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ZANE MICHAEL FLOYD,)
Appellant,)
v.) CASE NO. 36752
THE STATE OF NEVADA,)
Respondent.)

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RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether denial of Defendant's motion to sever counts constituted constitutional error.

2. Whether denial of Defendant's motion for change of venue constituted constitutional error.

3. Whether denial of Defendant's motion to dismiss statutory aggravators constituted constitutional error.

4. Whether it was constitutional error for the district court to require Defendant to disclose expert witness test results and allow the State to use the data during penalty phase rebuttal.

5. Whether denial of Defendant's motion to suppress Defendant's statements constituted constitutional error.

6. Whether there was prosecutorial misconduct during penalty phase closing argument.

7. Whether there was prosecutorial misconduct during presentation of victim impact testimony during the penalty phase.

STATEMENT OF THE CASE

On July 19, 2000, the Defendant, Zane Michael Floyd, was convicted by jury verdict of Count I - Burglary While in Possession of a Firearm (Felony- NRS 205.060, 193.165); Counts II, III, IV, and V - First Degree Murder With Use of a Deadly Weapon (Felony- NRS 200.010, 200.030, 193.165); Count VI - Attempt Murder With Use of a Deadly Weapon (Felony- NRS 200.010, 200.030, 193.165, 193.330); Count VII - First Degree Kidnaping With Use of a Deadly Weapon (Felony- NRS 200.310, 200.320, 193.165); and Counts VIII, IX, X and XI - Sexual Assault With Use of a Deadly Weapon (Felony- NRS 200.364, 200.366, 193.165). Record on Appeal (ROA), vol. 14, 2732-33. On July 21, 2000, at the conclusion of the penalty phase the jury found three aggravating circumstances: the murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person; the murder was committed upon one or more persons at random and without apparent motive; and the Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. ROA, vol. 14, 2733. The jury found no mitigating circumstances. ROA, vol. 14, 2733. The jury returned verdicts of death for Counts II, III, IV, and V. ROA, vol. 14, 2733.

On July 31, 2000, the Defendant was sentenced for Count I to one hundred eighty (180) months in the Nevada Department of Prisons with a minimum parole eligibility of seventy-two months; for Counts II, III, IV, and V to death by lethal injection as to each count separately; for Count VI to two hundred forty (240) months in the Nevada Department of Prisons with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive sentence of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months; for Count VII to life with a minimum parole eligibility of sixty (60) months, plus an equal and consecutive sentence of life with a minimum parole eligibility of sixty

(60) months; for Counts VIII, IX, X, and XI, as to each count separately, life with a minimum parole eligibility of one hundred twenty (120) months plus an equal and consecutive sentence of life with a minimum parole eligibility of one hundred twenty (120) months; all sentences to be served consecutively. ROA, vol. 14, 2733-35. Judgment of Conviction, Warrant of Execution, and Order of Execution were filed on September 5, 2000. ROA, vol. 14, 2732-40.

STATEMENT OF FACTS

Thursday, June 3, 1999, after spending an evening on the town with a female companion, the Defendant Zane Michael Floyd returned to his apartment alone at approximately 3:00 a.m. ROA, vol. 9, 1629. At 3:28 a.m., the Defendant called the "Love Bound" out call dance agency and requested that they dispatch a young female for his entertainment. ROA, vol. 7, 1370-75. The young lady who responded was twenty-year-old Tracie Rose Carter, a.k.a. Kayla, who arrived around 3:30 a.m. and remained in the Floyd's presence until she was permitted to leave around 5:00 a.m. ROA, vol. 7, 1370-77; vol. 9, 1684.

Immediately after entering the Defendant's apartment, Ms. Carter was threatened at gunpoint and was forced to comply with the Defendant's demands over the next hour and a half. ROA, vol. 9, 1630-52. This included the various sexual activities set forth in Counts IX through XII and numerous threats of murder. ROA, vol. 9, 1630-52; vol. 14, 2732-33. At one point the Defendant ejected a live shotgun shell from the chamber of his pump shotgun, and while displaying the shell to Ms. Carter, stated that her name was on it. ROA, vol. 9, 1649. Ms. Carter was convinced that she was going to be killed but did her best to comply with his every demand in hopes that her life would be spared. ROA, vol. 9, 1630-52. After approximately one hour of terror the Defendant got dressed in his Marine Corps utility camouflage blouse, trousers and combat boots and told Ms. Carter that he was going to go out and kill the first nineteen persons that he encountered. ROA, vol. 9, 1649, 1677-80. She observed the Defendant to put on a bathrobe over his

clothing which the Defendant used to conceal the shotgun during his walk from his residence to the Albertson's supermarket. ROA, vol. 9, 1679-80. Just before he allowed Ms. Carter to go, the Defendant told her that she was very lucky that he didn't kill her and probably would have done so "if the gun wasn't so big." ROA, vol. 9, 1653 (the Defendant apparently did not want to alert neighbors). The Defendant then told Ms. Carter that she had sixty seconds to run and get out of his sight or she would be one of the persons who he was going to kill. ROA, vol. 9, 1684. Around 5:00 a.m. after Ms. Carter ran from the apartment, the Defendant began his walk toward Alberton's. ROA, vol. 9, 1684-86; vol. 8, 1432-33. Albertson's was about fifteen minutes walk from the Defendant's apartment. ROA, vol. 9, 1684-86; vol. 8, 1432-33.

It is estimated that the Defendant arrived at Albertson's at around 5:15. ROA, vol. 8, 1432-33, 1455, 1526; vol. 9, 1763. Immediately upon entering the store, the store's video tape reveals that the Defendant shed his robe, revealing the shotgun, and moments thereafter shot his first murder victim, Thomas Michael Darnell, in the back. ROA, vol. 8, 1432-33, 1442. The Defendant then proceeded into the store in search of more victims. ROA, vol. 8, 1428-34.

The next person to be murdered by the Defendant was Carlos Chuck Leos, the frozen food manager. ROA, vol. 8, 1414, 1527. Mr. Leos suffered two separate shotgun blasts to the front of his body at relatively close range. ROA, vol. 10, 1935-39.

The third person killed was Dennis Troy Sargeant, age 31, who was the supervisor on duty. ROA, vol. 8, 1414-15. Mr. Sargeant was murdered by a single blast from the shotgun. ROA, vol. 10, 1923-27. After Mr. Sargeant was murdered, the Defendant shot at, but missed, a member of the floor cleanup crew named Lepe Acquino Fabian. ROA, vol. 8, 1415, 1529.

The Defendant next came upon a fleeing Zachary T. Emenegger. ROA, vol. 8, 1415-16. This twenty-one-year-old suffered two separate blasts from the shotgun

at close range with a third round missing. ROA, vol. 8, 1529-30. The attempted murder of Mr. Emenegger was evidenced on the store's video tape, which depicts the Defendant chasing Mr. Emenegger through the aisles in the produce section. ROA, vol. 8, 1428-34. Mr. Emenegger verbally pleaded with the Defendant not to shoot him to no avail. ROA, vol. 8, 1534. After having shot Mr. Emenegger twice the Defendant approached him and was heard to say "Yeah, you're dead." ROA, vol. 8, 1530. Although Mr. Emenegger was shot twice at close range with the shotgun, including a shot into the back, he miraculously survived and underwent extensive rehabilitation and medical treatment. ROA, vol. 8, 1533.

After shooting Mr. Emenegger, the Defendant proceeded to the rear of the store where he found Lucille Alice Tarantino. ROA, vol. 8, 1416-17. Mrs. Tarantino worked in the salad bar, and according to the Defendant's own statement, she begged him not to shoot her. ROA, vol. 2, 492, 535. Ignoring Ms. Tarantino's pleas, the Defendant removed most of her face and head with a close range blast of the shotgun. ROA, vol. 2, 492, 535; vol. 10, 1927-30.

The Defendant then went back toward the front of the store, where he stopped and looked at Mr. Emenegger again. ROA, vol. 8, 1451. Seeing no apparent signs of life, the Defendant proceeded out the front of the store. ROA, vol. 8, 1530. By this time, police had already arrived and were waiting for the Defendant when he exited the store. ROA, vol. 2, 496-97. The Defendant originally planned to shoot himself rather than be captured, but he could not bring himself to pull the trigger. ROA, vol. 2, 496. Defendant then thought about causing the police to shoot him, but later said he had too much respect for the police to point his gun at them. ROA, vol. 2, 495-97.

Shortly after exiting the store, the Defendant was disarmed and placed in a patrol vehicle by Officer Christopher Catanese. ROA, vol. 2, 489-517; vol. 9, 1777-78. Officer Catanese turned on his tape recorder, advised the Defendant of his Miranda rights, and began to speak with the Defendant. ROA, vol. 2, 489 (the

Defendant was disarmed at approximately 5:30 a.m., and the statement commences at approximately 5:40 a.m.) ROA, vol. 2, 489. As to the Defendant's motivation, in his words, "I just went to shoot people." ROA, vol. 2, 493. ". . . I was just running. Just running . . . just running, running and shooting." ROA, vol. 2, 493-95. In an obvious reference to killing Mrs. Tarantino, the Defendant stated:

> "Why did I kill those people? Why did I kill those people? I, I don't know . . . I just, I looked at her. I looked right at her and I just, I just, just blew her head apart. . . ." . . . . "And she kept asking me not to shoot her and I just . . . and I shot her in the head." . . . . "She was begging me not to shoot her and then, then I just, I walked right up to her head and I shot her." . . . . "She just kept asking, she kept begging me not to shoot her, just please don't shoot her and I just, I just walked like right up to her head and I just . . . her head exploded."

ROA, vol. 2, 490-95, 514-15.

In an obvious reference to his first murder victim, Mr. Darnell, the Defendant states:

> "I just remember shooting that guy in the back . . . I just seen the blood fucking shoot out . . . I might have said something to him like "Hey motherfucker" or something like that . . . I just shot him you know like right in the back."

ROA, vol. 2, 494, 514.

Again in reference to his motivation the Defendant referred to himself as a:

> "Fucking loser" "I got nowhere to go in life dude. You know, I'm a fucking loser, I'm a bouncer and I just moved back in with my parents and you know I'm a fucking loser you know I'm twenty-three and I moved back in with my fucking parents."

ROA, vol. 2, 512.

The Defendant blamed his lack of work, his lack of money, his lack of a home, and the fact that he is hooked on gambling. ROA, vol. 2, 503-10. After explaining that he had just lost all of his money that night gambling, the Defendant stated:

> "I lost the rest of my money like I usually do . . . I mean I'm so fucking far in debt, dude, the blackjack tables calling me, man."

ROA, vol. 2, 504.

The Defendant also attempted to blame the Marine Corps:

> "I went through all that shit teaching me how to shoot people and kill people and you know, and it's not like the Marine Corp's fault, they didn't like turn me into a killer and shit, you know. I mean that's what you gotta do, you know. I mean I was a machine gunner."

ROA, vol. 2, 511.

Near the end of his statement, with the officer still attempting to learn why he went on the shooting rampage, the Defendant stated:

> "I was drinking a few beers . . . I got home and I'm just thinking you know, I'm a fucking loser . . . I just wanted to, I just sat thinking . . . what would it be like to shoot somebody, you know."

ROA, vol. 2, 512-13.

He then went on to explain that as he approached the store:

> "I was just thinking what's it going to be like to shoot somebody you know."

ROA, vol. 2, 513.

The Defendant also displayed a certain degree of anger during his statement when at one point, he made reference to his aunt and stated that "If she'd have been here I'd have shot her ass too, that bitch." ROA, vol. 2, 508. Nowhere in the statement does the Defendant reflect any animosity towards any of the victims. ROA, vol. 2, 489-517.

The Defendant also expresses a fascination with firearms and talks at length about his shotgun and how he had modified it. ROA, vol. 2, 505-07. At one point the Defendant states "It's a sweet shotgun dude. I love that." ROA, vol. 2, 505.

At 7:00 a.m. the Defendant gave another statement to Detective Paul Bigham after being transported to the Clark County Detention Center. ROA, vol. 2, 518-43. The Defendant again spoke about the Marine Corps and his training, losing his money at the blackjack table, the fact that he is a loser and moved back with his parents because he didn't have a job. ROA, vol. 2, 525-30. As in his statement to

Officer Catanese, the Defendant recalls shooting Mr. Darnell and debating within himself whether to pull the trigger. ROA, vol. 2, 533. The Defendant also recalled shooting Lucille Tarantino and the fact that she kept begging him not to shoot her. ROA, vol. 2, 535. The Defendant wanted to end his life as he exited the store, but since he couldn't do it, he wanted the officers to kill him. ROA, vol. 2, 536. The Defendant stated that he couldn't bring himself around to pointing his weapon at the officers because he had too much respect for them because he himself wanted to be a police officer. ROA, vol. 2, 536. The Defendant mentions the fact that he has a drinking problem and that although he received an honorable discharge in the Marine Corps they were not going to permit him to re-enlist. ROA, vol. 2, 539-42. Finally at page twelve of his statement the Defendant expresses an urge he always had to go to war and kill people. ROA, vol. 2, 529. The Defendant states:

> "I've always just wanted to know, call me crazy, psychotic, whatever, I've just always wanted to know what it's like to shoot someone. . . . ever since I was a little kid I've always, you know, ever since I saw my first, my first war movie, I've always just wanted to go to war and kill people and, you know, that's why I joined the Marine Corps. That's the only reason I joined the Marine Corps."

ROA, vol. 2, 529.

Just prior to commencement of trial, in a sealed in-chambers proceeding, the Defendant informed the trial court that he did not intent to claim innocence in regard to the murders, and felt he would be in a better position during the guilt phase if he did not do so. ROA, vol. 10, 1994A-1994C. The Defendant stated:

> Look, this isn't where the big argument is in terms of the murders. I shot these people. Do, jury, what you think you have to do in the guilt phase as a result of this, which is probably find me guilty of first degree murder; possibly they will listen better in the penalty phase if I'm not taking a ridiculous position."

ROA, vol. 10, 1994B.

ARGUMENT

I

DENIAL OF DEFENDANT'S MOTION TO SEVER COUNTS DID NOT CONSTITUTECONSTITUTIONAL ERROR

The Defendant argues that the charges for sexually assaulting Ms. Carter immediately prior to the killings should have been severed and tried separately from the murder charges. The Defendant claims the crimes are separate and that trying the sexual assault charges in the same proceeding as the murder charges was prejudicial. What the Defendant fails to point out, however, is that there is absolutely no doubt that the Defendant committed the murders. There were numerous eyewitnesses and a video surveillance camera which identified the Defendant as the murderer, and the police were waiting outside of the Albertson's store when the Defendant exited with the shotgun in his hand. ROA, vol. 2, 496-97, 536. Additionally, the Defendant gave two voluntary statements admitting to the murders. ROA, vol. 2, 489-517, 518-43. The heinous nature in which the Defendant killed, without apparent motive, four innocent people and wounded a fifth could not have been prejudiced by the Defendant's sexual assault on Ms. Carter.

The decision to sever offenses is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. NRS 173.115, 174.165(1); Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998). If evidence of one count is admissible in evidence at a separate trial on another charge, the counts may not be severed and may be tried together. NRS 48.045, 173.115; Griego v. State, 893 P.2d 995, 111 Nev. 444 (1995). 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. NRS 48.045(2), 173.115; Mitchell v. State, 782 P.2d 1340, 105 Nev. 735 (1989). Errors resulting from misjoinder will be reversed only if the error has a substantial and injurious

effect or influence in determining the jury's verdict. NRS 173.115, 174.165(1). Brown v. State, 967 P.2d 1126, 114 Nev. 1118 (1998).

Based upon all of the evidence, including the Defendant's own statements, it is obvious that the Defendant decided that he was going to die on June 3, 1999. ROA, vol. 2, 489-543. Not unlike an individual who is granted a last meal before his execution, the Defendant wanted to fulfill two fantasies before he died. Those two fantasies would be satisfied between 4:00 and 5:30 a.m. on June 3, 1999, at the expense of Tracie Carter, Thomas Darnell, Carlos Leos, Dennis Sargeant, Lucille Tarantino and Zachary Emenegger. The Defendant's first fantasy was to engage in illicit sexual conduct, specifically anal sex with a female. ROA, vol. 9, 1634, 1642-43. Several pornographic tapes depicting anal sex were recovered from the Defendant's room. ROA, vol. 9, 1751. According to Ms. Carter, the Defendant spoke of his "sick little fantasy," talking to her about killing himself and killing others but not until he satiated his sexual desires by raping Ms. Carter. ROA, vol. 9, 1634-43. The Defendant was obviously intent on maximizing the pain and harm that he could inflict upon his fellow human beings before he himself died. ROA, vol. 9, 1641-43. This sense of rage apparently emanated from his feelings of low self-esteem demonstrated by referring to himself as a "loser." ROA, vol. 2, 512.

The law in Nevada is overwhelmingly supportive of joinder under the facts of this case and where the triable issues before the jury would permit cross-admissibility.

In Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998), this Court upheld the conviction of Middleton for two counts of first degree murder as well as the sentences of death even though the two murders occurred six months apart. The court concluded that the evidence of the two separate murders would have been "cross-admissible to prove Middleton's identity [and] . . . intent . . . ." The court then concluded that "[i]f 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." Id. at 1108.

In Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996), this Court upheld the joinder of two (2) automobile burglaries occurring 16 days apart, at different locations and with different victims, and further permitted the joinder in the same case of a store burglary which occurred on the same date as the second automobile burglary. In part of its rationale, this Court, citing NRS 173.115, stated:

> "The district court certainly could determine that the two vehicle burglaries evidence a common scheme or plan. Both offenses involved vehicles in casino parking garages and occurred only 17 days apart. Moreover, we conclude that evidence of the May 29 offense would certainly be cross-admissible in evidence at a separate trial on the June 16th offense to prove Tillema's felonious intent in entering the vehicle." NRS 48.045(2).
>
> . . .
>
> Likewise, the store burglary could clearly be viewed by the district court as 'connected together' with the second vehicle burglary because it was part of a continuing course of conduct."

Id. at 268-69.

In Graves v. State, 112 Nev. 118, 912 P.2d 234 (1996), this Court upheld the joinder of two (2) counts of burglary wherein the defendant entered one casino and stole coins from a patron and, thereafter, entered a different casino and stole money from a cashier. Again, this Court justified the joinder because the two (2) charged offenses "were part of a common scheme or plan and factually connected." Id. at 127.

Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) is a capital murder case wherein this Court upheld the joinder of two (2) counts of Robbery With Use of a Deadly Weapon and one (1) count of First Degree Murder which resulted in the imposition of the death penalty. The joined offenses were out of the following facts: The defendant was initially caught in the act of trying to defraud Sears Roebuck by seeking a refund on goods which he had not purchased. Id. at 573. While being so detained, the defendant produced a pistol and while holding the

security officers at bay, took the officers badge and portable radio. Id. After making his escape, and later that same day, the defendant met with what would be the homicide victim in a hotel parking lot in order to discuss purchasing the victim's vehicle. Id. During this meeting, the defendant represented himself to be a security officer and during these representations authenticated his claim by displaying the stolen portable radio. Id. Arrangements were, thereafter, made to meet the victim, a dentist, at his office for the purpose of test driving the vehicle at which location he killed the victim. Id. at 574. This Court, in its reasoning, stated as follows:

> "While it may not be possible to characterize the Sears robbery and the murder and robbery of the victim as the same transaction, they are clearly connected together. Howard gained possession of his bogus security officer status, the two way radio and the security badge, during the Sears episode. Then, Howard saw the victim's van in the Sears parking lot with a 'For Sale' sign bearing the victim's phone number. The two crimes occurred within a 24 hour period, and evidence indicates that Howard was wearing the same clothing during the two crimes and that one crime 'flowed' into the other."

Id. at 574-75.

In Gibson v. State, 96 Nev. 48, 604 P.2d 814 (1980), this Court granted the State's motion to join two (2) indictments for the purpose of jury trial. In Gibson, the defendant, an escapee from Susanville, California Correctional Center, stole a Toyota pickup truck on August 17, 1978. Id. at 49. The next day the defendant stole a Ford pickup truck from a car lot in Winnemucca, Nevada and left behind the Toyota truck. Id. In ruling on the propriety of the joinder of the two (2) separate indictments, this Court stated:

> "Since the possession of the Toyota truck and the subsequent larceny of the Ford truck could have been part of appellant's scheme or plan to escape from California Correctional Institutions, these indictments were properly joined."

Id. at 51.

In the instant case, the crimes against Ms. Carter and the murders at the Albertson's store were properly joined because the incidents with Ms. Carter just

prior to the killings provides evidence of intent, premeditation and provides a complete story of all of the crimes committed on June 3, 1999.

In Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992), Powell was convicted of the First Degree Murder beating death of his four year old child. The trial court permitted, and this Court upheld, the testimony of the child's fourteen-year-old sister Melinda who was permitted to testify that Powell had asked her to lie for him at trial, and that he had killed the four-year-old child and threatened to kill Melinda by telling her that "she was next." Id. at 707-08. Although these other threats constitute the proof of another crime this Court ruled that the district court did not abuse its discretion since the evidence constituted the proof of intent to kill the four year old child as well as the "complete story of the crime." Id. In this Court's view, the fourteen year old child ". . .could not describe Powell's admission that he had murdered Melia (the four-year-old) without describing the context in which the statement was made. Id. "Otherwise, the jury would have had no idea why Powell would 'confess' to a fourteen year old child." Id. at 708.

In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), Gallego was charged with killing two young females with a hammer. The trial court allowed evidence that Gallego had previously kidnaped two different young women from a shopping mall and thereafter shot and killed them. Id. at 789. This Court affirmed the lower court's ruling and allowed the evidence for the purpose of establishing common plan, intent, identity and motive. Id.

It is important to note that immediately after committing the crimes against Ms. Carter, the Defendant shot and murdered his victims at Albertson's. ROA, vol. 9, 1684-86; vol. 8, 1432-33. These offenses were all committed within a short time of one another, and the Defendant's plan to commit the murders was discussed with Ms. Carter before, during and after the sexual assaults committed against her. ROA, vol. 9, 1630-52. The Defendant's state of mind was in issue before the jury which should have the benefit of all of the events that transpired immediately

preceding and following the killings. The Defendant places his state of mind in issue through his plea of not guilty, and since a mental health expert was called as a witness during the guilt phase, additional compelling reasons existed to explore the activity by the Defendant immediately preceding the killings. See Findley v. State, 94 Nev. 212, 214, 577 P.2d 867, 868 (1978); Overton v. State, 78 Nev. 198, 205, 370 P.2d 677, 681 (1977). Further, since the Defendant was found guilty of Murder in the First Degree, the Defendant's conduct and thought process immediately preceding the murders were relevant in the jury's determination of punishment. It would have been a tremendous waste of judicial resources not to permit the same jury to deliberate upon the guilt or innocence of the Defendant on the sexual assault charges particularly when that conduct was so interwoven with the murders.

Further, because of the overwhelming undeniable evidence that the Defendant committed the murders, the fact that the Defendant committed sexual assault on a woman just prior to the killings would not have had a prejudicial effect on the jury's finding of guilt on the murder charges. Therefore, the district court properly denied the Defendant's motion to sever the sexual assault counts from the murder counts.

II

DENIAL OF DEFENDANT'S MOTION FOR CHANGE OF VENUE DID NOT CONSTITUTE CONSTITUTIONAL ERROR

The Defendant suggests that he did not receive a fair trial, and that the district court should have granted his motion for change of venue because the jury in this case was prejudiced and affected by the media. The Defendant asserts that the jury had knowledge of the attention and publicity surrounding the case and that a jury who is affected by the media and public opinion is an unfairly bias and prejudicial jury. There is absolutely no evidence to support the Defendant's claim that the jury was influenced by the media.

The decision whether to grant or deny change of venue based on pretrial publicity should not be reversed on appeal absent clear demonstration of abuse of discretion; the defendant has the burden of showing that publicity corrupted the trial or prejudiced the jury. NRS 174.455(1); Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993), rehearing denied, vacated 516 U.S. 1037, 116 S.Ct. 691, on remand, 113 Nev. 251, 934 P.2d 220 (1997).

Under NRS 174.455(2):

> An application for removal of a criminal action shall not be granted by the court until after the voir dire examination has been conducted and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county wherein the indictment, information or complaint is pending.

The district court conducted an extensive voir dire regarding pre-trial publicity in this case. See ROA, vols. 6 and 7. Every juror who indicated that his or her verdict would be affected by the pre-trial publicity was removed from the jury panel. The Defendant has not come forth with any evidence to suggest that any juror was dishonest in responding to the jury questionnaire or that any juror was affected by the publicity that surrounded the trial. Therefore, there is no basis from which the trial court could reasonably have concluded that the jurors were influenced by pre-trial media coverage.

Furthermore, there is no evidence that the jury disregarded the court's strict admonition not to talk about the case or listen to any media broadcasts regarding the case. Before every break, the court admonished the jury not to talk about the case, and to vigilantly avoid contact with the media. Absent clear evidence to the contrary, a properly instructed jury is presumed to have followed the law. United States v. Olano, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993); State v. Sheeley, 63 Nev. 88, 97, 162 P.2d 96, 100 (1945). Here, there is no evidence to suggest that any of the jurors in this case disregarded the court's admonition. Therefore, the Defendant's claim that the jury was affected by ongoing media coverage is totally unsubstantiated and must be rejected as without merit.

In Kaplan v. State, 96 Nev. 798, 618 P.2d 354 (1980), this Court held that where the defendant, who had been granted new trial after he was found guilty of murder, did not contend that content of the news concerning the case was so biased or inflammatory as to utterly corrupt the proceedings, it would not be presumed that juror exposure to information about defendant's prior conviction or to news accounts of the crime would, alone, deprive him of due process. See also, Bishop v. State, 554 P.2d 266, 92 Nev. 510 (1976)(defendant failed to show that the posture or setting of his trial was inherently prejudicial or that the process of selecting the jury allowed any inference of actual prejudice).

While a defendant who seeks change of venue on the grounds of pretrial publicity is entitled to an impartial jury, he is not entitled to a jury completely ignorant of the facts; it is not all publicity that causes prejudice to a defendant, but only that publicity which operates to deprive a defendant of fair trial. Gallego v. McDaniel, 124 F.3d 1065, cert. denied 118 S.Ct. 2299, 524 U.S. 917 (1997). To support a motion for change of venue the court must find either that it is impossible to get an impartial jury or that there is such public excitement about the case that even an impartial jury would be swayed by the considerable pressure of public opinion. Hanley v. State, 434 P.2d 440, 83 Nev. 461 (1967).

The Defendant, in his brief, sets forth the extent of the media attention this case received. But there is no evidence to support the Defendant's claim that the jury was affected by the media coverage. Defendant asserts that the mere fact that media publicity existed should be enough to imply actual prejudice. Defendant has failed to demonstrate even one instance of such prejudice to even one juror. Therefore, the district court did not abuse its discretion in denying Defendant's motion for change of venue, and Defendant has failed to make a necessary showing of constitutional error.

III

DENIAL OF DEFENDANT'S MOTION TO DISMISS STATUTORY AGGRAVATORS DID NOT CONSTITUTE CONSTITUTIONAL ERROR

The Defendant argues that Nevada's procedure in capital proceedings, Supreme Court Rule 250, is unconstitutional and violates the Due Process Clause of the Fifth and Fourteenth Amendments. Defendant's contention is based on his allegation that the State is allowed to file a notice of intent to seek the death penalty without affording a defendant a probable cause hearing.

The Nevada process under SCR 250 is in fact designed to protect the defendant's due process rights. Deutscher v. State, 95 Nev. 669, 678, 601 P.2d 407, 413 (1979). This is true because by its operation it allows the defendant to have notice of the fact that the State will be seeking capital punishment in his case. It also provides notice of the aggravating circumstances that will be argued during the penalty hearing. SCR 250(25.2), citing NRS 175.552(3). This Court has held that the purpose of NRS 175.552 is to "provide the accused notice and to insure due process so he can meet any new evidence which may be presented during the penalty hearing." Deutscher, 95 Nev. at 678, 601 P.2d at 413 (1979).

In addition, the Supreme Court Rule only allows the State to introduce evidence of aggravating circumstances if they have already been disclosed to the defendant before the commencement of the penalty hearing. SRC 250; NRS 175.552(3)(13). Thus, the Notice of Intent to Seek the Death Penalty is a method that allows the State to comply with the state statute. If the State intends on citing aggravating circumstances as a bases for capital punishment, it needs to have filed a notice of intent to seek the death penalty listing the aggravating factors. NRS 175.552(3).

Thus, the notice does not prejudice the Defendant. In fact it allows the Defendant the opportunity to develop mitigating circumstances to be introduced at the penalty stage. It also allows the Defendant to prepare a proper rebuttal against

the charges in their totality. In short, it provides the Defendant with notice and insures the Defendant's right to due process allowing him to "meet any new evidence which may be presented during the penalty hearing." Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991).

For these reasons, there was no denial of due process in this case. The Nevada process protects the Defendant's due process right. It allowed the Defendant to have notice of the aggravating circumstances that were going to be argued at his sentencing hearing. SCR 250 directly carries out the due process safeguards provided in NRS 175.552.

This Court has clearly stated that Nevada's death sentencing procedure is constitutional. See, e.g., Colwell v. State, 112 Nev. 807, 811, 919 P.2d 403, 407-08 (1996); Nueschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Furthermore, a statute enacted by the legislature is presumptively constitutional, and anyone attacking the validity of a statute bears the burden of clearly demonstrating the statute is unconstitutional. Sun City Summerlin Community Ass'n v. State By and Through Dept. of Taxation, 113 Nev. 835, 944 P.2d 234 (1997); Skipper v. State, 110 Nev. 1031, 879 P.2d 732 (1994). Therefore, Defendant bears the burden of proving Nevada's death penalty statute is unconstitutional.

"Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 3457 (1983). The sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has been found that the defendant is a member of the class made eligible for that penalty." Zant v. Stephens, 426 U.S. 862, 875, 103 S.Ct. 2733, 2742 (1983); see also Barclay v. Florida, 463 U.S. 939, 948-951, 103 S.Ct. 3418, 3424-3425 (1983) (plurality opinion). In contravention of those cases, the Defendant's argument would force the State of Nevada to adopt a mandatory

sentencing scheme that requires a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors. The States are not required to conduct capital sentencing processes in that fashion. Yuilaepa v. California, 512 U.S. 967, 979-80, 114 S.Ct. 2630, 2639 (1994).

Defendant's argument that his case did not become a capital case (as referred to in the Fifth Amendment) until the notice of intent was actually filed is erroneous. The Defendant was charged with a capital offense in the original Information filed January 26, 1999. ROA, vol. 1, 1-6. The Defendant was charged with, among other charges, four counts of murder with use of a deadly weapon. ROA, vol. 1, 1-6. NRS 200.030(1) defines the crime of first degree murder, and NRS 200.030(4) specifies that a jury may impose a penalty of death, when the jury has found the defendant guilty of first degree murder, if "one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstances or circumstances."

Defendant's attempted reliance on Jones v. United States, 526 U.S. 227 (1999), which held that the Due Process Clause of the Fifth Amendment and the notice and jury trial provisions of the Sixth Amendment require the State to allege any penalty for a crime in the indictment, and that fact must then be tried before a jury and proven beyond a reasonable doubt, is misplaced. The reasoning of Jones does not control the outcome of this case, because the original information sufficiently charged an offense which expressly subjects a convicted defendant to a maximum punishment of death. By filing a Notice of Intent to Seek the Death Penalty, the State is not increasing the maximum penalty for the crime charged, but is putting the defendant on notice that the State intends to seek the maximum penalty allowed. See Apprendi v. New Jersey, 120 S.Ct. 2348, 2362-63 (2000); Jones, 526 U.S. at 251, 119 S.Ct. 1215.

Apprendi and Jones do not require aggravating circumstances to be charged in the original charging document as suggested by Defendant. Both Apprendi and Jones prohibit the court from increasing the maximum sentence for the offense charged, but neither case prohibits the court from exercising its discretion in considering facts and imposing a sentence within a statutorily prescribed range. Further, the evils addressed by the decisions in Apprendi and Jones are not even present when the jury is making the sentencing decision, and all of the facts relevant to making that decision are considered and found beyond a reasonable doubt by the jury before a sentence is imposed. The fact-finding barrier that exists between a jury verdict that a defendant is guilty of a capital crime for which one punishment is known to be death, and a court's ability to impose that capital punishment, acts to protect the defendant from an automatic death sentence. Apprendi, 120 S.Ct. at 2380; see also Walton v. Arizona, 497 U.S. 648, 110 S.Ct. 3047 (1990) (explaining that aggravating circumstances are not separate penalties or offenses but rather are " 'standards to guide the making of the choice between the alternative verdicts of death and life imprisonment' "), quoting Poland v. Arizona, 476 U.S. 147, 156, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

The Defendant failed to demonstrate that Nevada's procedure in capital proceedings is unconstitutional, either on its face or in its application. Therefore, the district court properly denied Defendant's motion to dismiss statutory aggravating factors.

IV

IT WAS NOT CONSTITUTIONAL ERROR FOR THE DISTRICT COURT TO REQUIRE DEFENDANT TO DISCLOSE EXPERT WITNESS TEST RESULTS AND ALLOW THE STATE TO USE THE DATA DURING PENALTY PHASE REBUTTAL

The Defendant claims the district court erred in requiring the defense to disclose the test results of defense expert psychologist Dr. David L. Schmidt, because Dr. Schmidt was never called to testify at trial. The State's expert

psychologist, Dr. Louis Mortillaro, used Dr. Schmidt's test results in part in performing a psychological evaluation of the Defendant. The defense called another expert psychologist, Dr. Edward J. Dougherty, to testify during the penalty phase of Defendant's trial. ROA, vol. 13, 2305-1448. Dr. Mortillaro testified as a rebuttal witness following Dr. Dougherty's testimony. ROA, vol. 14, 2533-69.

A defendant waives his protection against prosecution's use in rebuttal of a one-time defense expert when the defendant introduces testimony on the mental state of the defendant from a different expert. United States ex rel. Edney v. Smith, 425 F.Supp. 1038, 1054-55 (E.D.N.Y.1976), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958, 97 S.Ct. 2683, 53 L.Ed.2d 276 (1977); see also, Lange v. Young, 869 F.2d 1008, 1013 (7th Cir.1989); Noggle v. Marshall, 706 F.2d 1408, 1414 (6th Cir.1983)(defendant's rights are not violated by the prosecution's offer into evidence, in rebuttal to a mental status defense, of unfavorable psychiatric evidence resulting from the defendant's investigation of the viability of that defense).

Defendant claims that the raw data obtained by Dr. Schmidt was privileged and that the court erred by ordering the defense to disclose the data. Defendant also contends that, once Dr. Schmidt was un-endorsed by the defense, the prosecution should have been prohibited from using that information in its rebuttal case. Defendant's arguments are without merit.

The court properly directed the Defendant to turn over the raw data obtained by Dr. Schmidt. NRS 174.245 governs the disclosure by a defendant of evidence relating to the defense. NRS 174.245, in pertinent part, provides:

> . . . at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any . . .
>
> (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant . . .

Thus, the Nevada discovery statutes specifically provide for the discovery of raw data obtained from scientific tests performed in mental examinations. Furthermore, other courts applying nearly identical discovery statutes have held that this type of data is discoverable. Woods v. Superior Court, 215 Cal.App.2d 463, 30 Cal.Rptr. 182 (Cal. Ct. App. 1996) (reciprocal discovery statute required defense to disclose defendant's responses to standardized tests given by a psychologist identified as a defense expert where: (1) the psychologist relied on the responses in reaching his conclusions; (2) the psychologist referred to the responses in his report; and (3) the report had already been disclosed to the prosecution).

Here, at the time the court entered its discovery order, Dr. Schmidt was still endorsed as a defense expert. ROA, vol. 4, 893-894. His report had been disclosed to the prosecution, and the report demonstrated that Dr. Schmidt relied on the raw data in order to reach his conclusions. ROA, vol. 4, 853. Under these circumstances, the reciprocal discovery law required that the raw data be disclosed. The court did not err by entering an order directing the defense to comply with the law.

The information obtained from Dr. Schmidt was not exempt from disclosure on the grounds of privilege either. The work product privilege protects only documents which reflect the mental processes of the attorney. See generally, Skinner v. State, 956 S.W.2d 532, 538-539 (Tx. Ct. App. 1997). The information at issue here was empirical data, which does not reveal the mental processes of the attorney and is not covered by the privilege. The tests administered by Dr. Schmidt were standardized tests, which would yield the same data irrespective of who gave the tests. Furthermore, if the data obtained by Dr. Schmidt had not been made available to Dr. Mortillaro (the State's expert), Dr. Mortillaro would have had to re-test the Defendant. Dr. Mortillaro indicated that the psychological tests used were standardized tests and a second set of tests would yield essentially the same results, and the Defendant would have succeeded only in holding the jury in abeyance for a

day or two while the tests were conducted. ROA, vol. 14, 2558-64. In light of the foregoing, it was not error for the Court to permit Dr. Mortillaro to use the raw data obtained by Dr. Schmidt.

The cases cited by the Defendant do not hold to the contrary. For example, in Smith v. McCormick, 914 F.2d 1153 (1989), the Ninth Circuit held that, where the court is required to provide a criminal defendant with a court appointed independent psychiatric evaluation, that duty is not satisfied if the psychiatrist is required to report its results directly to the court, rather than to the defendant. Clearly, that is an entirely different situation from the facts presented in this case. If the Defendant in this case wanted to withhold the information in question, all he had to do was un-endorse the expert witness before disclosure. In fact, that is exactly what was done by the defense with Dr. Paul and Dr. Camp, who were endorsed and who obviously gave the defense opinions that were not favorable to the defense position. ROA, vol. 3, 547-48, 741-42; vol. 4, 787. Dr. Schmidt was the Defendant's third mental expert. ROA, vol. 3, 741-742. Only after reciprocal discovery and independent examination by the State's expert was he likewise unendorsed in favor of the fourth defense expert, Dr. Dougherty, who apparently finally came up with an opinion the defense was willing to proffer to the jury. ROA, vol. 4, 880; vol. 13, 2305-2448.

This is not a case where the court denied the Defendant the right to a confidential psychiatric examination. Rather, in this case, the court was simply complying with the reciprocal discovery laws, in order to prohibit trial by ambush. The court properly ordered the defense to disclose the information in question. There was no error here.

Lastly, the Defendant contends that, despite the fact that the information had already been disclosed, once the defense un-endorsed Dr. Schmidt as a defense expert, the State should have been precluded from using the information gathered by Dr. Schmidt. While the Defendant cites a number of cases within this section of

his brief, the Defendant does not cite a single case to support this novel theory. It should be further noted that the State's expert, Dr. Mortillaro, never relied upon or referred to Dr. Schmidt's report or analysis, but did an independent analysis of the standardized test results. ROA, vol. 14, 2533-68. Nor did Dr. Mortillaro ever mention that the tests were administered by a defense expert. Id. He simply rendered an opinion based upon the standardized test results and an interview with Floyd. ROA, vol. 14, 2536, 2541-43, 2558-61.

The Defendant appears to suggest that the State should be precluded from using the information because it was obtained illegally and/or because it was obtained outside the parameters set up by our constitution. However, this is not the case. As explained above, the information in question was obtained lawfully and in the course of legally mandated discovery. The State did not obtain the information by illicit means, and there was no valid reason to preclude the State from using the information simply because the Defendant subsequently decided not to call the witness. There was no error here, and Defendant's claim to the contrary must be rejected.

V

DENIAL OF DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S STATEMENTS DID NOT CONSTITUTE CONSTITUTIONAL ERROR

Defendant claims that he should have been Mirandized prior to being permitted to speak with police officers and that any statements made prior to being Mirandized should have been suppressed. Additionally, Defendant claims both of his voluntary statements to police should have been suppressed in their entirety because the Defendant did not make a knowing, intelligent and voluntary waiver of his right to remain silent.

At 5:40 a.m. on June 3, 1999, the Defendant gave a tape recorded interview to Officers Christopher Catanese and Andrew Tedesco. ROA, vol. 2, 489-517. This was twenty-five minutes after the shooting began and shortly after the

Defendant was disarmed by the police after he exited the Albertson's store. The interview occurred while the Defendant was seated in the patrol vehicle with the two officers standing outside the vehicle. ROA, vol. 9, 1782-83.

Officer Catanese is a former Marine and he noticed that the Defendant was wearing Marine Corps clothing. In order to create a rapport with the Defendant, Officer Catanese asked some preliminary questions specifically as they relate to the Marine Corps. ROA, vol. 2, 489-90. A minute or so into the conversation about the Marine Corps, Officer Catanese stopped the Defendant and read him his Miranda rights. ROA, vol. 2, 490. After the rights were read Officer Catanese asked the Defendant if he understood those rights and the Defendant responded "Yeah." ROA, vol. 2, 491. After acknowledging his rights, Officer Catanese asked him "Do you want to talk about what happened?" ROA, vol. 2, 491. The Defendant answered, "I, I know what I did." ROA, vol. 2, 491. Officer Catanese asked, "Okay. Why don't you tell me what you did then?" and from that point forth the interview progressed. ROA, vol. 2, 491-517.

The first one and one-half pages of the twenty-eight-page dialogue took place prior to the Defendant being read his Miranda rights. ROA, vol. 2, 489-90. This dialogue between the Defendant and Officer Catanese should not be suppressed since the Officer was not questioning the Defendant about the offense or about any offense. At that point there was no reason for Officer Catanese or any reasonable person to believe the Defendant would incriminate himself. Miranda warnings must be given only during situations where there is "custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Interrogation is defined as questioning and other acts designed to elicit incriminating statements and the statements elicited are in fact incriminating. See Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980); Pendleton v. State, 103 Nev. 95, 734 P.2d 693 (1987); United State v. Henley, 984 F.2d 1040 (9th Cir. 1993).

The next issue raised by the Defendant is that, although he stated that he understood his rights and never thereafter invoked his rights, the waiver was not made knowingly and intelligently because he was intoxicated. The State must prove by a preponderance of the evidence that Defendant knowingly and intelligently waived his Fifth Amendment rights. See Falcon v. State, 110 Nev. 530, 872 P.2d 772 (1994). This Court in Falcon cited an earlier Nevada Supreme Court decision in Stewart v. State, 92 Nev. 168, 547 P.2d 320 (1976), wherein intoxication was discussed as a factor in the voluntariness of a statement, as well as a waiver of one's Fifth Amendment rights. The court in Stewart stated:

> Intoxication without more will not preclude the admission of incriminating statements unless it is shown that the defendant was so intoxicated that he was unable to understand the meaning of his statements.

Stewart, 92 Nev. at 170-71.

It should be noted that the issue in Stewart was actually voluntariness of the statement as opposed to waiver of a Constitutional right. Nevertheless, the court did address the issue of intoxication upon voluntariness.

It is important to note that after the Defendant acknowledged his rights, the Officer followed with a lengthy interview that consumes approximately twenty-eight pages. It is quite apparent that the Defendant was responsive to the questions and clearly understood the questions that were being asked.

In order for a confession to be deemed voluntary, it must be the product of a "rational intellect and free will" determined by the totality of the circumstances. Passama v. State, 103 Nev. 212, 213-214, 735 P.2d 934, 940 (1987). If, as a result of intoxication, defendant is not conscious of what he is saying or is unable to understand the meaning of statements made, then the statement is considered involuntary. See State v. Clark, 434 P.2d 636 (Ariz. 1967); State v. Hall, 54 Nev. 213, 13 P.2d 24 (1932). Intoxication by drugs or alcohol will not normally render an otherwise voluntary statement involuntary. See, i.e., Pickworth v. State, 95 Nev.

547, 598 P.2d 626 (1979) (defendant in light drug withdrawal at the time he gave his statement); Tucker v. State, 92 Nev. 486, 553 P.2d 951 (1976) (defendant under the influence of alcohol with a blood alcohol level of .20% held voluntary); Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997) (confession held voluntary even though the defendant had a blood alcohol level of .27%, had ingested various illegal controlled substances, and had an open stab wound in his arm.); see also Stewart v. State, supra.

It is important to note that the Defendant's blood was drawn at 8:02 a.m., two and one-half hours after the killings. The result of the test was a .09% blood alcohol level and negative for controlled substances.

In Criswell v. State, 86 Nev. 573, 472 P.2d 342 (1970), the Nevada Supreme Court held the defendant's confession to be voluntary and further that Criswell intelligently and competently waived his Constitutional rights in spite of the fact that at the time he gave the incriminating statements that he was suffering from a "schizophrenic reaction, paranoid in type." Again, the Court concluded:

> . . . such a mental disturbance itself will not necessarily preclude the admissibility of a confession by one afflicted, so long as the defendant is mentally capable of understanding the meaning and consequences of his statements.

Id. at 575-76

The Defendant gave a second voluntary statement to Detective Paul Bigham, after having been transported to the Clark County Detention Center, that was taken within approximately one-half hour of the conclusion of the statement to Officers Catanese and Tedesco. ROA, vol. 2, 518-43. According to the twenty-six-page transcript, it was commenced at 7:00 a.m. and ended at 7:32 a.m. and was taped in the Clark County Detention Center. ROA, vol. 2, 518-43. Detective Bigham used a Miranda rights card, and in the first two pages of the voluntary statement Defendant acknowledged receiving his rights. ROA, vol. 2, 518-20. The

applicable law pertaining to this statement is as set forth above and the conclusion as to its voluntariness is the same.

Under the aforementioned case law, the Motion to Suppress Defendant's Statements to Officers Catanese, Tedesco and Officer Bigham was properly granted by the district court. Defendant's claim that the court's decision constituted constitutional error is without merit.

VI

THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Defendant contends that certain statements made by the prosecutors in this case were so egregious that they denied Defendant a fair trial and violated his constitutional right to due process of law. The claim is entirely without merit.

The standard of review for prosecutorial misconduct rests upon the Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995), citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

Defendant first objects to a comment made by the District Attorney in his rebuttal argument in the guilt phase of the trial, in which the District Attorney stated that this crime was "the worst massacre in the history of Las Vegas." Defense counsel did not make a timely and specific objection to this argument when it was

made. Nor was an objection made after the argument was concluded, but before the jury was sent to deliberate. Only after arguments were finished and the jury had already been sent out to deliberate did defense counsel for the first time argue to the court that the comment was objectionable. If defense counsel had made a timely objection and motion to strike, the court could have ruled on the objection, and if it found the comment objectionable, admonished the jury to disregard it. In light of Defendant's failure to make a contemporaneous objection, any arguable error is waived. Abrams v. State, 95 Nev. 352, 355, 594 P.2d 1143, 1144 (1979); Stewart v. Warden, 94 Nev. 516, 579 P.2d 1244 (1978).

The State further submits that this comment is not improper. It is simply an accurate statement of fact known to anyone who has lived in Las Vegas any length of time, and akin to arguing in the Timothy McVeigh case that the Oklahoma bombing was the worst massacre in the history of the State of Oklahoma. The fact that four people were killed with a shotgun in a public place and a fifth nearly died was well known throughout this community as this city's worst mass murder. As such, this fact would have been a proper matter for judicial notice. NRS 47.130 (the court is permitted to take judicial notice of facts which are "[g]enerally known within the territorial jurisdiction of the trial court.") Accordingly, it was not error for the District Attorney to make this observation.

Even if the court believed that the comment in question was somehow improper, Defendant is entitled to no relief. The court offered the defense the option of recalling the jury and telling them to disregard the comment, which offer defense counsel declined. Having done so, particularly in light of the failure to interpose a contemporaneous objection, the defense cannot now claim a new trial is warranted.

Inappropriate prosecutorial comments, standing alone do not warrant reversal of a criminal conviction if the proceedings were otherwise fair. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). In order to reverse a

conviction, the errors must be "of constitutional dimension and so egregious that they denied [the defendant] his fundamental right to a fair jury trial." Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), overruled on other grounds in Byford v. State, 116 Nev.Adv.Op. 23, 994 P.2d 700 (2000).

Here, it is not possible that the comment in question jeopardized the Defendant's right to a fair trial. This comment was made during the rebuttal argument in the guilt phase of a trial at a point in the trial when the defense had already conceded guilt. ROA, vol. 7, 1363; vol. 10, 1912. As early as opening statements, the defense conceded that Floyd was guilty of four counts of first-degree murder and one count of attempt murder. ROA, vol. 7, 1363. Since the Defendant conceded guilt, there is no possibility that this passing reference affected the jury's verdict on the murder charges. Furthermore, since the comment was not directed toward the sexual assault charges, it could not have affected the jury's fair consideration of those offenses.

Moreover, in assessing whether this one comment could have possibly prejudiced the Defendant during the penalty phase of the trial, the State notes that this comment was made six days before the jury even began penalty phase deliberations and, in the interim, the jury heard compelling, emotional testimony and four subsequent arguments of counsel. It is not reasonable to believe that any comment, made during the guilt phase of the trial, substantially affected the penalty phase verdict. There is no evidence to support Defendant's claim that the prosecutor's comment affected his right to a fair trial. Therefore, the claim must be rejected for lack of merit.

Defendant next objects to a comment made by the District Attorney during closing argument in the penalty phase of the trial, in which he stated "If not in this case, what case?" Defendant did not object to the argument at the time it was made and, therefore, the issue is waived. Abrams v. State, supra; Stewart v. Warden,

supra. However, even if the court were inclined to address the claim further, the claim would still fail for lack of merit.

The argument in question was simply an argument that the jury should make the punishment fit the crime. ROA, vol. 14, 2570-72. This type of proportionality argument is entirely permissible. Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991), judgment vacated on other grounds in Moore v. Nevada, 503 U.S. 930, 112 S.Ct. 1463 (1992); State v. Witter, 112 Nev. 908, 924, 921 P.2d 886, 897 (1996) (holding that prosecutor's comment that anything less than the death sentence would be disrespectful to the dead and irresponsible to the living was proper argument regarding theories of penology and did not constitute misconduct) (overruled on other grounds in Byford, supra); State v. Mazzan, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989) (prosecutor's argument that the jury should make a statement or "set a standard" was not reversible error). As in the above cited cases, there was no error here. Therefore, Defendant's claim must be rejected.

Defendant next contends that the Chief Deputy District Attorney made an improper reference in closing argument as to how the Defendant might be treated in prison. This claim is specious. In closing argument, defense counsel contended that life without the possibility of parole was a very severe sentence. Defense counsel argued that the Defendant would not have an easy life in prison and that he would spend the rest of his life in a ten by fifteen foot cell while other people married, had children, and lived normal lives. In rebuttal, the prosecutor replied: "They mentioned a ten by fifteen cell block. Give me a break. He wants to be on the yard, he wants to play ball, he wants to watch televisions, have three meals a day . . ." ROA, vol. 14, 2667. Defense counsel clearly opened the door to this type of argument, and the prosecutor's statement was proper rebuttal. The prosecutor's rebuttal argument cannot be deemed error, in light of the fact that defense counsel invited the argument. Pacheco v. State, 82 Nev. 172, 179, 414 P. 2d 100, 104

(1966) ("the strongest factor against reversal on this ground is that the objectionable remark was provoked by defense.")

Defendant next contends that the Chief Deputy District Attorney committed misconduct in argument when he compared the instant facts to other cases. The argument in question, read in context, was as follows:

> Many people do not kill even one person or rape a single human being and still receive life without parole. . . . When I speak of proportionality of sentence, surely a quadruple murderer deserves a greater sentence than those who have only murdered once, than those who have only murdered twice, or three times, or those who have not murdered at all or raped at all.

ROA, vol. 14, 2667-68.

The Nevada Supreme Court has expressly stated that a prosecutor may compare the facts of the subject case to other hypothetical fact situations. Bennett v. State, 111 Nev. 1099, 1103-1104, 901 P.2d 676, 679-680 (1995), citing Jiminez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990). The use of hypotheticals in this manner constitutes a permissible proportionality argument, and it helps the prosecutor illustrate to the jury when the death penalty is appropriate and when it is not. Id. Under the foregoing authority, Defendant's claim of error must be rejected.

Defendant claims that this alleged prosecutorial misconduct was "especially improper" in light of the fact that the State was prosecuting two other death penalty cases close in time to Defendant's trial. Defendant's argument presupposes that the jurors in the Floyd case violated their oath and the court's instructions such that the verdict in this case was influenced by the verdict in the other cases. There is absolutely no evidence to support Defendant's claim in this regard. Since there was no prejudicial prosecutorial misconduct and there is no evidence to support Defendant's claim that the verdict in this case was influenced by the verdicts in other cases, it is inconceivable that the Defendant could have been prejudiced by the combination of these non-errors.

VII

THERE WAS NO PROSECUTORIAL MISCONDUCT DURING PRESENTATION OF VICTIM IMPACT TESTIMONY DURING THE PENALTY PHASE

The Defendant contends that this Court erred by allowing two out of approximately thirty living victims, who were present in the Albertson's store during the murders and who were, at the very least, terrorized and falsely imprisoned by the Defendant, to testify in the penalty phase of the trial regarding the facts surrounding Defendant's murder spree. The defense also claims that the trial court erred by permitting a State witness to testify to facts beyond the proper scope of victim impact testimony. These claims clearly fail for lack of merit.

The court has broad discretion in determining whether to admit victim impact testimony. Rippo v. State, 113 Nev. 1239, 1261, 946 P.2d 1017 (1997). A trial court's decision to admit such testimony will not be disturbed absent a showing of abuse. Id. An abuse of discretion occurs only if the decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. State v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997). There are Due Process limitations on the admission of victim impact testimony. However, in order to violate Due Process, the admission of the testimony must render the trial fundamentally unfair. State v. Leonard, 114 Nev. 1196, 969 P.2d 288, 299-300 (1998). Such is not the case here.

Defendant argues that the court erred by denying Defendant's motion to limit the State's victim impact testimony to just "one victim, one speaker." Defendant's argument misstates the record. The record in this case reveals that the court granted Defendant's motion, limiting the State's victim impact testimony to "one deceased victim, one speaker," notwithstanding the fact that the State had several family members for each murder victim that wished to address the jury. ROA, vol. 11, 2003-04.

The trial court agreed with the State that it was permissible to present witnesses who were present during the murders for the limited purposes of

establishing the existence of an aggravating factor, specifically 200.033(3) (murder committed by a person who knowingly created a risk of death to more than one person), and to show the true nature of this particular murder. ROA, vol. 11, 2003-04. However, the court cautioned the State that it would strictly limit the number of witnesses who could so testify and, if it believed that the evidence was becoming repetitive, it would be inclined to sustain an objection on the grounds that the evidence was cumulative. ROA, vol. 11, 2003-04. As such, the State called only two of approximately thirty living victims who were ready, willing and able to testify. ROA, vol. 11, 2045-62. Defendant's claim that his "one victim, one speaker" motion was denied is belied by the record and must be rejected on that basis.

Even if this Court were inclined to consider the issue further, the claim must be rejected. Defendant is objecting to the testimony on the grounds that it is improper, cumulative victim impact testimony. However, the testimony of the surviving victims was not victim impact testimony at all. Victim impact testimony is testimony which "refer[s] to effects of the murders on the victims' families and how much they are grieving their losses." Greene v. State, 113 Nev. 157, 171, 931 P.2d 54, 63 (1997). The State did not call the living victims to talk about the effect the murders have had on their lives. Rather, they were called to testify about the existence of an aggravating factor and to testify about Defendant's character.

It cannot be disputed that the State is entitled to present its best evidence in order to meet its burden of proof. State v. Evans, 689 A.2d 494, 498 (Conn. App. Ct. 1996) ("[T]he prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove every essential element of the crime by the most convincing evidence it is able to produce.") Furthermore, the State is entitled to present evidence of Defendant's character in the penalty phase of a capital trial. Robins v. State, 106 Nev. 611, 624-625, 798 P.2d 558, 567-568 (1990) (evidence of the defendant's uncharged misconduct was relevant to the

defendant's character and was admissible in the penalty phase of the trial). In light of the foregoing, Defendant's claim of error must be rejected.

Defendant contends that a State's witness, Mona Nall, testified to facts beyond the proper scope of victim impact testimony, and that the Court erred by allowing the testimony. This claim is totally without merit. The decision to admit evidence in the penalty phase of a capital case is within the broad discretion of the trial court. Guy v. State, 108 Nev. 770, 782, 839 P.2d 578, 586 (1992), cert. denied, 507 U.S. 1009 (1993). NRS 175.552 directs the court's discretion and, in pertinent part, provides:

> In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible.

In McNelton v. State, 111 Nev. 900, 900 P.2d 934, 938 (1995), this Court observed:

> The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just deserts."

Id., quoting Homick v. State, 108 Nev. 127, 137, 825 P.2d 600, 606 (1992). Victim impact testimony is admissible in the penalty phase of capital trials because it is relevant to show a victim's "uniqueness as an individual human being." Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991); Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994).

Mona Nall was the mother of murder victim Thomas Darnell, who was without question a unique individual with a unique background. Mrs. Nall testified that Thomas was mentally challenged and she explained the circumstances which lead to his disability. ROA, vol. 11, 2080-81. Thomas was born premature and, at five weeks, he fought a deadly battle with meningococcal meningitis. ROA, vol. 11, 2080-81. Thomas lived, but he required extensive therapy and had significant neurological impairment. ROA, vol. 11, 2081-83. Thomas's father was killed

Defendant has failed to show how the victim impact testimony elicited by the prosecutor was patently prejudicial. Riker, 111 Nev. at 1328, 905 P.2d at 713, or how the testimony so contaminated the proceedings with unfairness as to make the result a denial of due process. Wainwright, 477 U.S. at 181, 106 S.Ct. at 2471. Therefore, Defendant's claims that the prosecutor committed misconduct in his presentation of victim impact testimony must be denied.

CONCLUSION

All of Defendant's claims that the trial court committed constitutional error in its rulings on Defendant's pre-trial motions are without merit. There was no prosecutorial misconduct during penalty phase closing arguments, nor was there prosecutorial misconduct during presentation of victim impact testimony during the penalty phase. Therefore, the Defendant cannot be granted a new trial nor is he entitled to a new penalty hearing. The judgment of conviction should be affirmed.

Dated this 17th day of September 2001.

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