IN THE SUPREME COURT OF THE STATE OF NEVADA

DOMONIC MALONE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 61006

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOMONIC MALONE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 61006

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STATEMENT OF THE ISSUES

1. Whether the district court erred in reappointing counsel to Appellant.
2. Whether the district court erred by refusing to instruct the jury on robbery as a specific intent crime.
3. Whether the district court erred in providing recently upheld jury instruction on the presumption of innocence.

STATEMENT OF THE CASE

The crimes charged in this case on appeal took place between April 1, 2006 and May 19, 2006. The defendants are Domonic Ronaldo Malone (hereinafter "Appellant") and Jason Duval McCarty (Hereinafter "McCarty").

On August 2, 2006, Appellant and McCarty were charged by way of Information with: Counts 1, 4, 13 and 14 - First Degree Kidnapping (Felony – NRS 200.310, 200.320); Counts 2 and 5 - Battery with Substantial Bodily Harm (Felony – NRS 200.481); Counts 3 and 7 - Conspiracy to Commit Kidnapping (Felony – NRS 200.310, 200.320, 199.480); Count 6 – Robbery (Felony – NRS 200.380); Counts 8 and 9 - Pandering (Felony – NRS 201.300); Count 10 - Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); Count 11 - Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060,

199.480); Count 12 - Burglary (Felony – NRS 205.060); Counts 15 and 16 - Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); and Counts 17 and 18 - Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). 1 AA 1-8. McCarty was charged therein as to Counts 3-18; Appellant was charged as to all Counts. 1 AA 1-8. On August 16, 2006, Appellant and McCarty entered pleas of Not Guilty to the charges set forth in the Information. 1 AA 9-16.

On August 30, 2006, the State filed an Amended Information, wherein the substantive charges remained the same. 1 AA 46-53. Also on August 30, 2006, the State filed a Notice of Intent to Seek Death Penalty against Appellant, alleging thirteen (13) aggravating circumstances. 1 AA 17-28.

On October 9, 2006, McCarty filed a Motion to Sever his trial from Appellant's. 1 AA 54-71. The State filed an Opposition on October 23, 2006. 1 AA 72-91. On October 25, 2006, Appellant filed a Motion to Sever and a separate Joinder to McCarty's Motion to Sever. 1 AA 92-115, 116-117. The State filed an Opposition to Appellant's Motion to Sever on November 13, 2006. 1 AA 153-177. On November 30, 2006, the district court issued a decision denying the Motions finding that the crimes alleged were part of the same transaction, and that Joinder would not subject McCarty or Appellant to unfair prejudice. 2 AA 238-241.

On January 7, 2009, Appellant filed a fugitive pro per Motion to Dismiss Counsel, without attaching any points or authorities in support of said motion. 3 AA 607-608. Finding no good cause existed to dismiss counsel, the district court denied the motion. 3 AA 621. On February 5, 2009, following a hearing on a Motion to Recuse the District Attorney's Office, Appellant and counsel informed the court that all issues regarding representation had been resolved and Appellant was content with his counsel. 3 AA 635-639.

On December 3, 2009, Appellant filed a fugitive pro per Motion for Trial (Speedy) or in the Alternative, Motion to Withdraw Counsel. 5 AA 876-878. At

the December 15, 2009, hearing on Appellant's motion, the court found that the fugitive document was not properly filed and ordered the motion denied. 5 AA 887-888. However, upon Appellant's insistence, the court set a hearing for a Faretta Canvass.[1] 5 AA 892.

The Faretta Canvass hearing was held on January 8, 2010. 5 AA 893. After canvassing Appellant, the district court found that he had knowingly and voluntarily waived his right to counsel. 5 AA 916. The court then granted Appellant's request, and appointed Appellant's former counsel as stand-by. 5 AA 916-918.

On March 18, 2010, McCarty filed a Renewed Motion to Sever based upon the district court's decision to grant Appellant's request to proceed pro se to trial. 5 AA 929. The State filed an Opposition on April 9, 2010. 5 AA 1042. On April 29, 2010, the district court granted McCarty's Motion to Sever. 5 AA 1106.

At a status check and calendar call held on October 5, 2010, Appellant stated he was not ready for trial as he had not yet noticed his witnesses. 6 AA 1214, 1217. At that same hearing, McCarty's counsel announced ready and the district court ordered that trial for McCarty would go forward on October 12, 2010. 6 AA 1223-1225.

On November 3, 2010, the State filed a Second Amended Information removing only one count of Pandering from the Amended Information. Respondent's Appendix ("RA") 1-8.

On January 8, 2011, Appellant filed a pro per Motion to Dismiss Stand-By Counsel, however he failed to provide the court with any points and authorities in support of his motion. 6 AA 1278. On January 25, 2011, the district court questioned Appellant regarding his motion and, finding his complaints baseless

[1] This incident and others surrounding Appellant's period of self-representation are discussed in greater detail below. See, infra SECTION I(C)(1).

and the absence of any points and authorities improper, denied the motion. 6 AA 1279.

On June 29, 2011, Appellant filed a pleading entitled "Ex Parte Communication (Defendant Memorandum to Court)". 7 AA 1348. Therein, Appellant alleged that he had been forced against his wishes to represent himself in the underlying case. 7 AA 1349. On July 19, 2011, a hearing was held in which the court confirmed that Appellant filed the Ex Parte Communications and verified that the statements therein were true. 7 AA 1453-1459. Based on Appellant's statements, the district court revoked his request to represent himself and appointed the Special Public Defender, currently stand-by counsel, to represent Appellant once again. 7 AA 1455.

Appellant's jury trial commenced on January 10, 2012. 19 AA 3888. On January 26, 2012, Appellant submitted written Objections to the State's Proposed Trial Phase Jury Instructions. 14 AA 2971. A hearing on Appellant's objections to the State's proposed jury instructions was held outside the presence of the jury on January 30, 2012. 17 AA 3408-3429.

Also on January 30, 2012, the State filed a Third Amended Information, striking the First Degree Kidnapping charge alleged in Count 1. 17 AA 3407. The Third Amended Information thus charged Appellant as follows: Counts 1 and 4 - Battery with Substantial Bodily Harm (Felony – NRS 200.481); Counts 2 and 8 - Conspiracy to Commit Kidnapping (Felony – NRS 200.310, 200.320, 199.480); Counts 3, 11, and 12 - First Degree Kidnapping (Felony – NRS 200.310, 200.320); Count 5 – Robbery (Felony – NRS 200.380); Count 6 - Pandering (Felony – NRS 201.300); Count 7 - Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 9 - Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); Count 10 - Burglary (Felony – NRS 205.060); Counts 13 and 14 - Murder with Use of a Deadly Weapon (Felony – NRS 200.010,

200.030, 193.165); and Counts 15 and 16 - Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). 17 AA 3646-3651.

On January 31, 2012, the jury retired to deliberate. 17 AA 3624. On February 1, 2012, during deliberations, the jury presented four (4) questions to the court. 18 AA 3692-3695. At 1:23 p.m. on February 1, 2012, the jury returned its verdict. 18 AA 3634. The jury found Appellant Guilty of: Count 1: Battery with Substantial Bodily Harm; Count 2: Conspiracy to Commit Kidnapping; Count 3: First Degree Kidnapping; Count 4: Battery with Substantial Bodily Harm; Count 7: Conspiracy to Commit Burglary; Count 8: Conspiracy to Commit Kidnapping; Count 9: Conspiracy to Commit Murder; Count 11: First Degree Kidnapping; Count 12: First Degree Kidnapping; Count 13: First Degree Murder with Use of a Deadly Weapon (Charlotte Combado); Count 14: First Degree Murder with Use of a Deadly Weapon (Victoria Magee); Count 15: Robbery with Use of a Deadly Weapon; and Count 16: Robbery with Use of a Deadly Weapon. 18 AA 3635-3637. As to Counts 13 and 14, First Degree Murder with Use of a Deadly Weapon, the jury also returned a Special Verdict noting that the jury unanimously found the murders were: willful, deliberate and premeditated; committed during the perpetration or attempted perpetration of kidnapping; and committed during the perpetration or attempted perpetration of robbery. 18 AA 3636-3637. The jury found Appellant Not Guilty of Count 5: Robbery; Count 6: Pandering; and Count 10: Burglary. 18 AA 3635.

The penalty phase of Appellant's trial commenced on February 6, 2012. 18 AA 3643. On February 10, 2012, the jury returned with a Special Verdict as to Counts 13 and 14, Murder of the First Degree with Use of a Deadly Weapon, finding that the aggravating circumstance(s) outweighed any mitigating circumstance(s), and imposed a sentence of Life Without the Possibility of Parole as to both counts. 18 AA 3709, 3714.

On April 24, 2012, Appellant was present in court with counsel for sentencing. 18 AA 3751. As to Counts 13 and 14, Murder of the First Degree with Use of a Deadly Weapon, Appellant received four consecutive terms of Life Without the Possibility of Parole. 18 AA 3769. The court imposed various other consecutive and concurrent terms on the remaining Counts. 18 AA 3767-3770. Appellant also received two thousand one hundred forty-eight (2,148) days credit for time served. 18 AA 3770. The Judgment of Conviction was filed on May 8, 2012. 18 AA 3772. Appellant filed a timely Notice of Appeal on June 5, 2012. 18 AA 3777. Appellant's Opening Brief was filed on January 14, 2013. The State's Opening Brief follows.

STATEMENT OF THE FACTS

On May 20, 2006, at approximately 9:15 a.m., the Henderson Police Department (hereinafter "HPD") received a 9-1-1 emergency call that there were two naked, deceased females in the desert just west of Paradise Hills Drive and Dawson Avenue in Henderson, Nevada. Patrol officers responded to the location and secured the scene. At the time, there was no identification for the partially decomposed females who appeared to have been killed by both blunt and sharp force trauma. The bodies were later identified as those of Victoria Magee (hereinafter "Magee") and Charlotte Combado (hereinafter "Combado"). The following factual statement, elicited through testimony at trial, details the sequence of events surrounding Magee and Combado's murder.

Victim/Witness Melissa Estores aka "Red"

In the spring of 2006, Melissa Estores (hereinafter "Estores") resided at the Sportsman's Royal Manor (hereinafter "the Sportsman") on Boulder Highway and Tropicana Avenue. 8 AA 1557. Estores was a street hustler who sold both "hard" drugs (i.e., crack-cocaine) and "soft" drugs (i.e. methamphetamine) for various low-level drug dealers. 8 AA 1554. It was during her time at the Sportsman that Estores came to know Combado and Magee. 8 AA 1557-1559. Combado sold

crack-cocaine at the Sportsman, while Magee worked primarily as a prostitute. 8 AA 1557-1559. Both Combado and Magee were drug users as well. 8 AA 1557-1559.

In the months leading up to the Combado-Magee murders, Estores worked mainly for an individual known as Tre Black, later identified as Ramaan Hall (hereinafter "Tre Black"), selling methamphetamine on consignment. 8 AA 1563. Tre Black had a protégée named "D-Roc" (later identified as Appellant), for whom Estores would sell crack-cocaine on consignment. 8 AA 1561-1562.

April 2006
Beating of Estores

At some point, Estores and Appellant struck up some sort of sexual relationship. 8 AA 1702. Thereafter, Appellant apparently desired a more exclusive relationship with Estores than she desired. 8 AA 1567-1568. Sometime in April of 2006, Appellant showed up at the Sportsman bar and told Estores he wanted to talk to her. 8 AA 1567. Appellant put his arm around Estores and led her behind the Sportsman where no one could see them. 8 AA 1567-1568. Once they were behind the bar, Appellant told Estores that she owed money to Tre Black. 8 AA 1569. At that time, Estores had approximately two hundred dollars ($200.00) worth of "work," or drugs, on her person from Tre Black which she intended to sell. 8 AA 1569. Appellant then told Estores that she owed him money, which she denied. 8 AA 1570. At that point, Appellant became angry and told Estores to take off her jewelry because it was "PT" time. 8 AA 1568, 1570-1572. Estores explained that "PT" time meant "Prayer Time," which indicated that it was time for a beating. 8 AA 1568. Other witnesses would testify that "PT" stood for "Pimp Training." 15 AA 3006.

Appellant explained the rules of the beating: he would punch Estores in the chest and, if she tried to block it or made any noise, he would hit her in the right temple, the left temple, and the forehead. 8 AA 1572. He would then repeat the process. 8 AA 1573. Appellant then punched Estores in the chest, which she

naturally tried to block. 8 AA 1572-1573. Appellant then punched her in the head three times, and asked if she was ready again. 8 AA 1573. "PT" time continued for many more minutes until, severely injured, Estores fell to the ground to protect herself. 8 AA 1573. At that point, a friend came and helped Estores to a car. 8 AA 1574. Estores' injuries lasted for more than six (6) weeks. 8 AA 1575-1576.

May 16, 2006

Events Leading Up to the Kidnapping, Battery and Robbery of Estores

In the early morning hours of Tuesday, May 16, 2006, Estores and Combado were at the Sportsman, selling drugs. 8 AA 1579-1580. At that point, Combado was selling drugs for an individual later identified as Leonard Robinson, known simply as "Black" (hereinafter, "Leonard Black"). 8 AA 1581. Combado sold her "work" at the bar; however, she had lost all of her money in the gambling machines and owed Leonard Black one hundred fifty dollars ($150.00). 8 AA 1581-1582. She came to Estores seeking help. 8 AA 1582-1583.

Estores offered to help Combado and the two of them had breakfast with two of Estores' friends at the Sportsman. 8 AA 1583. During breakfast, Jason McCarty entered the Sportsman. 8 AA 1583. Due to a medical condition, McCarty had a deformed left hand, which he carried close to his chest, and his left leg would drag behind him when he walked. 8 AA 1585; 12 AA 2492-2493. McCarty interrupted the breakfast conversation, and then left without incident. 8 AA 1583-1587. Estores' friends would not loan Combado the money, so the two women left the Sportsman. 8 AA 1587-1588.

Outside the Sportsman, at a nearby Shell Gas Station, a scuffle erupted and Estores became involved in a physical confrontation. 8 AA 1587-1590. Wanting to leave before police arrived, Estores and Combado got into a green Oldsmobile driven by McCarty, and fled. 8 AA 1590. Although McCarty was often seen driving the green Oldsmobile, the car belonged to his friend Donald Herb, aka "D-Boy" (hereinafter "Herb"), a third co-defendant in the underlying case charged with Accessory to Murder after the fact. 8 AA 1590-1591; 12 AA 2488-2489.

McCarty drove Estores and Combado to the Oasis Motel on Las Vegas Boulevard near the Stratosphere Hotel and Casino. 8 AA 1591. Once inside the motel, Combado explained her predicament to McCarty regarding the $150.00 she currently owed to Leonard Black. 8 AA 1593. McCarty, in turn, explained a problem he was having with one of his "girls," named Victoria Magee, who was "out of pocket" and owed him eighty dollars ($80.00). 8 AA 1595-1597. McCarty and Combado struck up an agreement that involved McCarty covering Combado's debt to Black in exchange for Combado finding Magee and bringing her to McCarty. 8 AA 1595-1598.

Shortly thereafter, McCarty and Combado left the Oasis Motel, while Estores remained behind to roll a "blunt." 8 AA 1598. At some point, Estores looked out the window and saw Combado in a Burger King parking lot across the street walking with her arm around Magee. 8 AA 1599. Later on, around dusk, McCarty came back to the Oasis Motel on foot and told Estores to bring the blunt downstairs, at which point the two of them began walking towards the Stratosphere. 8 AA 1599-1600.

During the walk, McCarty was on the Nextel two-way communication device called a "chirper" that operates in the same manner as a walkie-talkie. 8 AA 1600. On the other end were Appellant and Combado, telling McCarty that they had Magee. 8 AA 1601. McCarty told Combado to pick them up at the valet to the Sahara Hotel and Casino. 8 AA 1605. When Estores and McCarty arrived at the Sahara valet, the green Oldsmobile was waiting for them. 8 AA 1605. Inside the car was Herb, who was driving, and Appellant, Combado and Magee. 8 AA 1605. McCarty and Estores piled in to the Oldsmobile and the group left for Herb's house, whereupon Herb exited the vehicle and the group left in his car. 8 AA 1606-1607. The group, minus Herb, drove to the Sportsman. 8 AA 1610. At this point, it was dark out. 8 A 1607.

Upon arriving, Appellant and Estores remained with the car while McCarty, Combado, and Magee entered the Sportsman. 8 AA 1610. Inside, Magee was sent upstairs to prostitute herself and render payment to McCarty. 8 AA 1610. Outside, Appellant accused Estores of giving him a sexually transmitted disease, which she denied. 8 AA 1611-1612. When Estores refused to be Appellant's girlfriend, Appellant became angry with her. 8 AA 1611-1613. A short time later, McCarty, Combado and Magee came back and the group got inside the green Oldsmobile and drove south towards Henderson. 8 AA 1613-1615.

May 16-17, 2006

Kidnapping, Battery and Robbery of Estores

During the drive, Appellant became upset and began hitting Estores and pulling her hair. 8 AA 1615. Eventually, the car pulled over near a deserted construction site of a planned residential community. 8 AA 1616-1617. McCarty ordered Estores out of the car. 8 AA 1618. Once outside the vehicle, Appellant began beating her about her head and her body with his fists and his feet. 8 AA 1619. When Estores fell to the ground, Appellant stood on her head with one foot and began kicking her with the other. 8 AA 1620. In the background, Estores heard McCarty shouting "Just take it, Red. Just take it." 8 AA 1620.

The beating continued until eventually, McCarty told Appellant that Estores had had enough. 8 AA 1621. At some point after, Appellant stopped beating Estores and walked back to the car. 8 AA 1621. McCarty then yelled to Estores, "You've got five seconds to get your shit and get in the car, or we're going to leave you out here to die." 8 AA 1621. Estores made her way back to the car, where she found Magee crying and Combado looking scared. 8 AA 1622. On the way back into town, Appellant took Estores' purse, removed its contents and threw them out of the car window. 8 AA 1624. At this point, it was approximately midnight or early morning on Wednesday, May 17, 2006.

May 17, 2006

Appellant and McCarty Threaten to Kill Estores, Magee and Combado

Once they got back into town, Appellant and McCarty dropped Estores Magee and Combado off at the Hard Rock Hotel and Casino. 8 AA 1626-1628. Before dropping them off, Appellant and McCarty explained to the women what was going to happen next: Magee had to make eighty dollars ($80.00) to give to McCarty, Estores had to make three hundred sixty dollars ($360.00) to give to Appellant, and Combado had to make sure that neither Estores nor Magee got away. 8 AA 1626-1630. Appellant and McCarty further explained that if the girls did not do as they were told, "there would be three shallow graves in the desert" waiting for them. 8 AA 1628.

The three women remained at the Hard Rock for the next few hours. Fearing that Appellant and McCarty would return and find the women without any money, Estores called a friend named David Parker (hereinafter "Parker") for help. 8 AA 1633-1634. Parker came and picked up the three women and took them back to his house. 8 AA 1635-1636. It was approximately 4:00 a.m. at this point. 8 AA 1636. The women fell asleep at Parker's house, not waking up until around 6:00 or 7:00 in the evening. 8 A 1637. Parker then told the women that they could no longer stay at his place, and they decided to head back to the South Cove Apartments, on 15th Street and Fremont, where both Tre and Leonard Black lived. 8 AA 1637-1638.

May 17, 2006
Kidnapping of Magee and Combado

When the women arrived at the South Cove Apartments, they attempted to enter Leonard Black's apartment, but he was not home. 8 AA 1642. Estores then had a conversation with Tre Black, which caused her believe Appellant intended to cause her harm. 8 AA 1642. Eventually, Leonard Black and his cousin, Demarco, arrived at South Cove, and the girls entered Leonard's apartment. 8 AA 1644-1645. Inside the apartment, they noticed a set of golf clubs. 8 AA 1645. Because Combado still owed Leonard Black money, Estores had Leonard and Demarco take her to a nearby convenience store to purchase cigarettes. 8 AA 1645-1646.

At some point while Estores, Leonard Black and Demarco were gone, Appellant and McCarty arrived at the South Cove apartments and spoke with Tre Black. 10 AA 2030. They were upset, saying that the girls owed them money. 10 AA 2030. Sarah Matthews, the mother of Tre Black's children, saw that Appellant had a golf club in his hands. 10 AA 2030-2031. Appellant and McCarty then walked down to Leonard Black's apartment. 10 AA 2033. Approximately ten to fifteen minutes later, they exited with Combado and Magee, forcefully holding their arms. 10 AA 2033-2034. Combado and Magee were crying. 10 AA 2033-2035. Appellant and McCarty walked them to a green car, they got in, then drove away. 10 AA 2034-2037.

When Estores, Leonard and Demarco returned, they found the door to Leonard's apartment open and Magee and Combado were gone. 8 AA 1646. Additionally, signs of a struggle were apparent: Magee and Combado's clothes were strewn about the floor, their purses had been emptied, and Magee's sandals (the only pair of shoes Magee owned) were also found in the apartment. 8 AA 1646-1647.

Upset that someone had broken into his apartment, Leonard Black asked Estores if she knew who was responsible. 8 AA 1647. Estores responded that it was Appellant and McCarty. 8 AA 1647. Leonard Black, Demarco and Estores then left for the Sportsman. 8 AA 1647-1648.

May 18, 2006

Beating of McCarty by Leonard Black

They arrived at the Sportsman in the early morning hours of Thursday May 18, 2006. 8 AA 1648. At approximately 4:00 a.m., McCarty arrived. 8 AA 1649. Leonard Black and Demarco jumped McCarty in the parking lot of the Sportsman and proceeded to beat him. 8 AA 1650-1651. Estores then left with Leonard Black before police arrived. 8 AA 1652.

Later that day, Estores was dropped off again at the Sportsman where she came into contact with Ryan Noe (hereinafter "Noe") in the parking lot. 8 AA

1653. Noe, a friend of Magee's, asked Estores if she knew where Magee was, and Estores explained what had happened the night before. 8 AA 1654. Noe then took her back to his residence, where she remained until Friday, May 19, 2006, when she heard a news report of the bodies found in the desert. 8 AA 1654-1655. Estores told Noe about what she saw on the news and he took her to the Henderson Police Department (hereinafter "HPD"), where she informed police of her story. 8 AA 1656-1658.

Subsequent Investigations

Donny Herb[2]

The following testimony provided by Herb at Appellant's trial corroborates and supplements the facts outlined above.

On Tuesday, May 16, 2006, Herb drove Appellant, Magee and Combado to the Sahara Casino in his green Oldsmobile to pick up McCarty and Estores. 12 AA 2502. Although Herb owned the green Oldsmobile, McCarty routinely drove it in the months preceding and up to May of 2006. 12 AA 2488-2489. After picking them up, Herb drove home, exited the vehicle, and remained at home while the rest of the group left in his Oldsmobile. 12 AA 2502-2503.

On Wednesday, May 17, 2006, Herb was at the Sportsman where he encountered Appellant and McCarty. 12 AA 2506. McCarty and Appellant told Herb that they had dropped "the girls" off at the Hard Rock earlier that day to put them "to work," but that they had failed to turn up with any money and/or drugs. 12 AA 2507. Herb noticed that they appeared irritated. 12 AA 2507. Herb subsequently went home and fell asleep around 11:30 p.m. 12 AA 2508-2509.

[2] Herb was initially arrested in connection with the crimes underlying this case. 12 AA 2542. Subsequent to his arrest, Herb cooperated with the State in its investigation. 12 AA 2542. Pursuant to a plea agreement, Herb agreed to testify truthfully to the events surrounding the case. 12 AA 2544. Herb was ultimately charged with, and pled guilty to, Accessory to Murder after the Fact. 12 AA 2544.

At approximately 1:30 a.m., on Thursday, May 18, 2006, Herb received a call from McCarty telling Herb that he and Appellant had found the girls and had taken them to the spot where they had beaten Estores a few days prior. 12 AA 2509-2510. McCarty asked Herb if he wanted to come see the girls get "dealt with," but Herb declined. 12 AA 2511. Shortly thereafter, Herb received another call from McCarty, who told Herb that if he wanted his green Oldsmobile, he would have to come and get it; otherwise, Appellant and McCarty were going to drive it across state lines and send it back on a flatbed truck. 12 AA 2511-2512. Herb, who had another car at his disposal, agreed to drive to his car and meet them. 12 AA 2512.

Herb had trouble finding Appellant and McCarty, requiring him to place multiple phone calls to McCarty along the way. 12 AA 2512-2515. Just before he arrived, McCarty again called Herb and said, "Do you realize that you're not involved in a beating this time? You're involved in two murders now." 12 AA 2516. In the background, Herb heard Appellant say "She's not dead yet," to which McCarty replied "Hit her with a club or something." 12 AA 2516-2517. Again, Herb heard Appellant's voice: "The club's broken, we only brought one." 12 AA 2516. McCarty responded: "Just hit the bitch in the head with a rock. Let's go." 12 AA 2517. McCarty then told Herb that they would meet him in a minute as they were "just cleaning up." 12 AA 2517.

Thereafter, Appellant and McCarty pulled up in the green Oldsmobile next to Herb and told him to follow them. 12 AA 2518. They proceeded south on the I-95 towards Hoover Dam and, prior to reaching the dam, pulled over to the shoulder of the road in a dark, secluded area. 12 AA 2518-2519. Appellant and McCarty began emptying items from the trunk of the Oldsmobile, including rocks, a knife, and a broken putter. 12 AA 2521-2523. McCarty and Appellant also discussed burning Magee and Combado's clothing. 12 AA 2525. McCarty asked Herb to be his alibi; Appellant stated that his wife would be his alibi. 12 AA 2526.

Both vehicles then drove back into town, and stopped at a gas station. 12 AA 2526-2527. McCarty asked Herb to enter the convenience store and buy a bottle of water so he could wash the blood from his hands; Appellant threw a grocery bag containing unknown items into a nearby dumpster. 12 AA 2527. McCarty asked Herb for money to change the tires of the Oldsmobile, and Herb gave him two hundred dollars ($200.00). 12 AA 2528-2529. McCarty then left for the Sportsman in the green Oldsmobile, and Herb drove Appellant home. 12 AA 2531-2531. Once Herb dropped Appellant off, Appellant threw his shoes away in a dumpster. 12 AA 2533.

A couple of days after the incident, Herb found himself at the Sportsman with McCarty inside a unit rented by Corrina Phillips (hereinafter "Phillips") and Lynn Nagel (hereinafter "Nagel"). 12 AA 2535-2536. McCarty was explaining to Herb that Phillips and Nagel would be providing him his alibi with regards to the late-night/early-morning hours of May 17 and 18, 2006. 12 AA 2535. Appellant arrived and, with McCarty, they explained to Herb that they had found "the girls" at an apartment belonging to some guy named "Black," and that they had taken the women's clothes to keep them from leaving the desert. 12 AA 2538.

Approximately one week later, Herb was arrested by HPD detectives. 12 AA 2540-2541. Herb would later drive the detectives out to the remote location where Appellant and McCarty had emptied the Oldsmobile's trunk. 12 AA 2543. There, police found a golf club shaft, a putter head, and rocks with blood on them. 12 AA 2544.

Corrina Phillips

The following testimony provided by Phillips at Appellant's trial corroborates and supplements the facts outlined above.

Phillips corroborated that, on Tuesday night May 16, 2006, McCarty, Magee and Combado showed up at the Sportsman. 15 AA 2996, 3000. While there, McCarty and Appellant sent Magee upstairs to perform fellatio on an unknown

individual in exchange for crack cocaine. 15 AA 3002. Appellant was also overheard on the phone discussing the need to take the women out to the desert for "PT" time. 15 AA 3001, 3005-3006. Phillips recalled that McCarty had told her that he was a pimp and the "PT" or "Pimp Training" was a method used to put his prostitutes to work and keep them in line. 15 AA 3006. She also heard discussion that they were going to take Magee and Combado to the Hard Rock Hotel and Casino. 15 AA 3003.

Phillips also testified that on Wednesday night, May 17, 2006, Appellant and McCarty had picked her up from work. 15 AA 3007. They then took her home to the Sportsman and, sometime around 11:30 p.m., Appellant and McCarty left together, saying they had to go look for Magee and Combado. 15 AA 3008-3009. Phillips did not see McCarty again until May 18, 2006, when he was beaten up by Leonard Black in the Sportsman parking lot. 15 AA 3012.

On Friday, May 19, 2006, Appellant and McCarty picked Phillips up from work. 15 AA 3014. On the way back, Appellant and McCarty were discussing whether there was anything in the newspaper about what had occurred. 15 AA 3014. When they returned, Phillips overheard Appellant on the phone, saying "no shoes, no clothes, desert." `15 AA 3015. The next day, Appellant and McCarty again pick Phillips up from work. 15 AA 3015. Before leaving, Appellant removed his pants and threw them in a dumpster near Phillips' place of employment. 15 AA 3015. When they returned to the Sportsman, McCarty, in Appellant's presence, asked Phillips to go out and get the tires on the green Oldsmobile changed. 15 AA 3017-3018. He provided her with cash and instructed her not to take a receipt or ask any questions. 15 AA 3018. Ultimately, the tire shop could not change the tires and Phillips returned to inform Appellant and McCarty that she was unable to get the tires changed. 15 AA 3019-3020. They told her not to worry about it, because they had a friend who could do it. 15 AA 3020.

Detective Gerard Collins

Detective Gerard Collins (hereinafter "Detective Collins") testified to examining the crime scene. 15 AA 3126. In addition to corroborating the testimony of Estores, Noe, and Herb, with regards to their assistance in the murder investigation (15 AA 3129-3145), Detective Collins testified to receiving cellular phone records for Herb, McCarty and Appellant. 15 AA 3145-3146. Detective Collins detailed the information provided within those records, which indicated when and where particular phone calls were made by these individuals at the times surrounding the murders. 15 AA 3147-3167; 16 AA 3291-3324. Ultimately, their locations at material times and dates corroborated the foregoing testimony provided by State's witnesses. 15 AA 3147-3167; 16 AA 3291-3324.

Victim Autopsy – Magee

On May 21, 2006, Dr. Piotr Kubicek (hereinafter "Dr. Kubicek") of the Clark County Coroner's Office performed an autopsy of Magee. 10 AA 2223. Dr. Kubicek identified multiple blunt and sharp force traumas to the head, neck, thorax, abdomen, and upper and lower extremities. 10 AA 2225, 2231-2239. Specifically, Dr. Kubicek found that the blunt force injuries inflicted on Magee's skull were consistent with being struck by golf club. 10 AA 2236. Additionally, he identified three (3) stab wounds to the head and neck area. All injuries were determined to have been suffered perimortum. 10 AA 2241. Dr. Kubicek determined the cause of death to be blunt and sharp force trauma to the head and thorax, with the manner of death homicide. 10 AA 2242. Finally, Dr. Kubicek detected levels of cocaine in the decomposition fluids and the liver. 10 AA 2240.

Victim Autopsy – Combado

Also on May 21, 2006, Dr. Kubicek conducted the autopsy of Combado. 10 AA 2243. Dr. Kubicek identified multiple blunt and sharp force injuries to Combado's head, neck, thorax, abdomen, and upper and lower extremities. 10 AA 2245, 2250. He also identified a sharp force injury across Combado' neck, six (6)

inches long and one (1) inch deep, which severed arteries and veins, and an incised wound on the right upper chest. 10 AA 2245-2246, 2249. Combado also had multiple fractures to her skull, jaw, teeth, eye orbit and nose, and a fractured vertebra. 10 AA 2246-2247. All of the injuries were found to have occurred perimortum. 10 AA 2248. Ultimately, the cause of death was determined to be blunt and sharp force trauma to the head and thorax; the manner of death was declared homicide. 10 AA 2251-2252. Finally, Dr. Kubicek detected levels of methamphetamine in both the decomposition fluid and the liver. 10 AA 2251.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN REAPPOINTING COUNSEL

Appellant first claims that the district court erred in terminating his right of self-representation. In support of this claim, Appellant makes the following five arguments: (1) Appellant's request for self-representation was timely; (2) Appellant's request for self-representation was not equivocal; (3) Appellant's request for self-representation was not for purpose of delay; (4) The district court did not make any findings that Appellant was disruptive to the judicial process; and (5) The district court erroneously based its revocation of Appellant's right to self-representation on the complexity of the case. Based on these factors, Appellant seeks reversal of his conviction.

However, during Appellant's eighteen-month stint as a pro se Defendant, he equivocated, obstructed, delayed and otherwise abused his right to self-represent. The five factors cited above by Appellant are generally relevant to a district court's determination of whether to grant or deny a defendant's *initial* request to waive counsel. See, e.g., Vanisi v. State, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001). The State does not challenge the validity of Appellant's initial waiver of his right to counsel, and to that extent the analytical framework set forth by Appellant in his Opening Brief is largely irrelevant to determining the propriety of the district court's actions. Rather, the grounds justifying the district court's

decision to reappoint counsel arose over the eighteen-month period Appellant acted as his own counsel, during which he repeatedly equivocated positions on his desire to self-represent, intentionally sought to inject error into the proceedings, and engaged in obstructive and disruptive behavior delaying the prosecution of his case. Ultimately, these instances culminated in Appellant filing an "Ex Parte Communication" with the court, in which he accused the court of denying him his right to representation and requested assistance. Each of these grounds justified the district court's decision to reappoint counsel. As explained below, this Court should look to the totality of the circumstances to determine whether the district court abused its discretion in reappointing counsel at Appellant's request.

A. Standard of Review

The issue of revoking or withdrawing (as opposed to denying) a defendant's invocation of the right to self-representation has not been addressed by this Court. However, in analyzing a defendant's conduct as a pro se litigant, this Court "will not substitute its own evaluation for the district court's personal observations and impressions." Vanisi, 117 Nev. at 340, 22 P.3d at 1171. Moreover, there is wide spread agreement amongst other courts that, following a Faretta waiver of counsel, the decision to reappoint counsel is well within the discretion of the court. United States v. Leveto, 540 F.3d 200, 207 (3d Cir. 2008); see also United States v. Solina, 733 F.2d 1208, 1211-12 (7th Cir.), cert. denied, 469 U.S. 1039 (1984); Menefield v. Borg, 881 F.2d 696, 700 (9th Cir.1989); U.S. v. Merchant, 992 F.2d 1091, 1095 (10th Cir.1993); State v. Rhodes, 807 N.W.2d 1, 7 (Wis. 2011); State v. DeWeese, 816 P.2d 1, 4 (Wash. 1991); People v. Lawrence, 205 P.3d 1062, 1069 (Cal. 2009) ("The standard is whether the court's decision was an abuse of its discretion under the totality of the circumstances."). Accordingly, the State submits that the district court's decision to reappoint counsel eighteen months after Appellant invoked his right to self-representation should be reviewed for an abuse of discretion based on the totality of the circumstances.

B. Relevant Case Law

Generally, a criminal defendant has the right to self-representation under the Sixth Amendment of the United States Constitution and the Nevada Constitution. See U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 818-19, 95 S.Ct. 2525 (1975); Nev. Const. art. 1, § 8, cl. 1. Where an accused chooses to self-represent, he must satisfy the court that his waiver of the right to counsel is knowing and voluntary. Faretta, 422 U.S. at 835, 95 S.Ct. 2525; Vanisi, 117 Nev. 330 at 337-38, 22 P.3d at 1169-70 (2001).

A court may deny a request for self-representation if the request is untimely, equivocal, or made for purpose of delay. Vanissi, 117 Nev. at 338, 22 P.3d at 1170. Additionally, such a request may be denied where a defendant has proven to be disruptive or obstructive to the judicial process. Id. at 340, 22 P.3d at 1171. While an accused has the right to conduct his own defense, that right does not give a pro se defendant license to abuse the dignity of the courtroom or to not comply with relevant rules of procedural and substantive law. Id. (citing to Faretta, 422 U.S. at 835 n. 46, 95 S.Ct. 2525). Finally, although the complexity of the case and fair-trial concerns cannot constitute an independent basis for denial of a motion for self-representation, they are relevant factors for the court to consider. Id. at 341, 22 P.3d at 1172.

It is also well recognized that, *after* the motion to proceed pro se has been granted, a defendant may, by virtue of his conduct, indicate abandonment or withdrawal of a request for self-representation. McKaskle v. Wiggins, 465 U.S. 168, 182, 104 S. Ct. 944, 953 (1984) (stating that "[e]ven when he insists that he is not waiving his Faretta rights," an invitation, acquiescence, or solicitation of certain types of participation by standby counsel undermines protestations that counsel interfered); see also Faretta, 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46; Brown v. Wainwright 665 F.2d 607 (5th Cir.1982); People v. Kenner, 223 Cal. App. 3d 56, 62, 272 Cal. Rptr. 551 (Ct. App. 1990).

In Wainwright, the Fifth Circuit majority, sitting en banc, squarely held that after a defendant has asserted the right of self-representation, a waiver may be found if it reasonably appears from the conduct of the defendant that he has abandoned his request to represent himself. Id. at 611. Comparing the right of self-representation and the right to counsel, the majority in Brown reasoned that the relinquishment of the right to proceed pro se is a far easier matter than waiver of the right to counsel. The majority explained:

> The important distinction in the manner in which the two rights come into play *requires that a different waiver analysis be applied to the right of self-representation than to the right to counsel*. Unlike the right to counsel, the right of self-representation can be waived by defendant's mere failure to assert it. If on arraignment an indigent defendant stands mute, neither requesting counsel nor asserting the right of self-representation, an attorney must be appointed. Even if defendant requests to represent himself, however, *the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue* or has abandoned his request altogether. [Citations.] ... [¶] The right of self-representation, then, is waived if not asserted, while the right to counsel is not. *Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived [than the right to counsel] at a later point, after assertion*. Therefore, … stringent requirements for waiver of counsel ... do not apply in full force to the right of self-representation. *A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself*.

Id. at 610–611 (emphasis added). Other courts have similarly held that a defendant's vacillating positions on a request to continue self-representation constitute a waiver of the right to proceed pro se. See, e.g., United States v. Bennett, 539 F.2d 45, 51 (10th Cir. 1976); Meeks v. Craven, 482 F.2d 465, 467-68 (9th Cir.); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15-16 (2d Cir.), cert. denied, 384 U.S. 1007, 86 S.Ct. 1950. While "personal dialogue" between the court and the defendant may be advisable to determine whether there is a waiver,

no such inquiry is necessary where the circumstances indicate vacillation or abandonment. Wainwright, 665 F.2d at 611-612.

C. The District Court Did Not Abuse Its Discretion by Revoking Appellant's Asserted Right to Self-Representation

During the year-and-a-half time in which Appellant represented himself, he repeatedly equivocated as to his decision to self-represent and, on more than one occasion, accused the court of denying him his right to appointed representation. This conduct alone established the reasonable appearance that Appellant abandoned his initial request to represent himself, and justified the district court's subsequent revocation of that request. Moreover, Appellant's equivocal comments made after the Faretta hearing should not entitle him to place the lower court in a position of committing error no matter which way the trial court rules. The State submits that this Court ought not to countenance the abuse of the right to self-representation by allowing Appellant to inject such error into the record and manufacture issues on appeal. Finally, Appellant engaged in a disruptive and obstructive pattern of conduct that resulted in a continued delay of the prosecution of his case, providing additional grounds for the district court to revoke Appellant's pro se status. For each of these reasons, Appellant's claim must fail.

1. Relevant Facts

a. *Appellant's Statements of Equivocation and Obstructive Conduct*

The Faretta Canvass hearing was held on January 8, 2010. 5 AA 893. After canvassing Appellant, the district court found that he had knowingly and voluntarily waived his right to counsel, granted Appellant's request to proceed pro se, and appointed Appellant's former counsel as stand by. 5 AA 916-918. Immediately afterwards, Appellant sought a continuance of the trial date, to which the State objected as grounds to deny Appellant's request to self-represent. 5 AA 924-925. The court explained to Appellant that an untimely request constitutes grounds for denial, and Appellant ultimately stated he would be ready to go to trial in April without counsel. 5 AA 926.

On March 25, 2010, when discussing the upcoming calendar call, Appellant interrupted the court and expressed a clear desire for an attorney, stating: "I did [*sic*] would like my counsel back." 5 AA 1011. However, when the court asked if he was now waiving his right to represent himself, Appellant equivocated, stating "at this point in time," he did not necessarily want stand-by counsel reappointed. 5 AA 1012. In light of Appellant's equivocation, and because one of Appellant's stand-by attorneys would not be available for the upcoming April trial date in the event that Appellant requested counsel be reappointed, the court continued the trial to October of 2010. 5 AA 1013-1016. Appellant lodged his objection to the court's ruling, stating he was ready to go to trial. 5 AA 1015-1016.

At the calendar call six months later, Appellant stated he was not ready for trial and he had not yet noticed his witnesses. 6 AA 1214, 1217. Notably, at a status check hearing only one month prior, the district court informed Appellant that the October trial was fast approaching and reiterated that he must be ready to go forward at that time. 6 AA 1193-1194. Ultimately, McCarty's counsel announced ready and the district court, having already severed the defendants' trials, ordered that trial for McCarty would go forward on October 12, 2010. 6 AA 1223-1225.

At a November 18, 2010, hearing on Appellant's Motions to Dismiss for Prosecutorial Misconduct, Appellant refused to be transported to court, requiring the court to continue the matter. RA 9-15. Appellant was subsequently admonished for his refusal to appear and the delay that it caused. RA 14.

On January 8, 2011, Appellant filed a pro per Motion to Dismiss Stand-By Counsel without attaching any points and authorities in support of his motion. 6 AA 1278. On January 25, 2011, the district court again admonished Appellant for failing to follow the rules of the court and advised Appellant that continued abuse of the rules would result in appointment of stand-by counsel. 6 AA 1285-1286.

Also on January 25, 2011, Appellant once again shifted his position regarding his decision to self-represent. In this instance, Appellant accused the district court of "den[ying] [him] the right to have representation," claiming that "during my Faretta hearing I had asked for, you know what I'm saying, counsel and stuff like that." 6 AA 1282. Moreover, Appellant again implied that he *might* invoke his right to counsel at some point before trial, but explained that he did not want the Special Public Defender's Office appointed "if this was to get to the point where I need not no longer represent myself." 6 AA 1282. When the court denied Appellant's motion to remove the special public defenders as stand-by counsel (which Appellant ostensibly filed in order to have different counsel appointed when he later withdrew his request to self-represent), Appellant asked the court: "So you're telling me today you're denying me the right to have representation?" 6 AA 1286.

On June 29, 2011, Appellant filed a pleading entitled "Ex Parte Communication (Defendant Memorandum to Court)". 7 AA 1348. Therein, Appellant once again claimed that he had "been forced to represent himself," that he "did not want to represent himself," and that he had "always been more than willing to accept proper assistance." 7 AA 1349. Based upon Appellant's representations, the court revoked Appellant's request to self-represent. See 7 AA 1455 (THE COURT: "Sir, if you feel you have been forced to represent yourself and there's – and that you did not want to represent yourself, your request to represent yourself is now vacated or is denied."). The court then appointed the Special Public Defender, currently stand-by counsel, to represent Appellant once again. 7 AA 1455. During a subsequent discussion with Appellant, the following exchange took place:

> THE COURT: Sir, your pleadings [*sic*] very clear. The Defendant did not want to represent himself in this matter.
> THE DEFENDANT: Yes. Yes, sir.
> THE COURT: Okay. Your wish is granted, sir.

7 AA 1456.

Even *after* the court reappointed counsel based on Appellant's requests for assistance, Appellant *again* equivocated, filing a Motion to Withdraw Counsel. 7 AA 1460. This final equivocation prompted the court to highlight the vagaries of Appellant's position and the delay it has caused the proceedings:

> And, sir, I think you've been playing games because I gave you the Faretta Canvassing. You were absolutely clear what you wanted to do…. [¶] Then a couple of months ago I get a letter from you saying you never wanted to do it and you were forced which again is utterly ridiculous because I personally gave credit and I painstakingly went over every question and then a couple of months – and some months ago, you play this game saying oh, I didn't really want to do this. Someone forced me to do this. And that's just ridiculous.

7 AA 1467.

Ultimately, Appellant went to trial with counsel, was convicted, and subsequently spared the death penalty, being sentenced only to Life Without Parole for his crimes.

b. *Effects of Appellant's Equivocations on the Underlying Proceedings*

The ambiguity of Appellant's resolve to self-represent can also be seen in the effects it had on arguments made by the State and in rulings by the district court. For instance, Appellant's equivocation created confusion in the proceedings that led to severance of the underlying trial, as neither the court nor the State knew whether Appellant wanted counsel appointed. On April 13, 2010, the district court heard defendant McCarty's renewed motion to sever, which was based on Appellant's recently acquired pro se status. 5 AA 1100. There, the State argued that "it's bad policy to let two Defendants sever themselves by one Defendant taking a Faretta Canvas *particularly a Defendant who's already said I'm most likely going to take my counsel back*." 5 AA 1100 (emphasis added).

The district court echoed this uncertainty when granting McCarty's motion to sever: "I think because of the problem with Mr. Malone, I don't know if he's playing games here. At the last minute he's going to say he wants the Special PD

to represent him or not, but due to the nature of this case I think we're going to prevent some problems by severing this." 5 AA 1106. Appellant's many equivocations caused the district court to repeatedly question whether Appellant was "playing games" with his pro se status, only to demand counsel just before trial. See, e.g., 6 AA 1181 ("I don't know if you're playing a game or at the last minute at Calendar Call you're going to say well, I want, you know, I want real attorneys."); 7 AA 1467. Ultimately, the court's concerns were well-founded, as Appellant conveyed an express desire for assistance in his "Ex Parte Communication" in the buildup to trial.

2. Appellant's Conduct Constituted an Abandonment of His Initial Request to Proceed Pro Se and a Renewed Request to Appoint Counsel

As noted, supra, where a pro se defendant's conduct indicates an abandonment of his initial request to represent himself, the court may consider the conduct a waiver of that request and reappoint counsel. Here, Appellant's conduct, including his repeated equivocations and the "Ex Parte Communication" in which he explicitly requests assistance, constituted an abandonment of his Faretta waiver and a renewed request for counsel. Accordingly, the reappointment of counsel was within the district court's discretion, and the court did not abuse that discretion by reappointing the Special Public Defenders.

First, Appellant's "Ex Parte Communication," filed June 29, 2011, constituted an explicit abandonment of his Faretta waiver and a request to appoint counsel. Therein, Appellant repeated his common accusations that he had "been forced to represent himself," explicitly stated that he "did not want to represent himself," and acknowledged that he had "always been more than willing to accept proper assistance." 7 AA 1349. Based in part on these representations, the district court found that Appellant had abandoned his request to self-represent and was asking the court to appoint counsel. 7 AA 1455. Because Appellant requested assistance and no longer wanted to represent himself, the district court was well

within its discretion to consider reappointing counsel. See, e.g., People v. Lawrence, 205 P.3d 1062, 1066-67 (Cal. 2009).

Even assuming arguendo that Appellant's "Ex Parte Communication" was not sufficiently explicit to constitute an abandonment of his Faretta waiver in its own right, it certainly constituted an implicit waiver, particularly when viewed in conjunction with Appellant's equivocating conduct during the eighteen-month period of self-representation. As demonstrated above, Appellant repeatedly vacillated on his decision to self-represent. In March of 2010, Appellant told the court he wanted "counsel back," only to then equivocate by saying he did not want counsel "at this point in time," implying that he eventually would withdraw his request to self-represent. 5 AA 1101-1102. In January of 2011, Appellant repeatedly accused the district court of "den[ying] [him] the right to have representation," and again implied he would seek representation before going to trial. 6 AA 1282. When the district court denied his motion to dismiss stand-by counsel, Appellant asked the court: "So you're telling me today you're denying me the right to have representation?" 6 AA 1286. These equivocating statements, in addition to the representations and accusations made in the "Ex Parte Communication," constituted "subsequent conduct indicating [Appellant] is vacillating on the issue." Wainwright, 665 F.2d 610-611. Because this conduct created a reasonable appearance to the court that Appellant was no longer resolved to represent himself, the court did not err in finding that Appellant had waived his request. See Vanisi, 117 Nev. at 340, 22 P.3d at 1171 (in analyzing a defendant's conduct as a pro se litigant, this Court "will not substitute its own evaluation for the district court's personal observations and impressions."). It was therefore within the district court's discretion to reappoint counsel.

Furthermore, the district court's decision to appoint counsel was not an abuse of discretion. In considering whether to withdraw a defendant's request for

self-representation and appoint counsel, the California Supreme Court has adopted "totality of the circumstances" framework. Specifically:

> [A] trial court should consider, along with any other relevant circumstances, (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

People v. Lawrence, 205 P.3d 1062, 1066-67 (Cal. 2009) (quotations and citations omitted). Ultimately, "the trial court's discretion is to be exercised on the totality of the circumstances, not strictly on the listed factors." Id. at 1067.

Here, Appellant had repeatedly equivocated on his desire to change from self-representation to counsel-representation, often accusing the court of denying him his right to counsel-representation. Moreover, he claimed that he wanted assistance and had been "forced" into a situation of self-representation against his wishes. By the time the court reappointed counsel, the proceedings were over four-years old, of which Appellant had been self-representing for one-and-a-half years. The district court's decision to appoint counsel did not disrupt or delay the proceedings, and in fact likely streamlined the case, as the court reappointed standby counsel who had already announced ready prior to Appellant's decision to self-represent. Finally, based on Appellant's unfamiliarity with the substantive components of the law, his inability to comply with procedural requirements such as noticing witnesses in advance of trial, the complexity of the case and severity of the charges, there was an extreme unlikelihood that Appellant would be able to effectively defend against the charges if he were required to continue on as his own attorney. Accordingly, the district court did not abuse its discretion, under the totality of the circumstances, in reappointing counsel. Appellant's claim should be denied.

3. Appellant Should Not Be Allowed to Abuse the Right to Self-Represent by Repeatedly Injecting Equivocating Remarks into the Record and Manufacturing Error for Appeal

As a pro se defendant, Appellant exploited numerous opportunities to voice his conflicting and equivocating positions on the decision to self-represent. Both in writing and during oral argument, Appellant would request assistance of counsel on one hand, reject it on another, and then hint that he *might* want counsel appointed at some later date. The end result was a record of manufactured error, in which Appellant would have this issue on appeal regardless of which way the lower court ultimately ruled on the matter. This Court ought not to countenance pro se defendants abusing the right to self-representation by placing trial judges in an impossible dilemma through equivocal waivers. See Meeks v. Craven, 482 F.2d 465, 468 (1973).

The case of Wheeler v. State, 839 So.2d 770 (Fla. 4th DCA 2003) illustrates this point clearly. In Wheeler, the district court granted the defendant's request to proceed pro se after conducting a Faretta hearing. Id. at 771. At a subsequent hearing, the defendant equivocated on the issue of proceeding pro se, and when the court offered to appoint an attorney, the defendant responded "[t]hat's fine," then later stated "[j]ust let me keep going like I'm going." Id. at 773. Ultimately, the district court did not appoint counsel and, on appeal, the defendant claimed the court erred in not doing so. Id. Rejecting this argument, the Florida Court of Appeals recognized the exploitative nature of an equivocal request for representation:

> The state properly draws our attention to the problem, noted by the Ninth Circuit Court of Appeals in Meeks v. Craven, 482 F.2d 465, 467 (9th Cir.1973), that, after waiving the right to counsel, the convicted defendant may "mount a collateral attack upon his trial or plea, claiming either that he did not understand what he was doing or that the court should have forced counsel upon him.... *We can find no constitutional rationale for placing trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a*

> *guaranteed error no matter which way the trial court rules*." Id. at 468 (emphasis added).
>
> Here, Wheeler's equivocal comments made after the Faretta hearing do not entitle her to place the court in a position of committing error no matter which way the trial court rules. See id. The state notes that if the trial court appointed counsel based upon Wheeler's equivocal comments (which she rescinded upon further inquiry by the trial court), then she would surely argue that the trial court improperly infringed upon her right to self-representation. Such "heads I win, tails you lose" tactics have previously been rejected by this court.

Id. at 774.

As already noted above, on more than one occasion Appellant: explicitly requested counsel be appointed (5 AA 1011, 6 AA 1282, 7 AA 1349); stated he no longer wanted to self-represent (7 AA 1349, 7 AA 1456); insisted he was being "forced" to represent himself (7 AA 1349); and repeatedly accused the district court of denying him his right to counsel-representation (6 AA 1282, 6 AA 1286, 7 AA 1349). These conflicting messages do not comport with a desire to self-represent. Appellant's less-than-steely resolve and inconsistent positions on his desire to self-represent are nothing more than shady attempts to intentionally inject error into the record for use on appeal. Appellant's gamesmanship should not be rewarded. To hold otherwise would be to "plac[e] trial courts in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules." Meeks, 482 F.2d at 468. Appellant's claim must be denied.

4. Appellant's Disruptive, Obstructive, and Dilatory Conduct as a Pro Se Defendant Constituted Grounds to Revoke His Faretta Waiver

Looking beyond the fact that Appellant, through his conduct, waived his right to self-represent, and further still looking beyond the fact that Appellant abused the right of self-representation by intentionally injecting error into the record, the district court had numerous other grounds upon which to revoke Appellant's pro se status.

For instance, Appellant's conduct as a pro se defendant resulted in at least two continuances of his trial. First, Appellant's statement "I did [*sic*] would like

my counsel back," at a March 25, 2010, hearing before calendar call forced the district court to continue the April trial out of concern that Appellant would request assistance when stand-by counsel was not available. 5 AA 1011-1016. Second, at the next calendar call in October 2010, Appellant announced "not ready," as he had failed to notice his witnesses.[3] 6 AA 1217. A court may deny a request for self-representation if the request is untimely, equivocal, or made for purpose of delay. Vanissi, 117 Nev. at 338, 22 P.3d at 1170

Additionally, Appellant engaged in conduct that was disruptive and obstructive to the judicial process, which is grounds for denying a request to self-represent. Id. at 340, 22 P.3d at 1171. For instance, Appellant refused to be transported to court for a hearing on a motion he filed, resulting in a continuance of the matter. RA 9-15. Appellant also filed motions without attaching any points and authorities, abusing court rules and decorum. 6 AA 1278. While a defendant has a right to conduct his own defense, that right does not grant the accused license to abuse the dignity of the courtroom or not comply with relevant rules of procedural and substantive law. Vanissi, 117 Nev. at 340, 22 P.3d at 1171 (citing Faretta, 422 U.S. at 835 n. 46, 95 S.Ct. 2525).

Finally, although the complexity of the case and fair-trial concerns cannot constitute an independent basis for denial of a motion for self-representation, they are relevant factors for the court to consider. Id. at 341, 22 P.2d at 1172. Here, the State had alleged sixteen separate charges against Appellant, fifteen of which were felony charges. In addition to the number of charges, the State was pursuing the

[3] Appellant claims that he was not obligated to be ready for trial in October because the prosecuting attorney had expressed a desire to try his co-defendant McCarty first, after their trials had been severed. AOB 28. However, as the district court explained to Appellant multiple times at separate hearings before the calendar call, it was up to the court, not the State, as to which trial would go first. 6 AA 1194, 1199, 1218. Moreover, each time the court informed Appellant that he must be ready at the October calendar call, Appellant acknowledged he understood. 6 AA 1194, 1199, 1218. Nonetheless, Appellant announced not ready, requiring a continuance of his trial.

death penalty as well. The charges spanned a six-week crime spree, requiring a six-week trial in which the State called nineteen witnesses, many of whom were experts. Moreover, the case consisted of multiple co-defendants, one of whom was testifying against Appellant pursuant to a plea deal. Lastly, the case was being prosecuted by two experienced and highly-trained district attorneys. In light of Appellant's inability to effectively serve as counsel during his eighteen month stint as a pro se defendant, it was clear that the complexity of the case and fair trial concerns weighed in favor of reappointing counsel based on Appellant's withdrawal of his Faretta waiver.

Each factor noted above, when taken together and in conjunction with Appellant's repeated equivocations, provided the district court with grounds to revoke Appellant's initial request to self-represent. The district court did not abuse its discretion in doing so, and Appellant's claim must be denied.

II
THE DISTRICT COURT PROVIDED PROPER JURY INSTRUCTIONS AS TO ROBBERY

Appellant next claims that the district erred in failing to provide a jury instruction defining robbery as a specific intent crime. AOB 39. While acknowledging that Nevada precedent defines robbery as a general intent crime, Appellant asks this Court to disavow that precedent and find robbery to be a specific intent crime. AOB 40. In support of this request, Appellant argues that NRS 200.380 is silent as to intent, necessitating a common law interpretation of robbery as a specific intent crime. AOB 42-43. Appellant also claims such an interpretation is necessary in cases where robbery serves as a predicate offense to felony murder. AOB 44-45. Because robbery is statutorily defined as a general intent crime, and because Appellant's arguments fail to justify overturning this longstanding Nevada precedent, Appellant's claim must fail.

A. Standard of Review

The district court has broad discretion to settle jury instructions, and the district court's decision is reviewed for an abuse of that discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A defendant is not entitled to misleading or inaccurate jury instructions that misstate the law. Geary v. State, 110 Nev. 261, 265, 871 P.2d 927, 929 (1994); Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). However, "whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo." Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). If a jury instruction is found to be in err, the instruction is reviewed under a harmless-error analysis. Barnier v. State, 119 Nev. 129, 132-33, 67 P.3d 320, 322 (2003). An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827 (1999).

B. Robbery is a General Intent Crime and the District Court did not Err in Instructing the Jury as Such

Appellant argues that the district court erred when it refused to instruct the jury that robbery was a specific intent offense. However, the district court's refusal to provide such an instruction cannot constitute an abuse of discretion because robbery *is* a general intent crime in Nevada. Litteral v. State, 97 Nev. 503, 508, 634 P.2d 1226, 1228–29 (1981), disapproved on other grounds by Talancon v. State, 102 Nev. 294, 301, 721 P.2d 764, 769 (1986). Moreover, robbery does not become a specific intent crime merely because it is used as a predicate felony for the purposes of the felony murder rule. See State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002).

Insofar as Appellant argues Litteral was incorrectly decided, he fails to provide this Court with the compelling grounds necessary to disavow longstanding Nevada precedent. This Court has repeatedly held that "under the doctrine of stare decisis, [this Court] will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice." Adam v. State, 261 P.3d 1063, 1065

(Nev. 2011), quoting Secretary of State v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). Moreover, the doctrine of stare decisis imposes a significant burden on the party requesting that a court disavow one of its precedents; this Court generally will not disavow one of its precedents absent a showing of serious detriment prejudicial to the public interest. Thomas v. Washington Gas Light Co., 448 U.S. 261, 272, 100 S.Ct. 2647 (1980); see also Burk, 124 Nev. at 597 n. 63, 188 P.3d at 1124 n. 63, citing to Grotts v. Zahner, 115 Nev. 339, 342, 989 P.2d 415, 417 (1999) (Rose, J., dissenting). Lastly, "[c]ourts are only justified in overruling former decisions where they are deemed to be clearly erroneous." Halloway v. Barrett, 87 Nev. 385, 389, 487 P.2d 501, 504 (1971).

Appellant has failed to meet his severe burden in justifying overturning this Court's ruling regarding the mens rea of robbery. NRS 200.380 defines Robbery as:

> the *unlawful* taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.

NRS 200.380(1) (emphasis added). Prior to Litteral, Nevada case law regarding the mens rea associated with robbery never addressed the governing statutory language. Litteral, 97 Nev. at 506, 634 P.3d at 1227. In Litteral, this Court held NRS 200.380 had defined robbery as a general intent crime, noting that "[w]here ... the Legislature in defining the crime of robbery speaks of `wrongful' or `unlawful' taking as our Nevada statute provides, it has been held that the statutory definition is more limited than the common law definition and no intent is necessary except the intention of doing the act denounced by the statute." Id. at 506, 634 P.2d at 1228 (citation omitted). The Litteral Court thus recognized that the Legislature had, within its prerogative, defined robbery as a general intent crime, overriding previous common law interpretations of robbery as a specific intent crime. Id.

Attempts to argue otherwise have long been rebuffed by this Court. See, e.g., Hickson v. State, 98 Nev. 78, 79, 640 P.2d 921 (1982); Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985); Daniels v. State, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998); Wilson v. State, 281 P.3d 1232 (Nev. 2009).

Similarly, there is not a specific intent requirement when robbery is employed as a predicate offense to felony Murder. The felony murder doctrine in Nevada is a creature of statute, defined by NRS 200.030(b) as murder which is "[c]ommitted in the perpetration or attempted perpetration of sexual assault, *kidnapping*, arson, *robbery*, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099." (Emphasis added). Simply stated, the Nevada Legislature has defined the felony Murder rule as any homicide committed while perpetrating or attempting a specifically enumerated felony. Payne v. State, 81 Nev. 503, 505, 406 P.2d 922, 924 (1965). The purpose of the felony murder rule is to deter felons from killing, whether intentionally, negligently or accidentally, by holding them strictly responsible for killings that result from their committed or attempted felonies. Id. at 506, 406 P.2d at 924. Thus, it is "[t]he heinous character of the felony," and not the intent associated with the felony, that "is thought to justify the omission of the requirements of premeditation and deliberation." Id. Accordingly, this Court has repeatedly held that robbery, as a crime of general intent, is a valid predicate offense under the felony murder rule. Cf. Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985) (defendant was not entitled to instruction that voluntary intoxication negated specific intent to kill because robbery invokes the felony Murder rule); Daniels v. State, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998) ("Daniels' claimed incapacity to form specific intent would not shield him from culpability for robbery and concomitant culpability for first-degree murder under the felony murder rule.").

Even if, assuming arguendo, Appellant has good cause to raise this argument, Appellant fails to demonstrate that he will be prejudiced by dismissal of this claim. In addition to finding Appellant committed the murders during the perpetration or attempted perpetration or robbery, the jury returned a Special Verdict finding that the murders were (1) willful, deliberate and premeditated, and (2) committed during the perpetration or attempted perpetration of kidnapping. 18 AA 3636-3637. Accordingly, any errors in the jury instructions related to robbery were harmless beyond a reasonable doubt. Cortinas v. State, 124 Nev. 1013, 1026, 195 P.3d 315, 324 (2008) (noting that if a jury does not receive the appropriate instruction regarding specific intent, a defendant's conviction must be reversed unless the district court's failure to instruct the jury was harmless beyond a reasonable doubt).

Finally, Appellant argues that this Court would violate its commitment to narrow the class of persons eligible for the death penalty when it permits general intent robbery to underlie a felony Murder offense. AOB 46. First, Appellant does not have standing to raise this argument as the jury did not impose the death penalty as a punishment in this case. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (in order to establish standing, claimant must have suffered an "injury in fact"). Second, Appellant's contention is meritless. Appellant conflates the definition of capital felony murder under NRS 200.030(b) with the capital sentencing scheme set forth in NRS 200.033(4). In McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), this Court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." Id. at 1069, 102 P.3d at 624. Here, the jury set forth nine (9) separate aggravating circumstances associated with the murders of Combado and Magee in its Special Verdict. The mens rea associated with the robbery charge, even as a predicate offense to the felony Murder, is separate and

distinct from the capital sentencing scheme. Accordingly, Appellant's claim must fail.

III
THE DISTRICT COURT ISSUED A PROPER INSTRUCTION ON THE PRESUMPTION OF INNOCENCE

For Appellant's final issue on appeal, he alleges that the district court erred in employing the following jury instruction on the presumption of innocence:

> INSTRUCTION NO. 45
> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt that every material element of the crime charged and that the Defendant is the person who committed the offense
> …
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

17 AA 3480. Although this Instruction complies with the presumption of innocence language set forth in NRS 175.191, Appellant asserts that the instruction was confusing and reduced the State's burden of proof because it did not identify the "material elements" of each charge. AOB 50. Appellant further argues that Nunnery v. State, 127 Nev. ——, ——, 263 P.3d 235, 259–60 (2011) (upholding use of the "material element" language in jury instructions), was wrongly decided because it relied on prior opinions that did not specifically address the issue of whether a jury could be instructed to determine the "materiality" of an element of a crime. AOB 51.

Appellant claims that Jury Instruction No. 45 is inadequate because it prefaces "element" with the term "material," thereby forcing the jury to determine an element's materiality. This contention is without merit. This Court has repeatedly upheld and approved of jury instructions containing the exact language currently found in Jury Instruction No. 45. See Nunnery, 263 P.3d at 259-260 (citing to See, e.g., Morales v. State, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006); Crawford v. State, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005); Gaxiola v. State,

121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005); Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998)); see also, Evans v. State, 112 Nev. 1172, 1190-91, 926 P.2d 265, 277 (1996); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 555 (1991); Beets v. State, 107 Nev. 957, 963, 821 P.2d 1044, 1048-49 (1991) Washington v. State, 112 Nev. 1067, 922 P.2d 547 (1996); Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993). While the cases cited in Nunnery may not have explicitly focused on the "material element" language contained within the jury instruction, they nonetheless explicitly approved the instruction in its entirety. It was Nunnery in which the "material element" argument set forth by Appellant was explicitly rejected, based, in part, upon the fact that this Instruction has long been upheld as constitutional in Nevada. Appellant's argument fails to provide any grounds that would necessitate revisiting the Nunnery decision.

Appellant also sets forth the blanketed allegation that Jury Instruction No. 45 runs afoul of federal case law and is thus unconstitutional. AOB 53. However, in Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080-81 (1993), the United States Supreme Court stated:

> The prosecution bears the burden of *proving all elements of the offense charged*, see, e.g., Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); Leland v. Oregon, 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 96 L.Ed. 1302 (1952), *and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements*, see, e.g., In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (per curiam).

Sullivan, 598 U.S. at 277-78, 113 S.Ct. at 2080-81 (emphasis added). Jury Instruction No. 45 "places upon the State the burden of proving beyond a reasonable doubt that every material element of the crime charged." This language clearly tracks that set forth in Sullivan, thus belying Appellant's baseless assertion. Though the phrases contain slightly different words, the standard enunciated

remains the same. Thus, the district court did not abuse its discretion in providing this long-upheld instruction.

Finally, Appellant's bare allegations that Jury Instruction No. 45 lowers the prosecution's burden of proof are unpersuasive and contrary to Nevada case law. There is no evidence to suggest that the instruction will lead, or has led, a jury to speculate as to the materiality of a particular element. Appellant seeks to quibble over semantics only for the sake of undermining an otherwise legally sufficient and longstanding reasonable doubt instruction. The district court did not abuse its discretion by giving this Instruction and this Court ought to reject Appellant's request to overrule Nunnery.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 9th 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) 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 14,000 words or does not exceed 30 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 9th 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 9, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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