IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DUVAL MCCARTY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58101

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction and Sentence of Death
Eighth Judicial District Court, Clark County

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Appellant Jason Duval McCarty and co-defendant Dominic Malone kidnapped Victoria Magee and Charlotte "Christine" Combado, drove them out to a desert location in Henderson, and murdered them. Malone and McCarty were "wannabe pimps" and drug dealers. 32 ROA 7025. In furtherance of that enterprise, McCarty engendered a relationship with Victoria Magee where McCarty would direct Victoria to prostitute herself, sell drugs to the individual purchasing sex, and give the money to him. 32 ROA 7190. McCarty was attempting to develop a similar relationship with Christine Combado. 32 ROA 7191. Ramaan Hall was the individual who supplied McCarty and Malone with the drugs they sold.[1] Melissa Estores, Malone's sometime girlfriend, also sold

[1]Many of the players in this drama had street monikers. For the reader's convenience upon reviewing the record, a brief guide:

- Appellant Jason McCarty is also known as "Rome" or "Romeo."
- Co-defendant Dominic Malone is also known as "D-Roc."
- Victim Melissa Estores is also known as "Red."
- Witness Ramaan Hall is also known as "Trey Black."
- Witness Leonard Robinson is also known as "Black."

drugs for Ramaan Hall. All of these individuals "ran in the same circles" and frequented a short-stay hotel-and-bar called Sportsman's Manor. 28 ROA 6120-25.

On May 16, 2006, Estores had breakfast at the Sportsman's Manor bar with Christine. They had been up all the previous night, and Christine had gambled away all of the money she made from selling drugs, which had been given to her on consignment by Ramaan Hall. 28 ROA 6027-30. McCarty arrived at the bar shortly afterward, looking for Christine. After finishing breakfast, Estores and Christine left with McCarty. Id. McCarty was driving his friend Donald Herb's green Oldsmobile, as he frequently did. 32 ROA 7184. McCarty offered to help Christine earn some of the money she owed to Hall by selling drugs for him, 28 ROA 6137, and he gave her a package of drugs to sell. 33 ROA 7202.

McCarty, Estores, and Christine eventually connected with Malone and Victoria much later that day. McCarty drove the five of them in Donald Herb's Oldsmobile out to a desert site in Henderson. McCarty claimed that he and his parents were having a house built in that area. 28 ROA 6150-74. This area is just off Boulder Highway in Henderson and at that time was sparsely populated desert terrain with evidence of new-home construction in the vicinity. During the ride out to this area, McCarty was hitting Victoria and Malone was hitting Estores and pulling her hair. When they arrived at the site, the five got out of the car and Malone struck Estores repeatedly in the chest. The attack continued for approximately 10 minutes, until Estores began to lose consciousness. 28 ROA 6172-90. While Malone was attacking Estores, McCarty struck Victoria several times and yelled over to Estores that she should just take the beating and exclaimed that "it is PT time."[2] Id.

- Corrina Phillips and Lynn Nagel—friends of McCarty—are also known as "the lesbians."

[2]"PT time possibly means "pimp training." 28 ROA 6101; 33 ROA 7215.

Eventually, McCarty and Malone directed everyone to get back into the vehicle or be left there. Malone and McCarty then seized Estores' purse, removed her phone from inside, and threw the purse out of the window. 28 ROA 6190-95. McCarty drove the women to the Hard Rock casino so that Victoria and Estores could prostitute themselves and sell drugs, thereby earning back some of the money McCarty asserted that they owed to him and Malone. Christine was apparently to be their supervisor. Before dropping them off, one or both of the defendants told the women that if they fail to "get that money," "there will be three shallow graves in the desert tomorrow." 28 ROA 6197-6200.

Once inside the casino, Estores called her friend David Parker, who drove to the Hard Rock to pick the three women up. Estores, Victoria, and Christine stayed the night at Parker's house, but in the morning of May 17, 2006, Parker told Estores that Victoria and Christine could not stay any longer. Worrying that because Victoria was "a loyal ho," she would go directly back to McCarty, Estores accompanied Victoria and Christine to the South Cove apartments where both Estores' friend Leonard Robinson and Ramaan Hall had apartments. 28 ROA 6200-22.

At some point, Estores left the South Cove with Leonard Robinson while Victoria and Christine stayed behind in his room. Id. Ramaan Hall was at his apartment just a few doors down at the time they arrived at the South Cove. Hall was close friends with Malone and Malone called him looking for Victoria and Christine. 29 ROA 6101. Hall warned the girls that they should leave because Malone and McCarty were looking for them, but Victoria and Christine failed to heed the warning. 29 ROA 6485-97. When Malone and McCarty arrived at the South Cove, they were yelling, exclaiming that "those bitches"—Victoria and Christine—were "out of pocket."[3] Malone was carrying a golf club and McCarty,

[3]This, in "pimp culture," apparently means that a prostitute is in violation of her pimp's regulations.

who was driving Herb's Oldsmobile, backed the car up near the stairs that led to the second-floor apartment that Victoria and Christine were occupying. Malone and McCarty gained entry into the unit and led Victoria and Christine down the stairs and into the car. 29 ROA 6497-6509. No one, aside from the defendants, saw either Victoria or Christine alive again.

A few days later, on Saturday May 20, 2006, an individual walking his dog found the dead bodies of two nude females. 36 ROA 8017-33. The first body—later determined to be Christine—had multiple blunt-force injuries to the head and a deep incised knife wound around the nape of the neck. She had so many overlapping wounds to the back of her head that it was impossible to determine how many times she was struck. 31 ROA 6917-22. The second body—later determined to be Victoria—also had major injuries to the back of her head and the pattern of the injuries indicated that they were caused by a golf club or hammer. 31 ROA 6869-81. Victoria also suffered various stab wounds, other blunt force trauma to the body, strangulation injuries, and defensive wounds. Id.

When Estores viewed media reports that two dead females were found in the same place in Henderson that she was driven to and attacked earlier that week, she contacted Henderson police (HPD). 28 ROA 6249-52. Based on the information that Estores provided to them during her initial interview, HPD detectives begin searching for Donald Herb, Malone, and McCarty. When they arrived at Donald Herb's house to interview him, Herb informed them that McCarty had just left the house and was traveling on foot. Detective Craig Ridings found him nearby and asked him if he would consent to an interview. 36 ROA 7972. All three were eventually arrested and charged with the kidnapping and murder of Victoria and Christine. Donald Herb was later determined to be an accessory after the fact, and re-charged accordingly. Herb pleaded guilty and agreed to testify against McCarty and Malone. 33 ROA 7271-77.

Jury selection in McCarty's trial began on October 12, 2010. 20 ROA 4382. On November 3, 2010, a final information was filed charging McCarty with Conspiracy to Commit Murder, Battery With Substantial Bodily Harm, Robbery, Pandering, Conspiracy to Commit Burglary, Burglary, Two Counts of Conspiracy to Commit Kidnapping, Three Counts of First-Degree Kidnapping, Two Counts of Robbery With the Use of a Deadly Weapon, and Two Counts of Murder With the Use of a Deadly Weapon.

During the guilt phase of the trial, the above evidence was adduced. Additionally, Donald Herb testified to his involvement. Herb was at home in the early morning hours of May 17, 2006. McCarty called him several times and told him that they had found Victoria and Christine and asked him to drive out to Henderson to meet them. 32 ROA 7198-33 ROA 7202. After refusing at first, he eventually relented. Herb drove from his home in northwest Las Vegas to a desert area of Henderson just off Boulder Highway. 33 ROA 7205-06. McCarty and Herb called each other several times so that Herb could find where McCarty and Malone were located. During these phone calls, Herb overheard a portion of the conversation that McCarty was having with Malone:

> McCarty (to Malone): "Hurry up!"
> Malone: "The club's broken."
> McCarty: "Just hit the bitch in the head with a rock!"
> 33 ROA 7210.

After finding the location, Herb waited near a trailer advertising new construction. McCarty and Malone eventually appeared, driving his green Oldsmobile, and McCarty motioned for Herb to follow them. McCarty drove southeast on Boulder Highway through Boulder City and pulled off the road at a location approximately four miles west of the Hoover Dam. 33 ROA 7211-15. When they arrived, McCarty informed Herb that Malone expressed a desire to kill Herb because Herb was "a loose end," but that McCarty had convinced him otherwise. McCarty directed Herb over to the open trunk of the Oldsmobile. Inside the trunk, Herb observed three or four medium-size rocks, a knife, and

pieces of a golf club. 33 ROA 7219-20. Malone handed Herb the detached head of the golf club and told him to dispose of it. McCarty removed a wooden-handled steak knife from the trunk and walked out into the desert to get rid of it. Id. Herb threw the head of the golf club into the darkness. They then left that location, with McCarty driving the Oldsmobile to the Sportsman's Manor for cleaning and Herb driving Malone back to Malone's abode. 33 ROA 7261-62. The three of them later assembled at a Corrina Phillips and Lynn Nagel's room at the Sportsman's Manor to discuss the alibis they would create: Malone's wife was to say that he was home all night and Phillips and Nagel would fabricate a story that placed McCarty with them. Id. at 7265-71.

Though Herb initially lied to investigators, he eventually began cooperating. 33 ROA 7273. Detectives credited his story that he was only an accessory after the fact when cell phone evidence corroborated it. 37 ROA 8103-26, 8170. That evidence was presented at trial and demonstrated that:

- In the early morning of May 17, 2006, McCarty's phone was in the vicinity of the new-construction desert area of Henderson (approximate time of the beating of Estores).
- A few hours later—at 2:24 a.m.— McCarty's phone was in the vicinity of the Hard Rock Casino.
- Later that day—May 17 at 9:27 p.m.—McCarty's phone was in the vicinity of the Sportsman's Manor.
- At 12:30 a.m. (now May 18, 2006), Malone's cell phone was near the South Cove Apartments.
- At 12:59 a.m., McCarty's cell phone was near the South Cove Apartments.
- At 1:08 a.m., Herb's cell was near his home.
- At 1:46 a.m., McCarty calls Herb. McCarty's cell phone was in the vicinity of the new-construction desert area of Henderson and Herb's cell phone was at his home.
- Between 2:11 and 2:38 a.m., McCarty and Herb continued to call each other and cell phone tower locations demonstrated that McCarty was still in the area where the bodies were later found and that Herb has left his home and was traveling to the scene.
- By 2:56 a.m., cell phone tower data show that McCarty, Malone, and Herb are in the vicinity of the location where evidence was disposed of.
- Between 4:23 and 7:00 a.m., McCarty's phone is in the vicinity of the Sportsman's.

37 ROA 8193-8219.

After deliberating for four hours, the jury found McCarty guilty on all counts charged. 40 ROA 8935-42. At the penalty phase, the State offered seven

aggravating circumstances: Five related to the guilty verdicts in the first phase (convictions for First-Degree Kidnapping of Estores, Battery with Substantial Bodily Harm, Robbery, and the First-Degree Kidnappings of Victoria and Christine), that the murders were committed in pursuit of monetary gain and that McCarty had been convicted of more than one count of Murder. 40 ROA 8980-9000. The State also presented testimony related to McCarty's past criminal convictions, including several instances of violence towards women, 41 ROA 9002-9062; see also 47 ROA 10520 – 48 ROA 10729, and victim-impact testimony from relatives of Victoria and Christine.

In mitigation, the defense introduced evidence of McCarty's cerebral palsy, his somewhat difficult childhood, his love for his children, and his past good behavior while in detention awaiting trial. 42 ROA 9200 – 43 ROA 9724. The jury found that all seven aggravators were proven beyond a reasonable doubt, found that 11 out of the 23 mitigating circumstances offered by the defense existed, concluded that the mitigators did not outweigh the aggravating circumstances, and elected a sentence of death on each count of First-Degree Murder. 44 ROA 9744-79. The district court later imposed various sentences as to the remaining counts. 45 ROA 9928. This direct appeal from the Judgment of Conviction and sentences of death followed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT NO CONSTITUTIONAL VIOLATION OCCURRED WHEN DETECTIVES INTERVIEWED MCCARTY

Henderson Police Department (HPD) detectives interviewed McCarty on three dates: May 25, 2006; June 1, 2006; and, June 6, 2006. 12 ROA 2494-2576. The May 25 statement was taken in the parking lot of a 7-11 convenience store and McCarty was not provided Miranda warnings until he was placed under arrest at the end of the interview. McCarty moved to suppress these statements and the district court held an evidentiary hearing on the motion. 14 ROA 3079 – 15 ROA

3230. After hearing the evidence and taking the matter under advisement, the district court concluded that "looking at the totality of the circumstances this Court finds that a reasonable person would have felt at liberty to terminate the interrogation and leave during the May 25th, '06 statement at issue, so the statements made before he was Mirandized were not the product of custodial interrogation." 14 ROA 2987.[4] Further, in light of McCarty's "lengthy and sophisticated criminal history" and "familiar[ity] with the criminal justice system," and considering that before the interviews McCarty had asked to speak with law enforcement, the court determined that the statements were not involuntarily taken. Id. While this court accords deference to the district court's factual "scene-setting" findings, its ultimate determinations as to voluntariness and custodial status for Miranda purposes are subject to de novo review. Rosky v. State, 121 Nev. 184, 192, 111 P.3d 690, 695 (2005). The district court did not err.

A

McCarty Was Not in Custody at The Initiation of the May 25 Interview And Therefore No Miranda Violation Occurred

After speaking with Donald Herb, HPD detectives determined that an interview with McCarty was required. 14 ROA 3090-93. Detective Craig Ridings—driving an unmarked truck with no emergency lights and not being in uniform—spotted McCarty walking on the side of the road in an area near Herb's house in northwest Las Vegas. Id. When Ridings asked to speak with him, McCarty expressed relief that Ridings was with law enforcement because people he knew were out to hurt him. They drove to a nearby convenience store and Ridings asked McCarty if he would wait to speak with Detective Gerald Collins. McCarty agreed and Ridings bought him a soda and a pack of cigarettes. They sat on the open tailgate of the truck and, while waiting for Collins, passed the time

[4]McCarty was given Miranda warnings at the opening of the June 1 interview and acknowledged that he still understood those rights at the start of the June 6 interview. 12 ROA 2538, 2553. The sufficiency of those warnings has not been challenged.

making small talk. Id. at 3097-3100, 3107. McCarty seemed to be in a pleasant mood. Id. at 3137-39. Collins arrived at 6:30 p.m. and commenced the taped interview. The other detectives (Ridings and Detective Webster) stood at a remove, some 15 feet away. Id. As Collins commenced the interview, he mentioned that he wanted to talk to McCarty about a beating. McCarty replied that he also wanted to talk about that. Id. at 3141; 12 ROA 2494-96.

The evidence supporting the district court's conclusion that McCarty was not in custody at the start of the May 25 interview is substantial. The prophylactic warnings mandated by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), are intended to protect an individual's Fifth Amendment right against self-incrimination in the context of custodial interrogation by an agent of the state. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); Silva v. State, 113 Nev. 1365, 1370, 951 P.2d 591, 594 (1997). Therefore, if an individual is not in custody for Miranda purposes, that right is not implicated and warnings are not required. Id. "'Custody' for Miranda purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Rosky, 121 Nev. at 191, 111 P.3d at 695. In this case, it is undisputed that McCarty was not formally arrested until the end of the May 25 interview, at which point he was given the Miranda warnings. See 12 ROA 2528-29; 14 ROA 3144.

"If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel 'at liberty to terminate the interrogation and leave.'" Rosky, 121 Nev. at 191, 111 P.3d at 695 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)). To conduct this inquiry, this Court analyzes the totality of the circumstances. Id. Among these circumstances are: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." Rosky, 121 Nev. at 192, 111 P.3d at 695. The factors that this Court considers when reviewing the indicia-of-arrest component include: "(1) whether

the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning." State v. Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998). No single factor is conclusive. United States v. McKinney, 88 F.3d 551, 554 (8th Cir. 1996).

This interview was conducted outside of a 7-11, not a police station. McCarty appeared to be at ease and was drinking cola and smoking cigarettes. McCarty was not restrained and, importantly, expressed his independent desire to talk to police. At the initiation of the interview, McCarty was a person of interest, not a suspect, 15 ROA 3151, 3168, and other persons of interest were still being interviewed. While McCarty was not specifically told that he could leave at any time, he was not told that he couldn't. 14 ROA 3117. McCarty did not confess to any crime before being Mirandized, clearly had a story that he wanted detectives to hear, and voluntarily accompanied Ridings to the 7-11 in order to tell that story. Collins was the only detective interviewing McCarty and the tone of questioning was conversational and non-confrontational. Finally, it should be noted that when McCarty was Mirandized upon arrest, the warnings did not alter his decision to speak. 12 ROA 2529-34. A review of the totality of the circumstances here leads inevitably to the conclusion that he was not in custody until he was formally arrested at the end of the May 25 interview. Accordingly, there was no Miranda violation and the district court correctly declined to suppress the May 25 statement.

As to the effect of error, should this Court discern any, reversal is unwarranted because this Court can easily conclude that the verdict would have been the same even if the unwarned portion of the May 25 interview had been

suppressed. First, during this portion McCarty does not confess to any crime, although he admits to being present when Malone battered Estores (the crime for which he was formally arrested at the conclusion of that interview), but claims that he intervened to stop the beating once he realized what was going on. 12 ROA 2518-19. Thus, the only conviction for which reversal could even be contemplated is his conviction for Battery With Substantial Bodily Harm (count 5). Yet independent evidence supports that count, as Estores compellingly testified to the beating and to McCarty's role in aiding and abetting it. 28 ROA 6172-97. Second, even if this Court were to find constitutional error in the unwarned portion of the May 25 interview, the integrity of the warned statements is unaffected and their use at trial is permitted. See United States v. Patane, 542 U.S. 630 (2004) (holding that Wong Sun fruits-of-the-poisonous-tree suppression is not appropriate in the context of a Miranda violation and the remedy is simply suppression of the unwarned statement, not evidence derived therefrom); Cota v. State, 124 Nev. 1459, 238 P.3d 803 (2008) (concluding that initial taint of unwarned statement does not affect subsequent warned statements).

B

McCarty's Statements Were Voluntarily Taken

The district court correctly concluded that McCarty's statements taken on May 25, 2006, June 1, 2006, and June 6, 2006 were voluntary. "To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant." Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). Factors to be considered when this Court reviews whether the defendant's will was overborne "include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Id.

As to McCarty's personal characteristics that militate against finding that he

is coercible, he was a mature man in his mid-30s with an extremely extensive criminal history. See 47 ROA 10451 – 48 ROA 10729; see also Rosky v. State, 121 Nev. 184, 192, 111 P.3d 690, 695 (2005) (noting that court may consider defendant's criminal history and experience of interactions with law enforcement when making voluntariness determination). None of the defense's experts testified that McCarty was of low intelligence, see 43 ROA 9607-64, and letters that McCarty wrote to his children reveal his competent literacy as a reflection of his intelligence, see e.g., 45 ROA 9970.

As to the circumstances of the May 25 statement, those are fully described above: McCarty was not in custody until near the end of the interview; questioning took place for under 2 hours in a non-police-dominated public venue; McCarty was made comfortable with soda and cigarettes; and McCarty did not confess to any crime. That statement was voluntarily taken.

The June 1 statement was taken after Miranda warnings while McCarty was in the custody at the law library of the Henderson Detention Center (HDC). 12 ROA 2538; 14 ROA 3151-54. The interview was initiated after McCarty's father—a retired law enforcement officer—called the Clark County District Attorney's Office at McCarty's behest. The screening deputy at this office contacted the HPD detectives directing the investigation and alerted them that McCarty wanted to talk. 14 ROA 3151-54. Detectives Collins and Ridings then went to the HDC to see what McCarty wanted to say. McCarty was Mirandized and an interview was conducted. That the interview was initiated only after McCarty's expression of his desire to speak should conclusively foreclose any post hoc argument that the statement was given involuntarily.

The June 6 statements had a similar provenance: McCarty was reminded of his Miranda rights and evinced a desire to speak to detectives, but was confronted with his cell phone records that demonstrated that he was not at the places he earlier had claimed to be at the time of the murders. 12 ROA 2553-76. At that

point, McCarty changed his story and claimed that Herb had his cell phone and that McCarty was only an accessory after-the-fact, helping to dispose of evidence. To bolster this new story, McCarty offered to show detectives where he purportedly disposed of evidence, including the knife and a rock used to kill the victims. Id. Detectives agreed to McCarty's proposal and took him from HDC. McCarty directed them to the scene and the knife was recovered.

McCarty's contention on appeal is that these statements were involuntarily taken because they were induced by detectives' encouragement of McCarty's "reasonable belief" that he "would be able to cut a deal with the D.A." AOB 24. It is unclear to the State exactly how this contention relates to the voluntariness of the statement. McCarty was repeatedly told that detectives cannot "make deals." 12 ROA 2538-39, 2542; 15 ROA 3154, 3205. In fact, McCarty acknowledged as much when he stated several times that "you [the detective] can't help me." 12 ROA 2538-50. Instead, detectives responded by telling him, in various ways, that honesty cannot hurt him and that if he was telling the truth about only helping to clean up evidence after the crimes, he should start telling the truth. 12 ROA 2528-29, 2556.

Whether McCarty had a subjective belief that whatever story he was proffering to the detectives would help him "cut a deal" is irrelevant; the only pertinent consideration is whether detectives made him a promise that unlawfully extracted his partial confession. See Passama v. State, 103 Nev. 212, 215, 735 P.2d 321, 323 (1987) ("If these promises, implicit and explicit, tricked [defendant] into confessing, his confession was involuntary."). The record is utterly devoid of any promise made to McCarty. Cf. Steese v. State, 114 Nev. 479, 489, 960 P.2d 321, 328 (1998) (holding confession voluntary where "no testimony at [evidentiary] hearing indicated that the police had either made any promises to Steese should he confess or made threats should he fail to do so."). McCarty claims that detectives made "promises of leniency," yet his citation to the record in

support of this contention reveals no promise whatever. McCarty's tortured "implication of a promise"—Detective Ridings' comment that evidence McCarty disposed of in a charity box might no longer be there if they wait too long to retrieve it—is nothing more than a statement of fact. Accordingly, the district court did not err in concluding that McCarty's statements were voluntarily taken and in denying his motion to suppress and various related mistrial-motions throughout trial.

C

McCarty's Interviews with Detectives Were Not "Offers in Compromise"

McCarty contends that his statements to HPD detectives were part of a formal plea bargaining process, and thus their suppression as "offers in compromise" was required by Nevada law. This contention—again apparently based on McCarty's asserted belief that he was "cutting a deal" when speaking to detectives despite their repeated warnings that they could do no such thing—should be summarily rejected.

"Evidence of a plea of guilty or guilty but mentally ill, later withdrawn, or of an offer to plead guilty or guilty but mentally ill to the crime charged or any other crime is not admissible in a criminal proceeding involving the person who made the plea or offer." NRS 48.125. The policy that this law supports is the integrity of the formal plea bargaining process. See Mann v. State, 96 Nev. 62, 64-65, 605 P.2d 209, 210 (1980) ("We would blind ourselves to reality to believe that the accused or the prosecutor would discuss relevant matters openly and honestly if the possibility existed that any such statements could and would be used against them in future proceedings."). "To determine if a discussion should be characterized as a plea negotiation, this court considers whether the accused had a subjective expectation of negotiating a plea at the time of discussion and whether that expectation was reasonable." Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013,

1022 (2000) overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

Here, McCarty meets neither the subjective belief nor the reasonable expectation prong. First, McCarty's assertion on appeal that he subjectively believed the detectives were empowered to "cut him a deal" is flatly belied by the record. See e.g., 12 ROA 2538 ("You told me once before you can't help me. . . . If you can't help me, I need to talk to the district attorney."). Even a cursory review of the disputed statements shows that McCarty understood that detectives could not offer him a deal and that he continually asked for the prosecutor so that plea discussions could begin. The contemporaneous evidence in the record—rather than McCarty's post hoc assertions on appeal—of what he subjectively believed detectives were empowered to do is dispositive. Further, even if this Court accepts his assertion of subjective belief, that belief is not reasonable under the circumstances where detectives told McCarty over and over some variant of "if you're looking for a deal, you know I can't give that to you." 12 ROA 2539; see McKenna v. State, 101 Nev. 338, 344-45, 705 P.2d 614, 619 (1985) ("McKenna was informed by [detectives that they] lacked authority to make deals, but that [they] would relay any information to the District Attorney's office. . . . Th[ese] facts clearly show that McKenna could not have entertained a reasonable expectation that [detectives] were authorized to negotiate a plea."), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011) . McCarty's statements were not part of a formal plea bargaining process and thus suppression of the statements as "offers in compromise" was neither available nor warranted.

II
THE FORMAL ADVERSARIAL PROCESS, AND THUS DEFENDANT'S RIGHT TO COUNSEL, DID NOT BEGIN UNTIL THE FILING OF THE CRIMINAL COMPLAINT ON JUNE 7, 2006

McCarty argues that arrest is a "critical stage of the judicial process" and that his Sixth Amendment right to counsel therefore attached on May 25, 2006.

McCarty errs. The United States Supreme Court has "construed the Sixth Amendment guarantee [of counsel] to apply to 'critical' stages of the proceedings." Patterson v. State, 129 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. 17, Apr. 4, 2013) at 5-6. "[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387 (1977) (internal quotations omitted).

The mere fact of arrest does not implicate the Sixth Amendment. See United States v. Gouveia, 467 U.S. 180, 190 (1984) ("[W]e have never held that the right to counsel attaches at the time of arrest."); State v. Garrison, 128 P.3d 741, 744 (Alaska Ct. App. 2006); Com. v. Arroyo, 723 A.2d 162, 169 (Pa. 1999) (declining to extend right to counsel to mere-arrest phase under state constitution); State v. Luton, 927 P.2d 844 (Haw. 1996); People v. Clair, 2 Cal.4th 629, 828 P.2d 705 (1992) ("It is not enough, for example, that the defendant has become the focus of the underlying criminal investigation."); State v. Dampier, 314 292, 333 S.E.2d 230 (N.C. 1985); Griffith v. State, 55 S.W.3d 598 (Tex.Crim.App.2001).

Because the State—in this case the Clark County District Attorney's Office—had not formally filed charges accusing McCarty of any crime, there was no "criminal prosecution" or "adversarial process" to which a Sixth Amendment right could attach. See 3 WAYNE R. LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 11.2(b) (2012) ("Of course, no matter how significant the particular proceeding, the Sixth Amendment right does not apply if the proceeding is not part of the "criminal prosecution."). The fact that there was a 13-day period between arrest and formal charge does not impact the Sixth Amendment analysis. See Gouveia, 467 U.S. at 190 (noting that while a 19-month delay between initial detention and arrest occurred, the remedy did not rest with

Sixth Amendment, rather with statutory speedy-trial and due-process objections). McCarty's argument that his Sixth Amendment right to counsel attached upon arrest should be rejected.

III
THE DISTRICT COURT CORRECTLY DECLINED TO EXCLUDE DEFENDANT'S STATEMENTS ON THE BASIS OF NON-EXISTENT PROSECUTORIAL MISCONDUCT

McCarty's next claim is highly misleading. McCarty asserts that he was "surprised" by the State's reliance on McCarty's statements to HPD detectives during guilt-phase rebuttal argument and this reliance somehow constitutes an act of prosecutorial misconduct. AOB 31-37. In furtherance of this curious claim, McCarty includes three pages of block-quoted, out-of-context summary of the State's rebuttal. AOB 32-34. The source of McCarty's "surprise" entirely avoids detection. Before guilt-phase opening statements, defense counsel sought an order from the district court that would have compelled the State to disclose whether or not it was going to introduce McCarty's statements. 27 ROA 5952-60. The State replied that it was unsure; the decision on which parts of the statements to play would depend on how the evidence comes out at trial. Accordingly, neither side addressed McCarty's statements during opening. 27 ROA 6034-60.

The State then declared that it would play some portion of McCarty's statements during the testimony of the HPD detectives. The defense objected. The district court determined that there was no basis to exclude the statements simply because the State was unsure at the beginning of trial as to whether it would employ a piece of evidence for which a hearsay exception permitted its use by the State (admission of party opponent), but not by the defense. 35 ROA 7720-28. This Court reviews the district court's decision for an abuse of discretion. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The district court did not err.

First, it must be noted that McCarty's misleading claim on appeal may lead the reader to assume that McCarty's statements were played for the first time

during the State's rebuttal argument, thereby "surprising" the defense and foreclosing any opportunity to respond. Of course, that could not be true. In fact, those statements were first played during the State's case-in-chief. 36 ROA 7916 – 37 ROA 8108. Therefore, the defense had several opportunities to respond to the non-surprising introduction of this evidence: on cross-examination of the detectives, during its case-in-chief, and in closing argument. In fact, the defense did employ McCarty's statements for its own purposes in its closing argument. 39 ROA 8757-80.

Second, there is no legal authority for the remedy that McCarty sought from the district court, and the district court acknowledged as much in making its ruling declining to issue an order to compel. 35 ROA 7724-25. McCarty likewise fails on appeal to cite any specific authority bolstering the availability of such a remedy.

Third, McCarty's claim is not cognizable as an assertion of prosecutorial misconduct because his objection below was not presented to the district court as a claim of prosecutorial misconduct. "[T]o 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." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (internal quotations omitted). Further, not only did McCarty fail to preserve the error, the actions of the prosecutor in refusing to state definitively whether he would use the hearsay statements cannot be construed as misconduct. This action—reasonable given the dynamic nature of the presentation of evidence at trial and entirely consonant with the law and rules of evidence—was not misconduct and simply provided no basis for suppression of the statement.[5]

[5]Finally, even if the prosecutor's action could somehow be deemed misconduct, McCarty cites no authority for the proposition that the remedy is suppression of his voluntary statements.

IV
THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES WAS NOT BASED ON RACIAL ANIMUS AND THUS COMPLIED WITH BATSON V. KENTUCKY

McCarty asserts that the two African-American jurors the State excused—but not the African-American juror the defense excused—were challenged based on their race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). The district court disagreed and denied both the defense's and the State's Batson challenges, concluding that neither side's race-neutral reasons for exercising the challenges as to the jurors they struck were impermissible pretext. 27 ROA 5968, 5997, 6008.

"There are three stages to a Batson challenge—(1) the opponent of the peremptory challenge must show a prima facie case of racial discrimination; (2) the proponent of the peremptory challenge must then present a race-neutral explanation; and (3) the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination." Hawkins v. State, 127 Nev. ___, ___, 256 P.3d 965, 967 (2011) (internal quotations omitted). This Court's review accords deference to "[t]he trial court's decision on the ultimate question of discriminatory intent." Diomampo v. State, 124 Nev. 414, 422–23, 185 P.3d 1031, 1036–37 (2008) (alteration in original) (internal quotation marks omitted).

First, McCarty challenged the State's exercise of a peremptory challenge to remove Jason Rogers (#98). McCarty utterly failed to establish a prima facie case of discrimination, but the analysis moved on to the second step anyway, as often occurs. The State explained its concern that Rogers was evasive and equivocating, refusing to elaborate on what kind of crime he had been the victim of, refusing to state whether or not he could impose the death penalty, and demonstrating a similar evasiveness in completing his juror questionnaire. 26 ROA 5967-69. Other than stating that Rogers did not meet the standard for dismissal for cause,

McCarty could not rebut the State's race-neutral proffer, and the proffer was accepted by the district court.

Second, McCarty challenged the State's exercise of a peremptory challenge to remove venireperson Brooks (#36). Again failing to establish a prima facie case of discrimination—other than to assert that Brooks is apparently African-American—the State was asked its reason for the strike. The State replied that Brooks was evasive when being questioned about a crime for which her brother was prosecuted. 26 ROA 5970-6000. Specifically, the prosecutor stated that "one of the biggest issues for the State is having a family member who is not happy with the State of Nevada because we prosecuted their brother or if their brother had a violent crime, which is a question I asked every juror, I believe, that had a family member involved in the criminal justice system at all." 26 ROA 5998. The district court recognized that this is a valid race-neutral reason for exercising the strike.

McCarty argues now, as he did below, that the "statistics" show that because more African-Americans are arrested, "virtually every African-American would be ineligible to serve on a jury." AOB 45. This borderline-offensive and clearly erroneous argument should be rejected. Even if this court were to accept McCarty's "statistics" as valid (but certainly not his inference from those statistics), disparate impact does not constitute the type of pretext for intentional discrimination that Batson attempts to prevent.

Third, McCarty's attempt to place on the record that the jury was not composed of any African-Americans should be viewed with skepticism: that "record" was not made until the conclusion of the penalty phase, after two guilt-phase jurors were removed. 44 ROA 9891. Also, while it is possible that there were no African-Americans on the jury, there were an unknown number of minorities on the jury. See e.g., 25 ROA 5758 (Selected Juror #15, Miriam Terrazas stating that she considers herself a minority). This was not an "all-white jury." AOB 41. The fact of the matter is that this Court will never know how

many minorities were on the jury because the defense failed (or chose not to) ask. Instead, the only contention in the record is based on the parties' visual assessments of racial identity—a dubious endeavor indeed, as it is highly suspect that lawyers and judges are competent to make definitive visual assessments of an individual's ethnic and racial background and identity. However, what is certain is that there would have been at least one African-American deliberating McCarty's fate, if McCarty himself had not struck him from the jury. 27 ROA 6008 (McCarty striking black juror "because of his military background").

V

REVERSAL OF DEFENDANT'S CONVICTIONS IS NOT REQUIRED BECAUSE ONE JUROR BRIEFLY NODDED OFF NEAR THE END OF A SIX-WEEK TRIAL

McCarty claims that his convictions must be reversed because Juror Nill (#16) was "sleeping through substantial portions of the trial." AOB 47. In fact, an accurate review of the record reveals that Nill only nodded off at one time, near the end of the penalty phase. The district court made an extensive record and, upon learning from the marshal that Nill was in fact nodding off, replaced the juror with an alternate. The district court acted conscientiously and McCarty was not prejudiced.

The first time this issue was brought to the district court's attention, defense counsel claimed that Nill appeared to be sleeping. 32 ROA 7148. Counsel for the State—asserting that he was physically the closest to the juror—noted that Nill's eyes were simply glancing down, they were not closed. The district court concluded that it was too far away to tell and stated its intention to pay close attention to Nill's condition. Id. Shortly thereafter, Nill, the juror that McCarty contends was sleeping and not paying attention, submitted a juror question. 32 ROA 7176. Nevertheless, defense counsel asked that he be removed because he "seems to be having difficulty." The State noted that while it appears from afar that he is sleeping, closer inspection reveals that he is looking down at a notepad and taking notes. 32 ROA 7180. The district court confirmed that it, too, noted

that while from afar Nill appeared to be sleeping, he was simultaneously writing in his notepad and thus could not be sleeping. 32 ROA 7181. The court made a further record confirming this observation on day 12 of the guilt phase. 35 ROA 7515. Defense counsel agreed that it too looked at Nill while he appeared to be asleep and saw him taking notes. Id.

The issue next arose on the 14th day of the guilt phase. Defense counsel again complained that Nill looked as if his eyes were closed. 37 ROA 8172. Counsel for the State noted that Nill kept his notepad on his lap and was writing furiously. The State further observed that because Nill's notepad was below the partition in the jury box, defense counsel would not be able to see him writing. Id. The district court confirmed that it appeared he was simply looking down and writing. Id. At the end of a long week of testimony—Friday, November 5, 2010, the 16th day of the guilt phase—several jurors were showing signs of fatigue and complained to the marshal that they were "flagging." 38 ROA 8524. Testimony concluded minutes later and the jury was released for the weekend.

Finally, on the second day of the penalty phase, the district court noted that Nill appeared to have his eyes closed, but that this time his hands were motionless and his head was jerking in the manner of someone beginning to fall asleep. 42 ROA 9369-70. The court stated that it was confident he was not sleeping during the guilt phase but that it appeared he may be losing concentration at that point. Id. The marshal confirmed the court's observation. Id. The court then brought Nill in to question him about his behavior. 42 ROA 9423. Nill explained that he often concentrates better with his eyes closed due to his cataract condition and denied that he was sleeping at any point. 42 ROA 9423-24. The marshal asserted that Nill was sleeping, but that this is the first day he had been inattentive. 42 ROA 9431. Instead of excusing Nill altogether, the district court then decided to place Nill on the alternate list and remove him from the jury deliberating on penalty. Id.

District courts, which are best placed to make factual determinations related to juror conduct, have broad discretion in handling a situation in which a juror has fallen asleep during testimony. United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000); United States v. Bradley, 173 F.3d 225, 230 (3d Cir. 1999); State v. Sanders, 750 N.E.2d 90, 107 (Ohio 2001). "A juror's 'mere falling asleep for a short time does not of itself constitute a sufficient cause for a new trial.'" State v. Prince, 250 P.3d 1145, 1162 (Ariz. 2011) (quoting Whiting v. State, 516 N.E.2d 1067, 1068 (Ind. 1987)) (internal alterations omitted). Further, where, as "[h]ere, there is no evidence that the sleeping juror missed large portions of the trial or that the portions missed were particularly critical," reversal is unwarranted. Freitag, 230 F.3d at 1023; see also United States v. McKeighan, 685 F.3d 956, 974 (10th Cir. 2012) (noting that "[c]ourts also may review the record to determine whether the district court was made aware of sleeping jurors, whether the court took action, and whether the record establishes that jurors were actually sleeping."), cert. denied, 133 S. Ct. 632, 184 L. Ed. 2d 411 (U.S. 2012); Prince, 250 P.3d at 1162 ("Juror 16 nodded off just once during the aggravation phase, when the gun expert's prior testimony was read. Nothing indicates that the testimony was particularly critical or that Juror 16 missed large portions of the trial."); Menard v. State, 193 S.W.3d 55, 60 (Tex. App. 2006) (concluding that "although the juror admitted to 'dozing a couple of times,' he confirmed to the trial court that he heard the evidence, 'was really apparent of what was going on,' and was able to render a fair verdict" and holding that "[t]he trial judge, as trier of fact, was free to believe the juror's representations on this point."); cf. Com. v. Braun, 905 N.E.2d 124, 126 (Mass. App. Ct. 2009) (concluding that trial court abused its discretion by failing to make any inquiry into whether the juror was in fact sleeping or not during trial) (internal quotations and alteration omitted).

In this case, the district court had broad discretion to credit or disregard the observations and representations of what counsel for the parties saw, what the

marshal observed, what the juror stated, and what the court itself saw. This court should defer to those findings. The court did have a duty of inquiry into the situation and discharged that duty conscientiously. Because the lower court found that there was no evidence that Nill was sleeping on any other occasion than briefly at the second day of penalty—after which it swiftly removed Nill from the deliberating jury—the court did not abuse its discretion in this matter.

VI
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING ESTORES TO TESTIFY TO THE BEATING SHE RECEIVED FROM MCCARTY'S CO-CONSPIRATOR

McCarty claims that the district court erred by overruling its objection to Estores' testimony about an incident where Malone beat her severely at the Sportsman's approximately six weeks before the charged conduct. Malone told her "it's PT time" and instructed her on how to take the beating for failing to pay him money. 28 ROA 6080-6101. Although Estores did not recall McCarty being present during the beating, McCarty claimed that he was there and tried to stop it. 12 ROA 2498. This is precisely what he claimed happened when McCarty drove Malone, Victoria, Christine, and Estores out to the desert location and Malone beat Estores again; conduct for which McCarty was charged. McCarty objected that this was irrelevant prior bad act evidence. The district court determined that as long as the evidence would at some point show that McCarty acknowledged being present during the beating, it was relevant and gave a limiting instruction to the jury. 28 ROA 6090-91.

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); see Bigpond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1249 (2012) (concluding that NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence not exhaustive). Here, the district court did not manifestly err. Although no evidence of McCarty's presence at or

encouragement of the earlier beating exists apart from his statement sufficient to satisfy corpus delicti and thereby permit a charged count for the Sportsman beating, the evidence is relevant to show modus operandi, knowledge, motive, identity, and plan as it relates to the charged beating of Estores and murder of Victoria and Christine. NRS 48.045. In each case, the motive was to show "the bitches" who were "out of pocket" precisely who was in control.

Additionally, any error in permitting the testimony was mitigated by the Limiting Instruction given just before the testimony was adduced. Finally, given the overwhelming strength of the evidence of McCarty's guilt adduced at trial—including McCarty's own statements and knowledge of the crime; the compelling testimony of Estores and Donald Herb; and the corroborating cell phone data evidence—any error here could be nothing but harmless.

VII
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RULING ON MCCARTY'S HEARSAY OBJECTIONS

McCarty claims that the district court erred when it overruled two and sustained one of his hearsay objections. Upon proper objection, the district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

First, McCarty challenges Estores' testimony relating Malone's reaction when she told Malone she was not his girlfriend, but rather "a free agent." There is no out-of-court statement offered to prove the truth of its assertion; rather it was offered to demonstrate the effect of the statement upon Malone. Thus, it is not hearsay. See NRS 51.035 Further, the defense's precise objection was that any statement Malone made could not properly be admitted as a statement of a co-conspirator because the conspiracy had not been proven yet at that point in the trial. This is the objection the district court properly overruled, noting that evidence had already been developed that Malone and McCarty worked together to pimp out Victoria. Additionally, McCarty seems to frame his hearsay challenges

as "Confrontation Clause" claims. However, there can be no Confrontation Clause violation absent a testimonial statement. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009). As Estores' comment and Malone's demeanor "would [not] lead an objective witness to reasonably believe that the statement would be available for use at a later trial," Medina v. State, 122 Nev. 346, 354, 143 P.3d 471, 476 (2006) (internal quotations omitted), the Confrontation Clause is not implicated.

Second, McCarty complains about a passing hearsay comment Ramaan Hall made in response to the State's question about how Malone's demeanor changed in the time he was hanging out with McCarty. 29 ROA 6478. Although the State inquired about demeanor, the witness relayed a comment Malone made. The defense objected to the comment as hearsay. At bench conference, the State announced its intention to move on and the district court stated its inclination to direct the jury to disregard the comment. Defense counsel declined the offered instruction. Id. Accordingly, it is difficult to discern exactly how the district court erred in this situation. There was no error and—for the same reason as the first claim—the challenged statement is not testimonial and does not implicate the Confrontation Clause.

Third, McCarty asserts that he is entitled to reversal of his convictions because the district court refused to grant his mistrial motion after his statements were played for the jury; specifically, he contends that the detectives' accusation that McCarty was lying during the interview is inadmissible hearsay. These comments by the detectives were not hearsay, as they were not offered to assert the truth of the matter (that detectives would in fact tell the deputy district attorney that McCarty was lying), but introduced only for their effect upon McCarty. NRS 51.035 (defining hearsay). Further, McCarty admits several times during his statements that he was, in fact, lying to detectives and admits that he has just been caught in a lie, thus mitigating any prejudice. See 12 ROA 2522-25, 2542, 2560.

In fact, the entire sequence of statements is a rolling, "evolving" story; i.e., a series of lies.

Finally, as to any error in the district court's hearsay rulings, it would be harmless given the overwhelming strength of the evidence of McCarty's guilt adduced at trial—including McCarty's own statements and knowledge of the crime; the compelling testimony of Estores and Donald Herb; and the corroborating cell phone data evidence.

VIII
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DEFENDANT'S IMPROPER IMPEACHMENT OF TWO WITNESSES WITH NON-EXCULPATORY HEARSAY EVIDENCE

First, McCarty claims that the district court improperly precluded him from confronting a witness, Nicolin Broderway, with the hearsay statement of another, Ramaan Hall. AOB 60-63. McCarty claims that the out-of-court statement Hall made to Broderway—which was itself recorded in Broderway's recorded interview with HPD—was inconsistent with Hall's earlier testimony. The district court ruled that the defense should have impeached the declarant who actually made the statement (Hall) with the purported inconsistency. The district court did not err.

NRS 51.035(2)(a) excludes a declarant's prior inconsistent out-of-court statement from the definition of hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." If the declarant is not cross-examined or otherwise confronted with the statement, it is not exempted from the hearsay rule. See Atkins v. State, 112 Nev. 1122, 1129, 923 P.2d 1119, 1124 (1996) (affirming judgment of district court to admit statement where witness "testified at trial, these out-of-court statements are inconsistent with his trial testimony, [and] he was confronted with these statements at trial and he was cross-examined regarding them.") (emphasis supplied). A similar analysis applies to McCarty's contention that Broderway's report to HPD of Hall's statement to Broderway about Victoria's and Christine's physical condition after their abduction was not hearsay because it was not offered for its

truth—the impeachment with this triple hearsay was only possibly relevant to Hall's testimony and not Broderway's.

Second, McCarty claims that the district court erred when it ruled that the form of defense counsel's impeachment of Harold Herb should be with the transcript of a prior inconsistent statement and not the recording of that statement. Following this ruling, defense counsel confronted Harold Herb with the transcript of his conversation with Donald Herb and he recanted his earlier statement. 32 ROA 7114-18. The witness was impeached. McCarty cites no authority for the proposition that the district court abuses its discretion when it directs the form impeachment should take, particularly when the form of impeachment it directs conforms to basic trial practice. Further, there can be no prejudice because Harold Herb was thoroughly impeached and questioning continued whereby the defense attempted to establish Donald Herb's consciousness of guilt through his father's testimony. See 32 ROA 7113-25.

IX
THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S CHALLENGE FOR CAUSE OF POTENTIAL-JUROR FONTANA

McCarty argues that he should be afforded a new trial because the district court declined to excuse for cause a potential juror who never deliberated in this case. He asserts that this venireperson, Faye Fontana, was "substantially impaired from considering the possibility of parole" and therefore the error caused by the district court's denial of his for-cause challenge entitles him to a new trial. There are several glaring weaknesses to this argument. First, the juror never stated that she could not consider all forms of punishment, only that it would be difficult to either select death or to select an option that held the possibility of parole; in fact, she viewed Life Without the Possibility of Parole as a sentence worse than death. 20 ROA 4415-40. As the district court stated in its ruling on the matter, "difficulty is not the standard" in a challenge for cause. See Id.; see also NRS 16.050(1)(f) (explaining that the grounds for cause include having "expressed an unqualified

opinion or belief as to the merits of the action") (emphasis supplied); Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) ("Because such rulings involve factual determinations, the district court enjoys broad discretion in ruling on challenges for cause."). Second, there can be no prejudice because (1) the juror did not serve on the jury, see 25 ROA 5511; 43 ROA 9456, (2) there is no allegation that the seated jury was not impartial, see Blake, 121 Nev. at 796, 121 P.3d at 578, and, (3) McCarty affirmatively argued to the deliberating jury that it should not consider the sentences that offered the possibility of parole, see 44 ROA 9827-74.

X
THE DISTRICT COURT CORRECTLY ASSESSED THE CONDUCT OF THE PROSECUTOR AND DETERMINED THAT NO RELIEF TO DEFENDANT WAS WARRANTED

This was a long and moderately contentious trial. McCarty asserts that various comments by the prosecutors in this case constitute instances of misconduct and a pattern of misconduct. In Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008), this Court thoroughly discussed how claims of prosecutorial misconduct should be analyzed. The analysis is performed in two steps: first, the court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id. at 1188, 196 P.3d at 476. The court's standard of review depends upon whether the misconduct was preserved for review. Id. at 1189, 124 P.3d at 477.

When the misconduct has been preserved for review, this Court uses a harmless-error standard to determine whether the misconduct warrants reversal. Id. at 1188, 196 P.3d at 476. "The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension." Valdez, 124 Nev. at 1188, 196 P.3d at 476. If the misconduct is of a constitutional dimension, this court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id. (*citing* Chapman v. California, 386 U.S. 18, 24 (1967); Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), modified on other grounds by Mclellan v. State,

124 Nev. 263, 268, 182 P.3d 106, 110 (2008)). If the misconduct is not of a constitutional dimension, the court "will reverse only if the error substantially affects the jury's verdict." Id. (*citing* Tavares, 117 Nev. at 732, 30 P.3d at 1132). In this case, there was no single instance of misconduct, and thus no pattern of prosecutorial misbehavior.

A

The Prosecutor's Single Mistaken Utterance of the Word "Expert" Was Not Misconduct And Did Not Affect the Jury's Verdict

During closing argument, the prosecutor mistakenly called a cell phone company's custodian of records an "expert." The defense objected and the district court corrected the prosecutor. Later, the prosecutor explained that he meant to say something else and it came out wrong. 40 ROA 8927-32. While McCarty's brief on this issue is full of high dudgeon, it is light on prejudice: there is simply no way that this non-constitutional error could have substantially affected the jury's verdict. Calling the custodian an "expert"—one time in a 7-week trial—does not change the "custodian's" damning testimony.[6] Given the overwhelming strength of the evidence of McCarty's guilt adduced at trial—including McCarty's own statements and knowledge of the crime; the compelling testimony of Estores and Donald Herb; and the corroborating cell phone data evidence—any error here could be nothing but harmless.

B

The Prosecutor's Comments did not Constitute "Burden Shifting"

First, McCarty complains that the State improperly shifted the burden of proof when it referenced McCarty's repeated comments in his interviews with HPD detectives that Lynn Nagel and Corrina Phillips would provide him an alibi

[6]McCarty fails to cite to the record for his contention that "[j]ust prior to closing argument, the defense requested that the district court admonish the State that they not be permitted to call the custodian of records an expert." AOB 66. Because it is not part of the record on appeal, this contention should be disregarded on review. See Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal); NRAP 28(e).

and stated that, "they want us to call his alibi witnesses for him." The district court concluded that this comment was not improper because it was specifically directed at rebutting McCarty's assertions in his recorded interview that these witnesses would provide him an alibi. 40 ROA 8932-35. On appeal, McCarty seems to acknowledge the correctness of the district court's action, but asserts that it is prejudicial because neither party addressed McCarty's statements during opening argument. The State is unsure how this non-sequitur addresses the underlying burden-shifting argument. Nevertheless, the district court did not err here and—if it did—the error was harmless given the strength of the evidence adduced at trial.

Second, McCarty complains that the State improperly shifted the burden of proof when it correctly pointed out that the defense did not argue the pandering count during its closing argument. "When assessing the strength of the prosecution's burden-shifting actions and whether they have shifted the burden of proof, courts mainly consider the degree to which: (1) the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) the jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof." People v. Santana, 255 P.3d 1126, 1131-32 (Colo. 2011). Considering these factors, it is clear that the burden never shifted. This argument only pointed out a deficiency in the defense's closing argument; the comment neither stated nor implied that McCarty had a burden to prove anything. Further, the jury was thoroughly instructed after closing arguments that the State alone carries the burden of proof in this case, see 39 ROA 8596, 8611, and courts presume it followed these instructions, see Weeks v. Angelone, 528 U.S. 225, 234 (2000); see also United States v. Diaz–Diaz, 433 F.3d 128, 135 (1st Cir. 2005) (holding that even if prosecutor's possible burden-shifting remarks were error, any error was "immediately and effectively" addressed by "prompt and thorough" instructions to

the jury); United States v. Paul, 175 F.3d 906, 912 (11th Cir. 1999) (stating that to whatever degree the prosecutor's comments may have shifted the burden of proof, any prejudice was cured by the court's and counsel's instructions to the jury); Flowers v. State, 738 N.E.2d 1051, 1058-59 (Ind. 2000).

C

The Prosecutor's Fleeting "Thug" Comment Was Not Improper

The prosecutor referred to McCarty and Malone as "thugs." The defense objected and the district court sustained the objection. The jury was instructed to ignore all comments to which objections were sustained, see 39 ROA 8600, and courts presume it followed this instruction, see Weeks v. Angelone, 528 U.S. 225, 234 (2000). Further, McCarty and Malone battered Estores severely, stole from her purse, and the next day kidnapped and killed two young women; as such they are thugs and the comment was not improper. See State v. Bryan, 804 N.E.2d 433, 465 (Ohio 2004) ("Moreover, the prosecutor's argument that Bryan was 'packing all of these guns around and trying to perpetuate an image to his girlfriend, Janie Winston, that he is a true thug, a gangster, from the gold chains to the lifestyle of an outlaw' represented fair comment on the evidence."); State v. Carson, 883 S.W.2d 534, 536 (Mo. Ct. App. 1994) (concluding that prosecutorial comment characterizing defendant as "thug and a bully" was not improper where "[t]hese terms were linked to the charged criminal conduct. . . . Here, the victim testified she was 'jerked back real quick,' hit in the back, and shoved to the ground. This conduct is the work of a thug and bully."); cf. Harris v. People, 888 P.2d 259, 266 (Colo. 1995) (determining that prosecutor acted improperly by calling defendant a thug just like Saddam Hussein and then extending the Hussein analogy throughout closing and rebuttal arguments).

D
The District Court Did Not Abuse Its Discretion by Denying McCarty's Mistrial Motion(s) Based on the Conduct of the Prosecutor

McCarty asserts a laundry list of grounds supporting its motion for a mistrial based on the prosecutor's conduct and claims the district court erred by denying that motion. AOB 70-72. He then strings together over a page of interesting—but not particularly germane—quotations explaining the law of prosecutorial misconduct. McCarty fails to explain how he was prejudiced by any of the grounds asserted in his laundry list and thus this claim should be denied. "Denial of a motion for mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980). The district court was best placed to assess whether any of the listed actions affected McCarty's rights at trial. It did not err in concluding those rights were unaffected.[7]

E
Neither the Court Nor the Defense Was Deceived

The prosecutor stated that "in my opening I do not discuss Mr. McCarty's statements." In his opening, the prosecutor did not discuss those statements. 27 ROA 6034-56. There was no deceit and thus no actionable misconduct.

XI
EVIDENCE OF DEFENDANT'S CUSTODY STATUS IN 2006 DID NOT AFFECT HIS 2010 TRIAL

McCarty claims that the district court erred in denying his motion for a mistrial. That motion requested relief because McCarty's custody status in 2006

[7]If a rebuttal of McCarty's inadequately pleaded claim is desired, the State submits the following: (1) McCarty was not prejudiced by a fleeting comment that his statements were redacted by the court; (2) Evidence that McCarty was in restraints during the search for evidence in the desert was necessary to explain the portion of the tape where detectives were assisting him in walking around and keeping his balance and that this was not due to his cerebral palsy condition; and, (3) The ostensibly-objectionable comment about "I suggest you pull the criminal complaint" is absent from the record, cf. 36 ROA 8059, 37 ROA 8104 (defense objections to testimony about Donald Herb's charges based on narrative style of testimony).

was referenced twice during trial: once when a detective mentioned that an interview of McCarty occurred at the HDC and once when the State asked a detective to explain a portion of the June 6, 2006 statement where McCarty needed assistance walking in desert terrain.

Prejudice to a defendant results from the trial jury learning about **contemporaneous** custody status and improperly inferring guilt from its knowledge of that status. State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993); Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). The challenged references are to McCarty's in-custody status over four years before trial. Any inference of McCarty's custodial status that can be implied from these references is limited to McCarty's custodial status just after his arrest and not necessarily his custodial status at the time of trial. Simply because a juror learns that a defendant was in custody at the time of his arrest, it cannot be reasonably presumed that the juror will believe that the defendant is still in custody at the time of trial. Additionally, the first comment was minor and fleeting. The second comment was adduced for the sole purpose of explaining that McCarty was in restraints during the search for evidence in the desert was necessary to explain the portion of the tape where detectives were assisting him in walking around and keeping his balance and that this was not due to his cerebral palsy condition. Finally, any error would be harmless given the overwhelming evidence of guilt in this case.

XII
THE DISTRICT COURT DID NOT ERR IN ADMITTING AUTOPSY PHOTOGRAPHS

McCarty claims that the district court erred in admitting autopsy photographs. McCarty asserts that he objected; however, there is only evidence of an objection to three admitted photographs: (1) Ex. 229, 31 ROA 6874; (2) Ex. 248, 31 ROA 6892; and (3) Ex. 213, 31 ROA 6929. The basis of the three objections was that the challenged photographs were cumulative to some others.

The district court overruled the objection, determining that each of the challenged images were helpful to the medical examiner's testimony and demonstrated a unique perspective.

"Admission 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." Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). "Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976) (citations omitted), overruled on other grounds by Alford v. State, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717-18 n.4 (1995).

The district court did not err in admitting the challenged photographs. Exhibit 229 was the only image that clearly showed the injuries to the back of Victoria's skull. 31 ROA 6874. Exhibit 248 was the only image that clearly showed an abrasion to Victoria's left hand. 31 ROA 6892. Exhibit 213 was the only image that clearly showed the perimortem injuries to Christine's buttocks and upper legs. 31 ROA 6929. Where Dr. Kubiczeck used each photograph to describe the wounds to the victims' bodies and to illustrate how he extrapolated manner and cause of death from the wounds, the district court did not abuse its discretion in admitting them. In addition, as to the any remaining images to which McCarty failed to preserve an objection, review is precluded and any error is not plain on the record. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

XIII

THE JURY INSTRUCTIONS WERE NOT ERRONEOUS

McCarty challenges several jury instructions, but admits these issues have been raised in previous appeals and denied by this Court each time. "This court

generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. However, whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review." Berry v. State, 125 Nev. 265, 273, 212 P.3d 1085, 1091 (2009) (internal citations omitted), abrogated on other grounds by State v. Castaneda, 127 Nev. ___, 245 P.3d 550 (2010). Each instruction was constitutionally sufficient.

First, McCarty challenges the "abandoned and malignant heart" language in the Malice Instruction. This language is derived from the applicable statute. See NRS 200.020(2). As McCarty acknowledges, this Court has determined several times that this language is constitutionally sound. Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004); Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001); Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998); see also Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000). It should do so here as well.

Second, McCarty challenges the premeditation and deliberation instruction. Jury Instruction No. 32 provides, in pertinent part:

> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.
>
> . . . .
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The language in Jury Instruction No. 32 tracks verbatim the instructions "we set forth . . . for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000). McCarty acknowledges that this instruction has been consistently upheld, but argues that emphasizing the instantaneous nature of premeditation undermines the requirement of deliberation. This Court should decline McCarty's invitation to reverse course, as it has in the past.

Third, McCarty argues that the statutory reasonable doubt instruction is unconstitutional and lessens the State's burden of proof. This Court has repeatedly held that the instruction codified in NRS 175.211 is constitutional and stated that it will defer to the legislature for changes to that instruction. See Garcia v. State, 121 Nev. 327, 339-40, 113 P.3d 836, 844 (2005); Noonan v. State, 115 Nev. 184, 189-90, 980 P.2d 637, 640 (1999); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002). That reasoning remains persuasive.

Fourth, McCarty claims that the "equal and exact justice" instruction lowered the burden of proof. In Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998), this Court held that the instruction did not concern the burden of proof or the presumption of innocence. Id. at 1209, 969 P.2d at 296. Further, where the jury has been instructed that the defendant is presumed innocent and the State bears the burden of proving the defendant's guilt beyond a reasonable doubt, the instruction does not deny the defendant the presumption of innocence or lessen the burden of proof. Id. In the instant case, the jury was properly instructed on the presumption of innocence and the State's burden of proof. 39 ROA 8596. While McCarty contends that this Court should overrule Leonard, this Court has repeatedly declined to do so. See Daniel v. State, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003); Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004). This Court should stay that particular course as well.

XIV
THE VERDICT OF MALONE'S JURY IS IRRELEVANT TO THE SUFFICIENCY OF THE EVIDENCE SUPPORTING MCCARTY'S CONVICTIONS FOR COUNTS 5 & 6

McCarty styles his next claim as one challenging the sufficiency of the evidence as to counts 5 and 6. What he is actually complaining about is that his jury and Malone's jury rendered inconsistent verdicts when asked to determine guilt based upon the same criminal transaction. Inconsistent verdicts as to different counts are valid. See Greene v. State, 113 Nev. 157, 173, 931 P.2d 54, 64 (1997),

overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Further, inconsistent verdicts by different juries as to co-conspirators are also permissible. See People v. Palmer, 15 P.3d 234, 236-37 (Cal. 2001) (opining that "[t]he law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence" and concluding that the "rule of consistency" should be abandoned); see also United States v. Dotterweich, 320 U.S. 277, 280 (1943). Finally, given Estores' testimony and corroborating evidence of her injuries, see 28 ROA 6127-97, the evidence as to counts 5 & 6 was constitutionally sufficient. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); NRS 200.381; NRS 200.480.

XV
VICTORIA'S FATHER'S COMMENT ON SENTENCE DOES NOT WARRANT REVERSAL FOR A NEW PENALTY HEARING

Victoria's father, when reading his victim-impact statement, stated that the persons who murdered his daughter "deserve nothing, nothing but the maximum penalty." 41 ROA 9174. The district court immediately intervened and instructed the witness to confine his comments to "the impact of your family." Id. McCarty moved for a mistrial. The State acknowledged that the comment was unfortunate and informed the court that reference to penalty was not part of the witness' prepared comments that the prosecutor had reviewed beforehand. The district court denied the mistrial motion, but offered to read a Limiting Instruction. McCarty declined the instruction. Id.

"[W]hile a victim may address the impact that the crime has had on the victim and the victim's family, a victim can only express an opinion regarding the defendant's sentence in non capital cases." Witter v. State, 112 Nev. 908, 922, 921 P.2d 886, 896 (1996), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011). A new penalty hearing is not required unless McCarty

can demonstrate a reasonable probability that the jury was influenced by this fleeting comment in making its sentencing determination. Middleton v. State, 114 Nev. 1089, 1113, 968 P.2d 296, 312 (1998). "In making this determination, this court should consider four factors: (1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing." Id.

Considering these factors, no relief is warranted. First, the fleeting remark was not solicited by the prosecution; in fact the prosecutor informed the court that he would have told the witness to strike the mention of penalty from his prepared statement if he had seen it and that he specifically instructed all of the victim-impact witnesses on what the permissible bounds of their testimony was. 41 ROA 9190-91. Second, McCarty declined a Limiting Instruction and the district court intervened with the witness immediately. Id. Third, the comment was fleeting and the victim-witness did not ask for a particular sentence. "Factor four relates here to death-worthiness, not guilt." Middleton, 114 Nev. at 1113, 968 P.2d at 313. This brutal and heinous murder of two young women certainly warrants a sentence of death. Accordingly, each of the Middleton factors mitigates the fleeting error made by the victim-witness and a new penalty phase is not required.

XVI
THE DISTRICT COURT DID NOT ERR BY DENYING DEFENDANT'S REQUEST TO INTRODUCE MALONE'S CRIMINAL HISTORY INTO EVIDENCE

McCarty moved to admit the notice of aggravation and intent to seek a sentence of death filed against Malone. 43 ROA 9460. The defense's stated purpose in doing this was that admitting the notice of intent was the most efficient way of getting Malone's criminal history before the jury deciding penalty. 43 ROA 9486. The district court concluded that this information was not relevant, as it did not relate to this defendant or the crimes charged. Id. at 9496. The district court did not err.

In furtherance of his argument asserting that this was error, McCarty argues that events that transpired in another case, State v. Burnside, No. 56548, are relevant. They are not. As of the date of this brief's submission, that case has not been decided and stands for no authority. That argument should be disregarded. NRAP 28(e). McCarty then contends that Flanagan v. State, 112 Nev. 1409, 903 P.2d 691 (1996), applies. Again, McCarty errs. Flanagan holds that it is not error for the jury to learn of the conviction and sentence of a co-defendant for the same criminal transaction. This was not what McCarty attempted to introduce; rather he wanted the jury to consider Malone's past crimes that have nothing to do with this defendant or this crime. Hence, that information is not relevant, see Gallego v. State, 117 Nev. 348, 364, 23 P.3d 227, 238 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011) ("Evidence presented in mitigation must be relevant to the offense, the defendant, or the victim); Collman v. State, 116 Nev. 687, 725, 7 P.3d 426, 450 (2000) (evidence of criminal character of another irrelevant to penalty), and the district court did not err in excluding it.

XVII
THE FACT THAT MALONE'S JURY ELECTED A SENTENCE OF LIFE HAS NO CONSTITUTIONAL CONSEQUENCE IN THIS CASE

McCarty claims that imposition of the death penalty is constitutionally excessive in his case because his co-defendant received a life sentence. While McCarty recognizes that proportionality review is no longer required following the Legislature's amendment of NRS 177.055 in 1985, he makes the argument anyway. Today, the Court need only determine "[w]hether the sentence of death is excessive, considering both the crime and the defendant." NRS 177.055(2)(e); Dennis v. State, 116 Nev. 1075, 1084, 13 P.3d 434, 440 (2000). In dispensing with proportionality review, this Court recognized that penalties imposed in other similar cases in this state are irrelevant to the excessiveness analysis now required by NRS 177.055(2). See Id; see also Pulley v. Harris, 465 U.S. 37, 43-44, 50-51 (1984).

Here, the sentence of death was not excessive considering both McCarty and his crime. McCarty murdered two young women in a brutal way for essentially no reason. The jury found seven aggravators. Moreover, Appellant behaved in a calculated fashion by searching out a place to leave their bodies, procuring a golf club from the room from which he kidnapped the girls, and knowing—during the long drive out to Henderson—that he and Malone were going to kill them. Notable also in this analysis: Malone broke his golf club after striking the victims' skulls so many times and McCarty instructed him to begin using a rock. The death penalty is not excessive as to this defendant. It would not have been excessive as to Malone, either, but the fact that Malone's jury elected to show him mercy for whatever reason is of no moment in this case.

XVIII

NO BURDEN-SHIFTING OCCURRED AT THE PENALTY PHASE

McCarty claims that the prosecutor engaged in burden shifting during penalty phase argument. However this claim is misleadingly presented. The comment excerpted in appellant's brief occurs when the prosecutor is discussing the failures and biases of Sheila Cahill, the "quarterback of the defense's mitigation team." 43 ROA 9877. It became clear during cross-examination of this witness that she did not conduct her mitigation investigation with an open mind. See 42 ROA 9400-20, 43 ROA 9532-50. Cahill interviewed Margo McMosely, but Margo was the only person who described physical abuse of the children. 42 ROA 9419. When the State asked Cahill if she verified any of the information that Margo McMosely told her, Cahill said she had not. 43 ROA 9507-10. Later, Cahill unconvincingly claimed that there were insufficient funds to do that investigation. 43 ROA 9605-06. During the State's rebuttal argument, the prosecutor was commenting on Cahill's failure to call Margo's brothers and sisters (i.e., call them on the phone). The defense made a contemporaneous burden-shifting objection and the State clarified that the argument referred to Cahill, not

McCarty or his counsel. The context of the argument clearly supports this; there is no actionable misconduct in this case.

XIX

THE DEATH PENALTY IS CONSTITUTIONAL

McCarty argues that Nevada law impermissibly permits the broad imposition of the death penalty for virtually all first-degree murders. McCarty errs. The United States Supreme Court has held that a sentencing process to be constitutional must "'genuinely narrow the class of persons eligible for the death penalty.'" Arave v. Creech, 507 U.S. 463, 474 (1993) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). The sentencing scheme must direct and limit the jury's discretion to minimize the risk of arbitrary and capricious action, Id. at 470, and must provide a principled basis for it to distinguish defendants who deserve capital punishment from those who do not, Id. at 474. This court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. See Thomas, 122 Nev. at 1373, 148 P.3d at 736-37; Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Gallego, 117 Nev. at 370, 23 P.3d at 242; Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998). Further, this court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979).

XX

CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

McCarty contends that his convictions should be reversed based upon cumulative errors at his trial. This 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); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). In addressing a claim of cumulative error, the relevant factors to consider are: (1) Whether the issue of guilt is close; (2) The quantity and character of the error; and (3) The gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000).

Insofar as McCarty 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). Even if this Court were to determine error did occur; such error was harmless because of the overall evidence of McCarty's guilt.

CONCLUSION

Wherefore, the State respectfully requests that this Honorable Court AFFIRM Appellant's Judgment of Conviction and sentence of death.

Dated this 22nd day of April, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(B)(i), (ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 37,000 words or does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 22, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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