IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON JONES
Appellant,

vs.

THE STATE OF NEVADA
Respondent.

Docket No. 63136

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court No. C-12-285488-1

APPELLANT'S OPENING BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Statutory Authority

Other Authority

I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, for one count of second degree murder with use of a deadly weapon. The judgment of conviction was filed on April 29, 2013. A timely notice of appeal was filed on May 3, 2013. This Court has jurisdiction over this appeal pursuant to NRS 177.015(3).

II. STATEMENT OF THE ISSUES

A. Whether the district court abused its discretion in failing to hold an evidentiary hearing on Jason's motion for substitution of counsel.

B. Whether there is insufficient evidence to support the jury's verdict.

C. Whether the district court abused its discretion in allowing a detective to give unsupported character evidence about witnesses and their neighborhood.

D. Whether the district court erred in instructing the jury.

E. Whether the conviction should be reversed because of cumulative error.

III. STATEMENT OF THE CASE

On November 14, 2012, the State charged Appellant Jason Jones, by way of Information, with one count of first degree murder with use of a deadly weapon. 1 App. 1. On November 27, 2012, Jason entered a plea of not guilty and invoked his right to a speedy trial. 1 App. 8. He stated that he did not want his counsel to file any petitions or motions on his behalf. 1 App. 8.

On December 17, 2012, Jason's counsel filed a pretrial petition for a writ of habeas corpus, or in the alternative, a motion for remand for admission of evidence of other acts and defenses. 1 App. 39. The State opposed the petition and motion. 1 App. 72. The district court found that there was sufficient evidence and denied the petition. 2 App. 180; 15 App. 1504.

On January 10, 2012, Jason filed a proper person motion to dismiss counsel. 2 App. 168, 172. The district court denied the motion without holding an evidentiary hearing. 2 App. 175.

Calendar call was held on January 17, 2013. 3 App. 212. It was disclosed that the State made a plea offer for voluntary manslaughter with use of a deadly weapon, pursuant to the Alford decision, and there would be a stipulated sentence of two consecutive terms of two and a half to seven and a half years. 3 App. 216. In addition, the State would not seek a habitual criminal adjudication and all other charges would be dismissed. 3 App. 216. The offer was rejected. 3 App. 219. Jason again noted that he disagreed with counsel and had tried to dismiss counsel. 3 App. 222. The district court stated that there was nothing else to discuss and concluded the proceeding. 3 App. 222.

Trial began on January 22, 2013. 3 App. 223. During jury selection, Jason's counsel objected to the composition of the jury panel because there was only one

identifiable African-American. 3 App. 259. The district court found that there "were several people of color, different racial and ethnic groups." 3 App. 259. The district court also found that a defendant is not entitled to have a certain panel so long as the group of prospective jurors that are summoned for all cases represent a cross-section of the community. 3 App. 260.

Jason proposed jury instructions. 8 App. 780. He also filed written objections to the State's proposed jury instructions. 8 App. 797. Jury instructions were settled on January 29, 2013. 14 App. 1412; 15 App. 1506. Details are discussed below.

The jury returned its verdict on July 29, 2013. 15 App. 1538. It found Jason guilty of second degree murder with use of a deadly weapon. 15 App. 1539; 1543.

The State filed a sentencing memorandum. 15 App. 1545. The sentencing hearing took place on April 4, 2013. 15 App. 1582. The district court imposed a sentence of life in prison with parole eligibility after 10 years, and a consecutive term of 60 to 240 months for use of a deadly weapon. 15 App. 1592.

On April 29, 2013, the district court entered its Judgment of Conviction. 15 App. 1595. A timely notice of appeal was filed on May 3, 2013. 15 App. 1597. This Opening Brief now follows.

IV. STATEMENT OF THE FACTS

On June 17, 2012, at around 10:30 p.m., Jaime Corona was shot while he was

in his apartment, at 1416 F Street, Apartment 10, in Las Vegas. The State alleged that Appellant Jason Jones committed the offense. Jason contended that he was not the person who shot Jaime.

Jaime's apartment was located in an apartment complex that consisted of 18 one-bedroom units, which were located in a U-shape, around a courtyard. 7 App. 669. Both Jaime and Jason resided in the apartment complex and their apartments were across from each other. Jason lived with his fiancé Denise Williams, their child, and another child who belonged to the fiancé.

A couple of days prior to the shooting, there was a break-in at the apartment rented by Jason and Denise. 10 App. 954. Electronics were on the floor, it looked like the apartment had been tossed, and there were broken items. 10 App. 954. Some items were missing. 10 App. 956. Both Jason and Denise were upset. 10 App. 957. The following day, Denise asked neighbors if they saw anyone. 10 App. 957. She believed that the issues between Jaime and Jason concerning the break-in had been resolved prior to Father's Day. 10 App. 981. Jason and Jaime were friends, they had a good friendship and talked almost every day. 10 App. 982. Any hard feelings had been resolved and there was no ill-will.[1] 10 App. 1007; 11 App. 1147.

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[1]A detective testified that Denise gave a statement on the night of the shooting in which she discussed the break-in. 11 App. 1115. Denise said that Jaime still owed Jason some money. 11 App. 1116. She also said that Jaime was upset when he found out his apartment was burglarized and the money that was owed to him was a result

On Friday, June 15th, apartment resident Jimmie Brown talked with Jason. 9 App. 871. Jimmie claimed that Jason approached him and asked whether he saw anyone break into Jason's apartment the prior night. 9 App. 872. Jason said that someone broke into his apartment, tore up items, broke his chair into pieces, and possibly took his microwave. 9 App. 872. At that time, Jason did not know who had broken into his apartment. 9 App. 905. Jason asked other neighbors, including Jaime, about the break-in. 9 App. 873, 909. Several hours later, Jason went to Jaime's door and seemed excited. 9 App. 873. Jason was pretty calm and was curious about what happened in his apartment.[2] 9 App. 915, 918, 925. Jimmie did not see Jaime and did not hear anything that was said. 9 App. 874. Jason did not ever tell Jimmie who it was that broke into his apartment. 9 App. 906. Jimmie did not ever hear Jason threaten Jaime. 9 App. 916. He did not see Jason with a pistol or gun in his hands. 9 App. 916.

A couple of days prior to the time that Jaime was shot, another neighbor, William Coleman, saw Jason talk to their neighbor Vincent. 7 App. 705-06. William heard Jason say to Vincent that "I'm getting my money." 7 App. 707. Jason seemed

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of that burglary. 11 App. 1116. At trial, Denise did not recall telling officers that she and Jason confronted Jaime about the apartment, he gave Jason the stuff back that he had taken, gave him $50, and agreed that he owed Jason another $50. 10 App. 958.

[2]The apparent inconsistencies in this statement of facts are reflective of the inconsistencies presented by the testimony.

upset. 7 App. 707. William could not hear the entire conversation. 7 App. 724. William did not know who owed money to Jason. 7 App. 725.

On the Friday or Saturday before the shooting, William noticed that Jaime had been struck on the head with a stick or something and he had to have stitches on his head. 7 App. 731; 11 App. 1050. Jimmie testified that Jaime had been in a fight and had been stabbed. 9 App. 909. Jimmie did not have any knowledge of Jason being involved in that matter. 9 App. 909. Bradley Sappington was arrested for the offense that caused Jaime's injury the day before the shooting. 11 App. 1117; 13 App. 1327. Bradley was in custody at the time of the shooting and he had not made any telephone calls from the jail. 11 App. 1117; 13 App. 1327.

On Sunday, later in the morning, Jimmie had a cigarette with Jason. 9 App. 874, 917. Later that day, just before dark, Jimmie saw Jason talking through Jaime's door, but he did not see Jaime. 9 App. 875, 917. Jimmie could not hear what they were saying. 9 App. 875. He also saw Jason knock on Jaime's door. 9 App. 876. Jimmie heard Jason say that they needed to talk. 9 App. 878. Jason was not angry. 9 App. 918-19. Jimmie did not see Jason with a gun and has never seen him with one in the past. 9 App. 919.

Loretta Coleman, who is William's sister, was in Jaime's apartment when

someone banged on the door and yelled at Jaime about money.[3] 8 App. 820-21. She heard something about five, but did not know if it meant five thousand, five billion, or something else. 8 App. 822. The TV was on and they were listening to music, so it was pretty loud inside. 8 App. 848. Someone would have had to have knocked loudly to get their attention as there was no doorbell.[4] 8 App. 848. Jaime called 911 around 9:00 p.m., and reported that someone was banging on his door and there was loud music. 7 App. 652; 8 App. 822, 826. During the call, Loretta, who was highly intoxicated, said "I don't know who it is. He knows my name, but I don't know him." 8 App. 827. She did not ever look outside. 8 App. 828.

Patrol officers responded at 9:18 p.m. and left 10 or 15 minutes later. 7 App. 652. The officers reported that Jaime was extremely intoxicated, very excited, and it was difficult for them to communicate with him because of his intoxication. 7 App. 653. They instructed Jaime to make a report when he was sober. 7 App. 654. No one else was in Jaime's apartment. 7 App. 654. Jaime did not mention Jason to the officers. 7 App. 659.

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[3]Loretta acknowledged that she suffers from schizophrenia and depression. 8 App. 830, 843. Her memories about the events come and go. 8 App. 845.

[4]Jimmie also testified that it was necessary to hit the door real hard in order to get someone's attention, and that just banging on the door did not mean that there was animosity or anger. 9 App. 911. The doors in the apartment complex were banged on daily. 9 App. 911.

Jimmie saw Jason that night after the police left Jaime's apartment.[5] 9 App. 884, 922. At trial, Jimmie could not recall what Jason said to Jaime.[6] 9 App. 890, 922. Jimmie did not hear Jason yell and he did not seem excited or angry. 9 App. 922. Jimmie did not see Jason with a gun. 9 App. 923. Jimmie knew Jason and Jaime to be friends and he never saw them fight or argue. 9 App. 925.

Several neighbors heard a gunshot that night. Calls were made to 911 at 10:38 p.m. 7 App. 662. Several occupants of the apartment complex were present in the courtyard when officers arrived. 7 App. 664, 686.

Jimmie was asleep at the time of the shooting. 9 App. 923. He took a sleeping pill.[7] 9 App. 892. After falling asleep, he did not see Jason at the apartment

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[5]On direct examination, Jimmie testified that he did not see Jason after the police left. 9 App. 884. At the preliminary hearing, Jimmie testified that Jason went back to Jaime's door about 30 or 45 minutes after the police left. 9 App. 884-86. At trial, Jimmie did not recall making this statement. 9 App. 884-86. He believed that it was not yet dark when Jason went to Jaime's door the second time. 9 App. 887. During the second time that Jason went to the door, Jimmie saw Jason knock at the door. 9 App. 888.

[6]Jimmie acknowledged that he was friends with both Jason and Jaime. 9 App. 891. At the preliminary hearing, Jimmie testifed that Jason said that Jaime needed to come out and talk to him. 9 App. 891. At trial, Jimmie thought this happened the first time Jason knocked at the door. 9 App. 891.

[7]Jimmie takes oxycodone for his spine. 9 App. 892, 900. He takes it four or five times a day and takes a couple of muscle relaxers and sleeping pills. 9 App. 893, 900-01. He also smoked marijuana that day. 9 App. 897.

complex.[8] 9 App. 893. He woke up due to his barking dog, talked with the police, and later gave a statement. 9 App. 896.

Loretta was inside of Jaime's apartment at the time he was shot. 7 App. 665, 681; 8 App. 818, 828. She was intoxicated and had been drinking with Jaime most of the day.[9] 7 App. 682, 726; 8 App. 818; 11 App. 1080. Loretta was asleep and did not see who shot Jaime.[10] 8 App. 828. She did not remember the gunshot. 8 App. 828. A detective testified that when he interviewed Loretta she was intoxicated and her emotional state was elevated.[11] 11 App. 1081. After the shooting, she was

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[8]He saw Jason's girlfriend, Denise, moving about a week after the incident. 9 App. 894, 923. At the preliminary hearing he stated that he saw Jason after the police left. 9 App. 899.

[9]Detective Ivey was not aware that Loretta suffers from schizophrenia. 11 App. 1128. He did not ask her about medications that she was taking. 11 App. 1128. The detective recorded her statement. 11 App. 1129. He did not interview her a second time. 11 App. 1130.

[10]Loretta told detectives that she heard one or two bangs and then Jaime fell on the floor. 8 App. 831. She also told a detective that she remembered Jaime going towards the door, opening it, and then she heard the bangs and he fell to the floor. 8 App. 832. Prior to opening the door, she heard voices and there could have been more than one person outside. 8 App. 850-52. She did not recognize the person at the door as a neighbor. 8 App. 857. She also testified that she did not see the person who did the shooting, but she knew someone was outside because she heard his voice. 8 App. 858. At trial, she could not remember whether there was one or two people outside. 8 App. 860.

[11]Over a defense objection, a detective testified, based upon a finding of admissibility as a prior consistent statement and excited utterance, that Loretta stated she heard a man knock on the windows and heard a male voice from outside asking

hysterical, and she ran out of the apartment. 8 App. 832. Loretta did not know Jason. 8 App. 834.

William and his girlfriend Jovonne Butler were in the bedroom of their apartment, watching television, at the time of the shooting. 7 App. 689, 693, 714, 742-44. After hearing a shot, William went to the window, looked out, and saw somebody standing by a small black car, and then saw the car drive off. 7 App. 693, 696, 711. He did not see where the person came from and did not know the person, but he recalled that the person was a male with short hair.[12] 7 App. 694, 715. There

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for money which Jaime owed him. 11 App. 1082. Loretta said she heard the man use her name and Jaime's name. 11 App. 1083. She said the man mentioned five dollars. 11 App. 1083. Loretta said that the person banged on the window so hard that she thought it was going to break. 11 App. 1085. Loretta also gave a statement to defense counsel. 12 App. 1285. She appeared to be sober at the time. 12 App. 1285. She told defense counsel that she did not see the person who was at the door. 12 App. 1285. She also said that she did not see Jason. 12 App. 1285.

[12]William acknowledged talking with a police officer on June 17th. 7 App. 694. At trial, he did not recall telling an officer than Jason was the person he saw running to the car. 7 App. 696. He did not recall identifying a car that was shown to him by officers. 7 App. 698. William did not recall telling officers that he saw Jason prior in the day and did not recall saying that he saw Jason knocking at Jaime's door and demanding money. 7 App. 701-03. In his voluntary statement, William did not state that he saw a gun and he stated that he only heard the shot. 11 App. 1141. When William met with a defense investigator, he stated that his written statement was accurate and he did not say that he saw Jason run away from the apartment complex and then drive away. 12 App. 1287. Javonne testified that she previously met with the prosecutor and an investigator and told them that William said he saw "J" running out of the room and getting in a car. 7 App. 745. She did not state this in her statement to the police or when she met with the defense investigator about a month after the offense. 7 App. 769.

were two similar cars at the apartment complex, but he believed that it was not the car that belonged to the short Mexican lady.[13] 7 App. 721, 736. He only saw the car for a second. 7 App. 738. William could not tell which car drove away.[14] 7 App. 721. He had previously seen Jason and his girlfriend drive the black car. 7 App. 697.

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[13]A detective testified that a Hispanic women who lived in the apartment complex drove a black Ford Focus. 13 App. 1328. The detective showed the car to William, but he said that was not the black car at issue. 13 App. 1330.

[14]A homicide detective interviewed William but he did not record the interview because he determined that William's written statement did not "seem like it had much merit." 11 App. 1085, 1130. William asked if the statement was being recorded and the detective told him no. 11 App. 1086. They talked for about 40 minutes. 11 App. 1086. The detective believed that William was afraid of retaliation because he looked around nervously and spoke very quietly. 11 App. 1087. According to the detective, William said that on about two separate times when he saw Jason at Jaime's door. 11 App. 1088. Over a continuing defense objection, the detective testified that William said Jaime had been knocking loudly on the windows and doors of Jaime's apartment. 11 App. 1088. He asked for money that Jaime owed him. 11 App. 1088. This took place prior to the initial arrival of the police. 11 App. 1088. The detective alleged that William said that the second time Jason appeared at the door was about an hour later, Jason knocked on the door for about 10 minutes, and asked Jaime to come out of the apartment for money that he owed, and then William heard a gunshot. 11 App. 1089. The detective claimed thatWilliam said he ran outside and saw Jason run from the courtyard to a Dodge Neon, which he was known to drive, and then drive at a fast rate northbound on F Street. 11 App. 1090. William did not ever describe the clothing of the person who was outside of Jaime's door. 11 App. 1143.

Detective Ivey testified that he had notes of his interviews of witnesses, including William Coleman, but he did not give those notes to the prosecutors and did not have a copy of them at trial. 11 App. 1120. He agreed to give a copy to counsel. 11 App. 1120. Those notes were different than the voluntary statement. 11 App. 1120. The voluntary statement was completed prior to the time that the detective talked to William. 11 App. 1121. In the voluntary statement, William said that he could not identify the suspect. 11 App. 1123.

William and Jovonne ran downstairs and tried to revive Jaime. 7 App. 698, 744, 750. Loretta was outside. 7 App. 699, 716, 744. She was drunk. 7 App. 699. Loretta seemed upset. 7 App. 699. She yelled something like "They shot him, they shot him over five dollars." 7 App. 700, 709, 716. In his written statement, William said that Loretta said "Someone shot him." 7 App. 711.

Denise Williams heard a gunshot, went to the door of her apartment and looked out. 10 App. 935. She saw a lot of neighbors and then went inside to her kids and took them to the back of the apartment. 10 App. 935. At trial she testified that she could not remember hearing a woman screaming.[15] 10 App. 936. Denise denied seeing Jaime's body. 10 App. 938.

William told officers that Denise was still in the apartment she shared with Jason. 11 App. 1092. Officers knocked at the door, but there was no answer. 11 App. 1093. Denise refused to open the door for anyone. 10 App. 940. She heard people knocking and was not sure if they were the police, and was scared so she did not open the door. 10 App. 942. The officers evacuated the apartment complex and called a SWAT team to serve a search warrant. 11 App. 1094; 13 App. 1318-22. After the SWAT team arrived she opened the door. 10 App. 940. After using flashbang explosions, at 4:25 a.m., Denise came out of the apartment. 7 App. 707;

[15]In Denise's statement to the police, she said she saw a lady screaming about five dollars. At trial, she did not recall making this statement. 10 App. 936.

10 App. 942; 11 App. 1096. The children were taken into custody and Denise was interviewed by officers. 10 App. 943; 11 App. 1097; 13 App. 1323.[16] Denise then went to her brother's house. 10 App. 942.

Denise testified that she did not see Jason the entire day on the day of the shooting. 10 App. 944. She saw him earlier in the morning and then he spent the day with his family because it was Father's Day. 10 App. 945. She did not recall telling a detective that she remembered him being there an hour before she heard the gunshot. 10 App. 945. She did not recall what vehicle he was driving when he left. 10 App. 945. She drives a black Dodge Neon, which Jason also drove. 10 App. 946. She did not recall telling detectives that Jason left that night in her car. 10 App. 946. She did not call Jason that night because he did not have a phone. 10 App. 946. She did not recall giving the detectives a phone number of 475-1998. 10 App. 946. She

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[16]A detective recorded the statement by Denise, but did not tell her he was doing so. 11 App. 1098; 12 App. 1236. The detective testified that he used this technique because people will be more honest and open if they know that they are not being recorded. He added, "Such as Mr. Coleman." 11 App. 1099. A detective told Denise that someone had seen Jason pounding on Jaime's door shortly before the shot was fired and that someone had seen him drive off in her car. 11 App. 1100. Denise said that she heard a loud bang outside, she came outside, and she heard a female saying that Jaime had been shot over five dollars. 11 App. 1101, 1103. Denise said that Jason had her black Dodge Neon. 11 App. 1104. She also said that Jason went to his uncle's house to watch a basketball game and he left about an hour before the shooting. 11 App. 1105. She said that she had not heard or seen Jason since that time. 11 App. 1105. Denise gave the detective the number of a cell phone that was used by Jason. 11 App. 1114.

testified that the phone was turned off so he would not have received any calls. 10 App. 947. She also used that phone. 10 App. 947. She denied using Jason's phone to try to get a firearm. 10 App. 948. She did not text anyone about a .380, a Beretta, or a .9 millimeter. 10 App. 949. Denise has never seen a gun in her apartment and would not allow guns around her children. 10 App. 986. Denise acknowledged that Jason asked her if he could have a gun. 10 App. 1005. Jason sometimes contacted her through the phones that belonged to neighbors. 10 App. 949. She did not hear from Jason that night. 10 App. 950. Denise testified that Jason was not a violent person and she did not believe that he had the personality to shoot someone. 10 App. 991.

Denise testified that in June of 2012, they may have needed money for rent. 10 App. 952. Rent was $300. 10 App. 953. She has three brothers. They had been to see her and her children at the apartment. 10 App. 988; 13 App. 1395. Two brothers are about 5'9" tall and have short hair. 10 App. 988. One brother, Danny has dreads. Harry is taller. 10 App. 988.

The crime scene revealed that there was a single shot that was fired through a metal screen door. 7 App. 665; 11 App. 1073, 1075; 12 App. 1168. There was no bullet hole through the door, suggesting that the door was open when Jaime was shot. Jaime's body was found in the living room. A bullet was found in the back wall of

the apartment. 12 App. 1178. A cartridge case was found outside of the front door. 11 App. 1073; 12 App. 1166. It had a head stamp of "WIN 380 AUTO." 12 App. 1166-67, 1211. The first officer at the scene testified that both doors to the apartment were open when he arrived. 7 App. 679. The bullet and casing were consistent with a .380 auto. firearm. 13 App. 1302. The cartridge casing is designed to be fired from a .380 firearm, but it might also be fired from a 9 mm Luger. 13 App. 1303. No gun was recovered. 11 App. 1135. Fingerprints were not recovered from the door or window of Jaime's apartment. 12 App. 1173-75. No effort was made to collect DNA from the door or window. 12 App. 1197. There was also no effort made to collect DNA or fingerprints from the cartridge case. 12 App. 1216. Cash, totaling $60, was found under a mattress. 13 App. 1318. Jaime's cell phone was released to his family without examination, so it is not known whether there were any threats against Jaime on that phone. 13 App. 1379.

The autopsy and toxicology revealed that Jaime had a blood alcohol level of .321. 11 App. 1050. There were also marijuana metabolites in his system. 11 App. 1054. Jaime died of a gunshot wound to the chest. 11 App. 1042, 1049, 1051. The bullet exited through his back. 11 App. 1042. Stippling was present, indicating that gunshot was fired at a close range, meaning it was within three feet 11 App. 1046, 1052.

Photos were taken inside of the apartment that belonged to Jason and Denise. 12 App. 1184. A photo was taken showing the search warrant return in the apartment. 12 App. 1184; 13 App. 1324.

Jason was not immediately located. Police officers ran plates belonging to a car that was driven by Denise and her brother. 12 App. 1224. Based upon this information, they went to an apartment complex. 12 App. 1224. They found the black Neon in the parking lot. 12 App. 1228. Jason was arrested without incident on June 21st. 12 App. 1229.

Following the shooting, Denise moved away from the apartment. 10 App. 959; 13 App. 1332. She recalled that the police left a search warrant return, but she did not know what she did with it. 10 App. 959. Her brother helped her move from the apartment. 10 App. 960; 13 App. 1332. Jason did not move in with her at her brother's house, but instead stayed with his family. 10 App. 963. She thought it was odd that she did not see him for a few days. 10 App. 964. A few days later, Jason was arrested at the apartment complex where Denise's brother Everett lived. 10 App. 964; 12 App. 1229. Denise saw Jason get arrested. 10 App. 964; 12 App. 1245. Denise was not cooperative about answering questions when she was at her brother's apartment. 12 App. 1246.

Following his arrest, detectives interrogated Jason. 13 App. 1334, 1369. A

video recording of the interrogation was played for the jury. 13 App. 1369.

Detectives impounded the clothing that Jason was wearing at the time of his arrest. 13 App. 1360-62. The clothing tested negative for gun shot residue. 13 App. 1364. A photograph of Jason on the day of his arrest showed that Jason had short hair. 11 App. 1034.

Detectives searched the apartment of Denise's brother. They found a copy of the search warrant return that they had left with Denise at the apartment. No guns were found in the apartment. 12 App. 1253. A search warrant was also obtained for the Dodge Neon. 12 App. 1237; 13 App. 1335. A telephone was recovered in a front seat of the car. 12 App. 1238. A purse in the back seat was also impounded. 12 App. 1239. It contained two cell phones. 12 App. 1239.

One of the seized telephones was inoperable. 12 App. 1261. Another had minimal information. 12 App. 1261. Detectives obtained information from the third cell phone, which was identified as (702) 475-1998. 12 App. 1263. Deleted information could not be recovered. 12 App. 1265. The phone was subscribed to Jason . 13 App. 1338. From the text messages it was clear that both Jason and his girlfriend used the phone. 13 App. 1339. Among other information, there was a text to "Big Homie", dated June 11, that stated "Shit fam:-) at my nigga spot . . . He gotta 380. . . a beretta dat hold 16. . ." Additional texts concerning the purchase of a gun

were also recovered. A text message from June 14, 2012, at 21:10, stated "J" in response to the question "who is this." 13 App. 1342. At 21:15, there was a text stating "you still got that 380 bro." 13 App. 1342. Denise sometimes used other people's phones to send text messages to the 475-1998 phone. 14 App. 1343. There were text messages that appeared to be between Jason and Denise, discussing their lack of money to pay the rent. 13 App. 1345. There was a text dated May 30, 2012, at 17:32 hours stating "I need a 9 milli clip bro." 13 App. 1346. The same text was sent to Rome, Eddie, Mike and Fresh. 13 App. 1347. Mike responded with questions, including the make. 13 App. 1348. The responding text stated "Hi Point 9 mm Luger, Model C9." 13 App. 1348. There was a text from Mini-Me, who was identified as Vincert Herrera. 13 App. 1348. He lived in the apartment complex. 13 App. 1348. The June 7th text from Mini- Me stated "go get my gun bros." 13 App. 1348. Additional text messages were recovered, including a text on June 10th, in which there was an outgoing call to Mini-Me stating "I need to burner, burna." 13 App. 1349. The detective testified that "burner" was a slang term for a gun or firearm. 13 App. 1349. Immediately thereafter there was a text in response stating "I'm leaving right now with it to a barbecue." 13 App. 1349. There was an outgoing text at 17:37 stating "I'll be right back with it, I'm just going to make a transaction, bro." At 17:41, there was another outgoing text stating "I need it bro." At 17:59

there was an outgoing message stating "sub bro, you gonna let me get that real quick." 13 App. 1350. Four minutes later there was another outgoing text stating "damn that's how you feel bro." 13 App. 1350. There were additional text messages between the two numbers. 13 App. 1351.

On June 11, 2012, there was an outgoing message to "Big Homey." 13 App. 1351. It stated "shit fam I'm at my nigga spot he got a 380 a Beretta that – and a Beretta that holds 16." 13 App. 1351. Big Homey responded a minute later, asking how much. 13 App. 1351. The outgoing text was "for the 380 he want 200 and for the Beretta he want 400." 13 App. 1351. The text conversation then ended. On June 14, 2012, there was a text at 21:10 stating "it's J." 13 App. 1352. Five minutes later there was an outgoing text to JR, stated "you still got that 380 bro." 13 App. 1352-53. JR responded at 21:16 with a text stating "yeah, I do, I got a .22 for I need a hundred and 25 for though." 13 App. 1353. Additional texts were exchanged concerning the .22. 13 App. 1353. At 21:20, there was an outgoing text request a picture of the .380 and .22. 13 App. 1353. JR responded at 21; 22, "I don't send pics of hammers." 13 App. 1353. At 21:25, there was an outgoing text stating "where you at, bro?" 13 App. 1353.

On June 14, 2012, there were more texts between the phone and JR. 13 App. 1353-54. At 15:31 there was an outgoing to text to JR, which states "I was gonna

stop through." 13 App. 1354. JR responded, "come through" to which there was an outgoing response of "yep." 13 App. 1354. JR then sent a text stating "if you can bring a Newport." 13 App. 1355. At 16:26, there was a text from JR stating "what number?" 13 App. 1355.

There were no text messages indicating that a weapon had been purchased. 13 App. 1393. There was no record of such a transaction. 13 App. 1393. There were no threats against Jaime in the texts contained on the phone. 13 App. 1393. There was also no information concerning the break-in at Jason's apartment. 13 App. 1394. No reports were filed with the police about the break-in. 13 App. 1393. Detectives did not obtain the real names of Big Homey or JR. 13 App. 1380. Jaime was not a contact listed in Jason's phone. 13 App. 1402.

As noted above, based upon this evidence, the jury found Jason guilty of second degree murder with use of a deadly weapon.

V. SUMMARY OF THE ARGUMENT

Jason was convicted of second degree murder with the use of a deadly weapon, based upon the shooting of his neighbor Jaime. The judgment is invalid, however, because there is insufficient evidence to support the jury's verdict. There were no eyewitnesses who saw the shooting, there was no forensic evidence implicating Jason, and no confession or admission which supported the State's theory at trial.

Although there was no testimony at trial from neighbors placing Jason at the scene, there were a couple of alleged prior, unsworn statements suggesting that Jason may have been at his small apartment complex at the time of the shooting. There was also testimony that he did not return to his apartment following the shooting. This evidence falls far short of establishing guilt beyond a reasonable doubt. The judgment is also invalid because the district court allowed a detective to give opinion testimony about the veracity of other witnesses and about people who live in Jason's neighborhood in general. The district court's instructions on the presumption of innocence and voluntary manslaughter were erroneous. Finally, the district court abused its discretion in the manner in which it addressed Jason's motion for substitution of counsel.

VI. ARGUMENT

A. The District Court Abused Its Discretion In Failing To Hold An Evidentiary Hearing On Jason's Motion For Substitution of Counsel.

Jason's state and federal constitutional right to due process, a fair trial, and right to counsel were violated by the district court's denial of his motion for substitution of counsel, which was made without the benefit of independent counsel or an evidentiary hearing. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6, 8 and 18; Art. IV, Sec. 21.

1. Standard of Review

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004); United States v. Prime, 431 F.3d 1147, 1154 (9th Cir. 2005).

2. Factual Statement

On January 10, 2012, Jason filed, in open court, a proper person motion to dismiss counsel. 2 App. 168, 172. He alleged that his Sixth Amendment right to counsel was being violated for the following reasons: counsel did not return phone calls; counsel stated that they were state employees who worked with the state and were not P.D.s; counsel stated that he was guilty, he was going to prison, and he would have to acquire a private attorney to prove his innocence; counsel disregarded his views pretrial, ignored his request and views, and instead paid attention to texting on a telephone; and he was threatened with the death penalty or life in prison if he did not cooperate. 2 App. 169-170. Jason stated that he had attached documents in order to substantiate his claims. 2 App. 170.

After quickly reviewing the motion in open court, the district court asked defense counsel if they had been in communication with Jason. 2 App. 172. Counsel responded affirmatively. The district court then, erroneously, informed Jason that his counsel were state employees but assured him that they were not working with the

State. 2 App. 173. Jason informed the district court that he had a couple of documents and began explaining that he had a document concerning a 911 call involved James Sheffield. 2 App. 173. The district court interrupted him, stating "Okay. Here's the deal. Wait. Here's the deal. I've read your motion, okay. The one thing that you seem to have been confused about I've addressed right now that that's – there's nothing wrong with them –." 2 App. 174. Jason stated he was not confused. 2 App. 174. The district court stated that he was not entitled to pick his counsel and the marshal told Jason to keep his mouth shut when the Judge was talking. 2 App. 174. The district court continued and stated that she would only remove counsel and appoint someone else if there was an actual conflict or if for some reason counsel fell below standards because of something going on in their office or a health reason, or a true conflict. 2 App. 174. The district court stated that there was nothing like that in the case so she was not going to remove counsel. 2 App. 175. The district court denied the motion. 2 App. 175. Defense counsel noted that they had met with the client and had conducted a full investigation, and noted that there was a disagreement about motions that were filed, 2 App. 175-76. Jason stated that he would rather have no counsel at all than to have his counsel. 2 App. 176. The district court then moved on to other matters. 2 App. 177. The court did not hold an evidentiary hearing. 2 App. 175.

3. The District Court Was Obligated To Conduct An Evidentiary Hearing

"Where a motion for new counsel is made considerably in advance of trial, the court may not summarily deny the motion but must adequately inquire into the defendant's grounds for it." Gallego v. State, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001). In reviewing the district court's exercise of discretion, this Court considers three factors: (1) the extent of the conflict; (2) the adequacy of the district court's inquiry; and (3) the timeliness of the motion. Young, 120 Nev. at 968, 102 P.3d at 576 (citing United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

Under the circumstances presented here, the trial court was obligated to conduct a thorough inquiry into the disputes between Jason and his counsel. In addition, the hearing should have been conducted outside the presence of the prosecutors, in an in-camera hearing, so that defense counsel and Jason could speak freely to the trial court about their differences without undue interference from the prosecutors and without the risk of divulging confidential information. See People v. Madrid, 213 Cal.Rptr. 813, 815 (Cal.App. 1985) (concluding that prosecutor should be excluded from the hearing concerning the conflict between the defendant and his counsel whenever information would be presented during the hearing to which the prosecutor is not entitled, or which could conceivably lighten the prosecution's burden of proving its case).

Jason made specific allegations concerning his counsel which warranted a hearing and/or the appointment of independent counsel. The motion here was made nearly two weeks before trial, which given the incredibly short period between arraignment and trial, was well in advance of the trial date. Although the district court briefly addressed Jason's concern that his counsel were state employees, the court did not address the other issues he presented. The brief exchange took place in the presence of the prosecutors. The inquiry was far from sufficient and did not establish any valid factual record upon which the district court could make a reasoned determination on Jason's motion.

The trial court's actions deprived Jason of his right to present specific examples of counsel's inadequate representation and his right for a judicial determination, based upon concrete facts and thorough inquiry, of whether his trial counsels' continued appointment would substantially impair his right to assistance of counsel. See Bland v. Dept. of Corrections, 20 F.3d 1469, 1475 (9th Cir.1994) (denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel), overruled on other grounds, Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000); State v. Vessey, 967 P.2d 960, 962-64 (Utah App. 1998) (trial court is obligated to conduct a hearing when confronted with this type of motion); State v. Pursifell, 746 P.2d 270, 272 (Utah Ct.App.1987) (under the Sixth Amendment, a

court must conduct sufficient inquiry if a defendant expresses dissatisfaction with his counsel); Farrell v. United States, 391 A.2d 755, 761-62 (D.C.1978) (conviction reversed because trial court did not conduct sufficient inquiry); United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir.1995) (Sixth Amendment violation occurs when trial court's denial is clearly erroneous or the court made no inquiry into the reason for the defendant's request to substitute counsel).

Jason recognizes that as an indigent defendant, he is not entitled to the counsel of his choice. See Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Nonetheless, in this case, where the trial court was informed of significant problems between the defendant and his counsel, it was incumbent upon the trial court to hold an evidentiary hearing concerning the conflict. The judgment of conviction should therefore be reversed, and this matter should be remanded for further proceedings in the district court, including the appointment of independent counsel and a hearing outside the presence of the prosecution on the merits of Jason's motion for appointment of new counsel.

B. The State's Evidence Is Insufficient To Support The Jury's Verdict

Jason's state and federal constitutional rights to due process of law, equal protection, a fair trial, and right to be convicted based upon only evidence establishing guilt beyond a reasonable doubt were violated. U.S. Const. amend. V,

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

1. Standard of Review

In reviewing an insufficiency of the evidence claim, an appellate court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Thompson v. State, 125 Nev. 807, 816, 221 P.3d 708, 714-15 (2009). A conviction that fails to meet that standard violates due process. Mikes v. Borg, 947 F.2d 353, 356 (9th Cir. 1991). The government must "prove every fact necessary to convict a defendant beyond a reasonable doubt." United States v. Orduno-Aguilera, 183 F.3d 1138, 1141 (9th Cir. 1999) (citing In re Winship, 397 U.S. 358, 364 (1970)).

2. The State Failed To Prove Jason's Guilt Beyond A Reasonable Doubt

A conviction for second-degree murder with the use of a deadly weapon requires proof beyond a reasonable doubt that the defendant killed a person with malice aforethought with the use of a deadly weapon. See NRS 193.165, NRS 200.010, NRS 200.030(2). The State failed here to prove that Jason was the person who shot and killed Jaime.

The evidence presented at trial revealed that on June 17, 2012, Jaime Corona was shot a single time, through the screen door of his apartment. There was no

testimony that anyone saw Jason Jones with a gun or saw him shoot Jaime. There was no forensic evidence implicating Jason in this crime. There was no DNA, no fingerprint, and no ballistic evidence suggesting that he was the perpetrator. Jason did not confess to the crime, to either detectives, jail inmates, or any other witness presented at trial.

The evidence presented by the State failed to establish that Jason killed Jaime. Instead, the evidence, viewed in the light most favorable to the State, merely showed that Jason and Jaime had a dispute because Jaime broke into Jason's apartment and took items from the apartment. 10 App. 954. Jaime agreed that he owed the nominal amount of $50 to Jason. 10 App. 958. Jason may have been upset with Jaime about this matter, 7 App. 724, but this was not the only strife in Jaime's life. Shortly before the shooting, Jaime had been struck on the head with a stick or something and he had stitches on his head. 7 App. 731; 11 App. 1050. He may have also been stabbed during that altercation. 9 App. 909. Jason was not involved in that matter, but a man named Bradley Sappington had been arrested for that offense. 11 App. 1117; 13 App. 1327. Although Bradley was in custody at the time Jaime was killed, the record is silent as to whether Bradley's confrontation with Jaime possibly involved other people who might have also had a motive to kill Jaime. 11 App. 1117; 13 App. 1327. In addition, toxicology testing performed in conjunction with the autopsy revealed

that Jaime had a blood alcohol level of .321. 11 App. 1050. He was so intoxicated that police officers could not communicate effectively with him only an hour before the time he was shot. 7 App. 653.

The State's primary claims against Jason were that he was seen knocking at Jaime's door about an hour before his death, he was possibly seen in the apartment courtyard and/or Jaime's apartment around the time of the shooting,[17] and he did not return to his apartment after the shooting. 7 App. 745; 8 App. 820-21; 9 App. 884-922; 10 App. 953. The State also presented evidence of text messages concerning the possible purchase or brokering of guns prior to the date of the robbery.

This evidence, even if fully believed by the jury, falls far short of proof beyond a reasonable doubt that Jason was the person who shot Jaime. Rather, this evidence is just as consistent with a theory that Jason saw someone else kill Jaime and he left the scene because he was known by the actual killer; Jason knew the person who killed Jaime and was afraid of that person; or any other number of possibilities. The State's evidence amounts to nothing more than speculation that Jason may have been

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[17]The neighbors who testified at trial did not testify to seeing Jason at or near Jaime's apartment at the time of the shooting. 7 App. 693. Rather, the State relied extensively upon prior inconsistent statements allegedly made by William in an unrecorded conversation. 7 App. 745; 11 App. 1089. This alleged statement was contrary to William's testimony at trial, and contrary to his Voluntary Statement that was given on the night of the offense. 7 App. 696, 701; 12 App. 1287. Defense counsel objected to the State's use of prior inconsistent statements as substantive evidence. 11 App. 1029.

the person who shot Jaime. Moreover, state and federal courts uniformly find that there is insufficient evidence to support a conviction where the only evidence against the defendant is an out-of-court, unsworn, prior statement. See United States v. Orrico, 599 F.2d 113, 117-18 (6th Cir. 1979) (check fraud); United States v. Bahe, 40 F.Supp.2d 1302, 1307-08 (D. N.M. 1998) (child sexual abuse); In re Miguel, 649 P.2d 703, 705-06 (Cal. 1982) (burglary); State v. Robar, 601 A.2d 1376, 1378-81 (Vt. 1991) (burglary); Brower v. State, 728 P.2d 645, 648 (Alaska Ct. App. 1986) (sexual assault); State v. Ramsey, 782 P.2d 480, 482-84 (Utah 1989) (sexual abuse of a child); State v. Giant, 37 P.3d 49, 58-60 (Mont. 2001) (aggravating assault; evidence of flight could not the sole corroboration of a prior inconsistent statement); State v. Pierce, 906 S.W.2d 729, 735 (Mo. Ct. App. 1995) ("a conviction based solely on a prior statement, though admissible via statute, falls short of due process protection"). See also Goldman, Guilt By Intuition: The Insufficiency of Prior Inconsistent Statements To Convict, 65 N.C.L. Rev. 1 (1986). "It is doubtful . . . that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction, since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone.'" Orrico, 599 F.2d at 118 (quoting 4 Weinstein's Evidence 801-74).

Even considering the alleged prior inconsistent statements as substantive

evidence, there is a substantial lack of evidence against Jason. The State's evidence amounted to nothing more than proof that Jaime owed a small amount of money to Jason, Jason knocked at Jaime's door an hour before the shooting, Jason may have been present in his own apartment complex near the time of the shooting, and Jason did not return to his apartment after the shooting. Considering all of the evidence presented, in the light most favorable to the State, no rational jury could find that there was sufficient evidence to support the conviction for second-degree murder. The judgment must therefore be vacated.

C. The District Court Abused its Discretion in Allowing a Detective to Give Unsupported Character Evidence about Witnesses and Their Neighborhood.

Jason's state and federal constitutional right to due process, a fair trial, cross-examination and confrontation were violated by the district court's order allowing a detective to testify about the reluctance of witnesses to testify, which was not based upon the events in this case, but was instead based upon his opinion of the neighborhood where the shooing took place. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6, 8 and 18; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Mclellen v. State, 124 Nev. 263, 267, 182 P.3d 106, 109

(2008). Confrontation clause violations are reviewed de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). This Court reviews a district court's evidentiary decisions for an abuse of discretion. Green v. State, 113 Nev. 157, 164-65, 931 P.2d 54, 59 (1997). A district court abuses its discretion if its decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Because Jason objected to the admission of the evidence, this Court reviews for harmless error. NRS 178.598; Mclellan, 124 Nev. at 267, 182 P.3d at 109.

2. The District Court Abused Its Discretion By Allowing A Detective To Testify About His General Opinion As To The Alleged Reluctance of Witnesses From The Neighborhood To Testify

The district court abused its discretion in allowing a homicide detective to testify that witnesses from Jason's neighborhood in general, and specific witnesses in this case, were reluctant to cooperate with the police and to testify at trial. This evidence was highly improper and acted to relieve the State of its burden of proving guilt beyond a reasonable doubt.

The claim of witness intimidation was not relevant to any issue in this case. See NRS 48.015 (defining relevant evidence); Lay v. State, 110 Nev. 1189, 1193-94, 886 P.2d 448, 450 (1994) (prosecutor's references to witness intimidation were not relevant to any issue in the case). See also Evans v. State, 117 Nev. 609, 627-29, 28

P.3d 498, 511-12 (2001) (testimony about witness fear that was not attributable to the defendant was irrelevant and inadmissible). A prosecutor commits reversible misconduct by referencing or implying witness intimidation by a defendant "unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation." Id. at 1193-94, 886 P.2d at 450-51.

Over a defense objection, based upon speculation and relevance, a detective testified that in his experience as a homicide detective, it is usual for people to be reluctant to talk to him. 11 App. 1077. He has previously had difficulty in getting witness statements in the area near 1416 F Street. 11 App. 1077. The detective testified that by "area," he meant West Las Vegas. 11 App. 1078. He further stated that it's a predominantly African American community that has many crimes, usually it's neighbors or people they know, so people are reluctant and there's a fear of retaliation. 11 App. 1078. The Court instructed the detective not so speculate about what people might be thinking. 11 App. 1078. Based upon the State's question, he testified, that this was absolutely a high crime area. 11 App. 1078. Jason's counsel objected and asked that the testimony be stricken. 11 App. 1079. The court overruled the objection. 11 App. 1079.

Outside the presence of the jury, Jason's counsel noted that during the testimony concerning possible retribution to witnesses, there was a conference at the

bench and counsel made a motion for a mistrial based upon the fact that there was nothing to tie this testimony to the defendant. 11 App. 1109. The district court denied the motion after finding that the testimony was beneficial to Jason because this is the kind of neighborhood where people don't want to talk to the police, it's a high crime type of neighborhood, and it's obvious that Jason is not responsible for all of the crime in the neighborhood. 11 App. 1110. The district court also found that the testimony explained the tenor of the community and explained why witnesses were afraid. 11 App. 1110. The district court found that there was no evidence to support a claim that witnesses were concerned because Jason had friends and family who knew that the witnesses lived in the apartment complex. 11 App. 1112.

This issue was referenced at closing argument as the prosecutor argued that the State did not get to handpick its witnesses; many witnesses from the neighborhood were very reluctant to talk to the police; Jovonne Butler was scared to come to court; and the officer testified that it was hard to find people from this particular neighborhood who wanted to talk to the police. 14 App. 1440-41. The State noted that specific witnesses, such as William, Jovonne, and Loretta did not want to testify or be seen talking to the police. 14 App. 1441.

The improper testimony in this case was especially prejudicial. The State failed to produce sworn testimony at trial that identified Jason as the shooter. There

was no physical evidence connecting him to the offense. The State's case was premised on alleged unsworn prior statements and then evidence of an alleged motive. By asserting that witnesses who lived in the immediate area would not cooperate with the police, the State was relieved of its burden of presenting witnesses with testimony implicating Jason. Moreover, this testimony was emphasized by the prosecution during closing arguments. Under these circumstances, the evidence was prejudicial and violated Jason's substantial constitutional and statutory rights. He should therefore be granted a new trial.

D. There District Court Erred In Instructing The Jury.

Jason's state and federal constitutional rights to due process of law, equal protection, a fair trial and right to proper jury instructions were violated by the district court's instruction on the presumption of innocence and voluntary manslaughter. The district court erred in using the erroneous instructions and in rejecting the defense proffered instructions. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (citing Brooks v. State, 124 Nev. 203, 206, 180 P.3d 657, 658-

59 (2008)). However, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo. Id. (citing Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007)).

2. The District Court Gave An Erroneous Instruction On The Presumption Of Innocence

Jason contends here, as he did in the district court, that the jury instruction on the presumption of innocence was erroneous. The district court instructed the jury as follows in Jury Instruction No. 10:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition as they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

15 App. 1515. Jason objected to this instruction. 14 App. 1416. He also requested that the jury be instructed on which elements of the offenses were material and requested that the jury be instructed according to statute. 14 App. 1417. The district court overruled the defense objection and denied the defense's requested instruction. 14 App. 1417-18.

Jason objects to this instruction because there is no instruction defining which elements are material and that without such an instruction, the jurors are free to speculate as to which were material and which were not. Moreover, the first paragraph is not supported by Nevada statutory authority and Nevada statutes provide a better definition of this concept.

The portion of the instruction at issue here is the first paragraph and not the second paragraph. Jason recognizes that NRS 175.211 mandates the second paragraph of the instruction and recognizes that this Court has repeatedly affirmed the constitutionality of the second paragraph of this instruction. See e.g. Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991).

It does not appear that this Court has directly addressed the first paragraph of the instruction in light of the statutory definitions of the presumption of innocence, which are different than the instruction given here. In Nunnery v. State, 263 P.3d 235, 259 (Nev. 2011), this Court briefly acknowledged this issue, stated that it "has repeatedly upheld such language" and cited to Morales v. State, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006); Crawford v. State, 121 Nev. 746, 751, 121 P.3d 582, 586 (2005); Gaxiola v. State, 121 Nev. 633, 650, 119 P.3d 1225, 1233 (2005); and Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Nunnery, 263 P.3d

at 259-60. None of these cases, however, analyzed or addressed this issue. Rather, in Morales, 122 Nev. at 970-711, 143 P.3d at 466, this Court found that the jury was properly instructed on a firearm offense and properly instructed that they were required to find the defendant guilty beyond a reasonable doubt on each element in order to reach verdicts of guilty. There was no challenge to the use of the term "material" within the instruction and no discussion as to whether the district court should be obligated to inform the jury which elements are material when using this instruction. In Crawford, 121 Nev. at 750-51, 121 P.3d at 586-87, this Court accepted, but found harmless, a defendant's argument that the district court erred in refusing to give a proposed jury instruction on the State's burden to prove that the defendant did not act in the heat of passion. In addressing the issue, this Court noted that the jury was given a general instruction on reasonable doubt, which included the "every material element" language at issue here, but it did so in the context of evaluating whether the defendant was prejudiced by the refusal to give his proffered instruction. Id. at 751, 121 P.3d at 587. This Court did not address whether the district court erred in failing to define the "material elements" of the offense. Id. In Gaxiola, 121 Nev. at 647-50, 119 P.3d at 1232-33, this Court considered a defendant's challenge to a "no corroboration" jury instruction in a sexual assault case. After a lengthy discussion, in which this Court found that the instruction was correct,

it stated in passing that "it is appropriate for the district court to instruct the jurors that it is sufficient to base their decision on the alleged victim's uncorroborated testimony as long as the testimony establishes all of the material elements of the crime." Id. at 650, 119 P.3d at 1233. This Court in no way considered the instruction at issue here and did not address whether the district court is obligated to inform the jury of which elements are material when using this instruction. Finally, in Leonard, 114 Nev. at 1209, 969 P.2d at 296, this Court held that the district court did not deny the defendant the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." This Court found that the equal and exact justice instruction did not concern the presumption of innocence, and noted that a separate instruction informed the jury that the State has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant was the person who committed the offense. Id.

This Court has not analyzed the issue presented here: must the jury be instructed as to which elements are material if a jury instruction states that the State is obligated to prove beyond a reasonable doubt only those elements that are "material." In other words, this Court has never addressed the issue of whether an instruction which invites the jury to determine materiality for itself is proper. Prior opinions mentioning the concept of "material element" did not address this specific

issue. The mere fact that this Court has generally discussed "material elements," within contexts entirely different from the issue presented here, is insufficient to establish that this Court "has repeatedly upheld such language" as it claimed in Nunnery, 263 P.3d at 259. See Anderson v. Harless, 459 U.S. 4, 6-7 (1982) (concluding that issues must be specifically raised and finding failure to exhaust state remedies where the defendant challenged a malice instruction and argued it was reversible error, but did not specifically present a federal constitutional claim: "It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made.") (citations omitted).

Likewise, this Court has not explained why the instruction given here, which is not supported by any statute, should be given in preference over two instructions that are explicitly provided for by Nevada statutes. See NRS 175.191, 175.201. Jason submits that the district court's instruction is confusing and misleading, and lessens the State's burden of proof as the jury will be free to decide, without guidance, which elements of the offenses are material and which are immaterial.

The first paragraph of this instruction is not mandated by statute. Either of Nevada's two instructions on the presumption of innocence are more appropriate instructions. NRS 175.191 provides the following:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

NRS 175.201 provides the following:

> Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted only of the lowest.

Neither of these statutes includes the "every material element" language that is the basis of Jason's issue here. Moreover, in light of the clear statute on point, it was appropriate for the district court to instruct the jury in the statutory terms rather than the State's proffered instruction.

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (quoting Winship, 397 U.S. at 364). "This reasonable-doubt standard 'plays a vital role in the American scheme of criminal procedure.'" Id. (quoting Winship, 397 U.S. at 363). The instruction given here fails to comply with Winship and Cage in that it allows the jury to speculate as to which elements of the offenses were material and which were not. Finally, Jason's

right to due process was denied based upon the district court's failure to instruct the jury in accord with the Nevada statute defining the presumption of innocence.

Jason submits that structural error was created when the district court gave the erroneous presumption of innocence instruction. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (finding structural error based upon an erroneous reasonable doubt instruction); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). This case differs from Kentucky v. Whorton, 441 U.S. 786 (1979). In that case, the United States Supreme Court found that an instruction on the presumption of innocence need not be given in every case and that Taylor v. Kentucky, 436 U.S. 478 (1978), did not hold otherwise. Whorton, 441 U.S. at 789. Here, in contrast, an instruction on the presumption of innocence was given, but that instruction was erroneous and reduced the State's burden of proof by allowing the jury to determine for itself which elements of the offenses were material and which were not. Under these circumstances, this Court should find the error to be structural.

In the alternative, Jason submits that his substantial rights were violated by this instruction as it was highly prejudicial. As set forth above, the evidence here was far from overwhelming. The jury rejected the State's claim of first degree murder. Had

the jurors been properly instructed on the presumption of innocence, there is a reasonable probability that they would not have returned this verdict. Jason is entitled to a new trial in which the jury is properly instructed.

3. The District Court Erred In Instructing The Jury On Voluntary Manslaughter

The district court also erred in instructing the jury on the offense of voluntary manslaughter. It instructed the jury as follows:

Instruction No. 25

> Manslaughter is the unlawful killing of a human being without malice express or implied and without any mixture of deliberation.
>
> Voluntary Manslaughter is a voluntary killing upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.
>
> The provocation required for Voluntary Manslaughter must either consist of a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact. However, neither slight provocation nor an assault of a trivial nature will reduce a homicide from murder to manslaughter.
>
> For the sudden, violent impulse of passion to be irresistible resulting in a killing, which is Voluntary Manslaughter, there must not have been an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, then the killing shall be determined by you to be murder. The law assigns no fixed period of time for such an interval but

leaves its determination to the jury under the facts and circumstances of the case.

15 App. 1530.

Instruction No. 26

The heat of passion which will reduce a homicide to Voluntary Manslaughter must be such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

15 App. 1531.

These instructions omitted language concerning the burden of proof. In accord with Crawford v. State, 121 Nev. 746, 750-51, 755, 121 P.3d 582, 586, 589 (2005), Jason requested that the following instruction be given:

If after the consideration of all the evidence you have a reasonable doubt as to whether or not the defendant acted in a heat of passion caused by the requisite legal passion, you must return a verdict of voluntary manslaughter. This is because the State has the burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion.

8 App. 804.

The issue was not discussed during settlement of instructions.[18] 14 App. 1420. Nonetheless, Jason objected to the State's instruction and requested that the Crawford instruction be given at trial. The instructions omit language concerning the burden of proof. In accord with Crawford, 121 Nev. at 755, 121 P.3d at 586, 589, Jason was entitled to an instruction which informed the jurors that if they had a reasonable doubt as to whether or not the defendant acted in a heat of passion caused by the requisite legal passion, they must return a verdict of voluntary manslaughter. It was error for the district court to fail to instruct the jury in accordance with Crawford.

Jason was prejudiced by the erroneous instruction and omission of the Crawford language. The State's own closing argument is proof that the omission of this instruction was not harmless:

> Counsel, ladies and gentlemen of the jury. On June 17 of 2012, the defendant, Jason Jones was mad at Jaime Corona. The defendant was mad at Jaime Corona for the burglary that was committed at the defendant's apartment just a few days before.
>
> The defendant going into the evening hours of June 17th was mad at Jaime Corona for money that was still owed to him over an agreement that had been reached for Jaime Corona to pay him back. Later that

[18]Following a discussion about instructions on circumstantial evidence, Jason's counsel noted that objections by Jason to proposed instructions 4, 5, 8, and 9 had been incorporated into the instructions. The prosecutor then stated "Everything else that I – I believe he told me he was going to withdraw based on either discussion or based on changes in the instructions." 14 App. 1420. Without receiving a response from defense counsel, the district court stated that they would take their break and there was no additional discussion of objections to the jury instructions. 14 App. 1420.

> evening the defendant was mad at Jaime Corona and was pounding on Jaime Corona's door.
>
> Then the police showed up after Jaime Corona wouldn't answer that door, but the police were called. The defendant was even more mad, pounding at the door for ten more minutes, pounding, yelling, demanding for Jaime to come out, demanding that he be paid the money that Jaime owed to him; and the defendant, being as mad as he was, then pulled out a firearm and shot Jaime Corona as he opened his door that evening at about 10:30 p.m.

14 App. 1426-27. During rebuttal argument, the prosecutor also noted that Jason was really mad and extremely angry. 14 App. 1497.

"The Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case[,]'" Ex parte McGriff, 908 So. 2d 1024, 1033 (Ala. 2004) (quoting Mullaney v. Wilbur, 421 U.S. 684, 704 (1975)). The district court's failure here to give the proper instruction warrants reversal of the conviction.

E. The Judgment Should Be Reversed Because of Cumulative Error.

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

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev.

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

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

affected the fairness of the proceedings and prejudiced Jason. He requests that this Court vacate his judgement and remand for a new trial.

VII. CONCLUSION

Jason respectfully submits that his judgment of conviction must be vacated because there is insufficient evidence to support the conviction. In the alternative, the judgment must be reversed and remanded for a new trial based upon the jury instruction and evidentiary issues presented here. Finally, this matter should be remanded for a full and fair evidentiary hearing on Jason's motion for substitution of counsel.

DATED this 3rd day of September, 2013.

Respectfully submitted,

//s/ JONELL THOMAS

By:_____

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the page limitation requirement of NRAP 32(a)(7)(B)(i).

4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of September, 2013.

/s/ JONELL THOMAS

_____

JoNell Thomas
Nevada Bar ID No. 4771
Clark County Special Public Defender's Office
330 S. Third Street Ste. 800
Las Vegas NV 89155

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 3rd day of September, 2013, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

BY ELECTRONIC FILING TO

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

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

/s/ JONELL THOMAS

JONELL THOMAS