IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64757

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. WHETHER THE DISTRICT COURT PROPERLY FOUND DEFENDANT'S CONFESSION WAS VOLUNTARY
2. WHETHER THE DISTRICT COURT PROPERLY FOUND DEFENDANT WAS NOT IN CUSTODY
3. WHETHER THE DISTRICT COURT PROPERLY ADMITTED TAPED CONVERSATIONS BETWEEN DEFENDANT AND HIS COCONSPIRATORS
4. WHETHER ANY RATIONAL TRIER OF FACT COULD FIND THAT THE STATE PROVED DEFENDANT GUILTY BEYOND A REASONABLE DOUBT
5. WHETHER ANY RATIONAL TRIER OF FACT COULD FIND THAT DEFENDANT USED A DEADLY WEAPON BEYOND A REASONABLE DOUBT
6. WHETHER REVERSAL FOR CUMULATIVE ERROR IS UNWARRANTED

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STATEMENT OF THE CASE

On June 20, 2005, the State charged Deangelo Reshawn Carroll (Defendant), by way of Information, as follows: COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 193.165); COUNT 2 – Murder with use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); and COUNT 3 – Solicitation to Commit Murder (Felony – NRS 199.500). 1 Appellant's Appendix (AA) 154–56.

On April 30, 2010, Defendant filed a Motion to Suppress, seeking to suppress his statements to the police. 3 AA 493–98. On May 4, 2010, the State filed its opposition to Defendant's Motion to Suppress. Id. at 635–46. On May 11, 2010, the District Court, upon reading the briefs, hearing argument, reviewing the transcripts, and viewing the video, denied Defendant's Motion. 3 AA 655.

Defendant's jury trial began on May 17, 2010. 4 AA 656–57. On May 21, 2010, the State filed its Fifth Amended Information, dropping COUNT 3 from the original Information. 8 AA 1587–88. The guilt phase of Defendant's trial ended on May 25, 2010, with the jury returning a unanimous verdict of Guilty on both counts. 9 AA 2000–01. Specifically, the jury found Defendant guilty of Conspiracy to Commit Murder, and guilty of First Degree Murder with Use of a Deadly Weapon. Id. On May 25, 2010, the jury sentenced Defendant, on the Murder charge, to Life in prison with the possibility of parole after a minimum of 40 years. 11 AA 2412.

On August 12, 2010, Defendant was sentenced. Id. at 2413–14. Recognizing Defendant's unique role in the crime, the District Court sentenced Defendant to 36 to 120 months in prison for Conspiracy to Commit Murder. Id. at 2416–17. Further, the District Court imposed the sentence of life in prison with parole eligibility after 40 years, to run consecutive to COUNT 1. Id. Defendant's sentence on the charge of First Degree Murder was composed of a term of life with parole eligibility after 20 years, with an equal and consecutive term for the deadly weapon enhancement. Id. Defendant was given credit for 1,904 days time served. Id. The Judgment of Conviction was filed on September 8, 2010. Id. at 2419. An Amended Judgment of Conviction was filed on March 23, 2011, to correct a clerical error. Id. at 2432–33.

Following the entry of the Judgment of Conviction, Defendant informed his trial counsel that he wished to pursue a direct appeal. Id. at 2435. Because of a communication breakdown between trial counsel, a Notice of Appeal was not timely filed. Id. Upon discovery of this, new counsel was appointed to determine whether an untimely appeal could be pursued. Id. New counsel had difficulty obtaining the complete file, and did not discuss the post-conviction claims with trial counsel. Id. at 2435–36. The District Court found that Defendant had good cause to excuse the untimeliness of his Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 2436–39. On December 20, 2013, the District Court ordered that Defendant be

allowed to pursue a direct appeal. Id. at 2440. Defendant's Notice of Appeal was filed January 6, 2014. Id. at 2441. The instant appeal followed.

STATEMENT OF THE FACTS

On May 19, 2005, Ismael Madrid (Madrid), then an employee of Home Depot, drove with two friends to Lake Mead. 6 AA 1181–82. Near midnight that night, Madrid began to drive back into town, along North Shore Road. Id. at 1183–84. While driving, Madrid and his companions came across a body lying in the middle of the road. Id. at 1184. The street was not well lit, and Madrid did not see the body until it was illuminated by the car's headlights. Id. at 1184–85. Madrid stopped, exited the car, and discovered the body of a white male adult. Id. at 1185. Scattered about the body were advertisements for the Palomino Strip Club (Palomino). Id. at 1186. Madrid then called the police. Id. at 1190. That body belonged to Timothy Hadland (T.J. or Hadland). Id. at 1289–90.

At approximately 6:00 p.m. on May 19, 2005, Defendant was called into the office of Louis Hidalgo Jr. (Hidalgo or Mr. H.). 12 AA 2511. Hidalgo was the owner of the Palomino. Id. at 2512. In the office, Hidalgo told Defendant that Hadland was spreading rumors about the Palomino, and first told Defendant to have Hadland beaten, before changing his mind and ordering Hadland killed. Id. at 2511–12. Defendant specifically understood Hidalgo's order as being one to kill Hadland. Id.

at 2517. Hidalgo did not want his son, Louis Hidalgo III (Louis or Little Lou), involved because he was already upset about the situation. Id. at 2540.

Defendant had previously considered Hadland a friend, and did not want to be the person to beat or kill him. Id. at 2512–13. Thus, Defendant recruited Kenneth Counts (K.C. or Counts), whom he believed to be a member of the Bloods street gang, someone who was willing to kill for a price, and who had previously performed such tasks for Hidalgo. Id. at 2497–98, 2512–13, 2518–19.

Following that conversation, Defendant took two accomplices, Rontae Zone (Rontae), and Jayson Taoipu (J.J.) with him as he passed out fliers for the Palomino. Id. at 2468–69. Defendant told Rontae and J.J. that Hidalgo had ordered them to kill someone. 6 AA 1272–75, Defendant then handed J.J. a pistol, and handed bullets to Rontae. Id. Rontae dropped the bullets, which were picked up by J.J. Id. at 1275–76. For the next several hours, Defendant, Rontae, and J.J. continued promoting for the Palomino. 12 AA 2513.

At around 11:00 p.m., Defendant placed a phone call to Hadland. Id. at 2516–17. At that time, Hadland was camping at Lake Mead with his girlfriend, Paijit Karlson (Karlson). 6 AA 1203–05. Defendant told Hadland that he wanted to meet Hadland to obtain marijuana from him. 12 AA 2517. At the end of the conversation, Hadland told Karlson that he was going to meet Defendant and they would get

marijuana together. 6 AA 1207, 1226–27. After the phone call and conversation with Karlson, Hadland took her car and left the campsite. Id. at 1206.

After the conversation with Hadland, Defendant, accompanied by J.J. and Rontae, drove to Counts' house. 12 AA 2519. When Defendant arrived at Counts' home, Counts was dressed all in black, wearing gloves, and carrying a pistol. Id. at 2521, 2547. Defendant brought J.J. and Rontae along so that they could verify later that he was not the shooter. Id. at 2522. On the drive out to Lake Mead, Counts argued with Defendant, arguing that J.J. be the one to shoot Hadland, which Defendant resisted. Id. at 2521–22. Also while en route, Defendant received a call from Anabel Espinolda (Espinolda), Hidalgo's assistant and a manager at the Palomino. Id. at 2526, 2543. In that call, Espinolda told Defendant that if Hadland was alone, he should be killed, and if he was accompanied that he should be beaten. Id. at 2544.

Upon arrival at Lake Mead, Defendant again tried to call Hadland, but had no cellular service. Id. at 2523. Defendant then circled around, and drove to a point where he could place a phone call. Id. at 2524. When Defendant realized that Hadland was already on his way to meet them, Defendant drove further into the park. Id. When they saw Hadland approaching, Defendant parked the van and stepped outside to relieve himself. Id. at 2524–2525. As Defendant reentered the van, Counts slipped out the side of the van. Id. Hadland approached the van, and began talking

to Defendant, who was again in the driver's seat. Id. As Hadland talked with Defendant, Counts crept around the side of the van toward the front, taking care not to be seen. 6 AA 1287–89. With Hadland distracted talking to Defendant, Counts rounded the front of the van, stood, and fired two rounds into Hadland's head. 12 AA 2525.

Defendant attempted to exit the van to check on Hadland, scattering the Palomino fliers around his body. Id. Counts then reentered the van, and demanded that Defendant drive them back to Las Vegas. Id. Defendant complied, and drove back to the Palomino. Id. Once there, Defendant entered the Palomino, found Hidalgo and Espinolda, and informed them that Hadland was dead. Id. at 2525–26. When Hidalgo tried to say that he only wanted Hadland hurt, Defendant reminded him of what the orders were. Id. Defendant then obtained the $6,000 payment for Counts. Id. Defendant exited the Palomino, and handed Counts an envelope with his payment, all in fresh $100 bills. Id. at 2527. Counts counted his money, and once satisfied, left the Palomino in a cab. Id. Defendant was given $100 by Hidalgo. Id. at 2528. Hidalgo finished his shift at the Palomino, before going home. Id. at 2529.

The next day, Detectives McGrath and Wildemann, who along with Detective Vaccaro (collectively the Detectives), had responded to the crime scene, approached Hidalgo. 7 AA 1389. Detectives had seen the Palomino fliers at the crime scene, and had learned that the last calls in Hadland's phone were from Defendant. 8 AA 1641.

The Detectives asked Hidalgo if he had contact information for Defendant. 7 AA 1390. Hidalgo asked the detectives to return later that evening to talk with a manager. Id. at 1391. Before the detectives returned, Hidalgo and Espinolda constructed a story for Defendant to tell the police if he was questioned. 12 AA 2561–63, 2566–67.

Upon their return to the Palomino, detectives came in contact with Defendant. 7 AA 1392. Detective Wildemann informed Defendant that they were investigating Hadland, and asked to talk to him because his phone was the last to call Hadland's. Id. at 1393. Detective Wildemann asked Defendant to accompany him, to discuss Hadland, and Defendant agreed. Id. at 1393–94. Because Defendant did not have his own car, detectives offered to transport Defendant. Id. at 1483.

When they arrived at the police station, it was deserted other than for Defendant and detectives. Id. at 1484. After making sure that Defendant was comfortable, detectives proceeded to interview him. See generally, 12 AA 2463–2577. The interview lasted approximately two and one half hours, though one half hour of that time was spent giving Defendant breaks to relax and drink water, unaccompanied by the police. 7 AA 1430. Throughout the interview, Defendant was not restrained, and he was specifically informed that he was not under arrest. 12 AA 2463.

At first, Defendant told detectives the story that was provided him by Hidalgo and Espinolda. Id. at 2463–92. When confronted with evidence placing him at the scene, Defendant admitted to his presence, and said that Counts killed Hadland. Id. at 2489–93. After a break, detectives asked Defendant for more details. Id. at 2508. Defendant revealed that this "was a hit." Id. at 2510. Defendant related to the detectives why Hidalgo, Louis, and Espinolda wanted Hadland dead, and his role in bringing about Hadland's murder. See generally, id. at 2510–77. Defendant repeatedly offered to testify in court, or to wear a wire to verify his statements. Id. at 2532, 2538–39, 2542, 2572–73.

Detectives eventually took Defendant up on his offer, and outfitted him with a wire. 7 AA 1416–17. Detectives discussed with Defendant that he was trying to obtain incriminating statements, but did not tell him what to say. 8 AA 1738–39. On two occasions Defendant met with Espinolda and Louis, and obtained recorded statements. See generally, 12 AA 2442–43, 2444–62. In the second conversation, Espinolda asks why Defendant went through with the plan. Id. at 2451. Espinolda then berated Defendant for carrying out the plan with other people in the car. Id. at 2452.

SUMMARY OF THE ARGUMENT

Defendant was properly tried and convicted by a jury of his peers for his part in bringing about the death of the man he called his friend. First, Defendant's

statements to the police were voluntarily given. Defendant's argument is based solely upon a mischaracterization of the promise made by the police, that at the end of the interview, they would return him home. Defendant had been driven to the police station by the officers because he had no car of his own, and they simply promised to take him home at the end of the interview, rather than to jail. The officers kept their promise, and made no other. The officers never promised Defendant leniency, and Defendant understood that he was still to be punished for his role. Under the totality of the circumstances, and the fact that Detective Wildemann specifically took a non-confrontational tone, Defendant has not shown that his will was overborn.

Second, no Miranda warnings were necessary, because Defendant was not in custody. Defendant voluntarily accompanied the Detectives to the station, and was indeed eager to go and relate the story that had been fed to him by Espinolda and Hidalgo. Defendant was informed that he was not under arrest, and was never placed in handcuffs. Defendant was given several unaccompanied breaks, with the door open. Defendant was not in a police-dominated atmosphere, given that the police station was nearly deserted, and Defendant interacted only with three detectives. Moreover, detectives were entirely professional in their approach, and did not use any strong-arm tactics. Finally, the interview was short, and at the end of it Defendant was driven home.

Third, there was no error in admitting the taped conversations recorded by Defendant, much less plain error affecting his substantial rights. The statements were clearly relevant to whether he intended for Hadland to be killed. Moreover, there was little risk of unfair prejudice, given that the jury was fully aware of the nature of the tapes, and was alerted to the fabrications within them. The statements were also non-hearsay, given that Defendant's lines were offered solely to give context to the responses of the other speakers. Further, those speaker were coconspirators, whose statements were designed to further the conspiracy. Finally, Defendant cannot show any constitutional violation as a result of the introduction of this evidence. Defendant provides scant legal authority or reasoning to support his claims, the evidence was not fundamentally unfair, and Defendant made effective use of it himself. Defendant was also not required to choose between remaining silent and explaining the content of the tapes, because his counsel very effectively set forth for the jury why the tapes were made, and Defendant's purpose in making his statements within them.

Fourth, Defendant cannot show that there was so little evidence that even when viewed in the light most favorable to the State, no rational juror could have found him guilty. The jury heard that Defendant understood his orders were to kill Hadland, that he recruited Counts specifically for that purpose, and that he brought

along witnesses in order to ensure that he was not blamed for actually shooting Hadland.

Similarly, Defendant cannot show that no rational juror could find that he knew that Counts would use a deadly weapon. The jury heard that Defendant provided J.J. with a gun and bullets, that Defendant knew Counts always carried a gun, that Counts had the gun visible when he entered the van, and that Defendant brought witnesses for the express purpose of ruling him out as the killer. It hardly stands to reason that a person would preemptively ensure the existence of witnesses who can rule him out as a shooter if he does not expect a gun to be used.

Finally, because Defendant failed to show any errors, there are no effects to cumulate. Even if small errors occurred, they were not so great, either individually or collectively, to overturn Defendant's conviction. The evidence against him was overwhelming, and any errors minor.

ARGUMENT

I

THE DISTRICT COURT PROPERLY FOUND THAT DEFENDANT'S CONFESSION WAS VOLUNTARY

The District Court properly found that the State showed by a preponderance of the evidence that Defendant's confession was voluntary. In the taped interview, the police offered to take Defendant, who did not have a car, home at the end of the interview. The police never promised Defendant leniency, and the police indicated that they would still investigate the case, belying any wishful thinking by Defendant

that he would not face consequences for his part in the murder of Hadland. Thus, Defendant was not coerced into confessing.

To be admissible, a confession must be made voluntarily. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). To be voluntary, the confession must be made as the result of a "rational intellect and a free will." Id. (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1966)). The question in each case is whether the defendant's will was overborne when he confessed. Id. at 214, 735 P.2d at 323. Once the issue of voluntariness is raised, the burden of proving voluntariness is on the State, by a preponderance of the evidence. Quiriconi v. State, 96 Nev. 766, 772, 616 OP.2d 1111, 1114 (1980).

To determine whether a confession in voluntary, the court considers the totality of the circumstances. Passama, 103 Nev. at 213, 735 P.2d at 322. Factors include: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Id. A lower than average intelligence does not, however, render a confession involuntary. Young v. State, 103 Nev. 233, 235, 737 P.2d 512, 514 (1987) (citing Ogden v. State, 96 Nev. 258, 607 P.2d 576 (1980)). Nor do personality disorders, or a desire to please authority figures. Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

Promises made during an interview are another factor for the court to consider. Id. at 215, 735 P.2d at 322. A confession made in response to a promise by law enforcement is not, however, *per se* involuntary. United States v. Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988); See Passama, 103 Nev. at 215, 735 P.2d at 322 (holding that a confession is involuntary only if the promises "tricked" the defendant into confessing). Rather, to render a confession involuntary, the promise must overcome the defendant's will. See Hutto v. Ross, 429 U.S. 28, 30, 97 S. Ct. 202, 203–04 (1976); Gurrero, 847 F.2d at 1366; Silva v. State, 113 Nev. 1365, 1369, 951 P.2d 591, 593–94 (1997) (noting that the lies in Passama were only used to trick the defendant); Brust v. State, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992); Passama, 103 Nev. at 215, 735 P.2d at 322 (holding permissible a promise to inform the prosecutor of the defendant's cooperation); Barren v. State, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983); Franklin v. State, 96 Nev. 417, 420–21, 610 P.2d 732 734–35 (1980) (holding voluntary a confession given after the police officer promised to attempt to secure an own recognizance release until after his testimony in other cases).

Police officers are also allowed to use deceptive tactics to produce a confession. Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 619–20 (1996); Silva, 113 Nev. at 1369, 951 P.2d at 594; see People v. Chutan, 72 Cal. App. 4th 1276, 1280, 85 Cal. Rptr. 2d 744, 747 (1999). This Court has, however, drawn a

distinction between the types of deception used by law enforcement, distinguishing between intrinsic and extrinsic falsehoods. Bessey, 112 Nev. at 325–26, 914 P.2d at 620–21. Intrinsic falsehoods include,

> misrepresentations regarding the existence of incriminating evidence such as placement of the defendant's vehicle at the crime scene, physical evidence linked to the victim in the defendant's car, presence of defendant's fingerprints at the crime scene or in the getaway car, positive identification by reliable eyewitnesses, and identification of the defendant's semen in the victim or at the crime scene.

Id. at 326, 914 P.2d at 620.

> Examples of extrinsic falsehoods of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt would include the following: assurances of divine salvation upon confession, promises of mental health treatment in exchange for confession, assurances of more favorable treatment rather than incarceration in exchange for confession, misrepresenting the consequences of a particular conviction, representation that welfare benefits would be withdrawn or children taken away unless there is a confession or suggestion of harm or benefit to someone.

Id. at 326, 914 P.2d at 620–21. Intrinsic falsehoods are viewed simply as another circumstance considered in the totality of circumstances. Id. at 326, 914 P.2d at 621. Contrary to Defendant's assertion, Appellant's Opening Brief (AOB) at 47, this Court has never considered whether extrinsic falsehoods are "coercive per se." State v. Robles-Nieves, 129 Nev. ___, ___, 306 P.3d 399, 406 (2013).

In this case, at the beginning of Defendant's interview, detectives verified that Defendant was speaking to them voluntarily, and that he was comfortable. 3 AA at 508.[1] Defendant then discussed his position at the Palomino, his job responsibilities, and his activities the previous day. Id. at 511–514. Defendant initially stated that he passed out VIP flyers for the Palomino, before heading home. Id. at 514–518. Defendant said that while at home, he called Hadland. Id. at 519. Defendant stated that his intention was to find Hadland in order to purchase marijuana from him, and that he refused Hadland's invitation to join him at Lake Mead because his son was sick. Id. at 521–22. Detectives then informed Defendant that they had learned that his cell phone had connected to cell towers near Lake Mead. Id. at 537–39. Detectives believed Defendant was not telling the truth. Id. at 540. At that point, Defendant asked whether he could "just start over." Id.

Before relating his next version of his story, Defendant indicated that he was "scared for [his] life. . . ." Id. at 541. He asked detectives, "how do I know that I'm fuckin' gonna be protected if I fuckin' say anything?" Id. Detectives said that they would help protect his family from retaliation. Id. at 541–42. Defendant then

[1] The State notes that there are two transcripts in the record, 3 AA 506–634; 12 AA 2463–577. The first transcript contains the vast majority, but not all of the statements in the second transcript. Only the first transcript was given to the District Court to consider as part of Defendant's pre-trial Motion to Suppress. 3 AA 493–99, 506–634. The District Court did, however, also have the video of the interview. Id. at 655.

indicated that he was scared of what would happen to him if he were immediately taken to jail. Id. at 542. In response to this fear, the Officers told Defendant that they would not take him to jail that day, but would take him home. Id. They also indicated that they would be continuing to investigate, to determine whether he told them the truth. Id.

Defendant then told the police that he, along with two minor friends, and a fourth individual whom he claimed not to know, drove to meet Hadland to purchase marijuana. Id. at 542–43. Defendant said that the fourth person, whom he identified only as "Kay," wanted to rob Hadland. Id. at 543. Defendant stated that upon meeting Hadland, "Kay" shot Hadland twice, before telling Defendant "you say anything, I fuckin' kill all you [sic]." Id. Detectives told Defendant that they would be asking him some questions, to get more details, and that after his statement, they would try to verify it. Id. at 543–44.

As the conversation progressed, Defendant said that he drove out to meet Hadland with J.J., Rontae, and Counts Id. at 545–50. Defendant indicated that when they met Hadland, Counts shot him. Id. at 550. Defendant also explained how the Palomino flyers and bank canister ended up at the scene. Id. at 551–52. When detectives expressed confusion, Defendant diagrammed for them the positioning and movement of his and Hadland's vehicles. Id. at 553–55.

When detectives told Defendant they would need to recover and process the van, which was Defendant's only means of transportation, he inquired whether he would be taken home. Id. at 560. The Officers told him they would return him home, before trying to verify his story. Id. Defendant offered to call Rontae and tell him to talk to detectives. Id. Detectives asked how Defendant would be able to prove his story, at which point he offered to testify against Hidalgo. Id. at 589. Detectives asked Defendant what he would do if he were in their position. Id. at 592. Defendant answered that he would "go investigate" the claims. Id. When asked how to verify his story regarding Hidalgo's motivation, Defendant offered to wear a wire. Id. Defendant then expanded on the latest version of his story, implicating himself, Counts, J.J., Rontae, Hidalgo, Louis, and Espinolda. Id. at 593–634.

The facts of this case clearly show that Defendant's statements were made voluntarily. Appellant's Opening Brief repeatedly construes detectives' statements that they would take Defendant home at the end of the interview as a promise of leniency, allegedly indicating that he would never face criminal charges. AOB at 44, 46–49. However, such a characterization is clearly belied by the record, given the context of the statement, and Defendant's inability to drive himself home. Moreover, Defendant explicitly stated, "I'm an accessory to murder and now my fuckin' family life's gonna [sic] be fuckin' ruined behind this shit. Now I might fuckin' go to prison. . . ." 12 AA 2528.

Defendant rode with detectives to the police station because he did not have a vehicle of his own, and the detectives could not authorize him to take one of the Palomino's vehicles. 7 AA 1483. Defendant also told detectives that he was in fear for the safety of his family, and his own safety in jail. 3 AA 541–42. Detectives told Defendant that they would take him home, rather than to jail. Id. However, they also indicated that they would investigate, and attempt to verify Defendant's statements. Id. The Officers never promised that Defendant would receive leniency, or that he would not face charges, rather, they simply promised to take him home at the end of the interview, and nothing more. Id.

This case bears striking resemblance to Barren. There, the defendant claimed that he confessed because of a promise of leniency. Id. at 664, 669 P.2d at 727. The defendant in Barren argued that the detective had offered to take him home, and that such an offer was a promise of leniency. Id. at 662–64, 669 P.2d at 726–27. This Court disagreed, stating, "the alleged promise of leniency to which appellant draws attention can be viewed as no more than an innocuous and ambiguous comment by Officer King that appellant would be 'going home.' King made this statement in the context of an offer to drive appellant home, which he subsequently honored." Id. at 664, 669 P.2d at 27. Here, just as in Barren, detectives offered to drive Defendant home, an offer they later honored. Id.; 3 AA 543–44. Just as in Barren, such a statement is not a promise of leniency. Barren, 99 Nev. at 664, 669 P.2d at 727.

Also similar to this case is that of Franklin. In Franklin, the police officers told the defendant that if he cooperated, they would secure an own recognizance release for him. Id. at 420, 610 P.2d at 734. The detective also promised to recommend leniency. Id. This Court held that such promises did not render the confession involuntary, because the promise to secure an own recognizance release was not a promise of leniency, and the promise to recommend leniency was insufficient to overcome the defendant's will. Id. at 420–21, 610 P.2d at 734–35. Here, detectives' statements that they would take Defendant home at the end of the interview are analogous to the Franklin promise to secure an own recognizance release. Id. Just as in Franklin, the statements were not promises of leniency, and were certainly insufficient to overcome Defendant's will. Id.

Even if detectives' statements are considered suggestions of leniency, rather than simply an offer to return Defendant home because he did not have a car, Defendant's argument is still unavailing. This case is akin to Brust. There, this Court denied a claim that statements were involuntary based on alleged promises of leniency, where the police detective made "suggestive statements regarding leniency," and suggested that the defendant needed to help himself. Brust, 108 Nev. at 874–75, 839 P.2d at 1301–02. The detectives also indicated that they still needed to collect evidence and verify the defendant's statements. Id. Similarly, detectives here indicated that they were still collecting evidence, and would need to verify

Defendant's story. 3 AA at 543–44. Moreover, to the extent that the offer to drive him home rather than to jail can be considered an offer for leniency at all, the "suggestive statement" fell far short of the coercive approach taken in Passama. Brust, 108 Nev. at 874–75, 839 P.2d at 1301–02.

Defendant's reliance on Passama is misplaced because it is readily distinguishable. In that case, the detective used a "carrot and stick" approach, indicating both that he would communicate the defendant's cooperation to the district attorney, and that he would make sure that the defendant went to prison if he did not cooperate or was untruthful. 103 Nev. at 215, 735 P.2d at 323–24. The detective combined this approach with suggesting to the defendant what to write in his statement. Id. at 215–16, 735 P.2d at 324. This Court found that these tactics "tricked" the defendant into confessing; these tactics, along with a five hour interview, wherein the defendant was denied food or drink, and was not allowed to talk to his fiancée despite his request, rendered the confession involuntary. Id.; Brust, 108 Nev. at 874, 839 P.2d at 1301.

Here, however, not only did detectives never threaten to ensure Defendant went to jail if he failed to cooperate, they did not even promise to inform the district attorney of his cooperation, something this Court has held is appropriate. Passama, 103 Nev. at 215, 735 P.2d at 323. Instead, detectives indicated that they would have to attempt to verify Defendant's story. 3 AA 543–44. Detectives simply told

Defendant that they would take him home at the end of the interview, rather than to jail. Id. Moreover, as Defendant concedes, they in fact took him home. AOB at 30; 7 AA at 1398. As such, there were no extrinsic falsehoods.

Upon looking at the totality of the circumstances, it is clear that the District Court and the jury were correct in determining this confession was voluntary. Defendant went with detectives voluntarily, and was not under arrest. 3 AA 508. Defendant was never handcuffed, and was repeatedly left alone. Id. at 561, 590. Defendant was provided with water, and detectives tried to make sure he was comfortable. Id. at 590; 12 AA 2507–08. Contrast Passama, 103 Nev. at 214, 735 P.2d at 323 (noting that the police did not provide the defendant with food or drink other than coffee, and denied his request to speak to his fiancée). Defendant was only in the interview for two and one half hours, and only two hours of that time was actual interview. 7 AA 1430. Contrast Passama, 103 Nev. at 214, 735 P.2d at 323 ("The five hour length of the detention and the repeated and prolonged questioning that occurred during that time are . . . important factors."). Defendant did not simply assent to everything that detectives said, but rather corrected some suggestions, and denied others, while offering information not previously mentioned by detectives. See, e.g., 3 AA at 527, 532, 534, 551–55, 572–73, 576, 581–86, 594, 601–03, 612, 621–23, 625–26. Compare Steese, 114 Nev. at 488–89, 960 P.2d at 327–28 (holding that the police did not "spoon feed" the defendant facts where they pointed out

contradictions in facts, and the defendant offered facts not stated by the police), with Passama, 103 Nev. at 215–16, 735 P.2d at 324 (holding improper the fact that the detective told the defendant what to write, where defendant did not know the facts admitted to). The interview here was relatively short, Detective Wildemann specifically used a nonconfrontational interview style, Defendant was never handcuffed, and was, as promised, returned home at the end of the interview. 7 AA 1398, 1427–28, 1430. Finally, the promise to drive Defendant home was not a promise of leniency, and any wishful thinking on his part could not make it so. Barren, 99 Nev. at 664–65 669 P.2d at 726–27. Indeed, Defendant understood that the offer of a ride home was not a promise of leniency. 12 AA 2528. As such, the District Court and the jury, after viewing the tape of the interview, properly found the statements voluntary. Steese, 114 Nev. at 488–89, 960 P.2d at 327–28; Brust v. State, 108 Nev. 872, 874, 839 P.2d 1300, 1301–02; Barren, 99 Nev. at 662–65, 669 P.2d at 726–27; Franklin, 96 Nev. at 420–21, 610 P.2d at 734–35; Ogden v. State, 96 Nev. 258, 264, 607 P.2d 576, 579–80 (1980).

II
THE DISTRICT COURT PROPERLY FOUND THAT DEFENDANT WAS NOT IN CUSTODY AT THE TIME OF THE INTERVIEW

The District Court properly determined that detectives were not required to give warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), because he was not in custody. Defendant went to the police station voluntarily, and

was told upon his arrival that he was not under arrest. Defendant was never restrained throughout the interview, voluntarily answered the questions posed, was interviewed by no more than two officers at any time, and was not placed under arrest at the end of the interview. Moreover, although Defendant did not sign a written waiver until the end of the interview, he was verbally informed of his rights during the interview itself.

To comport with the Fifth Amendment to the Constitution of the United States, and the right against self-incrimination contained therein, an individual must be given Miranda warnings before his statement may be used against him in the State's case-in-chief. Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). However, this requirement only applies when the individual is subject to custodial interrogation. Id. Absent custody, no Miranda warnings are needed. Id. "'Custody' for Miranda purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel at liberty to terminate the interrogation and leave." Id. (quoting Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995)) (internal quotation marks omitted); see also Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) overruled in part by Rosky, 121 Nev. at 190, 111 P.3d at 694.

Factors in determining custody are: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." Rosky, 121 Nev. at 192, 111 P.3d at 695 (quoting Alward, 112 Nev. at 154, 912 P.2d at 252). No single factor is dispositive. Id. Among the indicia of formal arrest are:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

State v. Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998). A person is not in custody for Miranda purposes where "the individual questioned is merely the focus of a criminal investigation." Id. at 1082, 968 P.2d at 323 (citing United States v. Jones, 21 F.3d 165, 170 (7th Cir. 1994)).

The question of custody is determined by examining the totality of the circumstances. Rosky, 121 Nev. at 191, 111 P.3d at 695. However, given that the focus is on the objective, reasonable person, the subjective beliefs of the suspect or the police officers do not bear on the question of custody. Taylor, 114 Nev. at 1082, 968 P.3d at 323. Generally, where a defendant "voluntarily accompanied officers to the police station, understood that they were not under arrest and voluntarily

responded to police questioning," they are not in custody. Rosky, 121 Nev. at 192, 111 P.3d at 695. Similarly, a lack of restraints, periods of time unaccompanied by law enforcement officers, and voluntary responses to questions all militate against a finding of custody. Id. at 193, 111 P.3d at 696.

A. The Location of the Interview is Not Determinative, nor was it Overly Intimidating

Because detectives did not know who was involved in Hadland's murder, or whether others at the Palomino were involved, they chose to interview Defendant at the police station. 12 AA at 2491. Defendant asserts that detectives chose to interview Defendant there because it was more intimidating. AOB at 51. However, such an assertion is simply speculation, without any support from the record, given that both detectives specifically denied choosing the police station because of any intimidation factor. 7 AA at 1486–87; 8 AA 1712.

The police station at that time was not a large building, and at the time of the interview, was nearly empty. 7 AA 1395, 1484. Defendant was not restrained at any time during the interview, and was left alone at times. Id. at 1398; 3 AA 561, 590. Although the room was hot, detectives gave Defendant water, and attempted to make him comfortable. 12 AA 2507–08. Further, Defendant's assertion that Detective Wildemann testified that a reasonable person would feel "pretty intimidated," is disingenuous at best. AOB at 51. Rather, both Detective Wildemann and Detective

McGrath specifically testified that whether a person is intimidated depends strictly on that person. 7 AA 1486–87; 8 AA 1713.

Here, the fact that the interview occurred at the police station, in a room termed by Defense as "small," is not determinative. Moreover, any intimidating factor involved in the location or physical characteristics of the room were dispelled by the fact that Defendant voluntarily accompanied detectives to the station, was never restrained, and was directly informed, at the beginning of the interview that he was not under arrest. 12 AA at 2463; Silva, 113 Nev. at 1370, 951 P.2d at 594 (finding that the a reasonable person would feel free to leave because he voluntarily went with the officers to the police station, and was informed he was not under arrest, despite the fact that the room was small, and the officer told defendant he would prove defendant's involvement).

B. The Investigation had Not Focused on Defendant

Upon arriving at the murder scene, the police found flyers for the Palomino and recovered a cell phone. 8 AA 1639. The number to Defendant's cell phone was among Hadland's most recent calls. Id. at 1641. Detectives talked to Hadland's girlfriend, from whom they learned that Hadland left her company in order to meet Defendant. 6 AA 1204–07. As a result, Defendant became a person with whom detectives wished to speak. 8 AA 1707. However, as Defendant admits, detectives did not know whether Defendant was the murderer, or a potential witness, or

someone entirely unrelated. AOB at 44. Moreover, detectives expressed this to Defendant at the beginning, and during the interview. 12 AA 2463, 2491.

Here, Defendant may have been a person of interest, but he was not the "focus" for the purposes of Miranda. First, a person is not in custody when the police are simply asking questions in a fact-finding investigative stage, or where the defendant is merely a person of interest. Taylor, 114 Nev. at 1082, 968 P.3d at 323. Further, a person is only a "focus" for purposes of Miranda when they are questioned by the police "*after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Avery v. State, 122 Nev. 278, 287, 129 P.3d 664, 670 (2006) (emphasis in original).

C. Objective Indicia of Arrest are Conspicuously Absent

As stated above, this Court considers, as indicia of arrest, the following factors:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1.

i. Defendant Voluntarily Accompanied Detectives and was Free to Leave

Defendant accompanied detectives to the station voluntarily. 12 AA 2463. Among the very first things told to Defendant upon his arrival at the police station was that he was not under arrest. Id. Moreover, Defendant wanted to speak with the police, because he was eager to tell them the story fabricated by Hidalgo and Espinolda. Id. at 2546, 2562–63, 2566–67. After the police contacted Hidalgo, he and Espinolda developed a story for Defendant to tell the police, and told him that Hidalgo's lawyers would be able to assist. Id. at 2561–63, 2566–67. This story is the same story that Defendant first related to detectives. Id. at 2566–67.

This Court has clearly stated that merely because the interview took place at a police station, or because the defendant was the person suspected by the police, the defendant is not necessarily in custody and Miranda warnings are not required. Silva, 113 Nev. at 1370, 951 P.2d at 594 (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517 (1983)). Rather, when the defendant voluntarily accompanies officers to the station, and voluntarily responded to questions, the interview is generally non-custodial. Id.; Rosky, 121 Nev. at 193, 111 P.3d at 696. As such, this factor militates against a finding of custody.

ii. Defendant was Not Under Formal Arrest

Defendant does not contest the fact that he was not under arrest. AOB at 59. Notably, at the beginning of the interview, Defendant was informed that he was not

under arrest. 12 AA 2463. Moreover, just as they told him they would, at the end of the interview, detectives drove Defendant home. 7 AA 1398. The fact that Defendant was not under arrest weighs against a finding of custody. Rosky, 121 Nev. at 193, 111 P.3d at 696; Silva, 113 Nev. at 1370, 951 P.2d at 594.

iii. Defendant was Free to Move, was Never Restrained, and was Unaccompanied in the Room, with the Door Open, on Multiple Occasions

Defendant complains that he was not free to move. AOB at 55. However, such a claim ignores the fact that Defendant was left unaccompanied in the interview room on multiple occasions, and that on each occasion the door was left open. 12 AA 2508, 2535. Moreover, Defendant was never restrained, no handcuffs were used, nor was he ever threatened with arrest. 7 AA 1398; 3 AA 561, 590. As such, this factor weighs against a finding of custody. Rosky, 121 Nev. at 193, 111 P.3d at 696 (finding interview noncustodial when the defendant was not handcuffed and could have moved about freely, the interview was more than two hours, and the defendant took an unaccompanied ten minute break at the suggestion of the officers).

iv. Defendant Freely Responded to Questions, Offered Additional Information, Offered to Encourage Others to Speak to Detectives, and Offered to Cooperate

Not only did Defendant voluntarily accompany detectives to the police station, he voluntarily answered the questions. As noted above, see Part I, supra, Defendant's responses were voluntary. Moreover, Defendant was even told that

some of the questions may be difficult to answer. 12 AA 2536. Defendant, without missing a beat, answered, "[o]kay. I'll answer." Id. Defendant also volunteered additional information throughout the interview, volunteering to encourage Rontae and J.J. to speak to the Officers, to testify against Hidalgo, and to wear a wire to implicate Hidalgo, Louis, Annabelle, and Counts. 12 AA 2532–35, 2538–39, 2542, 2575. Defendant even asked for paper in order to diagram the movement of the cars at the crime scene. Id. at 2524–25. These facts support a finding that Defendant was not in custody. Rosky, 121 Nev. at 193, 111 P.3d at 696.

v. The Atmosphere was Not Police Dominated, there were Never More than Two Officers in the Room at any one Time, and Only Three Total Officers Involved

The atmosphere of the interview was not police dominated. Here, there were never more than two detectives in the room with Defendant, and only three ever participating in the interview. 7 AA 1494. In fact, Defendant was not surrounded by police officers, given that the rest of the building was devoid of other law enforcement. Id. at 1484. Detective Wildemann specifically testified that he took a non-confrontational tone with Defendant. Id at 1427–28. Moreover, detectives went out of their way to make sure that Defendant was comfortable. 12 AA 2463, 2507–08, 2535, 2577. Finally, detectives left Defendant entirely unattended, without restraint, and with the door open, on multiple occasions. Id. at 2507–08, 2535.

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vi. The Police did Not Use Strong-Arm Tactics

Police did not use any strong-arm tactics. First, the two detectives who began the interview specifically used an interview style that was non-confrontational. 7 AA 1427–28. The interview also started with detectives ensuring that Defendant understood that he was not under arrest. 12 AA 2463. Detectives did confront Defendant with their belief that he had more to tell them. 12 AA 2510. However, not only did this come after Defendant told them that he had more to tell them, but such a statement by detectives does not constitute strong-arm tactics. Id. at 2509; Rosky, 121 Nev. at 193, 111 P.3d at 696 ("While the detectives used mild forms of deception during the taped statement, confronted Rosky with their belief that he was guilty and arrested Rosky after the interview, our review of the videotaped statement reveals no use of 'strong arm' or impermissibly coercive tactics.").

Defendant characterizes the statements about his minimization of his role as part of the alleged strong-arm tactics. AOB at 56. This claim, however, ignores the context of the statements. Moments prior, Defendant admitted, for the first time, that he was present when Hadland was murdered. 12 AA 2493. He then stated that he was afraid of retaliation from Counts or Hidalgo. Id. Detectives told him that they needed more details about the events, and that they would have to be thorough because such questioning may be necessary to enable the witness to remember facts

suppressed by the trauma of the situation. Id. Detectives told Defendant they were going to try to prove his story, and asked him not to minimize his role. Id. at 2494.

Defendant also complains about the tactics of Detective Vaccaro, calling them strong-arm tactics. AOB at 56. Although Detective Vaccaro was not as congenial as Detectives Wildemann or McGrath, there is still nothing in his interactions with Defendant that would qualify as strong-arm tactics. Before Detective Vaccaro's questioning began, Defendant was told that the questions would be harder to answer, to which Defendant responded, "[o]kay. I'll answer." 12 AA 2536. Moreover, before Detective Vaccaro's questions started, out of an abundance of caution, he informed Defendant of his Miranda rights. Id. at 2538. Further, even during Vaccaro's questioning, Defendant was not intimidated into agreeing with everything Vaccaro said, but instead gave a less inculpatory statement, stating this time that the plan was never to kill Hadland. See, e.g., 12 AA 2542, 2546, 2548, 2552, 2554. Most importantly, a review of the transcript shows that the vast majority of questions Detective Vaccaro asked were basic in nature, and were designed solely to flesh out Defendant's statement. See generally, id. at 2536–77.

Defendant attempts to characterize detectives' actions as strong-arm tactics and domination "in sneaky ways." AOB at 57. Specifically, Defendant cites to the fact that Detective McGrath could not find Defendant a cigarette, and that Defendant drank water and made himself comfortable at the detectives' suggestion. Id.

However, Defendant provides no evidence that these actions were done in attempt to exert control over him, rather than simply an inability to find a cigarette or Defendant's own desire for water in what was acknowledged to be a warm room. 12 AA 2508. As such, this "speculation unsupported by facts is of no value." Nika v. State, 120 Nev. 600, 609, 97 P.3d 1140, 1147 (2004).

Finally, Defendant takes issue with the mild deception used by detectives. AOB at 58. Although detectives did not have the cell phone records they claimed to have, this deception was related only to Defendant's connection to the crime, the type of deception this Court has held is *least likely* to invalidate a confession. Silva, 113 Nev. at 1369, 951 P.2d at 594. Moreover, with respect to the gunshot residue test, Defendant's characterization of the test as "worthless" is based on a misreading of the testimony at trial. Detective McGrath testified at trial that a gunshot residue test performed on Counts' clothing found atop his gun case would be worthless, because the case itself was likely to have residue on it, and there would be no way of knowing the source of the residue. 8 AA 1764–65. When asked about Defendant, Detective McGrath specified that a test performed on his clothing would have been relevant but would not be able to place him around firearms at any given time. Id. at 1765. He specified that a test performed on Defendant's hands would have been more relevant. Id.

Even disregarding this misunderstanding, detectives' suggested use of the test can hardly be characterized as a "strong-arm" tactic. First, when the detectives told Defendant that they were going to test his hands, he was eager to take the test, to prove he was not the shooter. 12 AA 2536. Defendant even said, "I'll take any test you want. I promise you I did not shoot T.J." Id. Moreover, just before the interview ended, Defendant reminded detectives about taking the test. Id. at 2572. Finally, as discussed above, detectives never promised Defendant leniency, only a ride home because he did not have a vehicle of his own, which they later honored. See Part I, supra.

A review of the interview clearly shows that detectives conducted themselves professionally, and that the mild deceptions used fell far short of any "strong-arm tactics" which would support a finding of custody. Rosky, 121 Nev. at 193, 111 P.3d at 696.

vii. Defendant was Driven Home at the end of the Interview, not Arrested

The final factor to be considered in determining the indicia of arrest is whether or not the defendant was arrested at the end of the interview. Taylor, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1. Even if the defendant is eventually arrested at the end of the interview, it does not mandate a finding that he was in custody. Rosky, 121 Nev. at 193, 111 P.3d at 696. Here, there is not even the issue of an arrest at the end

of the interview, given that Defendant, who was without a vehicle, was not only free to leave at the end of the interview, but was indeed driven home. 7 AA 1398.

D. The Interview was Relatively Short and the Form of Questioning Relaxed

Here, Defendant was interviewed for approximately two and one half hours. 7 AA 1430. However, the actual duration of the interview, not accounting for the breaks taken, was only two hours. Id. Defendant's description of the interview as "intense, with detectives in tag-team fashion pressing Deangelo," badly mischaracterizes the reality of the interview. AOB at 60. There was a grand total of three detectives involved in the interview: McGrath, Wildemann, and Vaccaro. See generally 12 AA 2463–2577. Moreover, the majority of the interview was conducted with the same two detectives in the room, McGrath and Wildemann. Id. at 2463–2535. In fact, Detective Wildemann was present for the entire interview. Id. at 2463–77. Thus, this was not a situation where different teams of detectives came and went, constantly changing styles and keeping the defendant disoriented.

The tone of the interview also militates against a finding of custody. Detective Wildemann specifically testified that his style was non-confrontational, and this description was reflected in the interview itself. 7 AA at 1427–28. Moreover, detectives went out of their way to make sure that Defendant was comfortable. 12 AA 2463, 2507–08, 2535, 2577. Finally, detectives left Defendant entirely

unattended, without restraint, and with the door open, on multiple occasions. Id. at 2507–08, 2535.

Considering all of the factors for determining custody, the Court and the jury, after reading the transcripts and viewing the tape, properly found that Defendant was not in custody. Here, Defendant voluntarily accompanied detectives, was informed that he was not under arrest, voluntarily answered questions, was given unaccompanied breaks, was never restrained, the tone of the interview was non-confrontational, only mild deception was used, Defendant was never placed under arrest, and the interview lasted only two hours. Compare with Rosky, 121 Nev. at 193, 111 P.3d at 696 (finding that the defendant was not in custody where he voluntarily accompanied the officers to the police station, was not under arrest at the start, voluntarily answered questions, was never restrained, was given a ten-minute break, was subjected only to minor deceptions, and was arrested at the end of the interrogation).

E. Because Defendant was Not in Custody, Miranda Warnings were Unnecessary

A claim that statements are inadmissible because of an alleged Miranda violation presupposes that the defendant was in custody at the time of the interrogation. See Silva, 113 Nev. at 1370–71, 951 P.2d at 594–95. Here, however, Defendant was not in custody at the time of the interview, and as such, the police

were not required to give Miranda warnings at any point. Id. As such, Defendant's reliance on Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004), is misplaced.

In his Opening Brief, Defendant compares his situation to that in Seibert. AOB at 61–63. However, Defendant ignores a critical distinction between the two situations—Seibert dealt with purposeful avoidance of Miranda's dictates with a defendant who was in custody, while Defendant was never in custody, and thus no Miranda warnings were needed.

In Seibert, the defendant was arrested at 3 a.m. at a hospital, and was not given her Miranda warnings. 542 U.S. at 604, 124 S. Ct. at 2606. Seibert, now in custody, was transported to the police station, where she was questioned without Miranda warnings for 30 to 40 minutes. Id. at 605, 124 S. Ct. at 2606. Once Seibert gave incriminating statements, the police took a short break, obtained a signed waiver of her Miranda rights, and then proceeded to record her confession. Id. The interrogating officer made a conscious decision to withhold Miranda warnings, and then use the unwarned statements to get Seibert to repeat her incriminating statements once the warnings had been given, resulting in a taped, warned confession that was "largely a repeat" of the pre-warning statements. Id. at 606, 124 S. Ct. at 2606.

The United States Supreme Court noted that law enforcement agencies had been specifically instructing officers on this technique, in an attempt to make an "end

run" around the dictates of Miranda, and vitiate its effectiveness. Id. at 609–10, 124 S. Ct. at 2608–09. The Court held that it was impermissible to use such a tactic to deprive those entitled to Miranda's protections of their effectiveness. Id. at 617, 124 S. Ct. at 2613. However, Seibert's decision was also predicated on the presumption that the defendant was entitled to Miranda warnings in the first place. See id. at 611–12, 124 S. Ct. at 2609–10.

Here, as discussed above, Defendant was never in custody during the interview. See Part II (a–d), supra. As such, the concerns of Seibert are inapplicable, detectives were not attempting to make an "end run" around Miranda's requirements, nor were they attempting to intentionally render its protections useless. See Seibert, 524 U.S. at 605–09, 616–17, 124 S. Ct. 2608–10, 2612–13. More importantly, whereas Seibert was entitled to Miranda's protections, because she was in custody, id. at 604, 124 S. Ct. at 2605, Defendant was not in custody, and was thus not entitled to Miranda warnings. Silva, 113 Nev. at 1370–71, 951 P.2d at 594–95. The decision to inform Defendant of his Miranda warnings was made out of an abundance of caution, not an attempt to deprive him of constitutionally protected rights, and thus his confession was admissible. See Rosky, 121 Nev. at 193, 111 P.3d at 696.

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F. Because Defendant was not Entitled to Miranda, No Waiver was Necessary

Because Defendant was never entitled to Miranda warnings, the admissibility of his statements did not turn on his waiver of those rights. See id. Moreover, the arguments Defendant makes attempting to show that any waiver was not voluntary and intelligent are contrary to this Court's precedent. Defendant argues that because he has an I.Q. of 82, allegedly "cannot understand some subtleties and abstractions," and supposedly has a personality disorder, he could not have intelligently and voluntarily waived his Miranda rights. AOB at 64–69. The State would first note that these claims were never presented to the District Court in Defendant's Motion to Suppress. 3 AA 493–99. Nor did Defendant ever argue that he was incapable of waiving his rights. Id. Thus, Defendant is precluded from making this argument for the first time on appeal. State v. Cantsee, 130 Nev. ___, ___, 321 P.3d 888, 892 (2014) ("[N]ew arguments may not be raised for the first time on appeal. . . .") (citing Walch v. State, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996)).

However, even ignoring Defendant's waiver of this argument, his claim is still unavailing. This Court has repeatedly rejected arguments that a below-average I.Q. renders ineffective a knowing and voluntary waiver of rights. See, e.g., Young, 103 Nev. at 235, 737 P.2d at 514; Ogden, 96 Nev. at 607 P.2d at 579–80. Additionally, Defendant's claim that his personality disorder vitiates his ability to knowingly and voluntarily waive his rights is unavailing. Steese, 114 Nev. at 488, 960 P.2d at 327

(finding waiver voluntary despite claimed personality disorder, drug withdrawal, lack of sleep, hunger, and a desire to please authority figures).

Even if Defendant had not waived this argument, it would be unavailing because he was not in custody, and thus not entitled to Miranda warnings. Rosky, 121 Nev. at 193, 111 P.3d at 696. As such, he was not required to execute a knowing and voluntary waiver before the statements would be admissible. Id.

III
THE DISTRICT COURT PROPERLY ADMITTED TAPED CONVERSATIONS BETWEEN DEFENDANT AND HIS COCONSPIRATORS

Defendant concedes, as he must, that he raised no objection at trial to the admission of the conversations between him and several of his coconspirators. AOB at 69–70. This Court reviews unpreserved allegations for plain-error. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Defendant must show that the error is clear from the record, and that it affects his substantial rights such that it causes "actual prejudice or a miscarriage of justice." Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). To be plain error, it must be "so unmistakable" that it is readily apparent from a casual reading of the record. Saletta v. State, 127 Nev. ___, ___, 254 P.3d 111, 114 (2011) (quoting Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995)). Here, not only can Defendant not show plain error, but he can show no error, given that the statements were relevant; that relevance was not greatly outweighed by the risk of unfair prejudice; the

statements were admissible as coconspirator statements and statements solely giving context to admissible statements; and none of Defendant's constitutional rights were implicated by the admission.

A. The Statements Were Relevant to Defendant's Knowledge and Intent

Defendant's claim that the statements were not relevant is disingenuous at best, given that at trial, he attempted to use the statements in the same manner as the State—that is, as proof of his knowledge that Hadland was to be killed. District courts have considerable discretion in admitting or excluding evidence. Holmes v. State, 129 Nev. __, __, 306 P.3d 415, 418 (2013). Reversal is warranted only where the decision is "manifestly wrong." Id. (quoting Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006)). To be relevant, evidence must have a tendency to make a material fact more or less likely. NRS 48.015. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. NRS 48.035.

Here, the relevance of the tapes was well known to both the State and Defendant. First and foremost, the statements tended to make it more or less likely that Defendant knew that the plan was to kill Hadland. See, e.g., 8 AA 1730–35, 1741–45. This purpose was apparent to both parties, and indeed Defendant attempted to use the statements to prove that Defendant only knew of a plan to beat Hadland, not kill him. Id. at 1730–35. Thus Defendant proved the relevance of the

tapes, arguing that it made it less likely that Defendant knew of an intent to kill. Id.; NRS 48.015. Similarly, both the State and Defendant referenced the tapes in their respective closing arguments, highlighting the relevance of the tapes. 9 AA 1835–38, 1840–42, 1851–52, 1855–57, 1866–67, 1868. As such, the tapes could make Defendant's knowledge of the intent to kill Hadland more or less likely, making them relevant. NRS 48.015.

B. There was no Unfair Prejudice, and Certainly not Enough to Outweigh the Probative Value

Defendant next complains that the relevance of the tapes was greatly outweighed by the risk of unfair prejudice. AOB at 72. However, the jury was informed of the nature of the tapes, specific inaccuracies in Defendant's statements were brought to the jury's attention, and the tapes were used for a very specific purpose—to prove Defendant participated in the plan, knowing it called for Hadland's death.

As stated above, evidence must be relevant to be admissible. NRS 48.015. However, even relevant evidence can be excluded if its probative value is "substantially outweighed" by the risk of unfair prejudice. NRS 48.035. The concern is only with *unfair* prejudice, because "[a]ll evidence offered by the prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not." Holmes, 129 Nev. at ___, 306 P.3d at 420 (quoting United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991)) (alteration in original).

At trial, the jury was well aware of the nature of the tapes. In fact, defense highlighted for the jury the fact that the tapes were made as part of the ongoing investigation. 8 AA 1726. The jury heard that Defendant offered to wear a wire, and that the information he collected was useful to the police. Id. at 1735–36.

Moreover, the jury was made well aware that Defendant was tailoring his statements in order to produce incriminating statements. Specifically, the jury heard that Defendant was attempting to elicit incriminating statements from Hidalgo, Louis, and Espinolda. Id. at 1729, 1738. Further, the jury heard that Defendant discussed strategy with the detectives, though he was not given a script. Id. at 1738–39. The jury heard that detectives suggested to Defendant that he talk about getting more money to keep other coconspirators quiet. Id. at 1739–40. Similarly, the jury was specifically informed that Counts was in jail at the time that the statements were made, and as such, the threats Defendant relayed were part of the plan to produce incriminating statements. Id. Thus, the statements were not, as Defendant suggests, "an unmapped mix of truth and falsity." AOB at 73. Rather, the jury was fully informed of the nature of the statements, and specific fabrications were identified.

Defendant first claims that the admission of these statements could lead the jury to convict him on improper grounds. Id. However, as explained above, defense did explain to the jury what parts of the statements were fabrications, and Defendant's purpose in making his claims. 8 AA 1726, 1729, 1735–40. Moreover,

although the statements may have included exaggerations, this does not prevent the jury from considering the evidence. Holmes, 129 Nev. at ___, 306 P.3d at 418–19 (allowing the use of "gangster rap" lyrics, despite the fact that they may involve metaphor, exaggeration, and other artistic devices). Similarly, the recordings were introduced and argued as evidence of his knowledge, with no references to other bad acts. 8 AA 1730–35, 1741–45; 9 AA 1835–38, 1840–42, 1851–52. See Holmes, 129 Nev. at ___, 306 P.3d at 418 (finding that the risk of unfair prejudice as a result of bad acts alluded to in "gangster rap" did not substantially outweigh the probative value where the factual recitation in the rap was similar to the facts of the crime).

Nor did the admission of the statements run the risk of confusing the issues before the jury. Despite Defendant's contention, the jury heard testimony outlining what within the statements were lies. 8 AA 1729, 1739–40. Moreover, both the State and defense were explicit in how the statements were used, arguing that the statements either proved or disproved Defendant's knowledge of the plan to kill Hadland. 9 AA 1835–38, 1840–42, 1851–52, 1855–57, 1866–67, 1868.

Defendant's reliance on Fields v. State, 129 Nev. 776, 220 P.3d 724 (2009), is misplaced. In Fields, the State not only introduced evidence of an entirely distinct conspiracy, but it "spent considerable time" on that evidence, and explaining every aspect of a related civil suit. Id. at 784, 220 P.3d at 729. This Court held that the evidence should not have been admitted, because the conspiracies were not related;

the jury could have been confused by the State's attempt to explain the differences in the civil and criminal proceedings with the accompanying changes in standards of proof; and because the defendant was never charged with conspiracy to murder, "significantly increasing the possibility of unfair prejudice and jury confusion. . . ." Id. Here, however, neither the State nor Defense referenced the later conspiracies to kill other coconspirators save as necessary to argue whether Defendant knew the plan was to kill Hadland. 9 AA 1835–38, 1840–42, 1851–52, 1855–57, 1866–67, 1868. Moreover, there was no evidence from civil actions to confuse the jury, and the conspiracies here are directly related to the conspiracy for which Defendant was on trial. Compare with Fields, 129 Nev. at 784, 220 P.3d at 729. Thus, Defendant failed to show an error so unmistakable that it is apparent from a casual reading of the record. Saletta, 127 Nev. at ___, 254 P.3d at 114.

C. The Statements Were Not Inadmissible Hearsay, Because Defendant's Statements Were Introduced Solely to Give Context, and the Others' Statements Were Statements by Coconspirators

Out of court statements may be admitted if they are not hearsay, or if they fit within a hearsay exception. See generally NRS 51.025–51.065. Here, Defendant's taped statements fall within one of the hearsay exceptions – namely that they were not offered for the truth of the matter asserted. NRS 51.035. As shown above, neither State nor defense argued that Defendant's statements were true, in fact, both

explained that his statements were instead designed to produce inculpatory statements. See Part III(A–B), supra.

Here, Defendant's statements were not offered for the trust of the assertions, but rather to give context to the responses, the statements of his coconspirators. In Wade v. State, 114 Nev. 914, 966 P.2d 160 (1994), modified upon rehearing Wade v. State, 115 Nev. 290, 986 P.2d 438 (1995), this Court held that statements made on tape, which were offered for the limited purpose of giving context to the responses and statements of others, fell under a hearsay exception. Id. at 917–18, 966 P.2d at 162–63. Further, upon rehearing, this Court noted that such statements are admissible even absent a limiting instruction outlining the purpose for which they are admitted. Wade, 115 Nev. at 293, 986 P.2d at 439–40. As such, Defendant's statements in this case were admissible. See, Wade, 114 Nev. at 917–18, 966 P.2d at 162–63; Wade, 115 Nev. at 293, 986 P.2d at 439–40; see also United States v. Valerio, 441 F.3d 837, 844 (9th Cir. 2006); United States v. Tangeman, 30 F.3d 950 (8th Cir. 1994).

The statements on the tapes made by Hidalgo, Louis, and Espinolda are also admissible, as statements by coconspirators. NRS 51.035(3)(e). "[T]he duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment." Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984); Foss v. State, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976). Coconspirator

statements can also encompass statements used to "induce further participation, prompt further action, reassure members, allay concerns or fears, keep conspirators abreast of ongoing activities, [or] avoid detection. . . ." Holmes, 129 Nev. at ___, 306 P.3d at 422 (quoting 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7025, at 289 (interim ed. 2011)) (alteration in original).

"The admissibility of testimony under the coconspirator exception is not predicated upon a conspiracy charge against the defendant." Carr v. State, 96 Nev. 238, 239, 607 P.2d 114, 116 (1980) (citing Cranford v. State, 95 Nev. 471, 596 P.2d 489 (1979)). Similarly, it does not matter whether the individual relating the statements of the coconspirators was part of the conspiracy, so long as the statements related were made by conspirators. Fish v. State, 92 Nev. 272, 275–76, 549 P.2d 338, 340–41 (1976).

Here, the statements were made in the furtherance of the conspiracy, given that they were made to bring Hidalgo, Louis, and Espinolda up to speed with the events, and to avoid detection. See generally, 12 AA 2442–62. As such, they were admissible. Crew, 100 Nev. at 46, 675 P.2d at 991; Foss, 92 Nev. at 167, 547 P.2d at 691.

Finally, Defense used the statements as part of the argument that Defendant did not know that Hadland was to be killed. 9 AA 1866–68. Thus, he is estopped from arguing on appeal that the statements were inadmissible. Carter v. State, 121

Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

D. None of Defendant's Constitutional Rights Were Implicated

As noted above, and conceded by Defendant, he chose not to object to the admission of these tapes. AOB at 78. As such, this Court reviews only for plain error. Valdez v. State, 124 Nev. at 1190, 196 P.3d at 477. This requires Defendant to show an error that is readily apparent from a casual reading of the record, sufficient to cause a fundamental miscarriage of justice. Saletta, 127 Nev. at ___, 254 P.3d at 114. In the context of claims of constitutional violations due to admission of evidence, only where "there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" Jamal v. Van de Kamp, 926 F.2d 918, 920 (1991) (quoting Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986), cert. denied, 479 U.S. 1068, 107 S. Ct. 958 (1987)) (emphasis in original). To warrant relief, the admission of evidence must fatally affect the process, rendering it so fundamentally unfair that it works a denial of due process. Kealohapauole, 800 F.2d at 1465; McNelton v. State, 111 Nev. 900, 906, 900 P.2d 934, 938 (1995).

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i. The Evidence was Not Fundamentally Unfair

The State would first note that Defendant provides only one citation in this section, and as such this Court should decline to consider this claim. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting that the Nevada Supreme Court should decline to consider claims not supported by relevant legal citations). The only citation Defendant provides is itself unrelated to this case, arising not from the introduction of a coconspirator's statement, but rather from a coerced confession. See Lisenba v. California, 314 U.S. 219, 236–37, 62 S. Ct. 280, 289–90 (1941).

Even ignoring these deficiencies, Defendant failed to show that the introduction of these statements rendered the proceedings fatally flawed, resulting in a denial of due process. McNelton, 111 Nev. at 906, 900 P.2d at 938. Although the statements could possibly have been used for an impermissible purpose, the statements could have been, and were indeed argued for a proper purpose—to show that Defendant knew the plan was for Hadland to be killed. 9 AA 1835–38, 1840–42, 1851–52, 1855–57, 1866–67, 1868. Thus, admission of this evidence cannot have been a violation of due process. Van de Kamp, 926 F.2d at 920 (requiring that *no* permissible purposes be possible before admission of evidence can rise to a level of denial of due process).

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ii. Defendant was Not Required to Take the Stand to Explain the Context of the Statements

Defendant's assertion that he was forced to choose between forsaking his right to remain silent and allowing the statements to go unexplained defies the bounds of reason. Defendant claims that he could not explain the nature and context of the statements without giving up his right against self-incrimination. AOB at 80. However, this claim is belied by the record, given that both the State and defense ensured that the jury knew the context of the statements, and defense highlighted for the jury which of those elements of the conversations were known to be false, along with those he wished the jury to accept. See, e.g., 8 AA 1726, 1729, 1730–35, 1741–45; 9 AA 1835–38, 1840–42, 1851–52, 1855–57, 1866–67, 1868. Thus, Defendant was both able to preserve his right against self-incrimination and explain the context of the statements to the jury.

E. Defendant's Substantial Rights Were Not Affected

As shown above, admission of the tapes was not error, and thus, no plain error occurred. However, even if it was error to admit these tapes, a point the State does *not* concede, Defendant is not entitled to relief because he suffered no prejudice. "A plain error affects substantial rights if it 'had a prejudicial impact on the verdict when viewed in context of the trial as a whole.'" Miller v. State, 112 Nev. 92, 99, 110 P.3d 53, 58 (2005). Defendant bears the burden of demonstrating such prejudice. Id. This

requires that Defendant show the evidence had a "substantial influence" on the jury. Tavares v. State, 117 Nev. 725, 732 n.17, 30P.3d 1128, 1132 n.17 (2001).

Here, it can hardly be said that Defendant's rights were prejudiced. As stated above, the tapes provided significant evidence that could have been, and was in fact argued by Defendant in support of his position that he was unaware of a plan to kill Hadland. 9 AA 1866–70; 8 AA 1720–22, 1731–35. In fact, defense highlighted this evidence in closing, arguing that it went to one of the few relevant parts of the trial—Defendant's specific intent. 9 AA 1866–70. Given that Defendant relied so heavily on this evidence, its admission can hardly be said to have prejudiced his substantial rights. Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

IV
A RATIONAL TRIER OF FACT COULD FIND THAT THE STATE PROVED DEFENDANT GUILTY BEYOND A REASONABLE DOUBT

At trial, the State presented significant evidence of guilt, far beyond what is necessary, when viewing the evidence in the light most favorable to the State, to allow a rational juror to find that the State proved its case beyond a reasonable doubt. Defendant here is simply asking this Court to do what it cannot, to substitute its view of the evidence for that found by the jury.

In reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution, and the relevant inquiry is whether

"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). The jury determines weight, credibility and credence of testimony and other evidence, and this Court will not disturb the jury's findings "absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt." Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) holding modified, Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006). "Circumstantial evidence alone may support a judgment of conviction." Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

To find an individual guilty of first degree murder, the State must show that the defendant had the specific intent to kill, intended to perform acts which were substantially likely to result in death and demonstrated a disregard for human life, or that the death occurred during the commission of a felony. See Collman, 116 Nev. at 712, 7 P.3d at 442. Alternatively, the State may prove that the defendant aided and abetted another in that murder, or that the defendant was a member of a conspiracy to commit that murder. See Sharma v. State, 118 Nev. 648, 652–53, 56 P.3d 868,

870–71 (2002). When charged as an aider and abettor, or as a coconspirator for a specific intent crime, the State must show that the defendant had the specific intent to bring about the underlying crime. See Bolden v. State, 121 Nev. 908, 914–21, 124 P.3d 191, 195–200 (2005).

A. The State Presented Sufficient Evidence to Support an Intentional Murder Theory

Defendant's contention that the State did not present sufficient evidence of his intent is based upon a basic misunderstanding of what is required. Defendant makes a big showing of his lack of desire to kill Hadland. AOB at 86. However, Defendant took actions with the aim of carrying out the desire of Hidalgo, Louis, and Espinolda, with the specific intent to bring about Hadland's death, however distasteful it may have been to him.

Viewing the evidence in the light most favorable to the State, the jury heard more than sufficient evidence that Defendant intended to either commit the murder, aided and abetted it, or was a part of a conspiracy to commit it. The jury heard Defendant say, in his own words, "what happened to [Hadland] was a hit. It came from [Hidalgo]." 12 AA 2510. The jury heard Defendant say that Hidalgo first wanted Hadland beaten, "then he said that he wanted [Hadland] knocked off, so you know I'm saying ___ none of us wanted to do it, so fuckin' he had us go get somebody. . . ." Id. at 2511–12. Moments later, Defendant reiterated, "[f]irst he said that he wanted him hurt bad, then he changed his mind and . . . told me to tell dude

to do whatever he felt was necessary to take [Hadland] out, whatever." Id. at 2515. Defendant specifically stated that he understood Hidalgo's orders as directing him to kill Hadland. Id. at 2517. After the deed was done, and Hidalgo attempted to say that he didn't want Hadland killed, Defendant is adamant that Hidalgo had indeed ordered the murder. Id. at 2525–26.

Defendant is indeed consistent that he did not want to be the one to kill Hadland. See, e.g., id. at 2517, 2521. Although Defendant may not have personally wished Hadland dead, he still participated in the murder, to prove his loyalty to Hidalgo and save his job. Id. at 2528. Further, because he did not want the death of his friend directly on his conscience, he contacted Counts, whom he knew was someone who would kill anyone so long as the money was right. Id. at 2513, 2518, 2543.

Moreover, Defendant's actions display his intent to ensure that the murder was carried out. Defendant brought J.J along, who also had a gun in his possession. Id. at 2522. Defendant even stated that he brought along witnesses who could prove that he was not the one to kill Hadland. Id. Finally, Defendant even said that he understood that he had aided and abetted a murder. Id. at 2528.

Based upon this evidence, it is clear that a rational juror could have found Defendant guilty beyond a reasonable doubt for intentional murder.

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B. The State Presented Sufficient to Prove Guilt for Murder by Lying-in-Wait

Murder by lying-in-wait changes the specific intent required to support a murder conviction. Moser v. State, 91 Nev. 809, 812 & n.3, 544 P.2d 424, 426 & n.3 (1975). Rather than requiring an intent to end the victim's life, murder by lying-in-wait requires only that the defendant act with the intention of either killing or inflicting bodily harm upon the victim. Collman, 116 Nev. at 717, 7 P.3d at 445 (citing Moser, 91 Nev. at 812 & n.3, 544 P.2d at 426 & n.3). To be considered lying-in-wait, the killer must have watched, waited, and concealed himself from the victim. Id.

Here, the jury heard sufficient evidence, especially when considered in the light most favorable to the State, to find Defendant guilty of murder by lying-in-wait. The jury heard that Defendant called Hadland, telling him to come and meet Defendant away from Hadland's campsite. 12 AA 2523–24. As Hadland approached, Defendant exited his van to relieve himself. Id. at 2525. While Hadland was walking from his car to the van, and Defendant was reentering the van, Counts surreptitiously exited the side of the van, and hid out of sight. Id. As Defendant distracted Hadland, Counts crept around in front of the van, where he stood and shot Hadland twice in the head. Id. at 2556–57. As was undisputed, Hadland never saw it coming. Id.

From this evidence, the a rational juror could have found that Defendant worked together with Counts, allowing Counts to wait for Hadland to approach the van, and while Defendant distracted him, seek the opportune time to ambush Hadland.

V
A RATIONAL TRIER OF FACT COULD FIND THAT DEFENDANT USED A DEADLY WEAPON BEYOND A REASONABLE DOUBT

In reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution, and the relevant inquiry is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid, 114 Nev. at 381, 956 P.2d at 1380 (quoting Koza, 100 Nev. at 250, 681 P.2d at 47); see also Jackson, 443 U.S. at 319, 99 S. Ct. at 2789. "Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." Bolden, 97 Nev. at 73, 624 P.2d at 20. The jury determines weight, credibility and credence of testimony and other evidence, and this Court will not disturb the jury's findings "absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt." Hutchins, 110 Nev. at 109, 867 P.2d at 1140.

"Under NRS 193.165(1), any person who 'uses' a deadly weapon in the commission of a crime is subject to a sentence enhancement." Brooks v. State, 124 Nev. 203, 208, 180 P.3d 657, 660 (2008). The statute does not preclude the

imposition of such a sentence upon an individual who, though personally unarmed, aided and abetted the commission of a crime wherein a deadly weapon was used. Id. "[A]n unarmed offender's participation by aiding and abetting an armed offender in the unlawful use of the weapon, makes the [unarmed offender] equally subject to the added penalty inflicted upon defendants who commit crimes through the use of deadly weapons." Id. (quoting Anderson v. State, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979)) (internal quotation marks omitted) (second alteration in original).

This Court has abandoned the requirement that the unarmed defendant have the ability to control the deadly weapon. Id. at 209–10, 180 P.3d at 661. Instead,

> an unarmed offender "uses" a deadly weapon and therefore is subject to a sentence enhancement when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

Id. Similarly, "if an unarmed assailant has knowledge of the use of the gun and by his actual presence participates in the robbery, the unarmed offender benefits from the use of the other robber's weapon, adopting derivatively its lethal potential." Nelson v. State, 123 Nev. 534, 549, 170 P.3d 517, 527 (2007) (quoting Jones v. State, 111 Nev. 848, 852, 899 P.2d 544, 546 (1995)) (internal quotation marks omitted).

Here, the jury heard more than enough evidence to find that Defendant knew that Counts would use a deadly weapon in killing Hadland. Viewed in the light most favorable to the State, the evidence showed, among other things, that Hadland's murder was a hit, ordered by Hidalgo; Hidalgo called Defendant into his office, and told Defendant to have Hadland killed. 12 AA 2510–12. Defendant didn't feel comfortable killing Hadland himself, so he contacted Counts, whom he knew would be willing to kill Hadland for a price because he had performed similar tasks in the past. Id. at 2513, 2518. On the car ride to meet Hadland, Counts argued with Defendant and J.J. about who was going to shoot Hadland. Id. at 2522. Defendant told Counts that he had J.J. and Rontae in the car with him so that they could verify that he was not the shooter. Id. Defendant stated that he also knew that Counts always had a gun on his person. Id. at 2548.

From this evidence, it is clear that a rational juror could have found Defendant knew Counts had a gun that was to be used in Hadland's murder. Defendant even stated that the reason that he brought J.J. and Rontae along was so that he could have them testify that he was not the shooter, reasoning predicated on Defendant's knowledge that a gun would be used. As such, the deadly weapon enhancement was properly found and adjudicated.

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VI
REVERSAL FOR CUMULATIVE ERROR IS UNWARRANTED

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Importantly, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

Here, there was overwhelming evidence of guilt. Defense conceded that Defendant was involved, that he was present at the time of the murder, and had driven Counts out to meet Hadland. 9 AA 1864–65. Defense's theory rested primarily on arguing that Defendant did not know that Hadland was to be killed. Id. However, the State introduced Defendant's own statements, wherein he repeated acknowledges that "this was a hit," that the plan was to kill Hadland. Id. at 1851; 12 AA 2510–15, 2517.

Although this was a grave crime, the quality and character of errors weigh against reversal for cumulative error. As admitted by Defendant, several of these alleged errors were not even sufficient to draw an objection at trial. AOB at 70, 78. Moreover, as shown above, they were not errors. As such, there are no effects to cumulate. Thus, reversal is unwarranted.

/ / /

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the Judgment of Conviction, and deny this appeal.

Dated this 2nd day of February, 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 does not comply 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 14,986 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 2nd day of February, 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 2nd day of February, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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