IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE SLAUGHTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 61991

RESPONDENT'S ANSWERING BRIEF

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

WILLIAM H. GAMAGE, ESQ.
Gamage and Gamage
Nevada Bar #009024
5580 South Fort Apache, Ste. 110
Las Vegas, Nevada 89148
(702) 386-9529

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE SLAUGHTER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 61991

RESPONDENT'S ANSWERING BRIEF

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

STATEMENT OF THE ISSUES

1. Whether the identifications were impermissibly suggestive; if so, whether they were nonetheless reliable.
2. Whether the surveillance video was admissible and sufficiently authenticated.
3. Whether the probative value of the surveillance video substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury.
4. Whether selected comments constitute prosecutorial misconduct.

STATEMENT OF THE CASE

Rickie Slaughter (hereinafter "Appellant") was initially charged by way of Information with Conspiracy to Commit Kidnapping, Conspiracy to Commit Robbery, Conspiracy to Commit Murder, two counts of Attempted Murder With Use of a Deadly Weapon, Battery With Use of a Deadly Weapon, Attempted Robbery With Use of a Deadly Weapon, Robbery With Use of a Deadly Weapon, Burglary While in Possession of a Firearm, Burglary, six counts of First-Degree

Kidnapping With Use of a Deadly Weapon, and Mayhem on September 28, 2004. 1 Respondent's Appendix ("RA") 1-9. Appellant initially pleaded guilty and was sentenced. 1 RA 98-120. On August 7, 2006, he filed a Post-Conviction Petition for Writ of Habeas Corpus challenging the voluntariness of his plea. Id. The district court eventually denied the Petition but this Court ultimately reversed that decision and ordered that Appellant be permitted to withdraw his plea. 1 RA 10-20, 98-120. Upon remand, Appellant entered a not-guilty plea and decided to proceed to trial. On January 31, 2011, Appellant filed a Motion to Preclude Suggestive Identification. 1 AA 17. The State filed its Opposition on February 11, 2011; Appellant replied on February 25, 2011. 1 AA 146, 151. The district court denied the Motion on March 3, 2011. 1 AA 196-207.

Appellant's trial was held on May 11 through May 20, 2011. 1 RA 98-120. On May 20, 2011, the jury found Appellant guilty on 14 of the 17 counts charged. 3 AA 542-46. Appellant was adjudicated guilty October 16, 2012 and sentenced as follows: **COUNT 1**-CONSPIRACY TO COMMIT KIDNAPPING to 24 to 60 MONTHS in the Nevada Department of Corrections (NDC); **COUNT 2**-CONSPIRACY TO COMMIT ROBBERY to 24 to 60 MONTHS, CONSECUTIVE to COUNT 1; **COUNT 3**-ATTEMPT MURDER WITH USE OF A DEADLY WEAPON to 60 to 180 MONTHS plus a CONSECUTIVE 60 to 180 MONTHS for the deadly-weapon enhancement, in the NDC, CONSECUTIVE to

COUNT 2; **COUNT 4**-NOT ADJUDICATED; **COUNT 5**-ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON to 48 to 120 MONTHS plus a CONSECUTIVE 48 to 120 MONTHS for the deadly-weapon enhancement, in the NDC, CONCURRENT to COUNT 3; **COUNT 6**-ROBBERY WITH USE OF DEADLY WEAPON 48 to 120 MONTHS plus a CONSECUTIVE 48 to 120 MONTHS for the deadly-weapon enhancement, in the NDC, CONSECUTIVE to COUNT 3; **COUNT 7**-BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON to a 48 to 120 MONTHS in the NDC, CONCURRENT to COUNT 6; **COUNT 8**-BURGLARY to 24 to 60 MONTHS in the NDC, CONCURRENT to COUNT 7; **COUNT 9**-1ST DEGREE KIDNAPPING WITH SUBSTANTIAL BODILY HARM WITH USE OF A DEADLY WEAPON to 15 YEARS to LIFE plus a CONSECUTIVE 15 YEARS to LIFE for the deadly-weapon enhancement, in the NDC, CONSECUTIVE to COUNT 6; AND COUNTS 10 to 14 - 1ST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON to 5 YEARS to LIFE plus a CONSECUTIVE 5 YEARS to LIFE for the deadly-weapon enhancement, in the NDC, ALL CONCURRENT to COUNT 9; with 2,626 DAYS credit for time served. 1 RA 87-90. The Judgment of Conviction was filed October 22, 2012. 1 RA 91-95. Appellant filed a Notice of Appeal October 24, 2012. 1 RA 96-97.

STATEMENT OF THE FACTS

Ivan Young (hereinafter "Ivan") was living at a home on 2612 Gloryview, North Las Vegas, Clark County, Nevada. 2 AA 337.[1] Also residing in the home were his wife Jennifer Dennis (hereinafter "Jennifer") and their ten year old son Aaron Dennis (hereinafter "Aaron"). 2 AA 337-38. On June 26, 2004, Ivan was in his garage working on a Monte Carlo with the garage door open. 2 AA 337-45. Ivan's wife, son, and nephew Jose Posada (hereinafter "Joey") had just returned home and entered through the front door. 2 AA 338.

There was still daylight and Jennifer went back out to check the mail about two houses down. 1 AA 165; 2 AA 339, 358. There, she observed a teal or blue, Mercury or Ford car, also parked two houses down, from which two men were walking toward their home. Id. She came to the garage briefly and told Ivan that she thought his friends were here. 2 AA 339. Ivan looked out the garage and observed the two men walking up from a green Ford Taurus but they were not his friends, nor the person he was expecting that evening. Id. At first, they asked if they could come in the garage and discussed painting cars and other related topics. Id. However, when Appellant asked Ivan for a phone number and Ivan turned to

[1] NRAP 10 states that the relevant portions of the trial court record shall be submitted in an "Appendix." Appellant entitles his "Appellant's Index" and has Bates Numbering containing a portion of his last name. The State will refer to the documents contained within using the same pagination but utilize the abbreviation for Appellant's Appendix of "AA."

get a business card, Appellant put a gun to Ivan's head and ordered him inside the home.[2] 2 AA 339-40.

Once inside the home Appellant and his co-conspirator tied Ivan up in the living room (later moving him into the kitchen area), tied Jennifer up in the kitchen, and restrained Aaron and Joey in the den area facing the wall using cords that they cut off of appliances in Ivan's home. 2 AA 340; 3 AA 432. Neither Aaron nor Joey had their heads covered. 3 AA 433. Appellant and his co-conspirator—throughout the encounter—demanded to know where the money, drugs, and guns were at. 2 AA 340. They appeared to be searching for cash. 3 AA 433. Although Ivan did not realize it, Appellant had previous knowledge that Ivan operated a cash-only car painting business out of his home. 2 AA 380-83.

Appellant and his co-conspirator sprayed Lysol on Jennifer and told her it was to cover up their fingerprints. 2 AA 350. Jennifer also noted that Appellant and his co-conspirator were wearing dark gloves. Id. Joey had a better look at the gloves and described them as sport gloves, possibly baseball gloves. 3 AA 432. Crime scene personnel testified that no fingerprints were found at the scene but a cloth pattern in the shape of fingers, consistent with gloves, was found on numerous items. 2 AA 347-50, 354-55.

[2] The witness descriptions and evidence connecting the guns and Defendant are described in detail in Argument, Section I(C).

When Ivan did not respond to their demanding questions, they would kick, hit, and strike him with their guns. 2 AA 340, 350, 364-65. At some point during this ordeal, Ivan's head was covered. 2 AA 340. Then they drug him into the kitchen and told him "to look up and this is the gun that's going to kill you." 2 AA 341. Appellant pointed the gun at Ivan and fired it into Ivan's face. Id. Ivan heard the gunshot and then blacked out for some period. Id. Joey described Ivan's shooting as follows:

> A: Me and my – my cousin and I were sitting in the den and they kept asking my uncle for money and then I hear a gunshot and then I looked over and nothing was wrong and then I faced the wall again and then a couple seconds later I look over and there's a pool of blood by my uncle's head.
> Q: Okay. What did you do?
> A: I told my cousin not to look and then I was trying to comfort him.
> Q: And what were you thinking when you saw the blood by your uncle?
> A: I thought he was dead.
> …
> Q: After you looked over, did you see anyone with weapons at that point?
> A: Yes, the two black men still had the guns.

3 AA 433.

Jennifer later discovered that the bullet had struck their floor after going through Ivan's face. 2 AA 361. She discovered this when "[she] had to clean up [her] husband's blood and teeth." Id. At some point, Ivan regained consciousness and heard his friend Jermaun Means (hereinafter "Jermaun") come in the home. Id. Ivan had painted some rims and was expecting Jermaun to pick them up. Id.

When Jermaun entered the room, Ivan was laying on the floor bleeding. 2 AA 335. Appellant and his co-conspirator tied Jermaun up and demanded his money. Id. Jermaun had brought $1,500.00 with him; they took at least $1,000.00 and his cell phone. 2 AA 334-35. After Appellant and his co-conspirator left, Jermaun was able to go across the street to his girlfriend's car and called 9-1-1; at some point Jennifer also got on the phone, telling police that the car was likely blue but a voice can also be heard in the background saying the car was green. Id.; 3 AA 434, 537.

At some point during the ordeal, one of Ivan's neighbors, Ryan John (hereinafter "Ryan"), also came in the house. 2 AA 341-42. Ivan heard the Appellant tie Ryan up, demand money, kick him, beat him, and jump on his head resulting in a scream. 2 AA 342. Ryan had been visiting his girlfriend but was summoned across to the house by the Appellant who claimed Ivan needed to talk to him. 2 AA 388. Appellant first summoned him to the garage and then forced him in the house at gun point. 2 AA 389. He was tied up in the kitchen. Id. Appellant took Ryan's wallet and Wells Fargo bank card. 2 AA 390. Ryan heard Ivan beg not to die in front of his son, then a gun shot. Id. After Appellant and his co-conspirator left the house Ryan went out a window, through the backyard, and to other homes where he found someone with a phone which he used to call 9-1-1. Id.

Eventually police and medical personnel arrived and were shown to a bedroom where Ivan was lying down. Id.; 2 AA 364. Ivan was taken to UMC and suffered severe injuries as a result of his attack. 2 AA 390. Ivan lost his right eye and four or five of his teeth. Id. Ivan also continues to suffer from severe migraines and sharp pains in the right side of his face. Id.

Quality of Witnesses' Identifications of Appellant as One of the Hostage Takers

Ivan had the longest opportunity to view the Appellant. 2 AA 337-46. Ivan saw them approaching from a green Ford Taurus; he testified that he did not recognize either as they were walking up, showing he was looking at their faces. 2 AA 339. Appellant and his co-conspirator had a discussion with Ivan about painting cars during which he had additional time to observe. Id. Ivan's Preliminary Hearing testimony also reflects that it was a summer evening and thus it was sunny outside, making it easy to see Appellant. 1 AA 165. Appellant was in the garage with Ivan during this discussion, while his co-conspirator stood in front of the garage. 2 AA 339. At trial, Ivan testified that it "looked like they were wearing like hats and wigs" and that both of them were talking in fake Jamaican accents, claiming to be from Belize. 2 AA 340. Ivan also previously testified that one of the men had dreadlocks and one was dressed in blue and white. 2 AA 344. In his Preliminary Hearing testimony, Ivan said the other man was wearing a red

and white jersey shirt; he clarified that the "Jamaican" accents sounded contrived. 1 AA 170-71.

Ivan specifically stated that at the time Appellant pulled the gun on him, "[he] didn't really pay attention to the gun." 2 AA 340. Prior to having something placed over his head, Ivan had more time for observation as indicated by his testimony that he could see where his wife, son, and nephew were tied up. Id. Ivan also noted that once tied up, but before he was moved, he was taunted with weapons and hit in the front of the face (allowing him to view Appellant). 2 AA 341. Ivan positively identified Appellant at trial. 2 AA 339. Ivan also selected Appellant from a photo line-up presented to him at the hospital on June 28, 2004, approximately two days after the crime, by initialing next to the photo. 2 AA 342-43. Ivan clarified that detectives did not tell him Appellant's name, nor did he know it at the time of the crime or lineup, but rather was told by a friend later. 2 AA 345. The police reports reveal that Ivan was listed as being in stable condition when the officer went to the hospital to conduct the interview. 1 AA 38. The report also states, "Young was very coherent and remembered the incident very well." 1 AA 45. Ivan also told the officer that he could identify Appellant without a doubt. Id.

Jermaun was grabbed as he entered the door but still made numerous observations. 2 AA 334-336. He said that two black males with dreadlocks or a

dreadlock wig grabbed him, that there were approximately four people tied up, and Ivan was lying on the floor bleeding. Id. He remembered seeing one gun but was focused on the Appellant's person rather than the weapon and did not remember what the gun looked like. Id. While Jermaun could not immediately name Appellant at the scene, he identified Appellant in a photo line-up approximately two days after the crime, on June 28, 2004; Jermaun said Appellant's face stood out to him, the face not the photograph used. Id; 1 AA 37. However, Jermaun admitted at trial that after seven years he probably could not identify Appellant in person; as such, the State never asked him to try to identify anyone in the courtroom. 2 AA 334-336. Jermaun testified at trial that he had also told the police that one of the attackers had been wearing a beige suit jacket and had dreadlocks or a dreadlock wig. Id.

Ryan also observed Appellant's actions during the hostage ordeal. 2 AA 388-396. Ryan testified that he was outside his girlfriend's house across the street from Ivan's and was walking to his car when Appellant called him over to Ivan's home using a fake Jamaican accent. 2 AA 388. When he arrived, Appellant shut the door behind him and held a gun under his throat while standing face to face; the co-conspirator was also in the garage. 2 AA 388-89. Ryan noted that they did not cover anyone's head until around the time they shot Ivan. 2 AA 389. Instead, he was supposed to keep his head down, but Ryan testified that they would stomp

on his head because he lifted it up. Id. Ryan also testified that he "could see them because [he] was like watching, trying to see what was going on because [he] was trying to get out of there, and [he] was waiting for both of them to go in the other room again." 2 AA 390. Ryan testified that he watched Appellant and his co-conspirator walking around, going through everything, going through everyone's pockets, and spraying Lysol or a similar substance. Id. Ryan also testified that he participated in a photo line-up on June 29, 2004, approximately three days after the shooting and identified Appellant. 2 AA 391. He also identified Appellant at the Preliminary Hearing; noting that he recognized Appellant by his facial features as the person he had seen the day of the crime who used a fake Jamaican accent to call him over to the home. Id.; 1 AA 178-79, 182. Further, Ryan was able to identify Appellant at trial. 2 AA 391-92. Finally, Ryan clarified that while he had seen Ivan and Jennifer prior to the line-up they had not discussed any details and while he wrote "I think" in his witness comments he did not intend to qualify his response and was sure that Appellant was the guy that called him over. 2 AA 394.

Joey had numerous opportunities to observe the Appellant and his co-conspirator because his head was never covered. 3 AA 431-37. Joey had not seen either Appellant or his co-conspirator before. 3 AA 431. Aaron and Joey were in a bedroom when Appellant came in the house; Ivan told them to come out and they saw Appellant before being moved to the main part of the house where they had to

lie down on the floor. Id. Later, Joey was tied up with his cousin and told to face the wall. 3 AA 431-32. However, he was able to look a few times and see Ivan, the Appellant walking around the house, and also noted that the men had the weapons after they shot Ivan. Id. Joey gave a statement to police on the night of the crime. 3 AA 434. The police report reflects that he described the suspects as two black males, one with braids and the other with a dark afro; he also noted that one of the men was wearing a tuxedo shirt. 1 AA 38. Approximately five days later, on July 1, 2004, Joey participated in a photo line-up because police said they had arrested someone; he identified Appellant by writing "I saw him next to my uncle. This man had a gun." Id. He was also able to identify Appellant at the Preliminary Hearing and at trial. 3 AA 435. At trial, Joey described Appellant and his co-conspirator on the day of the crime as having braids and dreadlocks and at least one of them having a "suit jacket" or "tuxedo dress up suit." 3 AA 431, 436.

Jennifer briefly saw Appellant when checking the mail and observed a teal or blue, Mercury or Ford car, from which two men were walking toward their home. 2 AA 339, 358. Jennifer testified at trial that one of the attackers had "little short dreads," and fake Jamaican accents. 2 AA 358, 362. She had provided descriptions that one of them was wearing a blue shirt and jeans and the other a red shirt and jeans. Id. Jennifer confirmed that she had not been able to pick Appellant out of the photo line-up but also noted that she followed Appellant's

instructions not to look up during the attack. 2 AA 350, 363. Jennifer observed that there were suit jackets missing from their home after the robbery; these were different than the leather jackets used to cover their heads with during the crime. 2 AA 360, 363.

SUMMARY OF THE ARGUMENT

The photo line-up identifications in this matter were not impermissibly suggestive and were sufficiently reliable. Further, contrary to Appellant's convoluted argument, the surveillance video was properly authenticated, properly admitted, and its probative value outweighs any danger of unfair prejudice, issue confusion, or misleading the jury. Finally, none of the alleged instances of prejudicial behavior of the prosecutors constitutes misconduct.

ARGUMENT

As a preliminary matter, the State notes that Appellant's Opening Brief in its Argument portion in Sections I, II, III, and IV(A) fails to provide any citations to the Record on Appeal to factual allegations. NRAP 28(a)(9)(A). "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). This Court has stated that "[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal." State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) (citing, Mazzan v.

Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000)). Regardless, the State will endeavor to respond on the merits and with record citations, although in some instances, the State will be forced to make educated guesses as to what exactly Appellant is contending.

I. THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S PRETRIAL "MOTION TO PRECLUDE SUGGESTIVE IDENTIFICATION" AND THUS DID NOT ERR IN PERMITTING LATER IDENTIFICATIONS AT TRIAL

This Court reviews mixed questions of law and fact for two different standards. See Lamb v. State, 127 Nev. ____, ____, 251 P.3d 700, 703 (2011) (stating that in analyzing a suppression motions, this Court "review[s] the district court's legal conclusions de novo and its factual findings for clear error."). Further, this Court recently held:

> Suppression issues present mixed questions of law and fact." Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), overruled on other grounds by Nunnery v. State, 127 Nev. ____, ____, 263 P.3d 235, 250–51 (2011). This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo. Cortes v. State, 127 Nev. ____, ____, 260 P.3d 184, 187 (2011); State v. Lisenbee, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000)

State v. Beckman, 129 Nev. ____, ____, 305 P.3d 912, 916 (2013). Here, Appellant sought to have the photo lineup and in-court identifications suppressed. 1 AA 17. Therefore, his claims on appeal are subject to the test set forth in Beckman.

Appellant claims that the lineup was impermissibly suggestive because Appellant's photo had a highlighted background, appeared to be a different age and condition, and gave the impression that he was the "man who did it." See, AOB, pg. 8-9. "In reviewing the propriety of a pretrial identification, this court considers '(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.'" Thompson v. State, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009) (quoting Bias v. State, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989)). Pretrial identifications will be set aside, "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Odoms v. State, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986) (citing Coats v. State, 98 Nev. 179, 643 P.2d 1225 (1982)). "**Short of that, it is for the jury to weigh the evidence and assess the credibility of the eyewitnesses.**" Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980) (emphasis added) (citing Stovall v. Denno, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 1972 (1967); Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Jones v. State, 95 Nev. 613, 600 P.2d 247 (1979); Wise v. State, 92 Nev. 181, 547 P.2d 314 (1976)).

A. The Photographic Identification Procedure, or lineup, was not impermissibly suggestive and did not give rise to a very substantial likelihood of irreparable misidentification.

To determine if a lineup was impermissibly suggestive, the court must examine the totality of the circumstances and determine "whether a photographic identification procedure was 'so unduly prejudicial as to fatally taint [the defendant's] conviction.'" Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (citing Simmons v. United States, 390 U.S. 377, 383 (1968)).

Here, Appellant relies on United States v. Saunders, 501 F.3d 384, 390 (4th Cir. 2007) and makes the assertion that the identification was suggestive because the background of Appellant's photograph in the lineup was white while the others were blue. See, AOB, pg. 2, 8-9. The court in Saunders, described a photo that was the only one in its array of six to have no overhead lighting and a dark background that gave the Appellant a "menacing countenance" that was not seen in the other photographs. Saunders, 501 F.3d at 390-91. Further, the Saunders court noted that where photos are dissimilar, precautions such as instructions to the witness and an attempt to dilute irregularities can mitigate any concerns. Id. Of note is that the Saunders court found the photo lineup impermissibly suggestive due to the combination of factors including the police department's failure to follow their own instructions/procedures, rather than just the background and menacing appearance; the Court also went on to allow the identification because it deemed it reliable. Id.

Here, the facts of the case are distinguishable from Saunders. First, examination of the color copies of the lineups used reveals that Appellant's background was not white, as a clear edge can be seen to his photograph. 1 AA 0-3. While varying shades of blue, all the photographs have some blue shading to the background and the individuals depicted have very similar appearances. Id. Most prominently, in Ivan's photo lineup the background on Appellant's photo (#2) is extremely similar to the background on (#5), the background shades of blue in #1 corresponds with #3, and #4 corresponds with #6. 1 AA 0. This same pattern can be seen again in Ryan's photo line up, as follows: #6(Appellant)/#5, #3/#4, and #1/#2. 1 AA 1. In this lineup all of the photographs copied lighter, as evidenced by the bottom right corner of #5 where the background fades into his brightly colored shirt. Id. The pairs are again evident in Joey's photo lineup as follows: #5(Appellant)/#6, #3/4, and #1/#2. 1 AA 2. It is unclear from the Appendix, but it appears Jermaun may have been presented with a black and white photocopy version of the same lineup; regardless, the backgrounds are substantially similar: #1/#2/#5 and #3/#4(Appellant)/#6. 1 AA 3. Furthermore, the lineups presented to the witnesses in this case were created with the criteria identified by Appellant's own expert witness for a good photographic lineup:

Q: How should one go about about (sic) constructing a lineup?
A: There are two rules.

> The first is that all members of the lineup, that includes the suspect plus the 5 other people who are call (sic) fillers in the lineup should all conform equally to the witness' description of what the actual perpetrator looked like.
> …
>
> The second rule is that irrespective of the witness' description, you should make sure that the suspect in the lineup does not stand out in any way compared to the fillers.
>
> So if all the fillers are large and the suspect's picture is small, or the fillers are all in the upright position and the suspect's head is tilted …

3 AA 475.

Here, the suspect and all the fillers match the witness descriptions of a black man with dreadlocks. 1 AA 38; 2 AA 334-36, 340, 344; 3 AA 434, 431, 436. Furthermore, all the photos are similar in apparent age, skin tone, face size, zoom (showing head and collar area of shirt), face shape, facial hair, lip shape, forehead size, and the line-up even contains three of each braid pattern (for example on Ivan's #1/#3/#5 have curved braids while #2(Appellant)/#4/#6 have straight back braids). 1 AA 0. If any photo of the six were to draw attention it would be the man in the yellow shirt (#5 in 1 AA 0-1; #6 in 1 AA 2-3) because unlike the other suspects wearing blue, dark blue, and black t-shirts that man appears to be wearing a bright yellow collared polo shirt with a sky blue lining on the collar. 1 AA 0-3.

Where the photographs match the general description of the perpetrator, the witnesses independently review the lineup, and the officer conducting the lineup

does not suggest which photo is the Appellant's, this Court has held that the lineup is not impermissibly suggestive. Odoms, 102 Nev. 27, 714 P.2d 568 (1986). Nevada has found lineups with more significant distinguishing features to not be impermissibly suggestive. In Lamb v. State, the "photograph of appellant bore a date soon after the crime, whereas the dates on the other photographs were older" but this Court still found the lineup not impermissibly suggestive where the witness had not commented on the dates during the lineup and testified he had not noticed them until he was questioned on cross-exam. 96 Nev. 452, 453, 611 P.2d 206 (1980). Further, the witness chose Lamb's photo without hesitation, and all the men in the lineup were of similar appearance. Id. In Cunningham v. State, an NHP Officer described the suspect as a white man with collar-length curly hair. 113 Nev. 897, 901, 944 P.2d 261, 263-64 (1997). The detective conducting the lineup asked him if it was possible that the suspect could be light-skinned black man. Id. The photographic lineup presented contained three white and three black or Hispanic men; the suspect was the only one with short hair. Id. Further, the detective reminded the NHP officer that hair length can change immediately before the identification. Id. This Court still found that the lineup was not impermissibly suggestive because there was more than one black man in the lineup, the hair comment was a standard instruction, and the NHP officer said he identified

Appellant's face/facial features rather than his hair and skin tone. Id. 113 Nev. at 903-04, 944 P.2d at 265.

While Detective Prieto chose the photos, he did so for a reason. First, Appellant's own motion admits the photo used was the most recent photograph in the police system. 1 AA 22, 189. Second, as evidenced by Appellant's expert's testimony Detective Prieto needed a photograph which resembled the appearance described by the victims. 1 AA 189; 3 AA 475; Odoms v. State, 102 Nev. 27 (1986). Appellant's Opening Brief claims that a booking photo of Appellant was available which would not have resulted in a different background; Appellant's Reply to his Motion to Preclude this evidence clarifies this claim, stating that Detective Prieto used a booking photo of Appellant from LVMPD and filler photos from NLVPD when a booking photo from NLVPD was available. 1 AA 156-57. However, a cursory examination of that photograph shows that the proposed photo also contains a light background (the exact allegation made against the photo used), Appellant is wearing a white shirt rather than a blue, dark blue, or black shirt, and Appellant has an afro-style haircut rising from his head approximately 1-2", a significant difference from the braids seen in the actual lineup and described by the witnesses. 1 AA 195.

Contrary to Appellant's assertions, at trial Ivan clarified that detectives did not tell him Appellant's name nor did he know it at the time of the crime or lineup

but rather was told by a friend later while in the hospital. 2 AA 345. The Preliminary Hearing testimony also reveals (1) Jennifer stepped out of the room while the photographic lineup was conducted, thus Ivan independently reviewed the photographs and (2) Ivan did not realize until much later that Appellant was the one who had purchased the car from his friend Kenny Marks. 1 AA 175; 2 AA 380-83. While Joey may have known a suspect was in custody, he did not testify that the police ever indicated which photo represented the suspect, or indicated in any way that he should select a certain photo. 3 AA 436.

Further, unlike the witness in Lamb v. State, Joey was not asked by defense counsel whether the background affected anything but rather merely to describe a color difference; as a young witness it is reasonable that he answered the way he did. 96 Nev. at 453, 611 P.2d 206. Appellant asserts that the white background created the impression of newness. However, if any photo would indicate newness it would likely be the man in the yellow shirt (#5 in 1 AA 0-1; #6 in 1 AA 2-3) because he stands out from the other five wearing blue or black and a reasonable person could assume that the polo shirt depicts someone who was recently arrested, is still in street clothes, and has not been issued jail clothes yet. 1 AA 0-3. As such, the lineup was not unnecessarily suggestive.

The district court agreed. That court, after reviewing the evidence at a lengthy hearing, found that: the guy wearing the yellow shirt (#5 in 1 AA 0-1; #6

in 1 AA 2-3) was the only person who stood out of the lineup; the picture offered by Appellant could not have been substituted given his hair; all members of the lineup had similar facial hair, hair style, age, facial features; and, all backgrounds were varying shades of blue. 1 AA 195-207. As this Court gives deference to the trial court's factual findings because it is in the best position to assess the reliability of identifications, Beckman, 129 Nev at ____, 305 P.3d at 916, the district court did no err in dying the motion to suppress the identifications.

B. Even if this Court finds the pretrial lineup impermissibly suggestive, the identifications are sufficiently reliable and were properly admitted on that basis as well.

Even if this Court finds the district court erred and that the pretrial lineup impermissibly suggestive, this Court must consider "whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.'" Thompson v. State, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009) (quoting Bias, 105 Nev. at 871, 784 P.2d at 964). Nevada employs the test set forth in Neil v. Biggers, 409 U.S. 188 (1972):

> The factors to be weighed against the corrupting effect of the suggestive procedure […] include [1] the witness' opportunity to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation.

Gehrke, 96 Nev. at 584, 613 P.2d at 1030; see also Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977).

The United States Supreme Court has specifically noted:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, […]. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement.

Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). [3]

When applying the Neil v. Biggers test, extended observation for even minutes is not required. United States v. Saunders, 501 F.3d 384, 392 (4th Cir. 2007). In Saunders, as cited by the Appellant, the victim had about three to four seconds of eye contact, looked away, and then saw Saunders patting down the security guard. The Court also noted:

> At this point, when Burton had a greater incentive to observe Saunders, he had a clear view of the side of Saunders's face. See Mysholowsky v. New York, 535 F.2d 194, 197 (2d Cir.1976) (**stating that a victim of a crime is more likely than a casual bystander to pay close attention to the criminal's appearance**); Levasseur v. Pepe, 70 F.3d 187, 195 (1st Cir.1995) (**stating that a victim's**

[3] Appellant cites a great length, State v. Long, 721 P.2d 483, 492 (Utah 1986) (holding modified by State v. Clopten, 223 P.3d 1103, 1113 (Utah 2009)) for the proposition the eyewitness testimony is unreliable. In Long, the Utah Supreme Court adopted a cautionary instruction regarding eyewitness testimony; in Clopten it held that where expert testimony was presented on the subject such an instruction was unnecessary. Id. Here, Appellant presented a significant amount of expert testimony on the subject of eyewitness identification. 3 AA 467-85. Furthermore, Nevada has specifically rejected the need for a jury instruction regarding eyewitness identification. Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985).

"degree of attention during a traumatic experience is presumed to have been acute").

Saunders, 501 F.3d at 392 (emphasis added). In Saunders, the witness had a generally accurate description of the defendant; he erred as to the defendant's pants (jeans vs. sweatpants) and height but was correct in his other descriptive comments. Id. Further, the witness did not hesitate in his identification and made it within two hours of the crime. Id. (citing Albert v. Montgomery, 732 F.2d 865, 872 (11th Cir. 1984) (stating that the two-day period between the attack and the identification supported finding of reliability); see also Thompson v. State, 125 Nev. 807, 810, 813-14, 221 P.3d 708, 711, 713 (2009) (while not reaching the second prong and applying the Neil test, this Court specifically noted that there was no indication that an in-court identification given after a photographic line up viewed 19 days after the crime was unreliable).

Here, Appellant claims the identifications were unreliable. Appellant errs. See AOB pgs. 11-19. As noted in the factual recitation above, Ivan, Ryan, Jermaun, and Joey each had lengthy interactions with Appellant during the hostage ordeal and ample opportunity to observe him. Their pretrial identifications and trial testimonies, considered together, demonstrate a reliable identification of Appellant as the perpetrator of the hostage ordeal. See Gehrke, 96 Nev. at 584, 613 P.2d at 1030.

C. Even if this Court finds that the identifications were not sufficiently reliable, the error was harmless.

The line-ups were not suggestive and the identifications were reliable. If for some reason this Court were to conclude otherwise, their admission was harmless. Here, the harmless-error test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Cortinas v. State, 124 Nev. 1013, 1027, 195 P.3d 315, 324 (2008) (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Appellant's unsupported conclusory statements are not sufficient to show harmful error. There were numerous other pieces of evidence upon which the jury could have, and likely did, base their verdict of guilty beyond a reasonable doubt. The evidence supporting the verdict includes: (1) guns identified by victims, forensic evidence relating to those guns, and forensic evidence of bullets, all of which were found in the car driven by Defendant, (2) Defendant's girlfriend's car, his jail calls and his attempts to create an alibi, and (3) items used in the commission or the crime later found in Defendant's possession.

First, the guns tie Appellant to the scene. Ivan young saw a total of three guns. 2 AA 341. One was a black revolver, possibly a .380 caliber. 2 AA 343. The second was a silver gun. Id. The third a bigger, possibly .9 mm caliber, black gun. 2 AA 344. Further, Appellant told Ivan that the gun he was going to shoot him with was a .380. Jennifer heard Appellant tell Ivan that they were playing a

game of murder and that they had a Magnum gun that was going to leave a big hole in Ivan. 2 AA 350-51, 364. She remembered the "game of murder" statement because she heard her son and nephew scream when it was said. Id. Jennifer saw a total of three guns, one black and the others black and grey. 2 AA 350. Jermaun saw the one gun they grabbed him with. 2 AA 335. Ryan saw multiple guns as well; specifically, a black gun was put against his throat and he saw a revolver while he was on the ground when they told him to look at the gun and if he touched it they would use it to blow his brains out. 2 AA 389. Joey saw the guns Appellant and his co-conspirator used to torment them; he saw one silver, one black, and a third gun. 3 AA 342, 346.

Crime scene personnel recovered fragments of a partial bullet core and bullet jacket from Ivan's face. 2 AA 353; 406-408. A Winchester .357 Magnum cartridge casing and larger partial bullet core were recovered from Appellant's girlfriend's car, a green Ford Taurus. 2 AA 367, 406-08, 417. Appellant was seen picking up his girlfriend in this same car approximately 30-45 minutes after the crime. 2 AA 386-87. Two guns were also found in the car, one a black .22 caliber revolver and the other a .25 caliber Raven Semi-Automatic Pistol. 2 AA 370-71, 405-06. A crime scene expert also testified that the Winchester .357 Magnum cartridge case found in the car could not have been fired out of either gun recovered, and that it was fired from a revolver which leaves the casing in the gun

rather than ejecting it. 2 AA 406-07. Further, the expert testified that the bullet core fragment found in the car had consistent cannulars, or marks made as the bullet is fired which are found on the bullet jacket and also imprinted on the softer bullet core, with the bullet jacket fragments recovered from Ivan's face. 2 AA 406 – 418. The expert further testified that the material composition of the bullet core found in the car, and presumably removed from the house, the jacket fragments from Ivan's face, and the cartridge casing found in the car were consistent with one Winchester .357 silver tip hollow point Magnum cartridge. Id.

Combining the descriptions of all the witnesses, the perpetrators of the crime possessed a small black revolver, a medium framed semi-automatic, and a large revolver which was used on Ivan. The perpetrators also cleaned up the scene after the shooting. No firearms evidence was found in the home, rather there were fragments from the bullet core and bullet jacket found in Ivan's face, consistent with a silver tipped Winchester .357 Magnum round, and the majority of the bullet core was in Appellant's vehicle. 2 AA 353, 367, 405-418. A small black revolver, a medium framed semi-automatic, a cartridge case to a silver tipped Winchester .357 Magnum expended round and a bullet core consistent with a silver tipped Winchester .357 Magnum round were all found in Appellant's vehicle. Id. Thus, the evidence shows that Appellant not only possessed all three guns consistent with

the crime, but also had all the parts to the one .357 Magnum round which was fired into the face of Ivan Young.

Second, the guns, bullet fragments, and casing were recovered from the same car Appellant was seen picking his girlfriend up in approximately 30-45 minutes after the crime by her boss. 2 AA 386-87. His girlfriend admitted that no one else drove her car and that Ivan did not clean it out after using it but before it was searched by police. 3 AA 458-60, 465. Appellant's girlfriend attempted to help create an alibi for Appellant, saying that he picked her up at 7:00 pm or 7:15 pm, depending on which version of the story she was giving. 3 AA 458-67. However, she also admits that her boss left before she did on the day of the crime. 3 AA 465. Her boss testified that they closed at 7:00 p.m., he waited with Appellant's girlfriend for at least 30 minutes, and he saw Appellant pulling in as he was leaving the parking lot. 2 AA 386-87. The jail calls played at trial demonstrated an obvious consciousness of guilt and also that Appellant threatened and/or at least yelled at his girlfriend that she had to say he picked her up at 7:00 on the night of the crime. 3 AA 516-17; 1 RA 21-38. The victims saw Appellant and his co-conspirator in this same car. Jennifer saw it when checking the mail, Ivan saw it when the men approached to speak with him. 2 AA 339, 358. Further, Jennifer saw the car again at the end of the crime while on the phone with emergency responders. Id.; 3 AA 434, 537.

The jail calls combined with the weak and confusing testimony of Appellant's second alibi witness, Monique Westbook, show that he was trying to create an alibi that did not exist. 3 AA 441-45, 516-17; 1 RA 21-38. Monique could only testify at trial that she was with the Appellant for a brief relationship of approximately one month and that they had sexual relations one weekend prior to July 4th, 2004 during which they hung out from about 6:00 or 7:00 p.m. until midnight. Id. Monique admitted that Appellant drove a green Taurus and that he had a do rag on so she did not actually know what his hair looked like, but it was usually short and close to his head. Id. Further, she admitted that her only recollection of the date came from remembering that it was a few days before Appellant's investigator came to speak with her; however, that investigator did not do so until July of 2005, a year after the crime. Id.

Third, in addition to the bullets and guns, more physical evidence tied Appellant to the scene. A blue shirt was recovered from Appellant's apartment which matched Ivan and Jennifer's description of Appellant (which is not inconsistent with Joey and Jermaun's description of suit jackets as Jennifer noted the same was taken during the crime). 1 AA 118, 169-71; 2 AA 344, 358, 362. Further Defendant's methodical clean-up efforts can be seen in the gloves which link Appellant to the crime despite his attempts to hide his fingerprints. Jennifer also testified that they sprayed Lysol on her and told her it was to cover up their

fingerprints. 2 AA 350. Jennifer also noted that they were wearing dark gloves. Id. Joey had a better look at the gloves and was able to describe them as sport gloves, possibly baseball. 3 AA 432. Crime Scene personnel testified that no fingerprints were found at the scene but a cloth pattern, consistent with gloves, in the shape of fingers was found on numerous items. 2 AA 347-50, 354-55. Further, they testified that only one partial print was found on the magazine of one gun; this is not uncommon because fingerprints are 99 percent water and tend to disappear when a gun is fired. 2 AA 354. There was not enough information in the partial latent print to event try to compare it to anyone's fingerprint. Id. Gloves were recovered from Appellant's apartment and from the Ford Taurus. 2 AA 368-71.

To the extent that Appellant raises a claim regarding the lack of DNA or lack of blood found in the car and/or on Appellant the arguments fail because the State presented testimony as to why blood and DNA evidence were not found. There was no DNA evidence analyzed because at the time of the crime touch DNA technology was not commonly used, the cords were not big enough to hold fingerprints, and the cords would likely have only victim DNA. 2 AA 356. Additionally, while multiple witnesses testified that there was a pool of Ivan's blood after he was shot, the only shoe prints were consistent with Ivan and Joey or Aaron; thus one cannot expect blood to have been tracked out by Appellant. 2 AA 357, 361; 3 AA 433.

Therefore, the State has demonstrated and the jury properly found beyond a reasonable doubt that Appellant committed the crimes even if this Court finds one or more of the identifications to be admitted in error.

II. THE DISTRICT COURT DID NOT ERR IN ADMITTING THE 7-ELEVEN TAPE BECAUSE IT WAS PROPERLY AUTHENTICATED

"[This Court] review[s] a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). NRS 52.015 provides:

> 1. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims.
> …
>
> 3. Every authentication or identification is rebuttable by evidence or other showing sufficient to support a contrary finding.

NRS 52.015. Further, NRS 52.025 provides:

> The testimony of a witness is sufficient for authentication or identification if the witness has personal knowledge that a matter is what it is claimed to be.

NRS 52.025. Nevada's hearsay rule is codified in NRS 51.065 which provides that it is generally inadmissible except as provided in the Nevada Revised Statutes or the Nevada Rules of Civil Procedure. NRS 51.135 provides:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with

> knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

NRS 51.135. Appellant concedes that Interdeep Judge, the 7-Eleven owner and custodian of records, was a proper and qualified person under the above statutes to authenticate "the location of the machine, time of the video, and whether the video is kept in the course of regularly conducted activity." See, AOB, pgs. 20-21. Appellant then raises objections to Ryan's testimony but appears to misunderstand what the State offered the video to prove and how the trial court ruled, although without citations to the record it is unclear exactly what Appellant is arguing.

At trial, Interdeep testified that his 7-Eleven store is located at 3051 East Charleston, that they keep surveillance video in the ordinary course of business, that the video from the date of the crime (June 26, 2004) depicts a black man walking in at 8:07 p.m. and using the ATM with his face partially covered, and that the screen shot stills from the video were fair and accurate depictions of the video. 2 AA 383-86. Appellant did not offer any evidence in rebuttal of the authentication. NRS 51.015(3). Therefore, the video was properly authenticated and given to the jury to view. Interdeep did not identify Appellant because he did not know him, but the jury was certainly capable of determining if they thought the man shown was Appellant as it was within their fact-finding powers. Id.

At trial most of defense counsel's objections were to the time-stamps on the video (an issue which the witness resolved by explaining that it was due to day light savings time and which the court ruled went to weight not admissibility) but they do not raise that issue in the argument section of the Opening Brief for this claim. Id.; 2 AA 377-79; AOB pg. 20-22. The remaining argument was made as follows:

> MR. MARCELLO: Just to make it clear for the record, for the record, for what we have, I'm saying that it can't be authenticated because it's does not show what the State is intending or purports it says it show.
>
> It shows - -
> …
>
> MR. MARCELLO: I'm saying, the State is purporting that person walked in this time, left at this time, accessed the ATM somewhere in that period.
>
> It doesn't show that - -
>
> THE COURT: What challenge to the authenticity of the video now, other than the time?
>
> MR. MARCELLO: None, but that is the whole point of the video. They are saying this person walked into this store during this time period.
>
> If you want to redact the time stamp from it, and not have anybody testify to the time that just somebody walked into that store, I think we're fine.
>
> THE COURT: No, I am going to deny your challenge.
>
> It's admissible, and you guys will cross-examine.

> I view it as something not being admitted just for purposes of time.
>
> This store, this location, this individual, this ATM, doing an ATM transaction, and then whatever hay can be made of what the apparent time is based upon whatever evidence you guys provided, make an argument about, but it doesn't challenge the authenticity or validity of the video itself, just as to whatever the time stamp is supposed to mean, which in my mind doesn't go towards admissibility, just the weight to be given to whatever argument you make about time.
> Okay. Anything else?
>
> MR. MARCELLO: No.
>
> Thank you.

2 AA 378-79. Just as Appellant's argument was unclear at trial, it is unclear here. Ryan's testimony has nothing to do with the admissibility or authentication of the video. The video is not offered to prove that Appellant took money from Ryan's account at 8:00 p.m. on the day of the crime – that is a reasonable inference that the jury made based on the evidence presented. The tape was offered to show that the person depicted on it went into the 7-Eleven on East Charleston and performed the actions shown on the tape (approaching the ATM and appearing to use it). Any issues of authentication would have required rebuttal evidence which the defense did not present, and as the trial court noted, any discrepancy in the two times on the video was not a question of authenticity but rather one of credibility and weight. Id. Thus, the trial court did not abuse its discretion in admitting the 7-Eleven video tape evidence.

Ryan's testimony was admissible. Neither Appellant nor defense counsel objected during Ryan's testimony. Id. This Court has held, "'failure to object precludes appellate review of the matter unless it rises to the level of plain error.'" Mclellan, 124 Nev. at 267, 182 P.3d at 109. Here, Appellant fails to address the plain error standard of review at all, but instead makes irrelevant arguments about other ways the State could have shown the same facts. "In conducting plain error review, [this court] must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Here, Appellant fails to allege, much less demonstrate, actual prejudice or a miscarriage of justice; Appellant also does not dispute that the card was used. Thus, Appellant's claim fails.

Regardless, Ryan's testimony was admissible. Ryan testified that Appellant took his Wells Fargo bank card, and that he gave the correct pin number because Appellant threatened to come back and kill him if it was incorrect. 2 AA 388-96. Ryan had personal knowledge of all of that information and properly testified thereto. NRS 50.025.

Any information obtained from Wells Fargo as to the amount of money and the time used was admissible. Any information from their records was admissible

under the same business records exception described above. NRS 51.135. The employee's statement to Ryan was admissible under NRS 51.075 because "its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness"; the employee was merely telling a customer what his banking records reflected, likely his previous few transactions. NRS 51.075. The statement was admissible under NRS 51.085 as a present sense impression of the status of Ryan's account.

Therefore, Ryan could properly testify that his card was used at a 7-Eleven at approximately 8:00 p.m. and that $300 was removed from his account. 2 AA 388 – 96. Any further connection between the tape and Ryan's testimony was for the jury to make from reasonable inferences; Ryan never asserted that the person on the tape was Appellant or even that Appellant was the one to use his card but merely that it was used at a 7-Eleven at 8:00 p.m. and money was taken. Id. Appellant was only charged with entering the 7-Eleven with the intent to use the card. 1 RA 39-47. Whether he successfully used the card was irrelevant. Appellant is clearly identifiable entering the 7-Eleven near his residence in heavy winter clothing in the middle of the summer, trying to partially conceal his face when he approached the ATM and attempted to use it. See, Security Video, State's Exhibit 112 at trial. Ryan testified that Appellant just stole his ATM card. 2 AA 388-96. Thus, from those two facts alone, sufficient evidence was presented of

burglary, actual use of the card is not an element. The district court did not abuse its discretion in admitting the 7-Eleven tape or the testimony of Ryan John, to the extent it was an issue raised.

III. THE PROBATIVE VALUE OF THE VIDEO OUTWEIGHS ANY DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES OR MISLEADING OF THE JURY

"The decision to admit or exclude evidence, after balancing the prejudicial effect against the probative value, is within the discretion of the trial judge, and such a decision will not be overturned absent manifest error." Jones v. State, 113 Nev. 454, 466-67, 937 P.2d 55, 63 (1997). This Court looks to see if "the district court manifestly abused or arbitrarily or capriciously exercised its discretion, that is, applied a clearly erroneous interpretation of the law or one not based on reason or contrary to the evidence or established rules of law." State v. Dist. Ct. (Armstrong), 127 Nev. ____, ____, 267 P.3d 777, 783 (2011).

NRS 48.035 provides as follows:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
> …

NRS 48.035. Here, the district court did not abuse its discretion or commit manifest error in admitting the video. The video was relevant because it made the existence of the following facts more probable in the context of the Burglary charge: (1) that someone used Ryan John's bank card at approximately 8:00 p.m. at

the specific 7-Eleven store depicted, (2) that the person was depicted on video for the jury to observe and determine if it was Appellant, and (3) that Ryan John's bank card was stolen in the crime. NRS 48.015.

This Court defines unfair prejudice as follows:

> …all evidence against a defendant will on some level "prejudice" (i.e., harm) the defense…. This court has defined "unfair prejudice" under NRS 48.035 as an appeal to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence."

Armstrong, 267 P.3d at 781 (internal citations omitted). Here the video does not invoke any emotional or sympathetic appeal but to the contrary asks the jury merely to analyze in the context of the other evidence whether Appellant is depicted and whether the ATM is used to take money from Ryan John. There was no danger of unfair prejudice. There is also no danger of confusion of the issues; contrary to Appellant's assertions juries are permitted to make reasonable inferences from the evidence. Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000). The district court did not apply a clearly erroneous interpretation of the law to its discretionary decisions here and therefore did not commit manifest error. Armstrong, 267 P.3d at 783.

Further, the State's review of the record does not find that Appellant raised this claim against admission of the tape at trial. 2 AA 377-79. Thus this claim is subject to plain error review. Mclellan, 124 Nev. at 267, 182 P.3d at 109. Again,

Appellant fails to allege, much less demonstrate, actual prejudice or a miscarriage of justice. Green, 119 Nev. at545, 80 P.3d at 95. Thus, Appellant's claim fails.

IV. THERE WERE NO INSTANCES OF PROSECUTORIAL MISCONDUCT; EVEN IF THIS COURT FINDS AN ALLEGED ERROR NONE WARRANT REVERSAL.

This Court reviews prosecutorial misconduct with a two-step process. "First, [the Court] must determine whether the prosecutor's conduct was improper. Second, [only] if the conduct was improper, [the Court] must [then] determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "If the error is of constitutional dimension, then we apply the Chapman v. California standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Valdez, 124 Nev. at 1189, 196 P.3d at 476 (citing, Chapman, 386 U.S. 18, 24, 87 S.Ct. 824 (1967)). Errors not of constitutional dimension are reversed only if the error substantially affects the jury's verdict. Valdez, 124 Nev. at 1189, 196 P.3d at 476.

"When a guilty verdict is free from doubt, even aggravated prosecutorial remarks will not justify reversal. Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) (citing, Yates v. State, 103 Nev. 200, 734 P.2d 1252 (1987); Dearman v. State, 93 Nev. 364, 566 P.2d 407 (1977)). Here, the prosecutors did not commit any acts of prosecutorial misconduct.

A. 7-Eleven Video Comments

Appellant asserts that the prosecutor committed misconduct "related to the 7-Eleven video." See AOB, pg. 26-27. It is unclear which comments relating to the video Appellant is challenging. Again, Appellant makes broad generalizations without any supporting citations to the record. NRAP 28(a)(9)(A). However, assuming they are the six comments referenced on AOB pg. 7, the State responds as follows.

As to comment 1, Jurors are prohibited from disclosing any fact related to the case from their own knowledge. NRS 175.121. "The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given." Leone v. Goodman, 105 Nev. 221, 223, 773 P.2d 342 (1989). As such it was necessary to inquire if any of the jurors had independent knowledge of the 7-Eleven, the rest of the sentence merely provides context as the jury was unaware of the underlying facts. This did not constitute misconduct.

As to comments 2 and 3, "[t]he purpose of the opening statement is to acquaint the jury and the court with the nature of the case. It is proper for the prosecutor to outline his theory of the case and to propose those facts he intends to prove." Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962). A

prosecutor has a duty to refrain from stating facts in opening statement that he/she cannot prove at trial. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). If prosecutor overstates in his opening statement what he/she is able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith. Rice v. State, 113 Nev. 1300, 9489 P.2d 262, 270 (1997). Here, the comments were proper summaries of expected testimony, Appellant does not allege bad faith, and the comments do not constitute misconduct.

As to comments 4, 5, and 6, "[t]he prosecutor ha[s] a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows." State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965)); see also, Bridges, 116 Nev. at 762, 6 P.3d at 1008 (2000). Here, the prosecutor was making the comments in the context of closing argument and commenting on what the evidence showed based on reasonable inferences from the evidence presented; this is not misconduct.

B. Cross-Examination of Ms. Westbrook

Appellant posits that the prosecutor committed misconduct when he asked a witness whether she was recruited by a friend of Appellant to offer testimony on Appellant's behalf. See AOB, pg. 27-28. When considered in context, the question was asked in relation to jail calls made by the Appellant and was used to impeach the witnesses' statements by showing that friends of the Appellant asked

her to lie for him. Whether she actually knew them or not is independent from whether she was asked the question. This question was permissible impeachment. NRS 50.075. Furthermore, the prosecutor did not call the witness a "bitch." Instead the prosecutor repeated a statement made by Jajuan Richards and even emphasized the same by saying "quote" prior to Richards' statement: "Are you telling me that Jajuan Richards didn't come to you to find, **quote**, a bitch to come say the saw Rickie Slaughter at the time of the crime." 3 AA 444 (emphasis added). Further, the judge had already noted that he was not going to require the redaction of language and offensive terms from recordings. 3 AA 424.

The case cited by Appellant is inapplicable; in Knorr v. State, 103 Nev. 604, 607, 748 P.2d 1 (1987) the question concerned improper character evidence by implying an affair with a teenage girl who was actually an adult and the court reversed the conviction due to a combination of the question (objection preserved issue for appeal) and blatant ineffective assistance of counsel throughout the case. Here, the question went to impeachment because the witness was testifying to show that Appellant was with her instead of committing the crime. This was not misconduct.

C. "That alone would make him guilty."

Appellant asserts that the prosecutor committed misconduct when he characterized some of the statements Appellant made in his recorded telephone

calls from the jail as constituting consciousness-of-guilt evidence. See AOB, pg. 28. Appellant did not object at trial. 3 AA 538. Therefore, this alleged error is subject to plain error review and Appellant fails to even allege causing "actual prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190, 196 P.3d at 477. Appellant's claim fails.

First, Appellant fails to cite any authority in support of this allegation. NRAP 28(a)(9)(A). See AOB, pg. 28. Further, while Appellant alleges a constitutional violation regarding reasonable doubt, the statement in context does not shift the burden:

> MR. DIGIACOMO (Closing Argument):
> …
> What else do we know; well, as he goes on, now he has to manufacture an alibi, and his first story is you heard in the first jail call, I am home alone playing Play Station.
>
> It is a little bit farther along, not what Monique says, I think maybe J.R. was there. Maybe J.R. is going to alibi me. Then later he decides he needs to get some woman to come in and say she's with him, Monique Westbrook, remember playing that call, I need to alibi myself.
>
> If he had not been doing something wrong at 7:00 o'clock at night, he wouldn't need anybody to come in here and lie for him. That alone would make him guilty.
>
> Then you get to the last phone call, which was from July of 2004, and you have to ask yourself this; he says I just got my discovery, will you help me get a lawyer.
>
> I might go to trial if they are going to keep at 18 to live, but if they offer me a plea of 8 to 9 years, I might take it.

> Guilty (sic) [Innocent] people don't, in the first week say, you know I am going to go do the next decade of my life in jail for something I didn't do.
>
> I got to tell Mr. Slaughter this, too, you shoot a guy in the face, you don't just get 10 years. Now you are left with the fact that you have all of this evidence piled up and you wind up with 4 ID's. Notice what he talked about with the 4 ID's.
> …

3 AA 538. The prosecutor is discussed the jail calls made by Appellant and how they demonstrate a consciousness of guilt. He never implied that the State does not have to prove the case beyond a reasonable doubt. This is not misconduct.

Even if this Court were to find misconduct the State can show that the comment did not contribute to the verdict beyond a reasonable doubt. First, there is overwhelming evidence of guilt in this matter. Flanagan, 104 Nev. at 107, 754 P.2d at 837; see, Statement of Facts and Argument Sect. I, supra. Second, the jury received instructions on the proper statutory definition of reasonable doubt (No. 31) and that arguments of counsel are not evidence (No. 33). 1 RA 39-86. Further, this Court has presumed "that juries follow district court orders and instructions." Summers v. State, 122 Nev. 1326, 1334, 148 P.3d 778, 783 (2006). Therefore, if found to be an error, these comments were harmless errors.

D. "I got to tell Defendant this, too"

Defendant claims the prosecutor improperly directed a comment during closing argument at Defendant. See AOB pp. 29-30. Appellant did not object at

trial. 3 AA 538. Therefore, this alleged error is subject to plain error review and Appellant fails to even allege causing "actual prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190, 196 P.3d at 477. Appellant's claim fails.

Again when taken in context this statement does not constitute prosecutorial misconduct. See, quotation above, Section IV(C), supra. The prosecutor was merely explaining why Appellant's assessment of a possible plea deal in his jail call was incorrect. 3 AA 538; 1 RA 21-38. Appellant offers no evidence that it was directed at the Appellant or that the prosecutor added any emphasis, movement, etc. other than a passing comment within the rest of the closing. See, AOB pgs. 29-30. It is an assessment of probable plea offers and in no way constitutes a personal belief and was properly related to the evidence offered. Floyd v. State, 118 Nev. 173, 42 P.3d 249, 261 (2002). Appellant admits that the conduct considered in Collier v. State, 101 Nev. 473, 479-80, 705 P.2d 1126, 1130 (1985) involved the prosecutor turning to face Appellant and melodramatically saying "Gregory Alan Collier, you deserve to die.". Further, the conduct in Guy v. State, 108 Nev.770, 785, 839 2.Pd 578 (1992) involved the prosecutor speaking to the Appellant, listing his wrongdoings, and then telling him he deserved to die.. Here the conduct, even viewed favorably for Appellant, is not nearly so egregious; rather it was a passing comment made in explanation of Appellant's misstatement concerning plea offers. It does not constitute misconduct.

E. "[D]oing the job"

Appellant claims that the prosecutor committed misconduct by improperly exhorting the jury to do its duty. See AOB, pg. 29-30. Appellant misconstrues the record. As an initial matter, however, Appellant did not object at trial. 3 AA 540. Therefore, plain error review applies and Appellant fails to even allege causing "actual prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190, 196 P.3d at 477. Appellant's claim fails.

In Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005) the prosecutor stated that defendant is a "drunk driver-he needs to be convicted-he's endangering people-he's certainly endangering his child-do his child and all of us a favor-do your duty in this case-find the defendant guilty.". Here, the prosecutor's comment was not imposing a duty on the jury to find him guilty but merely commenting on what he thought the evidence would show – Appellant' guilt – because he essentially stated that once the jury discussed and reviewed the evidence they would find Appellant guilty. "The prosecutor ha[s] a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows." Green, 81 Nev. at 176, 400 P.2d at 767 (1965)); see also, Bridges, 116 Nev. at 762, 6 P.3d at 1008 (2000). This comment was not misconduct.

F. Cumulative Claim of Misconduct

Appellant initially alleges a cumulative claim but addresses it only in the context of the surveillance video claims of prosecutorial misconduct. See, AOB pgs. 26-27. Out of caution the State notes that, as demonstrated above, none of Appellant's allegations constitute misconduct. Further, even if the Court finds that some do, they are harmless and/or fail the plain error test. Therefore, Appellant also cannot show that as a totality his allegations demonstrate that the comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Valdez, 124 Nev. at 1189, 196 P.3d at 477.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 10th day of October, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Ryan J. MacDonald*
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #12615
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

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 type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 11,805 words.
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 10th day of October, 2013.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Ryan J. MacDonald*

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #12615
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 10, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

WILLIAM H. GAMAGE, ESQ.
Counsel for Appellant

RYAN J. MACDONALD
Deputy District Attorney

/s/ eileen davis
Employee, Clark County
District Attorney's Office

RJM/Sarah Killer/ed