IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE TAYLOR, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 65388

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction, filed March 7, 2014
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the show-up of Appellant was unnecessarily suggestive, resulting in unreliable out-of-court and in-court identifications that violated his constitutional right to due process of law.
2. Whether Appellant's Sixth Amendment right to a fair trial and Fifth Amendment right against self-incrimination were violated when the State used an inflammatory PowerPoint slide declaring him guilty and made inappropriate comments in closing arguments that a reasonable juror would interpret only to mean that Appellant was guilty.
3. Whether the warrantless access and use of hundreds of data points showing Appellant's historical cell phone location over a week long period was a search that violated Appellant's Fourth Amendment rights.
4. Whether there was sufficient evidence at trial to support the jury's finding of guilt.
5. Whether accumulated errors so tainted Appellant's trial to deprive him of his Sixth Amendment right to a fair trial.

STATEMENT OF THE CASE

On January 14, 2011, Appellant was charged by way of Indictment with the following: Count 1 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Count 2 – Conspiracy to Commit Robbery (Category B Felony – NRS 199.480, 200.380); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count 4 – Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165). 1 AA 01-05.

On April 10, 2012, Appellant filed a Motion to Suppress Evidence/Motion to Reveal any Favorable Treatment, Promises, Benefits, and Any Other thing of Value to Potential Witnesses, as Well as Any Statements Inconsistent With Guilt Made to Any Member of Law Enforcement, as Well as Any Other Impeachment Material Under Bagley v. U.S. 1 AA 64-73. On May 3, 2012, the State filed an Opposition to the Motion. 1 AA 74-95. On May 16, 2012, the district court denied Appellant's motion to suppress evidence. 1 AA 119.

On June 28, 2012, Appellant filed a Motion to Suppress Identification/Due Process Violation/Motion to Turn Over all Impeachment Evidence Regarding Identification Issue. 1 AA 153-59. On June 29, 2012, the State filed an Opposition to the Motion. 1 AA 160-186. On July 30, 2012, the district court held a hearing

regarding Appellant's motion to suppress the identification. 1 AA 192-201. The court denied Appellant's motion to suppress the identification. 1 AA 200.

On February 5, 2013, Appellant filed a Motion to Suppress Physical Tracking Information Unlawfully Obtained from a Cellular Telephone Allegedly Tied to the Defendant. 1 AA 212-23. On February 8, 2013, the State filed an Opposition to the Motion. 1 AA 237-39. On February 15, 2013, the district court denied the motion to suppress the physical tracking information. 1 AA 243.

An Amended Indictment was filed on February 19, 2013, containing the same four charges as the original Indictment. 2 AA 247-51. On February 20, 2013, a jury trial convened and lasted six days. 2 AA 252-6 AA 1428. On February 26, 2013, the jury returned a verdict of guilty on all four counts contained in the Indictment. 6 AA 1280-81. On February 27, 2013, regarding Count 4, the jury imposed a sentence of life in the Nevada Department of Corrections without the possibility of parole. 6 AA 1422. Appellant was sentenced to the Nevada Department of Corrections as follows: Count 1 – maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months; Count 2 – maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, Count 2 to run consecutive to Count 1; Count 3 – maximum of one hundred fifty (150) months with a minimum parole eligibility of sixty (60) months, with a consecutive term of ninety-six (96) months with a minimum parole eligibility of thirty-eight (38) months

for the use of a deadly weapon, Count 3 to run consecutive to Counts 1 and 2; Count 4 – life without the possibility of parole plus a consecutive term of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months for the use of a deadly weapon, Counts 1, 2, and 3 to run concurrent to Count 4. 7 AA 1501-03. The Judgment of Conviction was filed on March 7, 2014. 7 AA 1501-03. On March 8, 2013, Defendant filed a Motion for New Trial. 6 AA 1482-87. On March 18, 2013, the State filed its opposition to the motion. 6 AA 1488-92. The motion was denied by the district court on April 8, 2013. 6 AA 1500. On November 13, 2014, the instant appeal was filed. The State's response follows.

STATEMENT OF THE FACTS

Shooting of Michael Pearson

On November 18, 2010, at approximately 2:00pm, Michael Pearson ("Pearson") and his girlfriend's three-year-old son, Ricardo, arrived at the apartment of Angela Chenault (Chenault), Ricardo's grandmother. 3 AA 650. Pearson was the boyfriend of Chenault's daughter, Tynia Haddon. 3 AA 648-49. It was common for Pearson to drop Ricardo, Haddon's son, off at Chenault's home before going to work. 3 AA 649-50. After taking Ricardo to the bedroom, she went to the kitchen, where she cooked chicken and spoke with Pearson. 3 AA 651. Pearson told Chenault he would be meeting some of his friends at the apartment. 3 AA 651. Pearson brought a black bag with him into the apartment and put it on top of the refrigerator.

3 AA 652. Chenault saw Pearson sit on the couch and talk to someone through his cell phone. 3 AA 653.

At one point Pearson left the apartment for a few minutes. 3 AA 656. When he returned Chenault let Pearson back into the apartment, along with two male individuals accompanying him. 3 AA 656. Chenault returned to the kitchen and resumed cooking. 3 AA 657. One of the individuals walked around the apartment and went toward the bedroom. 3 AA 657-58. The individual was holding a gun. 3 AA 659. To prevent the individual from entering the bedroom, Chenault stood in front of the bedroom door, and directly faced the individual. 3 AA 658. He asked who was in the room and Chenault replied it was her grandson. 3 AA 658. The individual then walked away from the bedroom. 3 AA 658. Chenault identified Appellant as the individual with whom she had this conversation. 3 AA 659-60.[1]

Chenault returned to the kitchen stove and resumed cooking. 3 AA 660. Pearson removed the black bag from the top of the refrigerator and placed it on the kitchen table. 3 AA 660-61. Pearson and the other two individuals stood around the table. 3 AA 661. The other two individuals were both holding guns and looking at the contents of the bag. 3 AA 662-63. Marijuana was inside the bag. 3 AA 665. At that point Chenault began paying closer attention to what was happening, now that

[1]The other individual who entered the apartment with Appellant was eventually identified as Travon Miles. His case was adjudicated separately from Appellant's. C-11-270343-2.

she realized there was marijuana and two men with guns in her home. 3 AA 665. Pearson asked for money and Appellant responded "no, we taking this." 3 AA 665. Pearson said "take it." 3 AA 665. Appellant then grabbed Pearson and began going through his pockets and patting him down. 3 AA 667. Appellant reached for the gun Pearson had in his waistband. 3 AA 669. Pearson then tried to grab his gun. 3 AA 669. There were five gunshots and then Pearson was lying on the floor in a pool of blood. 3 AA 670. The other two individuals ran out of the apartment with the bag of marijuana. 3 AA 671-72. Chenault called 911. 3 AA 670.

The police responded to Chenault's apartment. 3 AA 672. Las Vegas Metropolitan Police Officer Sean Smith ("Smith) was dispatched to the apartment. 3 AA 555-56. When Smith arrived he observed Pearson's body lying on the floor in a pool of blood. 3 AA 557. There was a semi-automatic handgun on the floor near Pearson's body. 3 AA 562. Smith escorted Chenault and her grandson from the apartment and contained the scene. 3 AA 558. Crime scene analysts and homicide detectives were notified and dispatched to the scene of the shooting. 3 AA 560. Chenault gave a description of both suspects to the police. She described Appellant as a Black male approximately 35 years of age, and nearly her height (Chenault is nearly six feet tall), with a medium build and an "almost shaved" haircut. 5 AA 1144-46.

Las Vegas Metropolitan Police Detectives Christopher Bunn and Detective Marty Wildemann responded to the scene of the shooting on November 18, 2010. 3 AA 568-69. Detective Bunn had a crime scene analyst take photos of the scene and of the victim. 3 AA 573. Four .45 caliber cartridge case and one .40 caliber cartridge case were recovered at the scene. 3 AA 585. Five bullets were also recovered from the scene. 3 AA 588-90. Pearson's body contained four entry and exit wounds. 3 AA 599. A 40-caliber Glock semiautomatic firearm was also recovered from the scene. 3 AA 600. The firearm appeared to have sustained a bullet strike on the handle. 3 AA 601. The firearm, bullets, and cartridges were collected by crime scene analysts and impounded. 3 AA 602-03. The .40 caliber cartridge recovered from the scene was determined to have come from the .40 caliber Glock pistol also recovered from the scene. 4 AA 832. All four .45 caliber cartridges recovered from the scene were fired from the same weapon. 4 AA 832-33.

Detective Marty Wildemann interviewed Tynia Haddon, Pearson's girlfriend, soon after the murders. 3 AA 645. Haddon stated that Pearson had been trying to arrange to sell marijuana to an acquaintance of his who went by "D." 3 AA 631. Pearson intended to sell three pounds of marijuana to "D" in exchange for nine thousand dollars. 3 AA 635. Pearson told her he would be conducting the deal with "D" at her mother's home. 3 AA 642-43. During the morning and afternoon of November 18, 2010, Haddon and Pearson communicated with each other by talking

on the phone and by text messages. 3 AA 643. A police detective sent her a picture of an individual, and Haddon identified that individual as "D." 3 AA 645-46.

The autopsy of Pearson's body was conducted on November 19, 2010. 4 AA 936. Pearson's body had a gunshot wound to the right wrist. 4 AA 941. The body also exhibited a gunshot wound to the left posterior shoulder. 4 AA 947. The body also exhibited a gunshot wound to the back of the neck. 4 AA 949-50. This wound was the fatal wound. 4 AA 950-51. The body also exhibited abrasions on the head and right shoulder. 4 AA 954-55. The cause of Pearson's death was gunshot wounds to the head and neck. 4 AA 960. The manner of death was ruled to be homicide. 4 AA 960.

Investigation Based Upon Cellular Telephone Records

Pearson's cellular phone was recovered from his body at autopsy and impounded. 3 AA 604-05. Detectives with the computer forensics unit downloaded information from Pearson's phone. 4 AA 793. The computer forensics unit provided the detectives with a document from the download of Pearson's phone that included the list of contacts and the records of text messages. 4 AA 793. The download from Pearson's phone showed a contact named "D." 5 AA 1094. The phone number listed for D was (626) 488-0423. 5 AA 1094. There were phone calls and text messages between Pearson's phone and the phone number (626) 488-0423 on the afternoon of November 18, 2010, shortly before Pearson's death. 5 AA 1095.

Wildemann then gave the phone number (626) 488-0423 to the FBI and requested that the FBI search databases and telephone records for further information regarding the suspect. 5 AA 1067. A search of government records indicated that phone number was associated with a police incident involving Jennifer Archer and Appellant. 5 AA 1068-69. The records provided an address for Jennifer Archer Detectives began surveillance of Donald Taylor's girlfriend, Jennifer Archer. 3 AA 613.

Pursuant to a subpoena, detectives obtained call-detail records and cell tower locations from Sprint for (626) 488-0423, which indicated that shortly before the murder a call was made from Appellant's cell phone which was routed through a cell tower located approximately 2.5 miles from the murder scene. 3 AA 755-56, 5 AA 1134-35.

At approximately 11:00pm on November 18, 2010, detectives observed Appellant and Archer leave Archer's apartment in a vehicle. 3 AA 613. Detectives performed a vehicle stop and arrested Appellant. 3 AA 613-14. Appellant identified himself as Donald Taylor and surrendered his cellular phone to Detective Wildemann. 5 AA 1076-77. Appellant stated his cellular phone number was (626) 488-0423. 5 AA 1077. Wildemann immediately called the phone number to ensure that was the phone number to Appellant's cellular phone. 5 AA 1077.

A search warrant was executed on Appellant's apartment. 5 AA 1007. An employment application was recovered from Appellant's apartment. 5 AA 1007-08. Appellant's name was printed on the application, as well as a phone number of (626) 488-0423. 5 AA 1009.

Jennifer Archer ("Archer), Appellant's former girlfriend, was interviewed by detectives. 4 AA 874. On the afternoon of November 18, 2010, Appellant came to her apartment and said to her "baby, it's all bad." 4 AA 868. Archer showed the detectives her phone contact for Appellant. 4 AA 878. Her phone contact listed Appellant as "Sin Baby" and listed his phone number as (626) 488-0423. 4 AA 878. Police photographed contact information and text messages from her phone. 4 AA 878-79.

Identification of Defendant

Immediately after arresting Appellant Wildemann called Chenault. 5 AA 1077. Wildemann told Chenault they had stopped a possible suspect and wanted her to come to the location to see if she recognized him. 3 AA 674. At approximately 11:45 pm, Chenault and Wildemann met at a location near where Appellant was arrested. 5 AA 1078. Wildemann then drove Chenault to the parking lot where Appellant was detained to determine if she could identify him. 5 AA 1078. Chenault stated Appellant looked like one of the men involved in the shooting but that he looked different because he was wearing different clothes. 3 AA 675, 705. Chenault

stated it looked like the man from the shooting, although his body looked different than she remembered. 5 AA 1080. She said if she only looked at the face "it looked like him." 5 AA 1080. She told the detective Appellant she recognized his face, but his body appeared bigger than she remembered because he was wearing different clothing than before. 3 AA 705. Chenault stated she believed Appellant was the man she saw in her apartment. 3 AA 675.

After Appellant was arrested and identified as Donald Taylor, Wildemann wanted to determine if Appellant was the individual Tynia Haddon had referred to as D. 5 AA 1081. Wildemann knew from interviewing Haddon that she knew what D looked like and wanted to find out if Appellant was that individual. 5 AA 1081. Wildemann texted Haddon, stating he would be texting her a photo and telling her to let him know if it was a photo of D. 5 AA 1081. Wildemann sent Haddon a text message with Appellant's photo attached. 5 AA 1081. The photo was a picture Wildemann had taken of Appellant with his cell phone. 5 AA 1081. Haddon replied with a text message stating that it was a picture of D. 5 AA 1082.

When Wildemann sent Haddon the text message he did not know she was with Chenault. 5 AA 1081. He knew they lived in separate locations and did not know they were together. 5 AA 1081. On the morning of November 19, 2010, Haddon showed the picture Wildemann had texted her to Chenault, her mother. 3 AA 677. Chenault immediately recognized it as a picture of the person who shot

Pearson. 3 AA 678. Haddon texted Wildemann, stating that she had shown the picture to Chenault, who had identified it as a picture of the person who shot Pearson. 5 AA 1083-84.

Prosecution's Closing Argument

During the State's closing argument, the prosecution focused on the cellular phone evidence linking Appellant to the shooting of Pearson. 5 AA 1210-17. During closing one of the prosecutors stated "The contact name for the defendant's number in the victim's phone is D. And we know that is a name that the defendant goes by. The defense suggests that it's not his phone or that someone else was using it, I would submit to you because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't." 5 AA 1217. The prosecutor's Powerpoint presentation contained a photograph of Appellant with the Appellant's statement "It's all bad" and the word "GUILTY" superimposed on the picture. 7 AA 1573.

During rebuttal one of the prosecutors stated to the jury: "I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor… for you to acquit Donald Lee Taylor, you have to decide the evidence doesn't show he killed him. I submit to you that you have a duty to find the truth. And I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed Michael Lee [sic], Michael Pearson. And I

submit to you if you're doing your duty and you're doing your job, you'll go back in that room and you'll come back here and you'll tell that person you know too." 6 AA 1272.

SUMMARY OF THE ARGUMENT

The identification procedure was not impermissibly suggestive and the eyewitness identification was reliable. The PowerPoint presentation used by the prosecution was not sufficiently prejudicial to violate Appellant's right to a fair trial. The prosecution's statements during closing did not express personal beliefs as to Appellant's guilty or comment on Appellant's decision not to testify. The historical cell phone tower location and call detail records were obtained in a manner that did not constitute a search for Fourth Amendment purposes. There was substantial evidence to support all of Appellant's convictions. Appellant has not established a single error at trial, and therefore there was no accumulation of errors that violated his right to a fair trial.

ARGUMENT

I

THE SHOW-UP OF APPELLANT WAS NOT UNNECESSARILY SUGGESTIVE AND BOTH THE IN-COURT AND OUT-OF-COURT IDENTIFICATIONS WERE PROPERLY ADMITTED AT TRIAL

Prior to trial, Appellant's counsel filed a motion to suppress Chenault's identification of Appellant. 1 AA 153-59. In that motion, Appellant's counsel argued that the identification procedures were suggestive and requested the

identification be suppressed, though it was not specified whether it was the show-up identification or the identification of Appellant's photograph that should be suppressed, and there was no mention of whether or not an in-court identification should be allowed. 1 AA 153-59.

On July 30, 2012, a suppression hearing was held at which both the State and Appellant's counsel presented arguments, but no testimony was taken. 1 AA 192-201. Regarding the one-on-one show-up, Appellant's counsel stated "that part we're okay with. The part we're not okay with is that the detective, in an effort to try and secure an identification of my client, let's her know and let's her daughter know, that he has only one suspect in mind, that's my client. He then sends – text messages a photograph to the only person who knows my client or may have met my client that's involved in this." 1 AA 195. Appellant's counsel went on to say "The entire procedure is wrong…the whole procedure needs to be suppressed. 1 AA 198-99. At the conclusion of the suppression hearing the district court properly denied Appellant's motion to suppress the eyewitness identification. 1 AA 200. The court stated there were sufficient indicators of reliability such that allowing the identification would not violate Appellant's due process rights. 1 AA 199-200. When giving the ruling, the court reviewed the reliability factors, stating there were "substantial contacts between Chenault and the individuals involved in this act." 1 AA 199. The court stated further that the degree of the witness's attention was a

matter for the jury to decide, that Chenault's prior description of the suspect did not weigh heavily in favor of exclusion or inclusion, and that Chenault's language at the identification indicated she was giving her "honest assessment." 1 AA 199.

On appeal, Appellant claims admittance of both the in-court and out-of-court identifications violated Appellant's due process rights. Appellant did not preserve the issue regarding suppression of the in-court identification, as this was not argued or briefed prior to or during trial. Appellant also appears not to have preserved the issue regarding the show-up identification, as Appellant's motion to suppress addresses only the photographic identification, but then Appellant's counsel orally argued at the hearing that "the whole procedure needs to be suppressed." 1 AA 153-59, 198-99. Thus, Appellant's claims that admitting the in-court identification and the show-up identification violated his rights is reviewed for plain error, while his claim regarding admission of the photograph is reviewed for harmless error. NRS 178.598; 178.602.

To prevail on these claims, Appellant must demonstrate that the procedure was unnecessarily suggestive and that the resulting identification was unreliable. See Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978); see also Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

A. The Identification Procedure was not Unduly Suggestive

Defendant's assertion that the identifications were unnecessarily suggestive and therefore in violation of his due process rights is without merit. The test to determine if an identification is in violation of the due process clause is "whether the confrontation conducted…was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was deprived due process of law." Banks v. State, 94 Nev. 90, 575 P.2d 592 (1978) (*citing* Stovall v. Denno, 388 U.S. at 301-302 ((1972)). The determination of whether an identification is unnecessarily suggestive requires a review of the totality of the circumstances. Id. See also Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980); Jones v. State, 95 Nev. 613, 600 P.2d 247 (1979).

The out-of-court identification procedure conducted with Chenault was not unnecessarily suggestive. The mere suggestion that the individual may have committed a crime does not give rise to a due process violation. To result in a due process violation, the suggestion must be so unnecessary or impermissible as to create a "substantial likelihood of irreparable misidentification." Carmichel v. State, 86 Nev. 205, 206, 467 P.2d 108, 109 (1970) (quoting Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); McCray v. State, 85 Nev. 597, 460 P.2d 160 (1969)).

In Ghehrke v. State, a case on which Appellant relies, a show-up was found to be impermissibly suggestive due to the police telling the witness they "had a suspect in mind", the defendant was placed in front of the headlights of a squad car, and the two witnesses were seated together during the identifications. 96 Nev. 581, 584, 613 P.2d 1028, 1029-30 (1980). Here, Chenault was the sole witness performing the identification. When taking Chenault to perform the identification, Detective Wildemann did not say that Appellant was a suspect he had in mind, but that he wanted her to tell him whether the person they had stopped was involved in the shooting or not. 5 AA 1079. This statement clearly allowed for the possibility that the person she was about to see was not in fact involved in the shooting. Detective Wildemann did not give Chenault any further information about the person. 5 AA 1079. There was a spot light from a patrol car on Appellant, but that was to make him easier for Chenault to see, as the identification took place in a parking lot at approximately 11:45pm. 5 AA 1078. Under the totality of the circumstances, this procedure was not impermissibly suggestive.

Further, a one-on-one show-up is "inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender. However, such a confrontation may be justified by countervailing policy considerations. For example, a victim's or eyewitness' on-the-scene identification is likely to be more reliable than a later identification because the memory is fresher." Jones v. State, 95

Nev. 613, 617, 600 P.2d 247, 250 (1979) (citing Banks, 575 P.2d at 595-96). Additionally, "police are not to be criticized because they attempted to establish an affirmative identification as promptly as possible." (Banks, 575 P.2d at 596) (quoting People v. Floyd, 1 Cal.3d 694, 714, 83 Cal.Rptr. 608, 620, 464 P.2d 64, 76 (Cal.1970)). Here, the detective initiated the identification procedure as soon as possible- immediately after Appellant was apprehended. 5 AA 1077. While the show-up was conducted approximately eight hours after the shooting, it could not have been conducted any earlier as Appellant was not in custody until that time. This procedure was not impermissibly suggestive.

Finally, admittance of Chenault's identification of the photograph of Appellant also did not violate Appellant's due process rights. This was not a suggestive procedure as the police did not even ask Chenault to identify Appellant or even communicate with her regarding the picture. Detective Wildemann did not know that Haddon and Chenault were together at the time and did not ask Haddon to show the picture to Chenault. 5 AA 1081. Additionally, this is further evidence of the reliability of Chenault's identification. Chenault already identified Appellant at the show-pu, and then she recognized him again upon viewing his photograph. Admittance of this identification did not violate Appellant's rights.

B. Chenault's Out-of-Court Identification had Significant Indicators of Reliability

Even if the identification procedure were impermissibly suggestive (a point the State is not conceding), there would have been no due process violation, as Chenault's identification contained sufficient indicia of reliability. Banks, 575 P.2d at 596 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

"[R]eliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98 at 114. The reliability of an identification is determined through examination of the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." Canada v. State, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988) (quoting Manson v. Brathwaite, 432 U.S. at 114). See also Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1029-30 (1980) (holding the accurate prior descriptions, certainty of the witnesses, and opportunity to view the perpetrators indicated the identifications were sufficiently reliable to overcome the suggestive identification procedure).

Here, there are numerous factors indicating Chenault's identification of Appellant was reliable. Chenault had sufficient opportunity and time to observe the perpetrator. Moments before the crime she came face to face with the perpetrator as

she prevented him from entering the bedroom in her apartment. 3 AA 659. She gave an accurate description of Appellant. She stated Appellant was a black male about her height. 3 AA 682-83, 703, 722. Chenault exhibited sufficient certainty. Contrary to Appellant's claim in his brief, Chenault did state that she recognized the Appellant. She stated "I thought that that was him." 3 AA 675. She told the detective that was the face of the shooter but he appeared bigger due to the bigger shirt he was wearing at the time of the identification. 3 AA 705.

Additionally, "the weight and credibility of identification testimony is solely within the province of the jury." Wise v. State, 92 Nev. 181, 183, 547 P.2d 314, 315 (1976). See also Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) ("[w]e will not usurp that function [of the jury], especially where, as here, the record supports a finding that the pretrial identification of Jones had sufficient indicia of reliability to remove any taint of suggestiveness."). Here, Appellant's counsel cross-examined both Chenault and the detective who arranged for the identification. The jury had ample opportunity to assess the credibility of the eyewitness in this case.

C. Chenault's In-Court Identification was Independently Reliable

Even if the identification procedure were sufficiently suggestive to indicate a lack of reliability regarding Chenault's out-of-court identification (a point the State is not conceding), Chenault's in-court identification would still be properly admitted because it was independently reliable. If an in-court identification is reliable, in and

of itself, it will not be found to be tainted, even if there were suggestive pretrial identification procedures. An in-court identification is allowable where "[i]t can be said that the identification was 'the product of observations at the time of the crime' rather than the result of 'impressions made during the suggestive pretrial photographic identification process.'" United States v. Hanigan, 681 F.2d 1127, 1133 (9th Cir. 1982) (quoting United States v. Field, 625 F.2d 862, 866 (9th Cir. 1980)). "[T]he focus is on the reliability of the witnesses' identification, rather than on the flaws in the pretrial identification procedures." United States v. Barron, 575 F.2d 752, 754, (9th Cir. 1978).

Here, Chenault had time to observe Appellant and saw him clearly during their face-to-face confrontation. Her in-court identification was the result of observing him prior to and during the crime. Chenault described Appellant with accuracy prior to the identification procedure. The totality of the circumstances indicates Chenault's in-court identification was reliable and independent of the pretrial identification procedure.

D. If Any Error Occurred by Admittance of the Identifications, Such Error Was Harmless Beyond a Reasonable Doubt or Was Not a Plain Error

Appellant claims the district court erred by admitting Chenault's in-court identification of him, as well as Chenault's identification of Appellant at the one-on-one show-up, and that these errors violated his due process rights. As explained

above, these issues were not preserved for appeal, and therefore receive plain error review. NRS 178.602. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Sanchez-Dominguez v. State, 318 P.3d 1068, 1073 (Nev. 2014) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). The existence of plain error requires a showing of actual prejudice. Green, 80 P.3d at 95.

Here, for the reasons stated above, Appellant has not established that admittance of the show-up and in-court identifications were in fact error. Appellant has not demonstrated actual prejudice by the admittance of the identifications. The State presented substantial evidence of phone communications by Appellant indicating he was meeting with the victim. 5 AA 1117-1190. Further, Appellant's counsel was able to cross-examine Chenault, attacking her credibility and the strength of her identification. 3 AA 678-88, 702-11, 722-23. There was no plain error in admitting Chenault's identifications.

Appellant also claims the district court erred by admitting Chenault's photographic identification of Appellant, and that this error violated his due process rights. As explained above, this issue was preserved for appeal, and therefore receives harmless error review. NRS 178.598. To be harmless, a due process error

must be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

If any error occurred through admittance of this identification (a point the State does not concede), such error was harmless. Admittance of Chenault's photographic identification was cumulative, as she had already identified Appellant at the show-up. Furthermore, Appellant's counsel cross-examined Chenault and attacked her credibility. 3 AA 678-88, 702-11, 722-23. As explained above, there was substantial evidence supporting a conviction in this case, even without Chenault's identification. If any error occurred in admitting this evidence, it was harmless and does not require reversal.

II
THE PROSECUTION'S POWERPOINT SLIDE DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHTS AND THE PROSECUTION DID NOT COMMENT ON APPELLANT'S DECISION NOT TO TESTIFY OR EXPRESS PERSONAL BELIEF IN APPELLANT'S GUILT

A. The Prosecution's PowerPoint slide containing the word "GUILTY" superimposed upon a picture of Appellant did not violate Appellant's Sixth Amendment right to a fair trial

Appellant's counsel did not object to the PowerPoint slide at trial. Thus, this issue has not been adequately preserved for appeal. If a defendant fails to object in the district court, appellate review is generally precluded. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (quoting Sterling v. State, 108 Nev. 391, 394,

834 P.2d 400, 402 (1992)). When the error has not been preserved, the claim receives plain error review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under that standard, the defendant must demonstrate that the error affected his or her substantial rights. Id.

In the instant case the prosecution's PowerPoint slide was permissible, and its use did not violate Appellant's right to a fair trial. In his brief, Appellant cites Watters v. State, 129 Nev. Adv. Op. 94, 313 P.3d 243 (2013) which was decided on November 27, 2013. Appellant's trial occurred in February of 2013. 2 AA 252- 6 AA 1428. Regardless, one of the primary reasons use of the photo was held to be error in Watters was that it "declared Watters guilty *before the first witness was called*…" Watters, 313 P.3d at 247 (emphasis added). Here, the photo was briefly used during the prosecution's closing, when the prosecution is permitted to ask the jury to find the defendant guilty. See Allred v. State, 120 Nev. 410, 419, 92 P.3d 1246, 1252–53 (2004) (upholding State's use of annotated photographs as demonstrative exhibits in closing argument).

The use of the word "GUILTY" superimposed upon Appellant's photo did not undermine the presumption of innocence. A prosecutor may not declare to a jury that a defendant is guilty. Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985). In Watters, this Court emphasized that use of the photo during *opening* argument violated the defendant's rights because it "undermined the presumption of

innocence." 313 P.3d at 248. However, at *closing* argument a prosecutor is permitted to argue "that the presumption of innocence has been overcome." Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006). Thus, the use of the word "GUILTY" upon a photo of a defendant can be an appropriate method of arguing to the jury, at closing, that the State has met its burden and overcome the presumption of innocence.

Further, the use of the word guilty during closing, whether verbally or visually, is not the equivalent of stating a personal belief in Appellant's guilt. During her closing, the prosecutor summarized the evidence of Appellant's guilt, emphasizing that Appellant's actions after the crime strongly indicated consciousness of guilt. 5 AA 1221-1225. The prosecutor emphasized that Appellant's statement to his girlfriend, "it's all bad" indicated his consciousness of guilt. 5 AA 1224-25. This statement was previously admitted at trial through Archer's testimony. 4 AA 868. This phrase "it's all bad" is also superimposed on Appellant's photo, more prominently than the word "guilty." 7 AA 1573. The photo is essentially a visual depiction of the prosecutor's argument that Appellant's statement "it's all bad" indicated his consciousness of guilt. This is a permissible argument and therefore the photo did not violate Appellant's right to a fair trial or undermine the presumption of innocence.

Appellant's brief cites the non-binding case *In re* Glasmann, 175 Wash.2d 696, 286 P.3d 673, 676, 678–79 (2012) in which the court held the State's PowerPoint presentation containing the defendant's booking photo along with the word "GUILTY" superimposed on the photo three different times deprived the defendant of a fair trial. One of the reasons the photo was held to be prejudicial was that the defendant's face in the photo was "battered" and the defendant appeared "unkempt and bloody." Id. at 676, 678. Here, the photo of Appellant was not inherently prejudicial, as Appellant appears to be wearing a collared shirt and does not appear unkempt. 7 AA 1573. Additionally, unlike the photo in Glasmann, the word "GUILTY" is displayed only once on the photo, underneath Appellant's previously admitted statement "it's all bad." 7 AA 1573.

B. The Prosecution Did Not Express Personal Belief in Appellant's Guilt

Appellant incorrectly claims the prosecution expressed an opinion regarding Appellant's guilt when discussing ownership of the cell phone linked to the crime. This issue was also not preserved for appellate review because Appellant's counsel did not object to prosecutorial statements on this basis at trial. Regardless, this claim has no merit.

It is true that prosecutors are not permitted to express their personal beliefs to the jury. Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985). However "[s]tatements by the prosecutor, in argument, indicative of his opinion, belief, or

knowledge as to the guilt of the accused, *when made as a deduction or conclusion from the evidence introduced in the trial*, are permissible and unobjectionable. Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996) (emphasis added) (*citing* Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

Here, the prosecutor stated "[t]he defense suggests that it's not his phone or that someone else was using it, I would submit to you because the person using that phone is guilty of the crimes charged in this case." 5 AA 1217. This statement followed the prosecutor's review of the text messages between the cellular phone recovered from Appellant and the victim's cellular phone. 5 AA 1214-16. The prosecutor was stating that the evidence previously introduced showed that the cellular phone was clearly linked to the shooting of the victim. This is permissible under Domingues and Collins. 917 P.2d at 1373; 488 P.2d at 545. The prosecutor's statement was not a personal belief; it was a conclusion from the evidence and therefore did not violate Appellant's right to a fair trial.

Appellant also claims the prosecutor's statement "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed [the victim]" was an improper opinion as to Appellant's guilt. 6 AA 1272. This statement did not refer directly to guilt. Like the statement above, this statement also followed a summation of evidence. The prosecutor discussed the eyewitness description and Archer's testimony about Appellant's actions after the crime. 6 AA

1271-72. This is permissible for the reasons explained above and did not violate Appellant's right to a fair trial.

C. The Prosecution Did Not Comment On Appellant's Decision Not to Testify

Appellant incorrectly claims that one of the prosecutor's commented on Appellant's failure to testify, thereby violating Appellant's Fifth Amendment rights. At trial, at the conclusion of the State's rebuttal arguments, Appellant's counsel made a motion for a mistrial, claiming the prosecution had made statements indicating Appellant had failed to rebut certain evidence or accusations. 6 AA 1273-74. The district court denied the motion for mistrial, stating the prosecution did not make statements commenting on the defendant's silence, or shifting a burden of proof onto the defense. 6 AA 1275-76. On March 8, 2013, Appellant filed a Motion for New Trial, claiming therein that the prosecution had made improper comment upon Appellant's decision not to testify. 6 AA 1482-87. In the motion, Appellant incorrectly paraphrased the prosecution's statement, stating that the prosecutor said "there is one person who was there that we haven't heard from." 6 AA 1483. On March 18, 2013, the State filed an Opposition to Appellant's motion for a new trial. 6 AA 1488-92. On January 27, 2014, the district court held a hearing on Appellant's motion for a new trial. 6 AA 1493-1500. At that hearing the court denied Appellant's motion, stating that the prosecutor was commenting on the evidence presented, and

not shifting the burden of proof to the defense or suggesting that Appellant was hiding something by not testifying. 6 AA 1499.

It is true that the Fifth Amendment requires the State to refrain from directly commenting on the defendant's decision not to testify. Griffin v. California, 380 U.S. 609, 615 (1965); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). If a prosecutor's comment indirectly references the defendant's decision not to testify, this may violate the defendant's Fifth Amendment rights if the comment "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." Bridges v. State, 116 Nev. 752, 763-64, 6 P.3d 1000, 1008-09 (2000) (quoting Harkness, 820 P.2d at 761) (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir.1968)).

Further, "[t]he context of the prosecutor's comment must be taken into account in determining whether a defendant should be afforded relief." Bridges, 6 P.3d at 1009. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone…" Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

The prosecutor did not comment on Appellant's choice not to testify in the instant case. A prosecutor may "comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to

what the evidence shows." State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965). Here, the prosecutor stated "[t]here has to be a rational explanation for the evidence…I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor." 6 AA 1272. The prosecutor was commenting on the evidence, and expressing a view that the evidence showed Appellant was guilty. This was not a comment on Appellant's decision not to testify.

The prosecutor did not comment on Appellant's choice not to testify when he stated to the jury "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed [the victim]. And I submit to you if you're doing your duty and you're doing your job, you'll go back in that room and you'll come back here and you'll tell that person you know, too." 6 AA 1272. In Harkness, a case on which Appellant relies, the prosecutor's comment was improper because he said "whose fault is it if we don't know the facts of the case?" Harkness, 820 P.2d at 760. Unlike the facts in Harkness, here the prosecutor did not imply that there were gaps in the evidence due to Appellant's decision not to testify. To the contrary, the prosecutor was saying the evidence strongly indicated Appellant's involvement in the crime.

D. If Error Occurred Through the Prosecution's Statements or PowerPoint Presentation, then the Error was Harmless or Was Not Plain Error

As explained above, there was no objection to the PowerPoint slide at trial, and therefore the plain error standard is applied. The existence of plain error requires a showing of actual prejudice that adversely affects the defendant's substantial rights. Green, 80 P.3d at 95. Here, as explained previously, use of the PowerPoint slide during the prosecutor's closing argument did not violate Appellant's Sixth Amendment rights. If use of the PowerPoint was error (a point the State does not concede), then it was not plain error. Appellant has not demonstrated how the PowerPoint adversely affected him at trial. The PowerPoint slide was a verbal depiction of the prosecutor's argument that Appellant had demonstrated consciousness of guilt and that the State had presented sufficient evidence to meet its burden of proving Appellant guilty. The prosecution would have been able to make essentially the same argument even without the PowerPoint slide. Therefore, the use of the PowerPoint slide was not plain error.

Similarly, regarding Appellant's claim that the prosecution improperly expressed personal beliefs as to Appellant's guilt, this issue has also not been preserved for appeal. While Appellant's counsel objected to statements he claimed were comments on Appellant's decision not to testify, no objection was made at trial, or in the motion for a new trial, on the basis that the prosecution expressed personal

belief in Appellant's guilt. Thus, this claim has not been preserved and receives plain error review under the standard expressed above. As discussed above, the statement "the person using that phone is guilty of the crimes charged in this case" followed a summary of the highly incriminating cell phone evidence in this case. 5 AA 1217. Appellant has not demonstrated how this statement was more prejudicial than the actual evidence against him. Further, the statement "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed [the victim]" was also not plain error. 6 AA 1272. This followed a discussion of incriminating eyewitness evidence and evidence related to consciousness of guilt. 6 AA 1271-72. This statement did not adversely affect the defendant, as it was a summary statement following incriminating evidence. Therefore, these statements did not amount to plain error.

Appellant's claim that the prosecution commented on Appellant's decision not to testify has been preserved for appeal, as Appellant's counsel objected at the trial's conclusion and filed a motion for a new trial including this claim. 6 AA 1273-74; 1482-87. Therefore, a harmless error analysis is applied. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); see also Chapman v. California, 386 U.S. 18, 24 (1967) (applying harmless error analysis where prosecutor improperly commented on defendant's failure to testify). Even if it was a Fifth Amendment violation for the prosecution to make these comments (a point the State does not

concede), it was still harmless beyond a reasonable doubt. Here, the prosecutor's statements did not contribute to the guilty verdict. Such statements were cumulative, as the prosecutor was stating that the evidence against Appellant was substantial enough that the only reasonable explanation of the evidence involved Appellant's guilt. Additionally, the prosecution had a strong case against Appellant due to the record of text messages between Appellant and the victim and between Appellant and Archer, Archer's testimony regarding Appellant's actions after the crime, and the eyewitness identification. There is no indication these comments on their own strongly affected the jury verdict. Therefore, if these statements were error, then they were harmless.

III
APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BECAUSE NO SEARCH OR SEIZURE OCCURRED BY THE GOVERNMENT OBTAINING A HISTORICAL PHONE RECORD

Prior to trial, Appellant filed a Motion to Suppress Physical Tracking Information Unlawfully Obtained from a Cellular Telephone Allegedly Tied to the Defendant. 1 AA 212-23. The motion claimed that Appellant's location data was obtained without a warrant in violation of the Fourth Amendment. 1 AA 216-19. On February 8, 2013, the State filed an Opposition to the Motion. 1 AA 237-39. On February 15, 2013, the district court properly denied the motion to suppress the physical tracking information, stating a lack of sufficient grounds to suppress the

information. 1 AA 243. Appellant then filed the instant appeal, asserting the same claim.

Appellant claims incorrectly that his Fourth Amendment rights were violated because the government performed a warrantless search by obtaining historical cell phone location data. This was not a violation of the Fourth Amendment's warrant requirement because a check of historical records is not a search for the purposes of the Fourth Amendment.

A. Appellant Does Not Have an Objectively Reasonable Expectation of Privacy in Sprint-Nextel's Cell Tower Records

A search for Fourth Amendment purposes occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." Maryland v. Macon, 472 U.S. 463, 469 (1985) (*citing* United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. 347, 361 (1967).

Appellant did not have an objectively reasonable expectation of privacy regarding the location of his cell phone over a limited period. There is no objectively reasonable expectation of privacy regarding the cell phone towers one's cell phone uses. Contrary to Appellant's assertion, Appellant's location was not tracked by the police. A valid subpoena was issued to Sprint-Nextel for call and text message

records for Appellant's phone, as well as the locations of the cell towers that routed those calls for a week-long period surrounding the time of the murder. 3 AA 745-46; 4 AA 749-50, 754; 7 AA 1514-55. Appellant misstates the facts in his brief when he claims this case concerns cell phone subscriber locations. The records provided by Sprint-Nextel indicate cell phone tower locations. 3 AA 754; 7 AA 1533-55. Appellant's precise movements were not tracked and this information does not even reveal his exact location. This was relevant at trial because the records indicated close to the time of the murder a call was made using Appellant's cell phone, and the Sprint-Nextel cell tower closest to the location of the murder routed the call. 4 AA 755-756; 7 AA 1531, 1542.

Further, the United States Supreme Court has held an individual has no reasonable expectation of privacy regarding phone numbers dialed. Smith v. Maryland, 442 U.S. 735, 744 (1979). The court stated "petitioner can claim no legitimate expectation of privacy here. When he used his phone, *petitioner voluntarily conveyed numerical information to the telephone company* and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." Id. (emphasis added). Here, Appellant voluntarily exposed cell tower information to Sprint-Nextel through the possession of his cell phone. Appellant assumed the risk that such information would be collected by that

company and could be revealed to the police. Therefore, Appellant's Fourth Amendment rights were not violated.

B. Appellant Has No Reasonable Expectation of Privacy Regarding Historical Business Records

Further, Appellant has no expectation of privacy regarding Sprint-Nextel's business record archives. An individual does not have an expectation of privacy in information conveyed to a third party that the third party may turn over to the government. United States v. Miller, 425 U.S. 435, 443 (1976). The United States Supreme Court has ruled that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443 (1976) (*citing* United States v. White, 401 U.S. 745, 751-752 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427 (1963). See also S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743, (1984) ("when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").

An individual does not have Fourth Amendment rights regarding historical business records. In Miller, the United States Supreme Court held that a defendant

had no Fourth Amendment protection regarding a bank's record of the defendant's financial statements, checks, and deposit slips, because such information was "exposed to their employees in the ordinary course of business." Miller, 425 U.S. at 442. In United States v. Phibbs, 999 F.2d 1053, 1076 (6th Cir. 1993) the government obtained the defendant's credit card statements and telephone records by subpoena. The court held that the defendant had no reasonable expectation of privacy in such records, and as the subpoena was issued not at the defendant, "but rather at third party businesses. As a consequence, he did not have standing to dispute their issuance on Fourth Amendment grounds…" Id. at 1077.

Here, the cell phone records were obtained from Sprint-Nextel, not the Appellant or the Appellant's property. In owning a cell phone, information regarding the phone calls made and received on that phone, as well as location information, are kept by the cell phone company as part of the ordinary conduct of business. 3 AA 741. As stated in Miller, an individual has no right to privacy in the historical business records of a company to which he voluntarily provided the information, and therefore no constitutional violation could have occurred.

Appellant incorrectly claims that the cell phone data obtained in this case was of such a great quantity and of such a sensitive nature that it renders the third-party doctrine inapplicable. No legal doctrine supports this assertion. Federal courts have concluded the third-party doctrine is directly applicable to historical cell site location

records. United States v. Graham, 846 F. Supp. 2d 384, 400 (D. Md. 2012). The court in Graham concluded "historical cell site location records are records created and kept by third parties that are voluntarily conveyed to those third parties by their customers. As part of the ordinary course of business, cellular phone companies collect information that identifies the cellular towers through which a person's calls are routed." Id. The court found "no legitimate expectation of privacy in those records." Id. at 403. Here, Appellant voluntarily used his cellular phone, thereby transmitting cell tower location data to Sprint-Nextel, and such information was kept by that company in the ordinary course of business. There is no legitimate expectation of privacy in the data.

While the Supreme Court's holding in Jones left it an open question whether an extensive amount of surveillance and tracking in the aggregate could rise to the level of a search for Fourth Amendment purposes, tracking and surveillance are not the police actions that occurred in this case. See Jones, 132 S.Ct. at 964 ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark.") (Alito, J., concurring). In Graham, pursuant to a subpoena under the Stored Communications Act, the police obtained cell site location data for more than 20,000 cell site location data points, over a period of two hundred thirty-five days. Id. at 387. The court found that such information was different from tracking and surveillance

information, as historical cell site location information reveals "where a suspect was and not where he *is*." Id. at 391. Additionally, such information does not reveal the precise location of the suspect, but only the cell tower most closely located to the suspect's phone at the time. Id. at 404.

Also, in many cases courts have held far more precise tracking of defendants' movements was not a Fourth Amendment violation. In Meisler v. State, 130 Nev. Adv. Op. 30, 321 P.3d 930, 933 (2014) this Court held that the police obtaining the defendant's cell phone GPS coordinates from the cell phone service provider did, without a search warrant, did not violate the defendant's Fourth Amendment rights. In United States v. Skinner, 690 F.3d 772, 781 (6th Cir. 2012) the Sixth Circuit Court held that police tracking of the defendant's location by using real-time GPS location data did not constitute a search because "[the defendant] did not have a reasonable expectation of privacy in the GPS data and location of his cell phone.". Additionally, when the United States Supreme Court held in Smith that there was no legitimate expectation of privacy in phone numbers dialed, at that time phones were made almost exclusively from land line phones, and thus, as a land line phone can only be used from one location, phone records actually provided more precise location data than cell site location data, which provides only the location of cell towers. 442 U.S. 735 at 744.

Here, the location data obtained was far less extensive than in the aforementioned cases. There was no real-time tracking of Appellant. The data did not even reveal his precise location, only the location of the cell towers used by his cell phone. No GPS data was obtained. Obtaining this information was not a search and did not violate Appellant's rights.

The cases on which Appellant relies in his brief do not support Appellant's assertion that historical records of cell site location data constitute a search. In State v. Earls, while the New Jersey Supreme Court found there was an expectation of privacy in cell phone location data, the decision was based on New Jersey state law, not the Fourth Amendment. 70 A.3d 630, 632. The court recognized that "the [New Jersey] State Constitution has offered greater protection to New Jersey residents than the Fourth Amendment." Id. New Jersey does not follow the third-party doctrine. Id. ("[u]nder settled New Jersey law, individuals do not lose their right to privacy simply because they have to give information to a third-party provider."). Similarly, the decision in Commonwealth v. Augustine 4 N.E.3d 846, 858 (Mass. 2014) was based on Massachusetts law, which states that the Massachusetts Constitution provides greater privacy protection than does the United States Constitution, particularly in regard to third-party records. ("[w]e have often recognized that art. 14 ... does, or may, afford more substantive protection to individuals than that which

prevails under the Constitution of the United States.") (quoting Com. v. Blood, 400 Mass. 61, 68 n. 9 (1987)).

C. There Was No Trespass Upon Appellant's Person or Property, and Therefore Jones is Inapplicable

Appellant repeatedly and incorrectly states that the decision in Jones v. United States 132 S. Ct. 945, 948 (2012) supports his claim that obtaining records of cell phone location data constitutes a search under the Fourth Amendment. In Jones, the police placed a GPS tracking device on the defendant's vehicle and then tracked the defendant's movement over the following twenty-eight days. . The Court held the defendant's Fourth Amendment rights were violated when the police installed the GPS tracking device on Appellant's vehicle, because such an action constituted a "physical intrusion." Id. Here, the historical cell tower location records were not obtained through any intrusion or trespass upon Appellant's person or property. Therefore, Jones is irrelevant to the instant case.

Finally, Appellant argues in his brief, and Appellant's counsel argued at trial, that the phone did not belong to Appellant. 6 AA 1258-59. If so, he has no standing to claim a violation of his Fourth Amendment rights. Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.") (*citing* Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960). Cf. Tileston v. Ullman, 318 U.S. 44, 46 (1943).

Appellant has not demonstrated that the cell site location data was obtained in a manner constituting a search. Appellant had no legitimate expectation of privacy in this information and therefore his Fourth Amendment rights were not violated and the district court properly denied Appellant's motion to suppress.

D. The Use of the Cell Tower Location was Harmless

As this issue was preserved for appeal, it receives harmless error review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); see also Chapman v. California, 386 U.S. 18, 24 (1967). Even if this Court determines it was error to allow the admission of the cell tower location data, such exclusion was harmless beyond a reasonable doubt. The location data only indicate that a phone call was made using Appellant's cell phone near the location of the murder, at the approximate time of the murder. 5 AA 1134-35. It was also used to indicate Appellant was in the area of his girlfriend's residence at a certain point in time. 5 AA 1137-38. The State had a strong case against Appellant even without this evidence. The testimony of both Archer and Haddon, the text messages Archer received from Appellant, the record of text messages and phone calls between the victim and Appellant obtained from the victim's phone, as well as the eyewitness testimony, all indicate that Appellant and the victim were planning a drug deal at the apartment, apart from the cell tower location evidence. Therefore, the guilty verdict was not affected by the introduction of the cell tower location data.

IV
THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF ALL COUNTS

Appellant incorrectly claims there was insufficient properly admitted evidence to support Appellant's convictions. However, it is irrelevant to a sufficiency of the evidence claim whether the evidence was properly admitted. When evaluating sufficiency of evidence, "a reviewing court must consider all of the evidence admitted by the trial court, *regardless whether that evidence was admitted erroneously*." Stephans v. State, 262 P.3d 727, 734 (Nev. 2011) (quoting McDaniel v. Brown, 558 U.S. 120, 131, 130 S.Ct. 665, 672 (2010) (emphasis added) (quoting Lockhart v. Nelson, 488 U.S. 33, 41, 109 S.Ct. 285, 291 (1988))).

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). The relevant inquiry 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-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)).

The State presented evidence of Pearson and Appellant communicating and arranging to meet on the day of the murder. The text messages contained on

Pearson's phone prior to the murder, and the record of phone calls between Appellant's phone and Pearson's phone, establish that the two were attempting to arrange a drug transaction. 5 AA 1095. On November 16, there is a text message to Pearson from Appellant stating "I was trying to see how much it's going to be for three pound of the good." 5 AA 1123. Pearson responded with a text stating "Three each." 5 AA 1123. On November 18th Appellant sent Pearson a text stating "You cool on the X?" 5 AA 1126. Pearson responded with a text asking "What you got?" 5 AA 1126. Appellant replies with a text stating "I got some blue and purple pistols." 5 AA 1126. At the time of his arrest Appellant had on his person multiple purple Ecstasy pills with pictures of pistols stamped on them. 5 AA 1127. There are numerous phone calls from Appellant to Pearson, the last two at 2:26pm and 2:29pm on November 18th, 2010. 5 AA 1130. Pearson was shot at approximately 2:30pm. 3 AA 555. There are no further contacts between Appellant's phone and Pearson after that time. 5 AA 1130. This evidence indicates Appellant was meeting Pearson at the apartment to effect a drug transaction, placing Appellant in the apartment at the time of the murder.

There was further evidence presented that Appellant was meeting with Pearson to effect a drug transaction. Tynia Haddon, Pearson's girlfriend testified that Pearson was "trying to make a deal" with "D." 3 AA 631. She stated that she had seen "D" at a party and knew what he looked like. 3 AA 631. The intention was

to "meet up with him" and give D a sample of marijuana. 3 AA 632. After this meeting with "D" Pearson returned with two Ecstasy pills. 3 AA 633. Pearson then arranged to conduct a larger deal with "D." 3 AA 634. Pearson intended to sell three pounds of marijuana to "D" in exchange for nine thousand dollars. 3 AA 635. Pearson told her he would be conducting the deal with "D" at her mother's home. 3 AA 642-43. After Pearson's death Haddon was interviewed by the police and Haddon provided the detectives with information regarding "D." 3 AA 645. Detective Wildemann texted her a picture of Appellant, and Haddon identified that individual as "D." 3 AA 645-46.

Evidence was presented at trial that on the day of the murder, Appellant texted his girlfriend, Jennifer Archer, that he was going to go "pick something up." 4 AA 884. Later that day, after Pearson had been killed, Appellant sent Archer a text message directing her to "delete them messages." 5 AA 1045. Archer testified that on the evening of November 18, 2010, Appellant came to her apartment and said to her "baby, it's all bad." 4 AA 868.

Substantial evidence was presented that Appellant was the user of the phone with the number (626) 488-0423. At the time of his arrest Appellant surrendered his cell phone to police, informing them that his cell phone number was (626) 488-0423, which Detective Wildemann confirmed by immediately calling that number. 5 AA 1076-77. When interviewed by police detectives, Archer showed the detectives her

phone contact for Appellant and allowed them to photograph the text messages from Appellant. 4 AA 878. Her phone contact listed Appellant as "Sin Baby" and listed his phone number as (626) 488-0423. 4 AA 878. Pursuant to a search warrant, an employment application was recovered from Appellant's home. 5 AA 1007-08. Appellant's name was printed on the application, as well as a phone number of (626) 488-0423. 5 AA 1009. There were text messages on the phone to and from Appellant's girlfriend, pictures of the Appellant that he appeared to have taken himself, and sexual photos of the Appellant with his girlfriend. 5 AA 1119-20, 1130.

Angela Chenault testified that on the afternoon of November 18, 2010, Appellant came into her apartment with a firearm. 3 AA 659. She stood face-to-face with Appellant. 3 AA 658. She saw him reach for Pearson's gun right before the gunshots occurred. 3 AA 669. When Appellant and his companion left, Chenault saw the bag of marijuana was gone. 3 AA 671. Chenault identified Appellant as the perpetrator at a police show-up. 3 AA 675.

Substantial evidence was presented at trial to support Appellant's convictions. An eyewitness identified him as being involved in the shooting. As Appellant was charged in the alternative, under a conspiracy theory of liability for the murder, it is not relevant whether Appellant or his companion did the actual shooting of Pearson. The records of text messages between Appellant and the victim indicate he was meeting with the victim to arrange a drug transaction. The evidence indicating he

told his girlfriend to delete his previous text messages, and his statement "it's all bad" shows consciousness of guilt. The fact that the bag of marijuana was gone after Appellant and his companion fled from the apartment is sufficient evidence of robbery.

V
THERE ARE NO GROUNDS FOR REVERSAL DUE TO CUMULATIVE ERRORS BECAUSE APPELLANT HAS FAILED TO ESTABLISH A SINGLE TRIAL ERROR

Appellant has not demonstrated a single error, and therefore cannot establish an accumulation of errors that deprived him of a fair trial. This Court recognizes that errors which are harmless individually may in the aggregate violate a defendant's right to a fair trial. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This analysis applies only to errors eligible for harmless error analysis. A plain error itself is sufficient grounds for reversal. Once an error is found to be harmless, there will only be grounds for reversal if the accumulation of harmless errors acted to deprive a defendant's right to a fair trial. Id. at 3, 1289.

The State's position is that no harmless or plain errors occurred during Appellant's trial. Alternatively, as discussed previously, the State argues that any errors not preserved for appeal do not constitute plain error, and any errors preserved for trial are harmless errors. The following issues are the only ones properly preserved and thus eligible for harmless error analysis: the photographic

identification of Appellant; the prosecution's statements that Appellant claims commented on Appellant's decision not to testify; the use of historical cell site location records.

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 charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). A defendant must present all three elements. Id.

As explained in detail above, there was more than sufficient evidence to secure Appellant's convictions. Thus, the issue of guilt is not close.

Regarding the gravity of the crimes charged, Appellant was convicted of grave crimes. See Valdez v. State, 124 Nev. 1172, 1198, 196 P.3d 465, 482 (2008) (stating first degree murder and attempt murder are very grave crimes). This is the only factor that weighs in Appellant's favor.

Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone establish that these alleged errors combined to violate his right to a fair trial. Appellant has failed to establish it was error for the cell tower location data to be admitted, for the eyewitness identification to be admitted, or that the prosecution violated his right to a fair trial by using a prejudicial PowerPoint slide, commenting on his decision not to testify, or expressing personal

belief as to his guilt. Therefore, the State requests this Court deny Appellant's request and affirm his convictions.

CONCLUSION

Appellant has failed to prove that the eyewitness identification was sufficiently suggestive or unreliable so as to violate his due process rights. Further, the prosecutorial statements and PowerPoint presentation did not violate Appellant's right to a fair trial. Additionally, the historical Sprint-Nextel business records of cell tower locations were not obtained through means constituting a search for Fourth Amendment purposes. Therefore, the State respectfully requests that this Court deny Appellant's request to reverse his convictions.

Dated this 15th day of December, 2014.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,521 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 15th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 15, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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