IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ERNEST LAKEMAN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64609

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

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STATEMENT OF THE CASE

On May 5, 2013, Dipak Kantilal Desai and Ronald Ernest Lakeman were charged by way of Fifth Amended Indictment with ten counts (Count 1, 4, 5, 8, 11, 14, 15, 18, 21, 24) of Insurance Fraud (Felony – NRS 686A.2815), seven counts (Count 2, 6, 9, 12, 16, 19, 22) of Performance of Act in Reckless Disregard of Persons or Property Resulting in Substantial Bodily Harm (Felony – NRS 0.060, 202.595), seven counts (Count 3, 7, 10, 13, 17, 20, 23) of Criminal Neglect of Patients Resulting in Substantial Bodily Harm (Felony – NRS 0.060, 200.495), one count (Count 25) of Theft (Felony – NRS 205.0832, 205.0835), two counts (Count 26 and 27) of Obtaining Money Under False Pretenses (Felony – NRS 205.265, 205.380), and one count (Count 28) of Second Degree Murder (Category A Felony – NRS 200.010, 200.020, 200.030, 200.070, 202.595, 200.495). 1 AA 1-35.

Lakeman's jury trial began on April 22, 2013. 1 AA 359. On July 1, 2013, the jury returned a guilty verdict for Lakeman on Counts 1, 2, 3, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 24, 25, and 26. 1 AA 44. Defendant was found Not Guilty of Counts 5, 9, 10, 11, 16, 17, 18, 22, 23, 27 and 28. 1 AA 39. The district court imposed various concurrent and consecutive sentences reflecting a sentence structure of 8-20 years in prison, with one hundred seventeen days credit for time served. 1 AA 37-39. The Judgment of Conviction was filed on November 13, 2013. 1 AA 36-39. This appeal followed.

STATEMENT OF THE FACTS[1]

After learning of multiple reports of patients contracting Hepatitis C in Las Vegas, Nevada, the Southern Nevada Health District launched an investigation on January 2, 2008. 18 AA 3988. After being contacted by the Southern Nevada Health District, the Center for Disease Control (hereinafter "CDC") conducted an investigation and concluded that Hepatitis C had been transmitted to various patients on two separate days at the Southern Nevada Endoscopy Clinic (hereinafter "Shadow Lane Clinic"). 17 AA 3682. The CDC determined a total of one person was infected on July 25, 2007, and a total of six on September 21, 2007. 17 AA 3784. The CDC was able to determine that there were two "source" patients on July 25, 2007 and September 21, 2007, by matching the genetic fingerprints of the virus. 18 AA 4001.

[1] Lakeman's appendix inexplicably does not include days 11, 14-22, 24, 30, 31, 34-36, 41, 42 and 44 of the jury trial. This appendix is Lakeman's second attempt at a complete record. Due to this insufficiency, the recitation of the facts is focused on only those facts directly relevant to the appellate claims, and thus cannot give the Court a comprehensive view of this complex and lengthy case. While in certain cases, the State may file a Respondent's Appendix to remedy a deficient Appellant's Appendix, in this instance it would require adding perhaps thousands of pages. It is not our burden to do so. See Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal); See also Suarez-Diaz v. Holder, 771 F.3d 935, 945 (6th Cir. 2014) ("[L]ike arguments that are not specifically raised on appeal, issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Sharrief Ziyad was the first patient scheduled on July 25, 2007 at the Shadow Lane Clinic. 10 AA 2134-35. He disclosed to Desai prior to his procedure that he was positive for Hepatitis C. 10 AA 2134. Later that day, Michael Washington had an endoscopy at the Shadow Lane Clinic administered by Desai, and later found out he was positive for Hepatitis C. 9 AA 1881-82, 1892, 1901. Washington has since passed away. Ronald Lakeman was the Certified Nurse Anesthetist (hereinafter "CRNA") who injected both patients with propofol on July 25, 2007. 16 AA 3616.

Kenneth Rubino arrived at the Shadow Lane Clinic on September 21, 2007, and was the first patient of the day. 10 AA 2077. He informed the nurse that he was positive for Hepatitis C. 10 AA 2079. The CDC eventually identified Rubino as the source patient. 17 AA 3698. Ronald Lakeman was working as a CRNA on September 21, 2007. 16 AA 3636.

Patty Aspinwall had a colonoscopy at the Shadow Lane Clinic on September 21, 2007, after which she was diagnosed with Hepatitis C. 12 AA 2666, 2685. Stacy Hutchison had a procedure done at the Shadow Lane Clinic that same day, and Lakeman administered the propofol. 10 AA 2173, 2175, 2218-19. Hutchison tested positive for Hepatitis C after that procedure. 10 AA 2173. Carole Grueskin was also infected at the Shadow Lane Clinic on September 21, 2007. 18 AA 4043.[2]

[2] Sonia Orellano Rivera, Gwendolyn Martin, and Rodolfo Meana were also infected with Hepatitis C on September 21, 2007. Lakeman was not the CRNA during these

After an investigation into the Shadow Lane Clinic practices, the CDC's conclusion was that the "outbreak occurred due to unsafe injection practices through the use of syringes to enter propofol vials and then using those for multiple patients." 18 AA 3958-59. When administering propofol, the anesthetic used on the patients of the Shadow Lane Clinic, the CDC recommends using a single vial of propofol and a new syringe and needle for each patient. 17 AA 3773. About 20 cc of propofol is needed for each procedure, and about 10 cc of propofol can fit in one syringe. 13 AA 2865, 2872. Propofol comes in 200 milligram or 500 milligram bottles, and thus there are multiple ways that a CRNA can administer the propofol without risking contamination. The first is to use only one vial of propofol on each patient. In that scenario, the same syringe and needle may be used more than once on the same patient without risk of contamination. The second option is for the CRNA to fill up multiple syringes out of one vial of propofol before the procedures begin—never putting the syringes or needles back into the vial. The risk of contamination occurs when a CRNA administers one dose of propofol using a needle and syringe, and takes that same syringe and puts it back in a vial of propofol. If that vial of propofol is later used on another patient, there is risk that blood from the syringe used on patient number one has contaminated the propofol, and will be spread to patient

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procedures. Meana eventually died from Hepatitis C and Lakeman's co-defendant, Dipak Desai, was convicted of Second Degree Murder.

number two. 18 AA 3995-97. This practice was referred to by Lakeman as "double-dipping." 17 AA 3714.

Gayle Langley, an employee at the CDC, investigated the outbreak at the Shadow Lane Clinic. 18 AA 3988. She witnessed Keith Mathahs, a CRNA employed at the Shadow Lane Clinic, "double-dipping" back into a bottle of propofol. 18 AA 3995-96. Further, employees of the CDC observed the pooling of propofol at Shadow Lane Clinic. 17 AA 3771. If something happens to contaminate one vial that is pooled with other vials, there is no telling how many patients are put at risk. 17 AA 3771. The CDC also observed filled syringes next to the pooled propofol, along with syringes that had been used dropped near the areas where syringes that had not been used were being kept. 18 AA 3985.

Melissa Schaefer, a medical officer at the CDC, spoke with Lakeman over the phone. Lakeman admitted to reusing syringes in one vial, and then using the propofol from that already contaminated vial on a new patient. 16 AA 3647-48. When asked if Lakeman used that technique at his current employment, he responded that he did not use that same technique currently, and it was the policy at his new job that the extra propofol would be wasted and discarded. 16 AA 3649-50. He acknowledged that "double-dipping" was not the safest practice, but explained he would keep pressure on the plunger in an attempt to prevent backflow of blood into the syringe from the patient. 16 AA 3648. Lakeman was questioned about the

risk and had a clear understanding of what it was. 16 AA 3648. Lakeman told Schaefer that he would deny all he had confessed. 16 AA 3645. He not only understood the risk, but actively attempted to minimize it. 18 AA 3949.

SUMMARY OF THE ARGUMENT

Just as with the appendix he has provided, Lakeman's Opening Brief is woefully deficient. He fails to include important pieces of evidence in the record to support his claims, cites to portions of the record that are incorrect, and requests plain error review for almost every claim in his Opening Brief. Additionally, because of the lack of a coherent record, the State is constrained in how to respond to many of his arguments.

ARGUMENT

I.

Change of Venue is an Inappropriate Claim to Bring for the First Time on Appeal

Lakeman contends that the court erred in refusing to grant a change of venue. Appellant's Opening Brief (AOB), p. 4. However, the district court never ruled on a change of venue request, as one was never brought. Lakeman's contention that the district court erred is disingenuous, as the lack of record cites in the Opening Brief shows a clear understanding that this issue is newly brought before this Court. While NRS 174.455(3) allows an appeal from a denial of a motion for change of venue in a criminal case on appeal from a final judgment, as there was no motion made, this statute is inapplicable.

Additionally, there can be no variety of plain-error review in this instance. In order for a purported error to be reviewed by an appellate court, there must be some object or action for the court to review. Instead, Lakeman urges this Court to review an omission and to essentially consider a retroactive motion for change of venue. As the record is insufficient to provide an adequate basis for plain error review, this Court should conclude that the claim regarding change of venue was waived. Cf. Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980) (finding that failure to file a motion seeking suppression of an interrogation in trial court waives the issue on appeal).

A decision on a motion for change of venue is a fact-intensive enterprise; accordingly, reaching the merits of this claim would involve impermissible appellate fact finding. See Ornelas v. United State*s*, 517 U.S. 690 (1996); Scott v. State, 782 A.2d 862 (Md. 2001). "To establish plain error, there must be (1) error, (2) that is plain, and (3) that affects substantial rights." United States v. Brown, 352 F.3d 654, 664 (2d Cir. 2003). Here, the district court would have been without the power to grant an application for change of venue sua sponte. See NRS 174.464(1) (requiring application be made in open court by one of the parties). Thus, the omission cannot be considered error, plain or otherwise.

II.
No Relief is Available on a Claim Related to the Videotaped Deposition of Rodolfo Meana

Lakeman contends his Confrontation Clause Rights were violated due to the

admittance of the videotaped deposition of Rodolfo Meana, yet he fails to provide a record of the deposition, precluding consideration of this claim. Further, even were this claim capable of review, any error would be harmless beyond a reasonable doubt. The United States Supreme Court has found that alleged violations of the Confrontation Clause can be reviewed for harmless error under Chapman v. California, 386 U.S. 18, 24 (1967). Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3 (1999)). Lakeman was not the CRNA who treated Mr. Meana, thus the jury elected to acquit him of the counts related to that victim. Accordingly, no prejudice inures to Lakeman even assuming an error existed.

III.
The District Court Was Correct in Determining the Testimony of Melissa Schaefer Regarding Lakeman's Confession Was More Probative than Prejudicial

Lakeman contends that allowing the testimony of Dr. Melissa Schaefer regarding Lakeman's phone conversation with her was more prejudicial than probative, and thus the court erred by allowing it into evidence. AOB at 15. Lakeman does not present any further legal cites explaining his objection to this testimony. The court stated:

> with respect to the probative versus prejudicial effect, I think the – you know, the probative value outweighs the

> prejudicial, I mean, it – you know, it's prejudicial, they wouldn't want to use it if it wasn't prejudicial. But the probative value, you know, is – goes to a knowledge of guilt and, you know, I think that that's probative. And again, you know, you can – you know, if you think that the statement is taken out of context or doesn't mean what is sounds like it means or something like that, you can elicit that on cross-examination.

8 AA 1647.

Lakeman contends that allowing the CDC to breach their promises of anonymity "could have a chilling effect on the public health safety of every city and town across America and possibly the world." AOB at 14. Lakeman's hyperbolic assertions are do not constitute an appropriate analysis under NRS 48.035. NRS 48.035(1) states "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."

Lakeman admitted his culpability and that he knew the risk he was taking by "double-dipping." Schaefer's testimony was probative as to the very nature of the charges against Lakeman:

> Q. Can you describe what he was saying when he used those words?
> A. So essentially you're going back into the vial. So, you know, like, when you take salsa and a chip and you eat it and then you double-dip, you go back into the dip with that chip that you have bitten into. You're putting your mouth bacteria into that bottle of dip for other patients. So I take my needle and syringe, I inject it into a patient. I double-dip, I go back into the vial with that same

> syringe. I've contaminated the medication of the dip or whatever you want to call it, and then I'm using that for other patients.
> Q. Did he ever indicate to you that he was aware of the risk of that process?
> A. So he mentioned that he—you know, I said this is not safe and he acknowledged that, you know, it was not the safest practice, but that he would keep pressure on the plunger to prevent—to try to prevent backflow of anything into the syringe from the patient.
> Q. So just so I'm clear on that. You questioned him about the risk, the safety of the practice; he acknowledged that?
> A. Yes.
> Q. That it was not a safe practice?
> A. Yes.

16 AA 3647-48. Lakeman makes no further argument as to how this clear statement against interest caused prejudice, confused the issues or mislead the jury. The only relevant question is whether the evidence caused **unfair** prejudice. "Evidence is 'unfairly' prejudicial if it encourages the jury to convict the defendant on an improper basis." Holmes v. State, 129 Nev. ___, ___, 306 P.3d 415 (2013). Here, the basis was entirely proper. Lakeman attempts to confuse the issue by invoking public health concerns, but this is not part of the analysis of prejudice to the jury in a criminal proceeding. The court appropriately found that Lakeman's statements were more probative than prejudicial.

IV.
The State Did Not Engage in Prosecutorial Misconduct

Lakeman contends numerous incidents of prosecutorial misconduct. When addressing claims of prosecutorial misconduct, this Court engages in a two-step

analysis. Valdez v. State, 124 Nev. 97, 196 P.3d 465, 476 (2008). First, this Court must determine if the conduct was improper, and second, if it is does it warrant a reversal. Id. Regarding the second step, constitutional errors are subject to the beyond a reasonable doubt standard of Chapman v. California.[3] Valdez, 124 Nev. at 97, 196 P.3d at 476. Other errors will result in reversal if they substantially affected the verdict. Id. Moreover, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11, (1985); Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002).

A. The State Did Not Threaten A Witness

Lakeman contends that the prosecutor committed misconduct by telling "[Mathahs] and his attorney in the middle of his cross-examination" that he was in violation of his proffer. AOB at 17. The court specifically stated that there was no misconduct on the part of the prosecutor. 12 AA 2565.

The State did not strong arm Mathahs. The prosecutor was simply letting counsel know that Mathahs was in violation of his proffer because he testified differently on direct then on cross examination, and thus at some point had not been

[3] 386 U.S. 18, 24, (1967).

truthful. Additionally, Lakeman misstates what occurred, as the conversation between the prosecutor and Mathahs' counsel was never communicated to Mathahs.

Further, any alleged error on the part of the prosecutor was harmless. NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

The conversation between the prosecutor and Mathahs' counsel was never communicated to Mathahs and therefore if it was misconduct, it had no bearing on the verdict. The prosecutor and Mathahs' counsel went on the record at the conclusion of Mathahs' testimony, agreeing that the State's discussion with counsel had not been passed along to Mathahs, thus his testimony was unaffected:

> Ms. Weckerly: I just want the record to be clear when we took the break and discussed that Mr. – that the State's opinion was Mr. Mathahs was in breach of his agreement with the State, his attorney – neither his attorney nor the State's attorneys nor the defense counsel informed him that the State considered him in breach, so there couldn't have been any influence on his testimony.
>
> Mr. Wright: Not to my knowledge.
>
> The Court: Right. I mean, I didn't see anyone inform him. The record's clear the Court admonished his lawyers not to inform him and no one else left the room.

> Ms. Weckerly: Thank you.
>
> Mr. Cristalli: Well, I can only speak for myself, I didn't inform him…

12 AA 2611. There was no prosecutorial misconduct, as Mathahs' testimony was not influenced and thus the verdict was not substantially affected.

B. The Prosecutor's Elicitation of Testimony Regarding the Federal Indictment Was Harmless

Lakeman contends that the prosecution "DELIBERATELY elicited inadmissible evidence of a pending federal indictment." AOB at 18. At one point in this lengthy trial, Tonya Rushing—Desai's business manager—volunteered that she was under federal indictment. The prosecutor then followed up by asking who was involved in that indictment. While the State does not concede this was misconduct, the district court gave a curative instruction that given stopped any prejudice. 20 AA 9376. A jury is presumed to follow its instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Further, the pending-indictment comment had nothing to do with Lakeman: Rushing only spoke of herself and Desai being indicted. Therefore the prejudice to Lakeman is unclear.

"Generally, when evidence is heard by the jury that is subsequently ruled inadmissible, or is applicable only to limited defendants or in a limited manner, a cautionary instruction from the judge is sufficient to cure any prejudice to the defendant." United States v. Escalante, 637 F.2d 1197, 1202-1203 (9th Cir. Cal.

1980). "It is the exceptional case in which such instructions are found insufficient to cure prejudice." Id. at 1203.

The court believed that the evidence had already come out prior to the comments made by Tonya Rushing, and if an indictment wasn't clear, the participation of the FBI and other federal authorities' involvement in this case was. 19 AA 4300-01. Rushing actually volunteered she was under federal indictment when asked if she was facing charges in this case. 19 AA 4294. Linda Hubbard also talked about being interviewed by the FBI. 15 AA 3423. Additionally, defense counsel brought up the federal case on cross examination of Mathahs:

> Q. Okay. Now had you previously – I jumped over something there. Had you previously gone and talked to the feds, federal prosecutors?
> A. Yes.
> Q. Okay. With that – that – do you recall if that was back in 2010 after you had been indicted by the State?
> A. Yes.
> Q. Okay. And you – when I say you went and talked to the federal prosecutors, you went with your lawyer, correct?
> A. Correct.
> Q. Okay. Mr. Cristalli?
> A. Correct.
> Q. And the federal prosecutors were contemplating prosecuting you for billing fraud.
> A. Correct.
> Q. And you went with your lawyer and gave a – an interview under terms of a proffer agreement. Do you recall that?
> A. Yes.

12 AA 2574. Defense counsel then further explored Mathahs' proffer given to the federal prosecutors:

> Q. Okay. Do you know what a proffer agreement is?
> A. Not truly.
> Q. Okay. Well, it was something where you could go in and talk to them and they would hear what you have to say and **then they would decide whether they're going to make you a witness or a defendant**. Is that true?
> A. Okay.
> Q. I mean, was that your understanding of it?
> A. I understand now, yes.
> Q. Okay. And so you – you went in and talked to the federal prosecutors with your lawyer, correct?
> A. Correct.
> Q. Okay. And then you – you were not prosecuted federally, correct?
> A. Correct.

12 AA 2474-75 (emphasis added). Defense counsel did not ask one or two questions regarding the federal investigation, but drug the issue out with Mathahs— going so far as to express that the federal prosecutors were deciding whether to make him a defendant. The reasonable inference is that there was or would be a federal indictment involving the major players in the Hepatitis C outbreak.

The State was trying to further explain Rushing's limited immunity in the State prosecution, and then simply tried to follow up. 19 AA 4294. The State agreed it was presented inartfully, but also that the question was only asked because "we had gone through those things with literally every witness that got on the witness stand with regard to, you know, the immunity and who had been involved with the

federal authorities and with the state authorities and so forth, and that was the reason to go down the line of questioning." 19 AA 4304. It was not purposeful on the State's part to elicit that response, and the State suggested a curative instruction. To the extent that this comment could be said to carry any prejudice at all since this defendant was not mentioned, the curative instruction given to the jury cured it.

C. The State Did Not Argue Improperly in Closing

The State did not make any improper argument during the closing statement or rebuttal. Lakeman contends the prosecutor was acting improperly when stating: "Michael Washington was infected. You saw him. Who among you would want to have a liver transplant regardless of how much money you got."[4] 25 AA 5496. Lakeman did not object during the rebuttal, but rather brought it up to the court in an untimely fashion, after the rebuttal was concluded. 25 AA 5507-08. The court said that "I caught it as well, but I didn't sua sponte do anything because then he moved on and I figured it might be worse and **nobody objected**." 25 AA 5508. "In order to preserve the issue of prosecutorial misconduct for appeal, the defendant must raise timely objections and seek corrective instructions." Parker v. State, 109 Nev. 383, 391 (1993) (finding that the defendant's failure to object and request an instruction precluded the consideration of the issue on appeal). If the court chooses

[4] Lakeman's record cite regarding the statement during rebuttal is incorrect. AOB at 19.

to consider this issue, it can only be reviewed for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).[5]

Lakeman relies on McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984), stating that this Court reversed the convictions in that case due to impermissible comments in violation of the "Golden Rule Argument" in closing. AOB at 20. "A 'Golden Rule' argument asks the jury to place themselves in the shoes of the victims." Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997). Lakeman mischaracterizes this Court's findings in McGuire. There, the conviction was not reversed solely because of comments made by the prosecutor asking the jury to put themselves in the victim's shoes. Rather, the prosecutor in that case made a plethora of comments that amounted to global and persistent prosecutorial misconduct, including: several disparaging remarks regarding the defense counsel's ability; referring to the fact that medical witnesses who testified on the appellant's behalf were paid for at county expense; arguing that finding the appellant not guilty gave him license to rape another young girl; and after objection, the prosecutor again stating, "I'll make it simple. If you find him not guilty, don't ever let me hear you complain." McGuire, 100 Nev. at 158-59, 677 P.2d 1060 (1984). The prosecutor in McGuire stated:

> If you find [the appellant] not guilty . . . you are going to give him a license to rape and the fact will be that a

[5] See supra I for the plain error review standard.

> young girl can go to a party, a young girl can turn down his intentions and try to leave. She can be dragged back in the house by her hair, thrown in the apartment . . . and raped, scream for help and that's consent.
>
> So any one of your daughters, if that happens, there's no problem.

Id. at 158. Firstly, this comment was one of many that caused this Court to overturn that conviction. Secondly, essentially threatening juror's daughters with rape is a far cry from asking who among the jury would want to have a liver transplant.

In context, the prosecutor's comment was made in response to the defense's attempts throughout the trial to show the victims' alleged profit motive. In responding to that theory of the defense, the prosecutor stated:

> Ziyad Sharrief, the source patient. That man did not want to be part of the infection. That man certainly, Kenneth Rubino, didn't want to. Michael Washington was infected. You saw him. Who among you would want to have a liver transplant regardless of how much money you got? Stacy Hutchison, Patty Aspinwall, Gwendolyn Martin, Sonia Orrelono [sic], Carole Grueskin.

25 AA 5496. This was in response to various comments made by defense counsel in closing and throughout the trial. Desai's counsel stated "I'd like you to take into consideration of a lot of the witnesses and why they –what – what their motives were and whether they had axes to grind." 25 AA 5418.[6]

[6] Similarly and more egregiously in Desai's counsel's closing argument, he stated "They—it—the—the virus, no one wants hep C. I hope that none of you have it.

Defendant has not met his burden to show manifest injustice.[7] The jurors saw Michael Washington in a weakened state and heard about his ordeal. The brief mention of this in rebuttal in the context of his health, simply reiterating what they had already heard from the witness, does not amount to reversible error. Lakeman has not met ***his burden*** and proved manifest injustice.

D. The State Did Not Commit Prosecutorial Misconduct During Opening Statement

Lakeman's next contention is essentially a laundry list of comments he does not agree with or does not feel were relevant. AOB at 21. These comments are appropriate arguments made by the prosecutors, and the State is confounded as to how a majority could even be considered prosecutorial misconduct. These include: 1) referring to patients as "cattle"; 2) a comment regarding moving patients in and

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Who knows? I keep hearing these statistics on how many of us might have it and don't know it." 25 AA 5412. The State did not object.

[7] During the court's ruling on the comment made in the State's rebuttal, prosecutors mentioned objectionable conduct in Lakeman's closing. The State was referring to Lakeman's following comments: "It is unfortunate that we don't have an answer because the public is clamoring for an answer. That's why you see all the television cameras and the news reporters because the public wants to know. And so the State and the District Attorney's office was forced into the position of taking this approach and prosecuting two individuals, Dr. Desai and Mr. Lakeman, to the exclusion of all the other CRNAs, to the exclusion of all the other doctors. *They had to come up with a sacrificial lamb because the public wants to know.* And they got a sacrificial lamb. They got Mr. Lakeman." 25 AA 5433-34 (emphasis added). The State did not object.

out of the clinic quickly; 3) listing various supplies; 4) a mention of HIV;[8] 5) double booking patients; 6) showing the jury chux and explaining that they were cut in half to save money; 7) re-use of biopsy blocks; and 8) an explanation of Desai's quick procedures, including that he "cracked the whip," a quote taken directly from a witness statement. AOB at 22. Lakeman did not object to any of the eight comments enumerated in the Opening Brief. Thus the matter is considered waived and should not be reviewed, but if the court chooses to do so, can only be reviewed for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).[9] Lakeman does not further explain his argument regarding these eight claims, and therefore they are bare claims and actual prejudice has not been proven.

Lakeman further contends that "[e]vidence put forth by the State and displayed to the jury was conceded to be inaccurate and misleading." AOB at 22. Specifically Lakeman cites to the portion of rebuttal where the prosecutor states that

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[8] Viewing the context of the prosecutors mention of HIV makes it clear that the prosecutor's intent was not to inflame the jury:

> I mean, you hear about needle sticks. And for comparison, HIV, hepatitis B and hepatitis C, from a single exposure needle stick, the risk of transmission for HIV is about .3 percent. The risk for hepatitis C is about 3 percent. And for B it's about 30 percent. So it's not the most infectious agent, but it is the single largest infected – or infectious communicable disease in the country. AA 1766.

[9] See supra I for a full explanation of plain error review.

he misinterpreted a piece of evidence. Rather than misleading the jury, the prosecutor attempted to clarify the point as he realized that he had misinterpreted that the cost of propofol had changed at some point. 25 AA 5450. The prosecutor corrected his mistake by saying:

> Now, for me, that was a piece of evidence that I misinterpreted. Now, it's in evidence. You can look at it yourself. *It's not like its misrepresented*. But my interpretation of that evidence was that there was a difference in cost of the propofol at least at one point. Ms. Stanish pointed out, and correctly so, that it was not appropriate or not – it wasn't reasonable to compare those two for the cost of the actual propofol.

25 AA 5450 (emphasis added). The prosecutor states clearly that nothing was misrepresented but rather his personal interpretation was incorrect. He followed by saying, "[t]hat's why you are here, ladies and gentlemen, because it's your interpretation that matters." 25 AA 5450.

Lakeman also contends that "the State further admitted that the number of patients that they argued were seen at the clinic on a daily basis was wrong." AOB at 22. This is also taken out of context. Rather, the prosecutor clarified that multiple witnesses testified that 75 to 80 patients were seen a day, but that if you do that math, the average was 59 patients. 25 AA 5451. The State did not attempt to mislead the jury during opening statement or closing argument, and Lakeman's attempts to show this are misconstruing the comments made by prosecutors. Lakeman has not met ***his burden*** under the plain error standard.

E. Any Errors Were Harmless and Not Cumulative

Lakeman contends that the alleged prosecutorial misconduct cumulated to deny Lakeman his constitutional right to a fair trial. Lakeman's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

Here, while the charges against Lakeman were serious, the issue of guilt was not close, as the evidence against Lakeman was overwhelming. Further, each and every one of Lakeman's claims is without merit as discussed above. As such, even if this Court did decide to accumulate Lakeman's claims, his argument still fails.

To the extent that any of these aforementioned references to prosecutorial conduct would be considered by this Court to be errors, the errors were harmless because there was strong admissible evidence of Lakeman's guilt.

V.
There Was Sufficient Evident to Support a Conviction for Criminal Neglect of Patients NRS 200.495

Lakeman contends there was not sufficient evidence to support his conviction for Criminal Neglect of Patients. Lakeman argues specifically that he, along with other investigators and experts, did not know that the technique being used was unacceptable. AOB at 25. He contends that "CRNA's, Doctors and medical experts, may have been under the mistaken impression that the procedures they had been

using for 20, 30 and in some cases 40 years were safe and aseptic." AOB at 28. This grossly misconstrues the testimony and evidence.

The standard of review for sufficiency of the evidence on appeal is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979). A reviewing court need not decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20. This standard preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.; see also Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses."). "Where there is substantial evidence to support a jury verdict, it will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); see also Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000). In rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Circumstantial evidence alone may support a judgment of conviction. Collman v. State, 116 Nev.

687, 711, 7 P.3d 426, 441 (2000) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

Lakeman's argument is that he simply made a mistake in thinking the technique he was using was proper—and so did everyone else. But this is simply false. Lakeman's awareness that he was taking risks with patient lives is clear. Schaefer of the CDC testified he knew the risk:

> Q. So just so I'm clear on that. You questioned him about the risk, the safety of the practice; he acknowledged that?
> A. Yes.
> Q. That it was not a safe practice?
> A. Yes.

16 AA 3647-48.

Lakeman points to the testimony of the CRNAS and that "each of them testified that the injection practices they used followed aseptic technique." AOB at 25.[10] But Lakeman's conduct was not the reuse of a single vial coupled with aseptic technique. He was charged for using a technique he himself called "double-dipping," that he knew was risky as he attempted to prevent backflow of potentially contaminated blood into the plunger. 16 AA 3647-48. This is clearly "aggravated, reckless or gross," not simply a mistake. No one has advocated that this "double-

[10] It is unclear based on the Opening Brief whether Lakeman is confused as to the difference between re-using single use vials while using proper aseptic technique and the conduct he engaged in which caused the Hepatitis C outbreak.

dipping" technique is appropriate aseptic technique. As Lakeman points out at length in his Opening Brief, the use of propofol vials on more than one patient is an accepted practice, *as long as a new needle and syringe is used each time*. Similarly, testimony by Dorothy Sims that the "multi-use of vials with aseptic technique" was acceptable is not the same as the criminal conduct Lakeman admitted to and was convicted of.

Additionally, Lakeman's argument that other clinics were using equally unsafe practices does not absolve him of liability. His argument that another endoscopy clinic was also "double-dipping" is a weak attempt to point the finger elsewhere. It is abundantly clear that this was not a safe technique, because seven people got Hepatitis C.

In addition to Lakeman's specific contention that the evidence did not show that his actions were aggravated, reckless or gross, under NRS 200.495, the State must have shown that:

> (b) the act or omission is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances that it is contrary to a proper regard for danger to human life or constitutes indifference to the resulting consequences.
> (c) The consequences of the negligent act or omission could have been reasonably foreseen; and
> (d) The danger to human life was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated reckless or grossly negligent act or omission.

Lakeman's admission to the CDC shows that he clearly understood the risk to human life, and his statement that he would deny his confession shows that he understood the gravity of his actions. Specifically, he was attempting to prevent blood from getting into the syringe as it could spread disease. Hepatitis C is a blood borne disease and thus its transference was reasonably foreseen. As much as Lakeman contends he made a mistake, the evidence is clear—he was reckless or grossly negligent. A rational trier of fact could have found Lakeman guilty of these crimes beyond a reasonable doubt.

VI.
NRS 202.595 is Not a Lesser Included Offense of NRS 200.495

Lakeman contends that he cannot be convicted of both Criminal Neglect of a Patient under NRS 200.495 and Performance of Act in Reckless Disregard under 202.595. Lakeman did not raise this claim below, and thus this court should not consider it. If this Court chooses to consider the claim, it should do so using plain error review.[11]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to Nevada citizens via the Fourteenth Amendment to the United States Constitution, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This protection is additionally guaranteed by the Nevada Constitution. Nev. Const. art. 1, § 8. The Double Jeopardy

[11] See supra I for the full plain error review standard.

Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

To determine whether two statutes penalize the "same offence," Nevada looks to the test set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932). See Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006). Under the Blockburger test "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006).

Under Blockburger, Lakeman's multiple punishment challenge fails because "each offense contains an element not contained in the other." United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856 (1993).

NRS 202.595 states:

> Unless a greater penalty is otherwise provided by statute and except under the circumstances described in NRS 484B.653, a person who performs any act or neglects any duty imposed by law in *willful or wanton* disregard of the safety of persons or property shall be punished . . . .

NRS 200.495 states:

> 1. A professional caretaker who fails to provide such service, care or supervision as is reasonable and necessary to maintain the health or safety of a patient is guilty of criminal neglect of a patient if:
> (a) The act or omission is aggravated, reckless or gross;
> (b) The act or omission is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances that it is contrary to a proper regard for danger to human life or constitutes indifference to the resulting consequences;
> (c) The consequences of the negligent act or omission could have reasonably been foreseen; and
> (d) The danger to human life was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated reckless or grossly negligent act or omission.

NRS 202.595 requires a willful or wanton disregard of the safety of persons or property, which is not required under NRS 200.495. NRS 200.495 has various elements not required under NRS 202.595. In fact, these statutes do not share a common element. The entirety of Lakeman's argument regarding the first prong of the test is that "the State's theory was that substantial bodily harm would not have resulted but for the unsafe injection practices employed by Lakeman. The first part of the test has been met." AOB at 29. Not only is Lakeman requesting this Court to review this claim under plain error, but he did not further analyze the first prong of the test. He has clearly not met ***his burden*** to show manifest injustice.

/ / /

/ / /

CONCLUSION

This Court should AFFIRM the Judgment of Conviction and deny Lakeman's appeal in its entirety.

Dated this 23rd day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,232 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 23rd day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 23rd day of March, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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