearing Flowers' statement that he might be willing to discuss Sheila's death, but he wanted to talk with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during closing arguments the State repeatedly emphasized Brass's cooperation with the detectives and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App. 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these arguments would have had far less impact upon the jury. As a matter of fundamental fairness, Flowers was entitled to present this evidence and the district court's exclusion of this evidence warrants reversal of the conviction.

D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce gruesome photographs of body parts dissected by the medical examiner during the autopsy. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews the district court's decision to admit photographs, over objection, for an abuse of discretion. Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083 (1978). The admission of gruesome photographs may so infect the proceedings with unfairness that there is a denial of the federal constitutional right of due process. Spears v. Mullin, 343 F.3d 1215, 1226 (2003). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. The district court abused its discretion in allowing the State to admit evidence of photographs from the autopsy which showed the deceased's tongue after it had been cut out of her body by the medical examiner and gruesome photographs of other body parts.

Gruesome photographs are admissible if they ascertain the truth, such as when used to show the cause of death, the severity of wounds, and the manner of injury. Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000). This Court has found that the mere fact that the defendant does not dispute the cause of death does warrant exclusion of autopsy photographs. Id. at 161, 995 P.2d at 473. In Dearman v. State, 93 Nev. 364, 369-70, 566 P.2d 407, 410 (1977), this Court approved of a district court's admission of photographs after the district court reviewed the offered photographs outside the presence of the jury, sustained the defense's objection to some of the photographs, heard testimony by the pathologist that the photographs would be helpful to him in explaining the cause of death, and considered the admissibility of the photographs outside the presence of the jury. Upon finding that the district court exercised caution and considered the prejudicial effect of the evidence, this Court found the admission of the photographs not to be an abuse of discretion. Id.

The probative value of these photographs is very slight especially in light of their

gruesome nature. Some of the photographs graphically depict Sheila's tongue after it had been removed from her body by the medical examiner during the autopsy. 3 App. 699-704. Her tongue and body were not in this condition at the crime scene, but rather the act of cutting the organ from Sheila's throat occurred during the medical examination. These photographs are extremely disturbing as the tongue is rarely viewed in such state and the sight is shocking. The probative value of the photographs is minimal as the cause of death was not contested and the medical examiner could have given a verbal explanation of hemorrhages without use of the photographs. In the alternative, the photographs could have been cropped to show only the hemorrhages instead of the entire tongue. See e.g. 3 App. 697-98 (showing only a portion of the tongue with hemorrhages). The district court abused its discretion in overruling Flowers' objection to these photographs. 2 App. 353.

Likewise, the district court abused its discretion in introducing, over objection, other graphic photographs from the autopsy. 2 App. 353; 3 App.705-13. For example, an exhibit shows Sheila's neck after it has been sliced open and the skin is peeled back and held in place by two gloved hands. 2 App. 354; 3 App. 707. The point of this photograph was to show hemorrhages to the neck, but this same point could have been established by showing a cropped photograph which focused on the hemorrhages rather than the two hands placed inside of the neck and other body tissues.

Unlike the district court in Dearman, the district court judge here did not review the offered photographs outside the presence of the jury, did not carefully review the proposed photographs individually to determine if they were unduly prejudicial, did not hear testimony by the pathologist outside the presence of the jury as to why the photographs would be helpful, and did not consider the admissibility of the photographs outside the presence of the jury. In other words, the district court here did not exercise any of the caution exercised by the judge in Dearman and instead abandoned his decision making role to the witness as he asked the simple question of "Doctor, did you go 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 App. 353. Upon the medical examiners summary statement that "Yes, I did do

that, sir", the district court overruled the objection. 2 App. 353.

A review of the medical examiner's testimony reveals that admission of several of the photographs was entirely unnecessary. For examples, exhibits 104 and 105 show the tongue after it was removed from the body. 3 App. 699-704. Neither of these photographs was discussed by the medical examiner during his testimony. 2 App. 354.

This highly inflammatory evidence fatally infected the trial and deprived Flowers of his constitutional right to a fair trial. His judgment must therefore be reversed.

E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

Flowers's state and federal constitutional right to due process, right to a fair trial, and right to present evidence were violated because the district court prohibited Flowers from introducing evidence that Sheila's boyfriend knew of her relationship with Flowers. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews a district court's determination of whether proffered evidence fits an exception to the hearsay rule for abuse of discretion. See Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006). The erroneous exclusion of a defendant's proffered evidence violates a defendant's right to present evidence. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers was entitled to present evidence in support of his defense.

During the State's case-in-chief, it elicited testimony from Debra that Sheila did not like older men, Debra talked about everything with her daughter, and Debra did not ever see Sheila talking to Flowers, having contact with him or anything like that. 2 App. 379. The State also elicited testimony that Debra was aware of Sheila's friendship with Quinse, though she did not know of their sexual relationship. 2 App. 382-83. The State also elicited testimony from Sheila's cousin, Ameia Fuller, about the fact that she had telephone conversation with Sheila prior to her death and Ameia knew that Sheila was involved with

Chicken (Brass). 2 App. 492-93. Ameia told the detectives that Sheila told Ameia that she was friends with Chicken. 2 App. 493. Flowers attempted to elicit similar testimony from William Kinsey, who was one of Sheila's boyfriends. 3 App. 541. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is Flowers' middle name and the name he used). 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

Due process requires that the "minimum essentials of a fair trial" include a "fair opportunity to defend against the State's accusations" and the right "to be heard in [one's] defense." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). When a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. Id. at 302. The erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers, 410 U.S. at 294).

"The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294.

The testimony Flowers sought to introduce from Kinsey was no different than that elicited by the State from Ameia Fuller and was similar to the testimony that the State elicited from Debra. The State opened the door to testimony about knowledge of Sheila's relationships based upon conversations of the State's witnesses with Sheila, so Flowers was entitled to elicit similar testimony from his witness. Under these circumstances, Flowers was prejudiced by the district court's refusal of evidence which would have contradicted the evidence presented by the State concerning Sheila's relationships. This evidence was essential to explaining the presence of Flowers' semen, which was in turn crucial to

establishing that Flowers did not sexually assault and kill Sheila. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of extensive prosecutorial misconduct. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"When considering claims of prosecutorial misconduct, this court engages in a two step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. __, 196 P.3d 465, 476 (2008) (citing U.S v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then we apply the Chapman v. California standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict." Id. (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); Harlow, 44 F.3d at 1265).

"Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct." Valdez, 196 P.3d at 477. "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." Id. (citing Chapman, 386 U.S. at 21, 24; Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the

resulting conviction a denial of due process." Id. (internal quotations to Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) omitted).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." Valdez, 196 P.3d at 477 (citing Olano, 507 U.S. at 731-32). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (internal quotation omitted) (citing Green, 119 Nev. at 545, 80 P.3d at 95 and Olano, 507 U.S. at 734).

2. The prosecutor commented on Flowers's right not to testify and to remain silent.

The State made numerous direct and indirect comments concerning Flowers' decision not to testify and not to talk with detectives:

> When Christina Paulette tested the swabs that were taken from Sheila's vagina and from her panties, whose DNA did she find? She found George Brass, the person who came in here, swore to tell the truth, and told you yeah, I had sex with Sheila that day. I had sex with her in the morning, and then I went to work. He didn't have to tell you that, but he did.
>
> . . .
>
> Now, George Brass was spoken to by the police. He could have said no, I'm not talking, I have nothing to say. Remember he's in custody. But he voluntarily spoke to the police and said, yeah, I had sex with her and then I went to work. George Brass who was in custody could have said hell, no, I'm not giving you a DNA sample, but he did. He voluntarily gave a DNA sample.
>
> If he had not told them, yeah, I had sex with her that day, if he had not given a sample, we would be in the same place we were six months ago, a year ago, two years ago, three years ago and have no idea who the other sample was.
>
> George Brass who has nothing to gain by being cooperative and basically everything to lose because the truth, and in fact, his DNA is found in the vagina of a girl who had just been murdered.

He voluntarily gives a statement, gives a sample and then comes in here to testify. He had nothing to hide. He told us that he was at the apartments that morning, he told us that he was living there, but he saw Sheila that morning, he went into her apartment and he had sex with her he thought between 10:30, 11 o'clock and then he went to work.

3 App. 595.

Well, what happens when the police finally show up on George Brass's door step? He tells them, yeah, I've had a sexual assault with Sheila that's been going on a long time. He doesn't ask for a lawyer, he doesn't ask to remain silent. he's sitting in custody, but when the police come and ask him, he gives it up. He says I had this relationship.....

. . .

And certainly when you have Brass's demeanor and his willingness to cooperate with the police, you can pretty much disregard that as rank speculation, which you're not supposed to do in this case.

3 App. 612.

By contrast, what was Mr. Flowers' response to the police when they started asking him about Sheila Quarles' murder. Mr. Flowers, do you know someone by the name of Debra Quarles? No response. They shows him a photo. Mr. Flowers, do you know Debra. Do you know this woman. I'm not saying.

MR. PIKE: Objection, Your Honor.

THE COURT: What's the objection?

MR. PIKE: Edwards versus State, post-Miranda silence.

THE COURT: Well, he wasn't silent. He was cooperative with the police and he was discussing the matter with him. He just didn't say anything as to that particular question. If he exercised his right to remain silent, of course you would have that right. Go ahead.

3 App. 613. See also 2 App. 386-87, 480-81; 3 App. 531 (testimony that Robert Lewis voluntarily gave a DNA sample and talked to police for about an hour).

A prosecutor's direct comment on a defendant's failure to testify, violates the defendant's constitutional right against self-incrimination. Bridges, 116 Nev. at 764-64, 6 P.3d 1008-09 (citing Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)). See also Griffin v. California, 380 U.S. 609, 613-14 (1965) (comment on the refusal to testify is a remnant of the inquisitorial system and violates the Fifth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the Fifth Amendment applies to the states through the Fourteenth Amendment). Even if the remark was an indirect reference, it would be impermissible if "the

language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Id. (citing Harkness and U.S v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

Although Flowers's trial counsel did not object to the indirect commentary on the fact that Flowers did not testify or talk with the police, as they emphasized Brass's decision to talk and to testify, this issue should be considered as a matter of plain error. See Harkness, 107 Nev. at 803, 820 P.2d at 761. "Where, as here, appellant presents an adequate record for reviewing serious constitutional issues, we elect to address such claims on their merits." Id. (citing Edwards v. State, 107 Nev. 150, 153 n.4, 808 P.2d 528, 530 (1991)). The jury would naturally and necessarily take this to be a comment on Flowers's failure to testify. Under the facts of this case, which are far from overwhelming, Flowers was prejudiced and the judgment should be reversed. See Herrin v. U.S., 349 F.3d 544, 546 (8th Cir. Mo. 2003).

Additionally, the admission of just a portion of Flower's statement regarding this case also evolved into an improper comment on Flowers' silence in violation of the Fifth Amendment. See Miranda v. Arizona, 384 U.S. 436 (1966); Neal v. State, 106 Nev. 23, 787 P.2d 764 (1980); Doyle v. Ohio, 426 U.S. 610 (1976).

The State's improper commentary on Flowers' lack of cooperation, refusal to talk with the police about this case, and failure to testify was highly prejudicial as it contrasted Flowers with Brass and suggested that Brass was not guilty because he gave a statement and testified. As the other evidence equally inculpated both men, Flowers was greatly prejudiced by this argument. The judgment of conviction must therefore be reversed.

G. There is insufficient evidence to support the conviction.

Flowers' state and federal constitutional rights to due process and conviction only upon presentation of proof beyond a reasonable doubt were violated because there is insufficient evidence to support the conviction. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

Claims of insufficient evidence are reviewed de novo. See U.S. v. Shipsey, 363 F.3d

962, 971 n.8 (9th Cir. 2004), U.S. v. Naghani, 361 F.3d 1255, 1261 (9th Cir. 2004). There is sufficient evidence to support a conviction if, 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. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). When determining whether a verdict was based on sufficient evidence to meet due process requirements, this Court will inquire 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. This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. Mitchell v. State, 124 Nev. __, 192 P.3d 721, 727 (2008).

2. There is insufficient evidence that Flowers sexually assaulted and murdered Sheila.

The evidence supporting Flowers' conviction fails to establish beyond a reasonable doubt that he sexually assaulted and murdered Sheila. As noted above, a simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Also as set forth above, the evidence concerning the Coote case fails to establish Flowers guilt in this case. There were substantial differences between the two cases so the probative value of the Coote evidence is weak. As there is insufficient evidence to support the conviction, it must be vacated.

H. The judgment should be vacated based upon cumulative error.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of cumulative error. U.S. Const. amend. V, VI,

XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgement. Flowers incorporates each and every factual allegation contained in this appeal as if fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Flowers of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Flowers. He requests that this Court vacate his judgement and remand for a new trial.

VI. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial. In the alternative, there is insufficient evidence to support his conviction and his judgment should be vacated.

DATED this 19th day of December 2009.

Respectfully submitted,

By: */s/ JoNell Thomas*

JONELL THOMAS
State Bar No. 4771

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of December, 2009.

By: */s/ JoNell Thomas*

JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26th day of October, 2009 a copy of the Appellant's Opening Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS

JONELL THOMAS

MR. PIKE: Thank you.

BY MS. LUZAICH

Q. It was an individual that she knew and was very familiar with it appeared?

A. Yes

Q. Did she also tell you about, without telling me what she said, did she tell you about things that that individual did after the death of Sheila?

A. Yes.

MR. PIKE: Objection, hearsay.

THE COURT: Well, they haven't said what she said.

MS. LUZAICH: And I specifically said that, without telling me what she said.

MR. PIKE: I understand. I just want to make a record in case I bring up the same questions.

THE COURT: The next question is gonna be though.

MS. LUZAICH: No, it's not.

THE COURT: Let's hear it.

BY MS. LUZAICH:

Q. So you were you aware of that information as well?

A. Yes.

Q. Okay. Now, did you go see this person after speaking with Debra?

A. Yes, I did. On August 24th.

Q. Okay. Now, when you went and saw this person, did you read him -- who did you go see?

A. I went and saw Mr. Flowers.

Q. You're looking over there. Do you see him here in court today?

A. Yes, I do.

Q. Can you describe where he's sitting and what he's wearing?

A. He's wearing a black suit and a maybe blew or greenish tie.

THE COURT: The record will reflect identification of the defendant Norman Keith Flowers.

MS. LUZAICH: Thank you.

BY MS. LUZAICH:

Q. Does the defendant look the same today as he did in August of 2006?

A. Yes, he does.

Q. Or at least very similar?

A. Yes.

Q. When you spoke with the defendant, you read him his rights?

A. Yes, I did

Q. When you do that, do you do it from memory or from a card?

A. From a card.

Q. Do you happen to have that card with you today?

A. Yes, I do.

Q. Can I have that card? May I have it marked?

MR. PIKE: It's okay. You can just read it in.

MS. LUZAICH: I'm gonna move it in actually. I am about to show defense counsel who has a copy of it, but defense counsel the actual card. State's proposed 135.

MR. PIKE: No objection.

THE COURT: It will be admitted

MS. LUZAICH: Thank you.

BY MS. LUZAICH:

Q. When you -- well, actually could you read into the record the rights that you read to the defendant on that day?

A. Yes. The adult advisement since Mr. Flowers was an adult at the time and still is, is number one, you have the right to remain silent.

Number two, anything you say can and will be used against you in a court of law. Number three, you have the right to the presence of an attorney. Number four, you cannot -- if you cannot afford an attorney, one will be appointed before questioning. Do you understand these rights.

Q. Did he indicate to you that you understood the rights?

A. Yes.

Q. And did he actually sign the card in your presence?

A. Yes, he did.

MS. LUZAICH: Move it into evidence.

THE COURT: It's already been admitted.

MS. LUZAICH: Thank you.

BY MS. LUZAICH:

Q. When you saw the defendant and spoke with him, did you first tell him that you were not there to talk to him about his case?

A. Yes.

Q. Did you kind of just talk to him about hey, how are you doing, what's your name, what should I call you?

A. A little bit. Not a whole lot. He was, he was in custody. I just wanted, you know, I was

[illegible] to have a [illegible] with him

Q. Did you -- you were aware that his name was Norman Keith Flowers

Did he indicate that he goes by the name Norman or another name?

A. He indicated to me that he goes by Keith.

Q. And when you spoke to him, was it August 24th of 2006 at 8:30 in the morning?

A. Yes.

Q. Did you tell him that -- well, did you tell him why you were there right away?

A. I basically told him that I was conducting an investigation and I was seeking his cooperation.

Q. The interview that you conducted with him, was it tape recorded?

A. Yes.

Q. Was it then transcribed?

A. Yes.

Q. And do you have a copy of that transcript with you?

A. Yes, I do.

Q. Could you open it up just so that we can get the words correct? Okay. On page two, did you ask him the first thing I want to talk to you about,

Keith, is I'm trying to find out who a friend of yours is. Maybe a friend of yours, maybe not a friends of yours. He's a black guy, he's got like a skin condition on his arms. Does that ring a bell of anybody.

Did you ask him that?

A. Yes.

Q. How did he respond to that?

A. You're giving me limited information was his --

MR. PIKE: Objection. It's in correct.

BY MS. LUZAICH:

Q. Well, was there an answer before that?

A. What's the point -- I'm sorry, yeah. What's the point of trying to find him. Why are you trying to find him for.

Q. Did you tell him because I need to ask him some questions on a case I'm investigating and your name, Keith, the defendant's name, came up in the case that he's a friend of yours?

A. Yes. And he replied you, you're giving me limited information.

Q. Did you try and fix that a little bit and say okay, how about I start and give you some more information. Do you know Debra Quarles?

A. And there was no verbal response.

Q. None at all?

A. No.

Q. So he didn't say yeah, I know her, I [illegible] her or anything like that?

A. No.

Q. So what did you then do?

A. I told Mr. Flowers that I wanted to show him a picture of her and asked him if it would help.

Q. How did he respond to that?

A. Yeah.

Q. So he wanted to actually see a picture of her before he would talk further?

A. Yes.

Q. Did you then show him a picture of Debra Quarles?

A. Yes, I did.

Q. And did you ask him if he knew her?

A. Yes.

Q. How did he respond to that?

A. I'm not saying.

Q. Okay. Not a lot of cooperation thus far?

A. No.

Q. Did you ask him if he thinks he knows her?

A. Yes.

Q. And did you actually tell him because she told you that she knew him?

A. Yes.

Q. How did he respond to that?

A. Again, he said I'm not saying. I mean until I know what's it about, I'm not saying anything.

Q. So then what did you say to him?

MR. PIKE: Your Honor, I move for admission of the tape recording of this, the best evidence.

THE COURT: Well, it doesn't have to, but do you have any objection?

MS. LUZAICH. Well, two. One, can we approach?

THE COURT: Yeah.

(Whereupon, an off-the-record discussion was had at the bench.)

THE COURT: All right. Go ahead. Go ahead. Page and line number, Ms. Luzaich, and you read the question Detective Sherwood asks and Detective Sherwood can read the answer that Mr. Flowers gave.

BY MS. LUZAICH:

Q. Okay. Detective Sheehan, have you been reading directly the responses that the defendant was giving you?

A. Yes.

Q. I for the most part was reading the questions you gave, but now we're on page three and I'm gonna read questions that you asked if that's okay with you, and if you could respond exactly the way he did.

A. Yes

Q. Okay. I'm on page three for the record. Did you say to him after he said I'm not saying anything to you, okay, here's what I'm investigating. I'm investigating the, the death of her daughter. It's possible that someone you know may have been involved in it. And I just, I'm trying to find out who that person is, so I can go and talk to him.

I mean, Debra tells me that she's a good friend of yours and that you would probably help me, and I wanted to come talk to you and appeal to you because Debra can't rest in peace because her daughter's killer hasn't been caught.

And the reason I think it's the guy with the skin condition is just prior to Sheila

you as a friend of Debra's, you know, to maybe point me in the right direction.

A. Can't do it, no. I'm not I don't want to be involved.

Q. Okay. Well, I understand that, I mean, you know, I can, I can find out. How well do you know Debra?

A. No, I won't answer no questions about any of that.

Q. Okay. Well, could I ask you a couple, just a couple more things, then we'll be done.

A. No. I got my own problems to deal with so I don't want to get involved in anybody else's matters.

Q. So you don't want to help Debra at all? You don't want to, you don't want to like try and help catch who killed her daughter?

A. No verbal response.

Q. Uh, really?

A. I'm not saying yes, I'm not saying no. I'm just -- I don't want to be involved in anybody else's problems. I have my own case to deal with.

Q. Okay. So as he is talking to you at this point, you're not getting any cooperation from him?

A. No.

being found, there was a guy hanging out, outside that matches the description of him wearing like a long-sleeved shirt which it wasn't extremely cold that day. It was a long sleeved flannel shirt and I'm thinking, you know, maybe this guy is trying to hide his skin condition or something like that.

A. I don't understand what makes you guys think a person would even have a skin condition because they have the long shirt.

Q. Well, here's why. Because this guy, this guy that I'm looking for I was told is a friend of yours. And I was told that you gave Debra rides home from work. So maybe, maybe he saw Debra and maybe he saw Sheila and maybe he got interested in Sheila?

A. Who is Sheila?

Q. Sheila is Debra's daughter.

A. Oh, only knew her by her nickname.

Q. Pooka? Okay So you didn't really know her well?

A. No verbal response.

Q. Okay. Anyway, you know, I'm just -- I'm trying to solve a crime that happened. And I mean, I know, I know you're probably not real anxious to cooperate with the police, but I wanted to appeal to

Q. At the time of this particular conversation, were you still under the impression that there may be two suspects?

A. Yes.

Q. And is that why you're trying to find out who his friends might be?

A. Yes.

Q. And are you kind of incorporating information that you got from just a bunch of different sources?

A. Yes.

Q. Not just Debra?

A. Right.

Q. When you saw the defendant that day, how old was he?

A. 31.

Q. Do you know about how tall he was?

A. 5'7".

Q. Weight?

A. A hundred and 85, 90 pounds.

Q. After you spoke with him, were you still trying to identify the other source of semen in Sheila?

A. Yes.

Q. And in fact, did you shortly thereafter

A. Yes.

Q. You may get somebody angry and try to get them to also give you information because they're angry?

A. Yes.

Q. That's another technique. You can go through and ask them questions that are completely unrelated to the crime that you're investigating to verify how cooperative they're going to be and that's another technique?

A. Yes.

Q. You also have been trained and informed that you can actually give them false information or lie to them about facts that you may or may not have and use that as an interrogation technique?

A. Yes.

Q. And you can also go through and appeal to their sense of humanity?

A. Yes.

Q. And in fact, you did attempt to appeal to his -- on page five. You wanted to appeal to his human decency?

A. Yes, sir.

Q. At that time in fact, Mr. Flowers advised

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you that he may want to speak with you in the future, going to page seven?

MS. LUZAICH: Well, objection.

MS. WECKERLY: I object.

MS. WECKERLY: Your Honor, can we approach?

THE COURT: Yes.

(Whereupon, an off-the-record discussion was had at the bench.)

THE COURT: Objection's sustained.

BY MR. PIKE:

Q. And based upon the collection of evidence just very recently in this case, that is the nature of your work in the cold cases is that things can come to life in the future and you reinvestigate and retalk to people and that in this case and in other cases may be a very effective investigative tool?

A. I'm not sure -- I'm sorry. I'm not real sure of the question.

Q. It was kind of rambling. Let me just put it this way: It never hurts to go back and talk to potential witnesses?

A. No.

Q. And in fact, you would, would say that that constant recontact with the witnesses, the

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[illegible] then opens the case wide open?

A. Yes, sir. In some cases.

MR. PIKE: All right. Thank you very much, detective.

THE WITNESS: Thank you.

THE COURT: Anything else, Ms. Luzaich?

MS. LUZAICH: Just briefly.

REDIRECT EXAMINATION

BY MS. LUZAICH:

Q. In all these times that you went back to talk to Debra knowing that there were two different sources of DNA, once you had identified the defendant Norman Flowers, were you trying to determine whether or not Debra knew who his friends were?

A. Yes.

Q. And is that because often times when people commit criminal offenses if they have somebody with them it is because it's their friend that's with them?

A. Yes.

Q. And when you talked to the defendant about the guy with the skin condition, is that

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because Debra Quarles told you he had a friend with a skin condition, just couldn't remember his name?

A. Yes.

Q. Now, when, when people -- in addition, to working homicide and cold case you were a detective for many years?

A. Yes.

Q. And you were on patrol for many years?

A. No, not on patrol for very long.

Q. Well, you've been a police officer for a long time?

A. Yes.

Q. Investigated lots of different kinds of offenses?

A. Yes.

Q. You worked narcotics for quite some time?

A. Yes.

Q. People who use drugs often steal, people who steal often use drugs?

A. Yes.

Q. Now, when people steal things, do they always pawn them?

A. No.

Q. Do they often keep them themselves?

A. Yes. Or in some cases they give them to

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

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

RESPONDENT'S ANSWERING BRIEF

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

[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

ORIGINAL

0001
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Assistant Special Public Defender
Nevada Bar No. 1940
CLARK W. PATRICK
Deputy Special Public Defender
Nevada Bar No. 9451
330 S. Third Street, Suite 800
Las Vegas, NV 89155-2316
(702) 455-6265
(702) 455-6273 fax
rpike@co.clark.nv.us
cpatrick@co.clark.nv.us
Attorneys for Flowers

FILED
MAR - 3 2010
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN FLOWERS,

Defendant,

CASE NO. C228755
DEPT. NO. VII

MOTION FOR NEW TRIAL BASED UPON NEWLY AVAILABLE EVIDENCE, SPECIFICALLY THE CONVICTION OF GEORGE BRASS FOR MURDER

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, Defendant NORMAN KEITH FLOWERS, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, and CLARK W. PATRICK, Deputy Special Public Defender, and hereby moves this Court pursuant to NRS 176.515 for a new trial based upon the conviction of GEORGE BRASS, an alternate suspect in this case for a Murder.

This Motion is made and based on the pleadings and papers on file herein; the Points and Authorities and Affidavit of Counsel attached hereto; and the argument of counsel at the hearing of the Motion.

RECEIVED
MAR - 5 2010
CLERK OF THE COURT

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

App 0165

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion for new trial based upon available evidence, specifically the conviction of George Brass for murder on for hearing before the above-entitled Court on the 17 day of March 2010, at the hour of 8:45 a.m.

POINTS AND AUTHORITIES

FACTUAL BACKGROUND

The State's initial theory in this case, as evidenced in it's Motion to admit other bad acts, was that there was a confederate of the Defendant, and that he was the source of the unknown DNA. The State, shortly prior to trial and after the disclosure of George Brass's contact with Ms. Quarles prior to her death appropriately amended its Information regarding the presence or involvement of a third party. The Court also heard the evidence regarding Jesse Nava, who was in possession of the stereo or "a stereo" after the death of Ms. Quarles. The Jury found did not convict the Defendant of the Robbery Count.

On October 20, 2009, after the trial of the Defendant Flowers, George Brass was convicted by a jury verdict of Murder in the First degree, Attempt murder, Robbery and other charges in case no. 09-C-253756-C. This conviction, if available for impeachment, certainly would have been a significant factor in the jury's deliberations and, based upon this information, it is more than arguable that the jury may have not found defendant Flowers guilt beyond a reasonable doubt.

As the Court will recall, After the Court issued it's ruling on the Defendant's motion in limine wherein the Court determined that the matters involving Marilee Coote would be admissible, the State of Nevada identified the source of the second DNA, a George Brass. Mr. Brass provided the allowed statement to Detective Sherwood. A crime scene analyst collected 21 samples for fingerprint examinations. 2 App. 414.Prints were found on nine of those items. 2 App. 420. None of the prints belonged to Keith Flowers.

This information and the additional information from Mr. Brass about the length of his relation ship with Ms. Quarles directly contradict the State's announced premiss at the time of the hearing that Ms. Quarles was strictly involved with women. Mr. Brass's relationship was not known to Ms. Quarles mother. It took over 3 years and additional investigation based in part on the information provided at the arguments for the Detectives to confront Mr. Brass and do the necessary DNA work. Mr. Brass was not in CODIS, due to his not yet being convicted on his pending armed robbery and murder charges. The fingerprints located at the scene that did not match Flowers were not compared to Mr. Brass. Items taken from the apartment, including a stereo and cell phone, were never found by police officers. 3 App. 517, of course, Mr. Brass' residence or vehicle was never searched as he was not identified until shortly before trial.

ARGUMENT

NRS 176.515 states that:

> "1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

FLOWERS asserts, that the where, as here, identity is a crucial issue and the evaluation of testimony by the jury relating to it is a matter of constitutional magnitude, specifically invoking due process rights. Lee v. United States, 388 F.2d 737 (9th Cir. 1968). Cited in State v. Crockett, 84 Nev. 516, 519 (Nev. 1968). In determining whether or not the newly available evidence is sufficient to require the granting of a motion for a new trial, the Court, indicated that the evidence, as required under State v. Stanley, 4 Nev. 71 (1868), and State v. Orr, 34 Nev. 297, 122 P. 73 (1912), the evidence is not one of "mere impeachment, but goes to the essence of [the defendant's] guilt or innocence." Under this a murder conviction would certainly be of the nature that exceed "impeachment". This is something that seems so significant that it would be appropriate to determine that a new trial is required. As the Court stated in State v. Crockett, 84 Nev. 516, 519 (Nev. 1968). for new trial to be granted, "the trial judge must review the circumstances in their entire light, then decide whether the new evidence goes to the **essence** of the defendants

finding of guilt by the jury. The Court disapproved of the "semantic distinction between *might* and *probably*".

This information, when juxtaposed with the admission of just a portion of the Defendant's statement (see defendants motion for a new trial exhibit D) regarding this case involving what the defendant feels evolved into an improper comment on Flowers invocation of right to counsel, and his silence in violation of the Fifth Amendment, and Brass' silence for almost three years further evinces the necessity for a new trial.

CONCLUSION

It is respectfully requested that based on the foregoing argument, this Court grant Mr. Flowers a new trial.

DATED this 5th day of March 2010.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

RANDALL H. PIKE
CLARK W. PATRICK
330 S. Third Street, Ste. 800
Las Vegas, NV 89155-2316
Attorneys for FLOWERS

ORIGINAL

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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CLERK

STATE OF NEVADA,

Plaintiff,

vs.

NORMAN KEITH FLOWERS aka
NORMAN HAROLD FLOWERS, III,

Defendant.

CASE NO. C228755

DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 17, 2010

RECORDER'S TRANSCRIPT OF
DEFENDANT'S MOTION FOR NEW TRIAL
BASED UPON NEWLY AVAILABLE EVIDENCE

APPEARANCES:

For the State: PAMELA WECHERLY, ESQ.
Chief Deputy District Attorney

For the Defendant: RANDALL H. PIKE, ESQ.
Assistant Special Public Defender
CLARK W. PATRICK, ESQ.
Deputy Special Public Defender

RECORDED BY: RENEE VINCENT, COURT RECORDER

Wednesday, March 17, 2010 - 9:00 a.m.

THE COURT: Page 17, State of Nevada versus Norman Flowers, Case Number C228755. Mr. Flowers is not present. He's in custody, in prison.

MR. PATRICK: He's in -- yes, Your Honor.

THE COURT: Okay. And he's represented by Mr. Patrick and Mr. Pike. State represented by Ms. Wecherly. This is on for a motion for a new trial.

MR. PIKE: That's correct, Your Honor. Basically, factually in this case, it was laid out fairly well in the original case -- or our motion as well as the State's response, but it ultimately came down to the question as to which of the two semen donors who actually committed this crime.

Now, it wasn't until after Mr. Brass was located some -- almost two years after this happened and after the police had told him that more or less he had immunity from any sort of prosecution that he came forward, admitted that he had had sex with the deceased the morning that she was killed -- or on the day she was killed and --

THE COURT: You had that information before trial; right?

MR. PIKE: Yes.

THE COURT: Okay.

MR. PIKE: We had that information. It was given to us totally before trial. And during the course of the trial, the way it would've changed the trial is basically Mr. Flowers did not testify, none of his previous background came into it; and had we been able to impeach the Defendant with a conviction for murder, I definitely think it would've made a difference, along with the fact

that there was a robbery associated with it, and there was a robbery charge that was associated with this case.

And, in fact, it was the charge of stealing the items or robbery as a motive that ultimately was found -- the Defendant was found not guilty in this case. So it would have had a significant impact, we believe, to the jury, and we would request that based upon that information a new trial be granted.

THE COURT: Okay. Ms. Wecherly.

MS. WECHERLY: My recollection at trial is different than Mr. Pike's. I actually don't even think they were trying to blame George Brass, the person who eventually sustained a later conviction. At trial they were blaming another individual named Jesse Nava, who actually was deceased at the time of trial.

None of this is here nor there because their office was well aware that Mr. Brass had charges against him. He was actually in custody when he testified. Their office represented Mr. Brass' co-defendant on the murder and robbery charge. They opted to go to trial when they did, knowing that Mr. Brass' trial was pending.

The other point I would make is that Brass was absolutely excluded as a -- as a suspect in the murder, not because of his own testimony, but because of work records where he was at work at Walmart at a time before the victim was killed. He had a really short, narrow time frame when the murder occurred, and Mr. Brass essentially had an alibi at that time.

And the third point I'd like to make is what they're suggesting they would've liked to have argued to the jury would be an improper character argument saying that, well, Mr. Brass had committed a murder, and so it's

likely he committed this murder as well, which would've been an improper argument. The only thing they could've used it for was the fact that he had been convicted in the year of conviction.

And based on all of that, I don't think respectfully that they've met the standard at all that's required for a new trial.

THE COURT: Okay.

MR. PIKE: Properly, it would've been argued that we did attack this alibi. It was not as airtight; that it was subject to manipulation that was brought out during cross-examination, and he had the time and the opportunity and the fact that he hid the relationship for two years until after he was given that -- that coverage. And the fact that he had the ability to alter the records regarding his alibi, then the impeachment would've been properly argued in much different light.

And so I believe at the time of trial that I would've certainly been able to get into that and argue it properly. So it was not something that would've been automatically excluded from an argument, and I would've phrased in an appropriate fashion.

THE COURT: Okay. Well, I appreciate that, Mr. Pike. I don't think, though, that a conviction when he had already been arrested and charged with the crimes and when the Defense had been provided the information constitutes -- under those circumstances constitutes new evidence that would warrant a new trial, so I'm going to deny the motion. Thank you.

MR. PIKE: Thank you very much, Your Honor. Would you like us to prepare the order on that?

THE COURT: We'll let the -- the State can prepare the order.

MS. WECHERLY: Okay. We will. Thank you.

MR. PIKE: All right. Thank you.

[Proceeding concluded at 9:05 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Renee Vincent

RENEE VINCENT, Transcriber
District Court, Dept. VII
(702) 671-4339

NOAS
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
Nevada Bar No. 0824
RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
330 South Third Street, Ste. 800
Las Vegas, NV 89155-2316
(702) 455-6265
Fax: 455-6273
rpike@co.clark.nv.us
cpatrick@co.clark.nv.us
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO. C228755 DEPT. NO. VII

NOTICE OF APPEAL

DATE: N/A
TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff;

TO: DAVID ROGER, DISTRICT ATTORNEY; and

TO: DEPARTMENT VII OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

NOTICE is hereby given Defendant NORMAN FLOWERS, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the denial of his

. . .

. . .

. . .

Motion for New Trial on March 17, 2010.

DATED this 1 day of April, 2010.

DAVID M. SCHIECK
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
RANDALL H. PIKE
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4771
330 S. THIRD ST., STE. 800
LAS VEGAS, NEVADA 89155-2316
(702) 455-6265

CERTIFICATE OF MAILING

The undersigned employee with the Clark County Special Public Defender's Office, hereby certifies that on the 1st day of April, 2010, a copy of the Notice of Appeal was deposited in the United States mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to District Attorney's Office, 200 Lewis Ave., 3rd Floor, Las Vegas NV 89155; the Nevada Attorney General's Office, 100 N. Carson, Carson City, NV 89701; and Norman Flowers, No. 39975, High Desert State Prison, P.O. Box 650, Indian Springs, Nevada 89070; that there is a regular communication by mail between the place of mailing and the place so addressed.

DATED: 4-1-2010

_____
KATHLEEN FITZGERALD
An employee of The Special Public Defender

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent

CASE NO. 55759
CASE NO. 53159

FILED

APR 19 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

MOTION TO CONSOLIDATE APPEALS FOR DECISION AND USE OF THE APPENDIX

Appellant Norman Flowers, by and through his counsel Randall H. Pike, Deputy Special Public Defender, hereby requests this Court consolidate the appeals docketed in this Court under Case No. 55759 and 53159 (both appeals from the same Eighth Judicial District Court Case C228755) for decision and use of the appendix If granted, Mr. Flowers requests this court allow him to file a Supplemental Appendix.

This request is based on the Declaration of Counsel attached hereto.

Dated April 15, 2010.

RESPECTFULLY SUBMITTED:

RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
330 S. Third St., No. 800
Las Vegas NV 89101
702-455-6270

DECLARATION OF RANDALL H. PIKE

RANDALL H. PIKE makes the following declaration:

I am one of the attorneys who represented Mr. Flowers at his District Court trial (C228755) the subject of the direct appeal in Case No. 53159. JoNell Thomas represents Mr. Flowers on his direct appeal.

Following the jury verdict, the Judgment of Conviction was filed on January 16, 2009. The

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Notice of Appeal was filed on January 26, 2009, and the direct appeal was docketed in this Court on January 27, 2009. The Opening Brief and Appendix, and the State's Answering Brief have both been filed. The Reply Brief is due on May 3, 2010.

On March 4, 2010, the Defendant/Appellant Norman Flowers filed a motion for new trial in the district court under Case No. C228755 and moved the district court pursuant to NRS 176.515 for a new trial based upon the conviction of George Brass, an alternate suspect and witness against Mr. Flowers. On October 20, 2009, after the conviction and sentence of Mr. Flowers, George Brass was convicted in the Eighth Judicial District Court by a jury of Murder and related charges in an unrelated case (Case No. C253756). It is Mr. Flowers' contention that this conviction, if available for impeachment, would have been a significant factor in the jury's deliberations in Mr. Flowers' case and that the jury may have not found defendant Flowers guilty beyond a reasonable doubt.

On March 17, 2010 the district court denied the Motion for New Trial. Mr. Flowers filed a timely notice of appeal from the verbal order denying a motion for a new trial.

Mr. Flowers requests the appeals in Case No. 53159 and 55759 be consolidated for decision, but not for briefing. He also requests that the Appendix of Record filed in Case No. 53159 be used for case No. 55759 so as to avoid the unnecessary duplication and expense of providing a new appendix that would consist of almost all of the same documents and transcripts that are already on file. He also requests that this Court, if the motion to consolidate is granted, allow him to file a Supplemental Appendix, which includes documents concerning the motion for a new trial.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 15th day of April, 2010..

RANDALL H. PIKE

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 16 day of April, 2010, a copy of the foregoing Motion to Consolidate Appeals was served by depositing a copy in the United States Mails as follows:

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

DATED: 4-16, 2010.

KATHLEEN FITZGERALD
an employee of The Special
Public Defender's Office

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
NORMAN FLOWERS,
#01179383
Defendant.

Case No. C228755
Dept No. VII

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 03/17/2010
TIME OF HEARING: 8:45 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 17th day of March, 2010, the Defendant not being present, REPRESENTED BY RANDALL H. PIKE, Deputy Special Public Defender the Plaintiff being represented by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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IT IS HEREBY ORDERED that the DEFENDANT'S MOTION FOR NEW TRIAL, shall be, and it is DENIED.

DATED this 10th day of ~~March~~ April, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

Pamela Weckerly

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

jh/MVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S REPLY BRIEF

JoNell Thomas
State Bar #4771
Deputy Special Public Defender
David M. Schieck
State Bar #0824
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Norman Flowers

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TABLE OF AUTHORITIES

Case Authority

Statutory Authority

Other Authority

I. INTRODUCTION

Appellant Flowers is entitled to a new trial based upon the numerous violations of his constitutional rights that took place at his trial. Each of the violations is set forth at length in the Opening Brief. The State's Answering Brief fails to establish the validity of the judgment. Flowers is therefore entitled to relief.

II. REPLY TO THE STATE'S ARGUMENT

A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

Flowers contends that his rights to due process and right to a fair trial were violated because the district court allowed the State to introduce prior bad act evidence of another murder which was not relevant and which was highly prejudicial. His rights were further violated because the State presented bad act evidence in excess of that permitted by the district court's order. In response, the State argues that evidence of the Marilee Coote murder was properly admitted because the two murders were sufficiently similar and that the probative value of the Coote murder was not outweighed by its prejudicial effect as such evidence was needed to prove the absence of consent in Sheila's murder. Answering Brief at 13-15.[1] The State also contends that the evidence produced at trial did not exceed the bounds allowed by the district court's order. Answering Brief at 17-18.

The State's argument that the evidence of Coote's murder was properly admitted under the identity exception to NRS 48.045(2) is without merit. Despite some marginal similarities, the State failed to show any unique or signature similarities between the two murders sufficient to satisfy the identity exception. 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

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[1]The State also contends that Flowers has conceded there was clear and convincing evidence to establish he committed the Coote murder because he did not argue so in the Opening Brief. Answering Brief at 13. This is untrue. Flowers cited the three pong test for admissibility and stated, "Flowers submits that the State failed to establish the admissibility of the Coote murder under these three prongs." Opening Brief at 19. Flowers' intent is to challenge admissibility on all three prongs but focused his arguments on the last two prongs.

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)).

> When the purpose for which such evidence is offered is that of identifying the defendant as the perpetrator of the charged offense through showing a modus operandi common to the charged and uncharged offenses, particular care must be exercised to insure that the inference of identity, upon which probative value depends, is of significant force. It is apparent that the indicated inference does not arise from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant. On the other hand, the inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. The important point to be made is that, when such evidence is introduced for the purpose of proving the identity of the perpetrator of the charged offense, it has probative value only to the extent that distinctive "common marks" give logical force to the inference of identity. If the inference is weak, the probative value is likewise weak, and the court's discretion should be exercised in favor of exclusion.

Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 251-52 (1979) (quoting People v. Haston, 444 P.2d 91, 99-100 (Cal. 1968)).

When crimes of a certain type are committed in much the same manner, it is essential that some distinctive characteristics be demonstrated before evidence of other crimes is admitted to prove identity. Mayes, 95 Nev. at 143, 591 P.2d at 252. In Mayes, a prostitute was charged with grand larceny for allegedly stealing the victim's valuables after having sexual intercourse with the man. Id. at 141. During the trial the State called two witnesses who claimed that the prostitute had also slept with them and stole their valuables after sex. Id. This Court held it was improper to admit evidence of the other crimes because of the lack of any similar characteristics between the three thefts the defendant allegedly committed that would differ from how any other theft by a prostitute would occur. Id. Similar to Mayes, the State failed to prove any similarities between Sheila's and Coote's murder/rapes that are distinctive from what would be expected in any other murder/rape. The State contends that

there are sufficient similarities because both victims were found face up, there was evidence of strangulation and blunt force trauma and both were victimized in their homes. Answering Brief at 14-15. There is no evidence that these characteristics are distinctive to these two murders. Many murder/rape cases could share these same similarities. Also, there were substantial differences between the two incidents. See Opening Brief at 19-20. The district court erred in admitting evidence of the Coote murder.

The State's argument that evidence regarding Coote's murder was more probative than prejudicial because it was needed to prove lack of consent is without merit. Answering Brief at 15. First, the evidence was allowed for the limited purpose of proving identity, not lack of consent. 2 App. 318-19. Second, the State's propensity argument is exactly what the rule was designed to prevent. The State cannot argue and the jury cannot convict Flowers on the idea that if he committed a crime on one occasion, he must have committed it on this occasion too. NRS 48.045(2). Lastly, the probative value of the Coote murder was substantially outweighed by the danger of unfair prejudice, even if the evidence was only used for identity purposes.

> Evidence of other crimes has a strong probative value when there is sufficient evidence of similar characteristics of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which the defendant has been charged is one and the same person.

Mayes, 95 Nev. at 142, 591 P.2d at 251. The probative value of the Coote murder was very low considering there were no distinctive similarities between the two crimes. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers.

The State's last contention is also without merit. It argues conclusory that the evidence presented during trial did not exceed the court's order. The district court ruled:

> You can put on the Coote case to show intent to and to show identity by talking to the detective about the similarities in the case, the nurse and the coroner/medical examiner about the way she died, the similarities in vaginal tearing, and the DNA profile person, and then that's as far as the State is going.

2 App. 318-19. In response, the State contends that the testimony of the apartment manager who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's who testified that Coote did not watch pornography and did not have a boyfriend. 2 App. 444, was necessary because Flowers claimed he had consensual sex with Sheila. The district court's order was clear that testimony regarding the Coote murder was to be limited to the detectives and the nurse. The State's perception of what it believes is necessary to prove a case should not be allowed to trump a clear order of the court.

The district court erred in admitting the evidence regarding the Coote murder. As stated in the Opening Brief, the evidence against Brass was as equally strong. Thus, the prejudice to Flowers was great as there is a substantial likelihood that he would not have been convicted had evidence concerning the Coote case not been introduced. The judgment of conviction should therefore be reversed.

B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Melendez-Diaz v. Massachusetts.

Flowers contends that his rights to due process, confrontation and cross-examination were violated because the district court allowed the State to introduce testimonial hearsay evidence. In response, the State argues that testimony presented by experts concerning the findings of other experts does not violate the Confrontation Clause. The State first argues that testimony from Dr. Simms, concerning the autopsy findings, was permissible because he formed his own independent opinion after reviewing the supporting materials. Answering Brief at 18. The record refutes this argument. Dr. Simms began his testimony by explaining the credentials of Dr. Knoblock and then testified that Dr. Knoblock conducted the autopsy on Sheila on March 25, 2005. 2 App. 350. He testified that Dr. Knoblock prepared an autopsy report, took phots, discussed extensive details of Dr. Knoblock's examination, and presented Dr. Knoblock's findings. 2 App. 350-55. For example, Dr. Simms testified that Dr. Knoblock found that Sheila had been asphyxiated, found bruising on her abdomen, and found lacerations in the vaginal area. 2 App. 350. Although Dr. Simms also testified as to

his own observations from phots, there was no foundation for the admission of these phots as Dr. Simms was not present when the phots were taken and had no personal knowledge as to whether they were actually phots of Sheila. 2 App. 350. Dr. Simms also presented direct testimony about Dr. Knoblock's conclusions. 2 App. 351, 354. Similar testimony about Dr. Knoblock's examinations and findings in the Coote case was also introduced by the State. 2 App. 355-60. Dr. Simms directly presented Dr. Knoblock's findings to the jury. 2 App. 359-60. The State also contends that DNA expert Paulette testified at trial regarding her own findings in Sheila's case and the Coote case. Answering Brief at 18. The record, however, establishes that Paulette also testified about findings by Thomas Wahl, even though Wahl did not testify at trial. 3 App. 551-53.

The State next argues that the DNA report was not testimonial. Answering Brief at 21-22. It cites to People v. Johnson, 394 Ill. App.3d 1027, 1037-39 (2009) as support. Answering Brief at 41. No other post-Melendez-Diaz authority is cited. Other post-Melendez-Diaz case authority is to the contrary and holds that DNA findings by experts who do not testify at trial are inadmissible as a violation of the defendant's right of cross-examination and confrontation. See Michigan v. Payne, 774 N.W.2d 714, 725-27 (Mich. App. 2009) (finding violation under Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) and reversing conviction under a plain error standard); Hamilton v. Texas, 300 S.W.3d 14, 19-22 (Ct. App. Tex. 2009) (finding a confrontation violation based upon one expert's testimony as to the findings of another expert who did not testify, but the error was harmless).

The State next argues that the coroner's reports were not testimonial and that the Flowers' rights of confrontation and cross-examination were not violated by the admission of testimony as to Dr. Knoblock's findings despite the absence of his testimony at trial. Answering Brief at 23-25. These arguments are without merit. Several other courts have examined autopsy reports and testimony in light of Melendez-Diaz and have concluded that they these are testimonial reports for which Crawford v. Washington is applicable. See State v. Locklear, 681 S.E.2d 293, 304-05 (N.C. 2009); Com. v. Avila, 912 N.E.2d 1014 (Mass. 2009) (expert witness's testimony must be confined to his own opinions); Wood v. State, 299

S.W.3d 200, 212-13 (Tex. App. 2009) (finding the autopsy report at issue to be testimonial and finding that an expert could not testify about the results of an autopsy because the medical examiner who performed the autopsy did not testify and the expert could not disclose the facts supporting his opinion); Martinez v. State, 2010 WL 1067560 (Tex. App. 3/24/2010) (finding an autopsy report to be testimonial and rejecting the State's business record argument and finding that an expert could not disclose facts from the autopsy report); People v. Dungo, 176 Cal.App.4th 1388, 1398-1404 (Cal. App. 2009), cert. granted 220 P.3d 240 (Cal. 2009) (finding that an autopsy report was testimonial and that the medical examiner who testified at trial was not qualified to do so because he was not a percipient witness to the autopsy and because he based his opinion upon the contents of another doctor's report as "substituted cross-examination is not constitutionally adequate"). See also Seaman, Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony, 96 Geo. L.J. 827, 847–48 (2008) (If the expert's opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to demonstrate the underlying information is incorrect or unreliable.) The courts have rejected the business record argument proffered here by the State. The authority cited the State, however, all pre-date Melendez-Diaz and is therefore of negligible worth in light of the Supreme Court's rejection of this argument. See Melendez Diaz, 129 S.Ct. at 2538-40 ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. . . . But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.").

Finally, the State asserts that the violation of Flowers' constitutional rights was mere harmless error. Answering Brief at 27. This argument is without merit. The findings of the coroner as to the cause of death and the findings of the DNA expert concerning the presence of Flowers' DNA were crucial portions of the State's case. Indeed, had this testimony been excluded, the State would have essentially no evidence against Flowers. This evidence had a significant impact upon the jury's verdict and a new trial is therefore mandated.

C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.

Flowers contends that his rights to due process, a fair trial, to remain silent and to counsel were violated because the district court allowed the State to introduce evidence of statements made by Flowers at a time when he was represented by counsel, and had invoked his right to remain silent, in a case for which the conviction here serves as an aggravating circumstance. His constitutional and statutory rights were also violated because the district court prohibited Flowers from introducing his whole statement to the police after the State had introduced a portion of the statement.

The State first argues in response that Flowers' Sixth Amendment right to counsel was not violated. Answering Brief at 27 (citing Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d 16, 24 (2004); Fellers v. United States, 540 U.S. 519 (2004)). The State also notes that the Sixth Amendment right to counsel is offense specific and does not attach to investigations of unrelated cases. Answering Brief at 28 (citing Kaczmarek and McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)). The State's response fails to address the primary issue presented by Flowers: did the district court err in admitting evidence of Flowers' statement to police officers because he was in custody, had been formally charged, and was represented by counsel for murder charge in the case involving Coote, at the time he was interrogated by police officers in this case, in light of the fact that the State was seeking the death penalty against Flowers in the Coote case and the conviction in this case is alleged as an aggravating circumstance in the Coote case. Flowers recognizes the general rule stated by the State in its Answering Brief, that police officers may interrogate a person who is in custody for an offense which has not yet been charged, but he submits that this general rule does not apply in a case such as this because the conviction for murder in this case is an aggravating circumstance in the other case. The fact that this case is used as an aggravating circumstance for the Coote case distinguishes it from Kaczmarek, Fellers and McNeil.

The State next argues that the district court did not abuse its discretion by prohibiting Flowers from introducing his entire statement to detectives after the State introduced a

portion of that statement. Answering Brief at 28. The State claims that the district court properly prohibited reference to Flowers' statement that he would not decide whether to answer the detectives' question until he spoke with his attorney, 3 App. 534, because reference to his counsel implicated the Sixth Amendment. Answering Brief at 28. This decision, however, was a strategic call that properly belonged to Flowers and his counsel, not the district court. The cases and statute cited by the State, at page 29 of the Answering Brief, correctly hold that the *State* or prosecution may not introduce evidence of a defendant's silence or desire to speak with his attorney. See Doyle v. Ohio, 426 U.S. 610, 619 (1976); Griffin v. California, 380 U.S. 609, 615 (1965) (the Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence) ; and Diomampo v. State, 185 P.3d 1031, 1039-40 (Nev. 2008) ("the prosecution is forbidden at trial . . ."). None of these cases, however, address the issue of whether a defendant may introduce evidence that he wished to talk with his attorneys before answering additional questions presented by the detectives. It was a matter of sound trial strategy for trial counsel to conclude that this testimony was less prejudicial than allowing the evidence to simply reflect that officers attempted to question Flowers and he refused cooperation without any explanation. The district court abused its discretion by substituting its own judgment for that of defense counsel as to this matter of trial strategy. The State fails to address this issue.

The State next argues that Flowers was not prejudiced by the district court's ruling. Flowers was prejudiced by the district court's decision because the jury was precluded from hearing his statement that he might be willing to discuss Sheila's death, but he wanted to talk with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during closing arguments the State repeatedly emphasized Brass's cooperation with the detectives and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App. 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these arguments would have had far less impact upon the jury. As a matter of fundamental fairness under the state and federal constitutions, Flowers was entitled to present this evidence and the district court's exclusion of this evidence warrants reversal of the conviction.

D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

Flowers contends his rights to due process and right to a fair trial were violated because the district court allowed the State to introduce gruesome photos of body parts dissected by the medical examiner during the autopsy. The State argues that the photos were highly probative as they were necessary to show the similarities between the deaths of Sheila and Coote. Answering Brief at 30. This argument is without merit. First, the State fails to explain how photos of Sheila's tongue were necessary considering the fact that Dr. Simms did not mention the photos during his testimony. 2 App. 354. Second, no photos of Coote's autopsy were introduced to show any similarities of injuries which the jury could have used to compare photos. Lastly, the State fails to state why cropping the photos to reduce their inflammatory nature would have rendered them less useful. The State contends in conclusory fashion that cropping the photos would not have allowed the jurors to see the pattern of injuries. Answering Brief at 31. The photo was used to illustrate the hemorrhaging inside the neck. Cropping out Dr. Simms' hands folding back the flaps of the neck would not have prohibited Dr. Simms from testifying as to the pattern of injuries inside the neck.

Next, the State contends that nothing in this Court's opinion in Dearman v. State, 93 Nev. 364, 369-70, 566 P.2d 410 (1977) compels a judge to view the photos outside the presence of the jury before ruling on its admissibility. Answering Brief at 30. In Dearman, this Court did not explicitly state that a trial judge must review each photo before determining its admissibility. However, it is clear that this Court put a lot of weight on the trials court's careful review of the photos before ruling on admissibility.

> The trial judge exercised caution and took the intermediate step of determining whether the probative value of the proffered evidence outweighed any prejudicial effect. The trial court considered all of the objections to the photographs, rejecting several and admitting others.

Id. Common sense dictates that a judge could not properly determine if the probative value of potential evidence is outweighed by any prejudicial effect without looking at the evidence first. There is "no other way for a court to make this important decision involving prejudice and redundancy." See Curtin v. United States, 489 F.3d 935, 957 (9th Cir. 2007) (a judge

must read every line of a inflammatory story in a child pornography case in order for its weighing discretion to be properly exercised and entitled to deference on appeal).

Lastly, the State argues that the district court did not abuse its discretion in light of Dr. Simms testimony that he used the minimum amount of photos necessary to make his point. Answering Brief at 31. This argument is without merit. The State cites to no authority which supports its position that the district court may abandon his decision making role to the witness. Contrary to the State's position, the trial judge's decision to admit evidence over objection is not entitled to deference unless the trial court engages in the proper weighing process. See Seim v. State, 95 Nev. 89, 97, 590 P.2d 1152, 1157 (1979).

The district court failed to subject the autopsy photos to a proper balancing test before ruling on admissibility. Although gruesome photos which help ascertain the truth may be admissible, there is no per se rule allowing for their admissibility. See Shuff v. State, 86 Nev. 736, 739-40, 476 P.2d 22, 24-25 (1970). The district court abused its discretion by admitting the photos by abandoning his discretion to the witness. The probative value of the photos were outweighed by its prejudicial effect. This highly inflammatory evidence fatally infected the trial and deprived Flowers of his right to a fair trial. The State fails to prove such error was harmless beyond a reasonable doubt. Thus, the judgment must be reversed.

E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

Flowers contends his rights to due process, a fair trial, and to present evidence were violated because the district court prohibited him from introducing evidence that Sheila's boyfriend knew of her relationship with Flowers. Specifically, Flowers asserts the district court erred by excluding the testimony of Kinsey. Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is Flowers' middle name and the name he used). 3 App. 541. The district court sustained the State's hearsay objection to this testimony, after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43. The decision to exclude Kinsey's testimony was an evidentiary error and also

deprived Flowers of his right to due process under the state and federal constitutions.

In his Opening Brief, Flowers noted that the testimony he was precluded from introducing was essentially the same as that which was introduced against him by the State, through witness Ameia Fuller, who testified that she was aware that Sheila and Brass had a relationship with each other. In response, the State argues that Fuller's testimony was not introduced for the truth of the matter asserted, but was instead introduced to show that Fuller told police officers about the relationship between Sheila and Brass. Answering Brief at 32. This argument is without merit. First no limiting instruction was given as to Fuller's testimony. 2 App. 493. Second, Fuller testified directly that Sheila and Brass were involved, and did not merely state that she told officers that Sheila told her she was friends with Brass. 2 App. 493. Third, the State argued in closing arguments that Brass and Sheila were involved in a relationship, and based that argument upon Fuller's testimony, thus refuting the State's claim here that the testimony was not introduced for this purpose. 3 App. 594. Finally, the fact that Fuller told officers of a relationship between Brass and Sheila was irrelevant and immaterial, so the evidence could not have been introduced for that purpose. Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 411 n.14 (2001); Zemo v. State, 646 A.2d 1050, 1053 (Md. Ct. Spec. App. 1994)..

The State next contends that Kinsey's testimony was not admissible because it was unreliable, and in the alternate, if admissible, the decision to exclude the evidence was harmless error. Answering Brief at 31-33. These arguments are without merit. First the State argues that this case can be distinguished from DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001). Answering Brief at 33. The State argues that the evidence in Deptris is different from Kinsey's proffered testimony because in Deptris, the evidence went to the heart of the defense and was reliable. Answering Brief at 33. The State misunderstands the reason for citing Depetris. Flowers cites Depetris for the purpose of illustrating when evidentiary errors rise to the level on a constitutional error. In Depetris, the admissibility of the evidence was not at issue and reliability was never discussed. Depetris, 239 F.3d at 1061-62. The State's attempt to distinguish this case is not persuasive. This contention is equally

unpersuasive to the extent it is construed as stating the error in Flowers' case does not rise to a constitutional violation. The State next argues that Chambers is not applicable to this case because Chambers was limited to the "facts and circumstances" of that case. Answering Brief at 33, n. 12. This argument is without merit. A comparison of this case indicates it is sufficiently similar to Chambers to establish a constitutional violation on Flowers' right to due process.

"[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In Chambers, the trial court excluded three of the defendant's witnesses who would have provided testimony that another individual confessed to the crime. Id. at 298. The testimony was excluded because, although the statements were against declarants' interest, it did not meet Mississippi's hearsay exception that the statement be against the declarant's pecuniary interest. Id. at 298-99. However, the statement did fall within the rule's rationale for admission and was therefore reliable. Id. at 300-301. In holding the statements should have been admitted, the Supreme Court reasoned that when testimony bears assurances of trustworthiness and is critical to the defense, a state cannot exclude the evidence simply because it does not technically meet the requirement of the hearsay exception. Id.

Similarly, Kinsey's proffered statement was reliable because it fell within the rationale of an exception to the hearsay rule. NRS 51.355 provides:

> A statement concerning the declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, ancestry or other similar fact of personal or family history is not inadmissible under the hearsay rule if the declarant is unavailable as a witness, even though declarant had no means of acquiring personal knowledge of the matter stated.

The excluded statement was made by Sheila concerning her own personal history of dating men. 3 App. 541. Although the statement was not about Sheila's marriage, it was regarding her own personal romantic relationships. Therefore, the same rationale that would render hearsay statements regarding the declarant's marriage reliable enough for admission should also apply to statements regarding the declarant's romantic relationships. The statement

made to Kinsey should have been admitted under the rule as it qualfies an "other similar fact of personal or family history." NRS 51.355. Also, the statements made by Sheila to Kinsey seem to have been spontaneous. Kinsey was romantically linked to Sheila and it is likely Sheila would share this intimate information with Kinsey. Furthermore, there appears to be no reason for Kinsey to fabricate this information as he and Flowers did not know each other. Kinsey had nothing to gain by testifying on behalf on Flowers. Therefore, the testimony in this case was equally reliable to the testimony in Chambers.

Kinsey's testimony was critical to Flowers defense. The State concedes that in order for it to prove Flowers was guilty beyond a reasonable doubt, it had to prove Brass was not the perpetrator because both mens' DNA was found inside the victim. Answering Brief at 35. The State achieved this in part by admitting evidence that Brass and Sheila were involved in a prior consensual relationship. At the same time, it relied on the fact that there was no evidence Flowers was in a consensual relationship with Sheila. The district court's exclusion of the only evidence which could have established Flowers had a consensual sexual relationship with Sheila deprived him of his right to present witnesses in his defense and confront the State's accusations. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.

Flowers contends that his rights to due process, equal protection, and right to a fair trial were violated when the prosecutor improperly commented on his failure to talk to police or testify in his own defense. In response, the State argues that the prosecutor did not commit misconduct because he was not commenting on Flowers' right to remain silent, but was commenting on the evidence. Answering Brief at 34. The State cites to this Court's decision in Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001), to support its position. The State's argument is without merit because Leonard is easily distinguishable from this case.

In Leonard, this Court considered the issue of whether a prosecutor improperly shifts the burden of proof to the defendant by commenting on the defendant's failure to substantiate a claim made in defense of the State's allegations. Leonard, 117 Nev. at 81, 17 P.dd at 414-

15. The defendant in Leonard made a claim that another man was responsible for the crime and a piece of evidence introduced at trial belonged to that other person. Id. During closing arguments, the prosecutor commented that the defendant had a prior opportunity to question the other person about the piece of evidence but failed to do so. Id. This Court held that the prosecutor did not improperly shift the burden of proof the to the defendant. Id. This Court reasoned that although a prosecutor may not normally comment on a defendant's failure to present evidence, it can comment on the failure to substantiate a claim. Id. However, unlike the situation in this case, the prosecutor's comment in Leonard does not connote lack of a personal response by the accused himself. Therefore, Leonard is not dispositive because the defendant's right to remain silent was not at issue.

The State fails to address Flowers' assertion that the jury would have considered the prosecutor's comments to be an attack on Flowers' failure to testify. Opening Brief at 36. As this Court explained in Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991), the prosecutor commits misconduct if "the language used was manifestly intended to be *or* was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Id (emphasis added). In this case, the jury would have understood the prosecutor's statements to be a comment on Flower's failure to testify in his own defense. The prosecutor specifically commented on the fact that Brass did not have to testify but did anyway. 3 App. 595. The prosecutor then proceeded to compare Brass to Flowers. 3 App. 612-13. It is likely that the prosecutor intended his comments to mean Brass was more credible because he testified while Flowers did not. Even if this was not the prosecutor's intent, the jury would have naturally and necessarily took the comment to mean that if Brass did not have to testify but did anyway, Flowers should have also testified.

The State has failed to prove this error was harmless beyond a reasonable doubt. Flowers was greatly prejudiced by the prosecutor's misconduct because the other evidence equally inculpated both men. The judgment of conviction must therefore be reversed.

G. There is insufficient evidence to support the conviction.

Flowers contends that there was insufficient evidence to support his conviction. There

was an equal amount of evidence which pointed to Brass as the perpetrator. The State argues in responses there was sufficient evidence to convict Flowers because the jury heard testimony of another rape and murder Flowers allegedly committed. The State further argues that both incidents were similar enough for the jury to decide Flowers murdered and sexually assaulted Sheila. Answering Brief at 37.

In attempt to show both incidents were sufficiently similar, the State asserts that both victims were found face up and suffered blunt force trauma. The State fails to state how any of these facts are sufficiently unique as to support the inference that they were committed by the same person. In fact there were substantial difference between both incidents. See Opening Brief at 19-20. The conviction must be vacated because there is insufficient evidence to support the conviction.

H. The judgment should be vacated based upon cumulative error.

Flowers' rights to due process, equal protection, and right to a fair trial were violated because of cumulative error. The State asserts that there was no error and that Flowers' right to a fair trial was not violated. Answering Brief at 37-38. For the reasons set forth above, the State's argument is without merit. There were numerous statutory and constitutional violations at Flowers' trial. A new trial should be granted based upon each of those violations and the combined impact of all of them.

III. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial. In the alternative, there is insufficient evidence to support his conviction and his judgment should be vacated.

DATED this 3rd day of May 2010.

Respectfully submitted,

By: */s/ JoNell Thomas*

JONELL THOMAS
State Bar No. 4771

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of May, 2010.

By: */s/ JoNell Thomas*

JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 3rd day of May, 2010 a copy of the Appellant's Reply Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS

JONELL THOMAS

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS A/K/A NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53159
NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 55759

FILED

MAY 21 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION

Cause appearing, we grant appellant's unopposed motion to consolidate these appeals for purposes of disposition only. See NRAP 3(b). When briefing the appeal in Docket No. 55759, the parties may cite to the appendices filed in Docket No. 53159. Any additional documents necessary for the appeal in Docket No. 55759 that have not been included in the appendices filed in Docket No. 53159 must be provided in a supplemental appendix filed in Docket No. 55759.

It is so ORDERED.

, C.J.

cc: Special Public Defender
Attorney General/Carson City
Clark County District Attorney

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 55759

CONSOLIDATED WITH

Docket No. 53159

Direct Appeal From an Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Linda Bell, District Judge
District Court No. C288755

APPELLANT'S OPENING BRIEF

Randy Pike
State Bar No. 1940
Deputy Special Public Defender
David M. Schieck
State Bar No. 0824
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Norman Flowers

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Case Authority

Statutory Authority

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. 2 App 250-251. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed. 2 App 329-502; 3 App 503-628 George Brass was at the scene of Ms. Quarles death when police were investigating. He did not admit to having sex with her shortly before her death until almost the eve of trial after police advised him that they were not going to prosecute him. 2 APP 493-497.

After the trial in this matter, George Brass was convicted of an unrelated Murder and Robbery (C253756). Based upon this conviction, the Defendant brought a Motion for a New Trial based upon the newly available evidence. 4 App 663-66 The State opposed the Motion. 4 App 667-78 At the hearing on March 17, 2010, Judge Bell denied the Motion. 4 App 686-87; 688.

A timely Notice of Appeal was filed on April 1, 2010 from the hearing. 4 App 684-85. Flowers is requesting this Court remand the matter back to the Court below to grant a new trial.

II. STATEMENT OF THE CASE AND JURISDICTIONAL STATEMENT

This is an appeal from a denial of Flowers' post trial motion for a new trial. This is an ancillary issue that is best considered in conjunction with the pending appeal of the underlying judgment of conviction pursuant to a jury verdict. (Case No. 53159) Flowers adopts and incorporates by this reference the Statement of the Case and Jurisdictional Statement contained in the Opening Brief.

This Court has jurisdiction over this appeal pursuant to NRS 177.015.

III. STATEMENT OF THE ISSUE ON APPEAL

Whether the district court violated Flowers' constitutional rights by denying the appellant's Motion for a new trial.

IV. PROCEDURAL HISTORY

On December 13, 2006, the State charged Appellant Norman Flowers with one count of burglary, one count of first degree murder, one count of sexual assault and one count of robbery. 1 App. 1. Sheila Quarles was identified in the Indictment as the victim. 1 App. 1. The State filed a motion indicating its intent to seek the death penalty. 1 App. 30, 82, 112.

On December 26, 2006, the State filed a motion to consolidate this case with the case of State v. Flowers Dist. Ct. No. C216032. 1 App. 8. Marilee Coote and Rena Gonzalez were identified as the victims in that case. 1 App. 8-12. Flowers opposed the motion to consolidate. 1 App. 21. During a hearing on April 13, 2007, the State informed the district court (Judge Mosley) that Judge Bonaventure denied the motion to consolidate the two cases. 2 App. 259. Judge Mosley indicated a desire to have the cases consolidated and asked that the matter be heard before Judge Villani, who was assigned the other case following Judge Bonaventure's retirement. 2 App. 261-62.

On January 23, 2007, Flowers filed a motion to preclude evidence of other bad acts. 1 App. 35. The State opposed the motion. 1 App. 48. On November 5, 2007, the State filed a motion for clarification of the court's ruling. 1 App. 64. Flowers opposed the motion. 1 App. 77. On November 15, 2007, the matter was heard by Judge Bell. 2 App. 63. He ordered that a Petrocelli hearing be conducted. 2 App. 264. The hearing was held on August 1, 2008. 2 App. 267-324. The district court ruled that evidence concerning the Coote allegation was admissible but evidence concerning the Gonzalez allegation was not. 2 App. 318, 327, 332. The district court further ruled that the State could present evidence from the detective about similarities between the two cases, from the nurse and the coroner/medical examiner about the way Coote died, and DNA evidence. Other evidence concerning that case was found to be inadmissible. 2 App. 318. On September 29, 2008, Flowers filed a motion to reconsider the ruling on the motion in limine to preclude evidence of other bad

acts. 1 App. 120. The district court denied the motion and allowed Flowers to make a continuing objection to the evidence. 2 App. 331-34. The district court found that the record was preserved concerning admissibility of the evidence. 2 App. 334. The district court ruled that Flowers was entitled to a cautionary instruction as the evidence was introduced and to a jury instruction. 2 App. 334.

Jury trial began on October 15, 2008. 2 App. 331. During trial, the State objected to testimony from William Kinsey, who was called as a witness by Flowers. 3 App. 541-42. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila Quarles was dating someone named Keith. 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

After struggling with deliberations for more than 24 hours, the jury returned verdicts of guilty on the charges of burglary, first degree murder and sexual assault. 1 App. 182-83; 3 App. 625. The jury noted on a special verdict that it unanimously found Flowers guilty of a murder committed during the perpetration of a burglary, sexual assault or robbery. It did not unanimously find him guilty of willful, deliberate and premeditated murder. 1 App. 183; 3 App. 622. The jury found him not guilty of robbery, 1 App. 183; 3 App. 622.

Following the verdicts, on October 30, 2008, Flowers filed a motion for a new trial. 1 App. 187. The motion was based upon the district court's rulings on the admission of evidence from another case and the admission of a portion of Flowers' statement to the police. The State opposed the motion. 1 App. 236. On November 18, 2008, the district court denied the motion. 1 App. 248; 3 App. 630.

The sentencing hearing was held on January 13, 2009. 3 App. 632. The judgment of conviction was filed on January 16, 2009. 2 App. 250. A notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first

degree murder, and a consecutive term of 120 months to life with the possibility of parole for sexual assault. 2 App. 255; 3 App. 640. An amended notice of appeal was filed on February 20, 2009. 2 App. 256.

Flowers filed a Motion for New Trial on March 4, 2010. 4 App 684-85. The State filed it's response on March 9, 2010. 4 App 667-78. The district court denied the motion after a hearing on March 17, 2010. 4 App 769-83; 686-87. This appeal follows.

V. STATEMENT OF FACTS

Appellant adopts the Statement of Facts as contained in the companion appeal pending before this Honorable Court, and further states as follows.

Detective Sherwood investigated the source of the second semen sample and learned from Detective Long that the source had been identified. 3 App. 527. George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass.[1] 3 App. 556.

Debra knew both Flowers and Brass. 2 App. 373. Flowers dated Debra for about four months in 2004. 2 App. 378. Flowers knew Sheila and Debra's other children. 2 App. 378. She saw Flowers at her apartment complex about two weeks prior to Sheila's death. 2 App. 379. At that time, Debra and Sheila were sitting outside near their apartment. 2 App. 379. They asked Flowers what he was doing there and he said that he worked as a maintenance man at a couple of the apartment complexes owned by the landlord. 2 App. 379. They talked for about 20 minutes. 2 App. 379.

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[1] George Schiro, a DNA expert, testified that it is possible to have a false "hit" when evaluating DNA in a case where a mixture is present. 3 App. 558. As the Quarles case, it would be expected that between 40 and 130 people in the Las Vegas valley would have the same profiles as those attributed to Flowers and Brass. 3 App. 558. It is not possible to determine from DNA how long a sperm sample has been present or in which order two sperm samples were deposited. 3 App. 558. Other clothing could have been examined to establish a timeline as to when the semen was introduced. 3 App. 559.

Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. Debra knew that Brass and Sheila were friends, but did not know of any sexual relationship between them. 2 App. 374.

Following Sheila' death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379. Flowers recommended a psychiatrist and drove her to the two appointments she attended. 2 App. 379.

V. ARGUMENT

A. The district court erred by denying Flowers' motion for a new trial.

Newly discovered impeachment evidence may be sufficient to justify granting a new trial if the witness impeached is so important that impeachment would necessitate a different verdict. See Hennie v. State, 114 Nev. 1285, 968 Pl.2d 761 (1998). In the present case, the State's witness was not only an alternate suspect as a result of his DNA being found in the body of the deceased, but his actions in withholding his identity for years certainly belied the credibility and strength of his alleged "alibi".

Standard of Review

Flowers acknowledges that the granting of a new trial in criminal cases on the ground of newly discovered evidence is largely discretionary with the trial court, and that court's determination will not be reversed on appeal unless abuse of discretion is clearly shown. McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982) . Given the peculiar circumstances of this case, Flowers believes that the district court abused its discretion and that a new trial is mandated.

Argument

In Flowers' trial, the ultimate issue was which of the DNA "donors", if either, were the cause of the death of Ms. Quarles. There was no physical evidence as to the actual identity of the perpetrator of the death-producing act, nor were there any eyewitnesses. The State, in an effort to prove identity relied upon other bad act evidence to establish identity.

The State, in an effort to secure a conviction against Flowers vouched for the credibility of it's witness, Mr. Brass, the alternate suspect, even making improper commentary upon Flowers' right to remain silent. Clearly, the credibility of Mr. Brass became an important issue to the jury via the arguments of the State.

In Giglio v. United States, 405 U.S. 150 (1972) the Court focused on the reliability of witness testimony and its effect on the jury. Id. The Court stated that "'when the reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of disclosure]." Id at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959). While this is not a case of nondisclosure, it is a case in which the potential impact of impeachment evidence must be considered as a basis for a motionf or a new trial. The Giglio Court determined that a new trial is required if "the false testimony could . . in any reasonable likelihood have affected the judgment of the jury." Id at 154 quoting Napue, at 269 . Althought the main focus of the ruling in Giglio deals with the obligations and duties of the prosecution to divulge information, it is informative in that it is clear that the rule from Giglio is that when there is evidence relevant to the credibility of a witness, a jury is entitled to know about it. Id. at 155.

While the Court allowed in the "other bad act" evidence against Flowers over objection, the impact of the evidence was improperly extended in the present case. NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of 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, 1064-65 (1997). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put – whether, having been admitted for a permissible limited purpose, the evidence

was presented or argued at trial for its forbidden tendency to prove propensity. See Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). In the present case the comments upon Flowers' non-testimony also appears to be an improper extension of the bad act arguments.

The probative value of the evidence from the Coote case was substantially outweighed by the danger of unfair prejudice to Flowers. Presentation of evidence concerning the Coote case was a substantial portion of the evidence presented at trial. The State presented evidence from the apartment manager who discovered her body, officers who responded to the scene, a medical examiner concerning the autopsy, a fingerprint examiner, an expert in DNA, Coote's friend, and Coote's neighbor. In essence, the State presented a second trial concerning Coote within the trial concerning Sheila. Further, extensive argument about the Coote case was made during closing arguments. 3 App.597-98, 611-12. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers. Evidence of a conviction of murder by Mr. Brass would also have been highly prejudicial to the credibility of the witness/alternate suspect Brass.

A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. The motion for a new trial should have been granted.

VII. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial.

DATED this 27th day of May, 2010.

Respectfully submitted,

/s/ RANDALL H. PIKE

By:_____
Randall Pike
State Bar 1940

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: 5/27/2010

/s/ RANDALL H. PIKE

By:_____
Randall Pike
State Bar 1940

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 27th day of May, 2010 a copy of the Appellant's Opening Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ RANDALL H. PIKE

By:_____
Randall Pike

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN FLOWERS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 53159

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Motion For New Trial
Eighth Judicial District Court, Clark County

RANDALL H. PIKE, ESQ.
Nevada Bar #001940
330 South Third St., #800
Las Vegas, Nevada 89155
(702)455-6265

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

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RESPONDENT'S ANSWERING BRIEF

Appeal from an Order Denying Motion for New Trial
Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE(S)

Whether the district court abused its discretion in denying Defendant's Motion for New Trial.

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 two (2) counts of sexual assault (along with 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 Bret 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).

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

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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. (1 AA 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).

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. (2 AA 254-55).

On December 21, 2009, Defendant filed an Opening Brief in the direct appeal number 53159, wherein he argued, among other things, that the district court erred in admitting evidence of the Coote murder at trial. See Opening Brief, pg 18-20. Defendant also argued that statements he made to police while in custody for another offense was improperly admitted at trial.[6] See Opening Brief, pg. 24-27. The State responded to Defendant's contentions in its Answering Brief in case number 53159 filed on February 19, 2010. That issue is currently pending before this Court.

On March 4, 2010, Defendant filed a second motion for new trial. (4 AA 663-66). The motion was based on allegedly newly discovered evidence, George Brass' conviction for murder in an unrelated case. (4 AA 663-66). The state filed an Opposition on March 9, 2010. (4 AA 667-78). On March 17, 2010, the district court denied Defendant's motion finding that Brass' conviction was not newly discovered evidence because the defense was aware before Defendant's trial that Brass had been arrested and charged with murder and the admissibility of that murder was not enhanced by the conviction. (4 AA 679, 682). Defendant filed a Notice of Appeal on April 1, 2010.

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[6] Defendant uses this current appeal as an opportunity to reargue both the issues even though he previously raised them in his direct appeal from the Judgment of Conviction.

STATEMENT OF THE FACTS

The State will adopt the Statement of Facts as presented to this Court in the State's February 19, 2010 Answering Brief in case 5159, but would specifically want to highlight the following facts for the issue presented in this brief:

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

On March 24, 2005, Sheila stayed home from work and had several phone conversations throughout the day. (2 AA 375). She talked to Qunise while Qunise was at work. (2 AA 409). Sheila also talked to her mother several times that day. (2 AA 375). During her last phone conversation with Sheila around 1:00 PM, Debra testified that the phone went dead. (2 AA 375). 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). Qunise tried to call Sheila back several times but ended up only getting Sheila's voicemail. (2 AA 410).

Debra returned to the Pecos Apartment around three in the afternoon and found Sheila submerged and non-responsive in the bathtub. (2 AA 377). Paramedics arrived at the Pecos Apartment too late to render any aid or revive Sheila. (2 AA 365).

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). Additionally, Debra noticed that some jewelry and pillow case from her bed were missing from the apartment. (2 AA 378).

Sheila's body had no major external injuries. (3 AA 520). There was also no sign of forced entry into the apartment. (2 AA 478). Some items in the bathroom were knocked over

but there were no obvious signs of a struggle or fight. (2 AA 393, 479). However, the Las Vegas Metropolitan Police Department ("LVMPD") detectives noticed that Sheila had two superficial injuries to her body. (2 AA 353). She had a bruise on her left abdomen and she had a scrape on her knee. (2 AA 353).

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). This indicated that Sheila suffered some a blunt force injury to her head around the time of her death. (2 AA 351-52). Sheila also had several injuries to her neck area. (2 AA 351). The injuries to her neck indicated that Sheila was manually strangled. (2 AA 351). The injuries were consistent with someone applying pressure with his hands with the intent to cause injury. (2 AA 352).

Dr. Simms also testified that Sheila had multiple lacerations in her vaginal area which indicated that Sheila was sexually assaulted. (2 AA 350). 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). 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 the autopsy, DNA samples from semen were collected from Sheila's vaginal area. (2 AA 483). 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).

Less than three months 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). Marilee was Defendant's girlfriend's neighbor. (3 AA 509). Similar, to Sheila's case there were no signs of forced entry. (2 AA 439). Marilee was found laying in her living room completely naked. (2 AA 410). Also similar to Sheila's

murder, 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).

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

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). The police compared the Defendant's DNA profile with the DNA profile created from DNA evidence collected from Marilee and a carpet stain located under Marilee's legs. (3 AA 552). The police learned that Defendant's DNA profile matched the DNA found in Marilee and on the carpet beneath her. (3 AA 553). The frequency of the profile is rarer than one in 650 billion people. (3 AA 552). 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).

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). Paulette testified at trial that Defendant could not be excluded as the DNA source unlike 99.99% of the population. (3 AA 550).

The police talked to Debra and found out that the Defendant actually dated Debra in the past. (2 AA 378). Debra told police that the Defendant had met Sheila before as well. (2 AA 378). She testified that the last time she saw the Defendant while Sheila was alive was two weeks before Sheila's death. (2 AA 379). Sheila and Debra were outside their Pecos Apartment when they spotted the Defendant. (2 AA 379). Defendant noted that Debra had changed apartments in the complex. (2 AA 379). 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 trial, the property manager for the apartment complex testified that Defendant never worked at the complex. (3 AA 571-72).

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). Defendant asked Debra for updates regarding the investigation of Sheila's case. (2 AA 379). 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).

The police questioned Sheila's friends about other possible sexual relationships she may have had with men. (2 AA 483-84). The police discovered from Sheila's friends that Sheila also had a casual sexual relationship with Brass. (2 AA 494). The police questioned Brass and he volunteered that he had a sexual encounter with Sheila in the morning on the day she was murdered. (2 AA 484; 494). Brass told police that after the sexual encounter with Sheila he left to go to work at Wal-Mart. (2 AA 494). 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).

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). There was no indication that anyone changed Brass's time record. (2 AA 498). 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). Thus, Brass checked into work before Sheila's murder and left for lunch after Sheila body was discovered.

On August 26, 2006, police interviewed the Defendant about Sheila's murder. (3 AA 524). At the time, the Defendant was incarcerated in the Clark County Detention Center due to the Marilee Coote murder. (3 AA 666). Defendant had his Miranda rights read to him from a card and the Defendant acknowledged that he understood his rights. (3 AA 524). Defendant signed the Miranda card. (3 AA 524). Defendant was evasive while answering the

detective's questions regarding whether he knew Debra and Sheila. (3 AA 525). Initially, Defendant even told the detective he did not know Sheila. (3 AA 526). After the detective 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). 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).

ARGUMENT

THE DISTRICT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

The Supreme Court reviews the district court's grant or denial of a motion for a new trial under an abuse of discretion standard. Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997). Moreover, under NRS 176.515(1), "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." The court has the authority to grant a new trial based on the post-trial discovery of new evidence, provided the evidence in question is: (1) newly discovered, (2) material to the defense, (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial, (4) non-cumulative, (5) such as to render a different result probable upon retrial, (6) not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable, and (7) the best evidence the case admits. Funches, 113 Nev. at 923-24, 944 P.2d at 779-80; see also Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991).

A. The district court properly ruled that Brass' involvement in an unrelated murder is not new evidence.

At the March 17, 2010 hearing on Defendant's Motion for New Trial, Defendant's counsel admitted that they were aware of Brass' sexual encounter with Sheila before trial. (4 AA 680). Furthermore, the Defense was also aware of the pending murder charge against Brass before the trial began but decided to proceed to trial. (4 AA 681). Brass was even in custody when he testified and Defendant's counsels' office represented Brass' co-defendant,

Eugene Nunnery, in Brass' criminal matter. (4 AA 674, 681). After hearing argument, the district court held that the conviction under these circumstances, when the Defense knew before trial that Brass had been arrested and charged for murder, did not constitute new evidence that would warrant a new trial. (4 AA 682). The district court decision was not made in error.

Despite being aware of Brass' pending case, Defendant proceeded with the trial instead of waiting for the outcome of Brass' murder trial. Additionally, Defendant could have sought a continuance during the trial when it became known for certain that Brass would testify but again he opted against filing such a motion. Instead, Defendant waited until the outcome of his own trial as well Brass' trial and only then sought a new trial based on Brass' testimony. Granting such a request would encourage defendants to seek out a quick trial when a witness in their case has a pending charge with hopes of getting a second trial if the first one does not turn out to their liking and the witness is eventually convicted of the pending charge.

Moreover, in this case, if Defendant's counsel believed the underlying facts of Brass' matter was relevant to Sheila's murder, they could have filed a motion under 48.045(2) to explain how Brass' conduct in his own matter related to Sheila's murder. However, no motion was ever filed, likely because the facts of the robbery/murder in Brass' matter were quite different from the murder/sexual assault Defendant was charged with in his case. See Argument I, Section C. Thus, the district court did not err in denying Defendant's Motion since the conviction did not constitute new evidence.

B. Brass' conviction is not sufficient basis upon which to grant a new trial.

Even if this Court found that Brass' conviction constituted new evidence, it would not have changed the outcome of the trial and therefore is not sufficient basis to grant a new trial.

In this case, Sheila's murder must have occurred within a very specific time period. Sheila's mom testified that she talked to Sheila on the phone until around 1 PM when the phone suddenly went dead and that she arrived home around 3 PM where she found Sheila

non-responsive in the bathtub. Furthermore, Dr. Simms testified that Sheila's death and sexual assault occurred around the same time due to lack of swelling around the multiple laceration found in Sheila's vaginal area. Thus, the person who sexually assaulted Sheila likely murdered her.

Both Brass' and Defendant's DNA were found on Sheila's vaginal swabs. During the trial, the jury heard testimony from an assistant manager at Brass' workplace, who brought Brass' time record for the day of the murder, which was introduced by the State without objection. (2 AA 498). He testified that Brass checked into work at noon that day, 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. The State was able to demonstrate that Sheila had talked to someone over the phone after Brass had clocked in at work and was murdered before he took his lunch break.

Moreover, testimony at trial showed that Brass was well acquainted with Sheila and her family. Brass was good friends with Sheila's brother and Brass' mother was good friends with Sheila's mother. Brass testified at trial that he a sexual relationship with Sheila. (2 AA 494). He admitted that he had a sexual encounter with Sheila around 10:30 in the morning. (2 AA 494). Additionally, the jury heard testimony that Sheila's friends knew that she had a casual sexual relationship with Brass. There was no evidence that Defendant had any type of sexual relationship with Sheila prior to her murder.

Defendant is not asserting that he has any new evidence to dispute Brass or anyone else's testimony regarding this subject. Instead he argues that knowledge of Defendant's conviction would have been helpful to him at trial because the jury would have heard that he had been convicted of murder. However, this is not enough for a new trial. See Hennie v. State, 1114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998) (holding that new information which directly contradicted testimony by key witnesses and which could not have been discovered pretrial was sufficient to justify a new trial). Even if Brass had been convicted before Defendant's trial, Defendant could have only admitted Brass' conviction and the year it was sustained. The defense would have been precluded per NRS 48.045 from arguing that Brass

had a propensity for violence and thus was the person responsible for Sheila's murder and sexual assault.

Finally, Brass' testimony was not critical to the case. As previously stated, Dr. Simms stated that the sexual assault and the murder were contemporaneous. The State produced a witness who spoke to Sheila after Brass had already checked in at work. The State, through the assistant manager of Brass' work, could have established Brass was at work without his testimony. Moreover, the State also produced at trial a witness who testified about Brass' casual sexual relationship with Sheila. Thus, the State could have eliminated Brass a potential culprit to Sheila's murder without his testimony. Therefore, Defendant could not demonstrate that a different result was probable in this case. United States v. Steel, 759 F.2d 706, 713 99th Cir. 1985) (noting that requirement that newly discovered evidence would probably result in an acquittal is a stringent standard requiring more than mere speculation); Walker v. State, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (district court did not err in denying defendant's motion for new trial when it is not reasonably probable that the new evidence would lead to a different result).

C. Arguing to the jury that Brass was violent due to his murder conviction would be improper character argument.

Unlike Marilee Coote's murder, Defendant would have been unable to introduce the facts underlying the Brass related murders at trial.

NRS 48.045(2) provides that "(e)vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith" but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Flores v. State, 116 Nev. 659, 661 5 P.3d 1066, 1067 (2000). 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). The plain language of NRS

48.045(2) states that it applies to a "person" and not just to a "defendant" or an "accused". Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (upholding a district court's ruling not to admit other bad acts of a State witness).

As noted in the State's Opposition to Defendant's Motion for New Trial, the facts underlying the Brass' criminal conduct are quite different from what occurred in this case. (4 AA 674-75). In Brass' case, the victims were not in their own residence when attacked, were attacked while in a group, were not women, were not sexually assaulted, and were shot not strangled.[7] [8] The State did not even accuse Brass of being the actual shooter in his case but instead that he accompanied the shooter, Eugene Nunnery, in attempting to rob the victims of money and valuables.[9]

On the other hand, as argued in the State's Answering Brief in case number 53159, Sheila's and Marilee's murders were quite similar. 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.[10] 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

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[7] See Amended Information in Case C227661B, found on Blackstone. The State asks that this Court take judicial notice of these documents per NRS 47.130 and 47.150.

[8] See Transcripts of the Jury Trial in Case C227661B, Opening Statement, pages 11-28 found on Blackstone. The State asks that this Court take judicial notice of these documents per NRS 47.130 and 47.150.

[9] See Transcripts of the Jury Trial in Case C227661B, Opening Statement, pages 17-19 found on Blackstone. The State asks that this Court take judicial notice of these documents per NRS 47.130 and 47.150.

[10] 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.

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 murders, which occurred less than three months apart. Thus, testimony regarding details of Marilee's murder was plainly relevant to the identity and intent.

It is clear that while Sheila and Marilee's murders are similar enough for the identity and intent exceptions to NRS 48.045(2) to apply, there is no exception applicable to the facts underlying Brass' matter. Per NRS 48.045(2), evidence of other acts is not admissible to prove the person acted in conformity with those acts. Thus, it would have been improper to introduce evidence of Brass' case at this trial or argue that as a convicted murderer, he was a possible suspect for Sheila's murder. Therefore, the district court was correct in denying Defendant's Motion for New Trial.

CONCLUSION

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

Dated this 28th day of June 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) 671-2750

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 28th day of June 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) 671-2750

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 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
Nancy Becker
David Schieck
Randall Pike
JoNell Thomas

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

BECKERn/Michael Schwartzer/english

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 55759

CONSOLIDATED WITH

Docket No. 53159

Direct Appeal From an Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Linda Bell, District Judge
District Court No. C288755

APPELLANT'S REPLY BRIEF

Randy Pike
State Bar No. 1940
Deputy Special Public Defender
David M. Schieck
State Bar No. 0824
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorneys for Norman Flowers

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Statutory Authority

I. INTRODUCTION

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. 2 App 250-251. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed. 2 App 329-502; 3 App 503-628. George Brass was at the scene of Ms. Quarles death when police were investigating. He did not admit to having sex with her shortly before her death until almost the eve of trial after police advised him that they were not going to prosecute him. 2 APP 493-497.

After the trial in this matter, George Brass was then convicted of Murder and Robbery (C253756). The Motion below and this appeal followed.

II. REPLY TO STATE'S ARGUMENTS:

A. THE DISTRICT COURT ERRED IN DENYING FLOWER'S MOTION FOR A NEW TRIAL

The newly available impeachment evidence was sufficient to justify granting the Motion for a new trial, and the failure of the Court to so rule constitutes an abuse of discretion, under both McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982) and Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997).

1. The newly available impeachment evidence is properly considered "new evidence" in this context.

In the present case, the Court below apparently ruled solely on the fact that "a conviction when he had already been arrested and charged with the crimes and when the Defense had been provided the information constitutes – under those circumstances constitutes new evidence". 4 App 682. This was the sole criteria of the Court's decision, and it was not further explained in the Order prepared by the State, as the Order merely indicates that the Motion was denied. 4 App 687.

Flowers acknowledges that Brass' alleged involvement and the fact that he was eventually charged with the unrelated murder and robbery was known to the defense as well as the State. Clearly, however, the newly available evidence that is relevant to impeachment was the fact that George Brass was subsequently convicted of that murder and robbery. Mr. Brass had, prior to the State's calling him as a witness, been allowed to withdraw his pleas of guilty to two counts of robbery in that case.

As the State has requested that this Honorable Court take Judicial notice of the proceedings in the case of George Brass, (Case No. C-227661) so too does the appellant. In the Brass case, it is important to note that Mr. Brass had entered a plea of guilty prior to the trial of Mr. Flowers. However, just prior to his sentencing, on June 6, 2008, Mr. Brass brought a Motion to withdraw his plea of Guilty. While the State did file an opposition to Mr. Brass' motion, it appeared that it was basically a *pro forma* opposition, stating that "no reasonable person would withdraw their pleas under the facts and circumstances of this case." (State's Opposition pg. 3). Had the State opposed this withdrawal of plea more rigorously, and the conviction remained intact, then the defense would have used these convictions to impeach the witness in the original trial. The State's actions, however, paved the way for Brass to testify without impeachment by a prior felony conviction in the jury trial which began on October 15, 2008. 2 App. 331.

The State and Federal Constitution offers a firm protection that defendants are presumed innocent until proven guilty. N.R.S. 175.191. The fact that Brass has been proven guilty and convicted of both murder and robbery, changes the circumstances and certainly is newly available evidence that a jury should hear, and is relevant to his impeachment as a witness. Indeed, the nature and the quality of this impeachment evidence could be said to have been within the control of the prosecuting agency.

2. Brass's conviction is of a nature and quality that it provides a sufficient basis upon which a new trial should have been granted.

Even under the authority cited by the State, under the Funches approach, it is clear that the judgement of conviction upon which the motion is based would be both "the best evidence

that the case admits" and even if this was an attempt to "impeach or discredit a former witness" that Brass was "so important that a different result would be reasonably possible." Funches, *supra* at 113 Nev. At 923-24, 944 P.2d at 779-80. This is consistent with the decision in Hennie v. State, 114 Nev. 1285, 968 Pl.2d 761 (1998) when the witness to be impeached is so important that impeachment would necessitate a different verdict.

In the present case, the State's witness was not only an alternate suspect as a result of his DNA being found in the body of the deceased, but his actions in withholding his identity for years, his lack of concern over the death of Ms. Quarles and his subsequent actions certainly belied the credibility and strength of his alleged "alibi".

George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass. 3 App. 556. Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. None of Brasses family members came forward, nor did Brass until after he was contacted by police while in custody.

Following Sheila's death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379 . Flowers recommended a psychiatrist and drove her to the two appointments she attended. 2 App. 379. On the other hand there was no evidence that Brass showed any such compassion or post death concern over the death of his alleged lover.

3. The State's supposition that the Defense would attempt improper impeachment of their witness is not a basis to deny a new trial in this case.

In the present case, the State vouched for Brass' credibility by calling him as a witness to testify in the case, using the only other person whose DNA was found on the body of the deceased. There was no other witness called by the State to corroborate the testimony of

Brass. This established a paradigm in which the credibility of Brass became an extremely important issue to the jury given the fact that there was no physical evidence as to the perpetrator of the death-producing act and there were no eyewitnesses. It appears that Brass went out of his way to avoid providing any assistance to the family or police. Brass was at the scene of Ms. Quarles death when police were investigating, yet he did not admit to having sex with her shortly before her death until nearly the eve of the trial after police advised him that they were not going to prosecute him. 2 App 493-497.

The State presupposes that the defense would impeach Brass with improper arguments. In doing so, the State's own actions of vouching for Mr. Brass, by challenged commentary upon the defendant's right to remain silent at the time of the trial and it's prejudice is clearly focused. (See Appellant's opening brief in the companion appeal). Counsel for the Defendant is well aware that pursuant to N.R.S. 50.095, evidence of the conviction of a crime is admissible for the purpose of attacking the credibility of a witness is limited, however, it is also absolutely admissible:

> 1. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.
>
> 2. Evidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since:
>
> (a) The date of the release of the witness from confinement; or
>
> (b) The expiration of the period of the witness's parole, probation or sentence, whichever is the later date.
>
> 3. Evidence of a conviction is inadmissible under this section if the conviction has been the subject of a pardon.
>
> 4. Evidence of juvenile adjudications is inadmissible under this section.
>
> 5. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The admissibility of impeachment by confrontation with a criminal conviction is absolute and is not subject to the restrictions of NRS 48.045 suggested in the State's opposition. The only restriction of impeachment by a conviction is contained within the

statute itself.

III. CONCLUSION

A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. The motion for a new trial should have been granted. For each of the reasons set forth above, Flowers is entitled to a new trial.

DATED this 2nd day of August, 2010.

Respectfully submitted,

/s/ RANDALL H. PIKE

By:_____
Randall Pike
State Bar 1940

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 2, 2010.

/s/ RANDALL H. PIKE

By:_____
Randall Pike
State Bar 1940

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 2nd day of August, 2010 a copy of the Appellant's Reply Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ RANDALL H. PIKE

By:_____
Randall Pike